

Tulsa Law Review

Volume 33
Number 1 *Dedicated to the U.S. Supreme Court* Volume 33 | Number 1

Fall 1997

The New Oklahoma Adoption Code: A Quest to Accommodate Diverse Interests

D. Marianne Brower Blair
marianne-blair@utulsa.edu

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

D. M. Blair, *The New Oklahoma Adoption Code: A Quest to Accommodate Diverse Interests*, 33 *Tulsa L. J.* 177 (1997).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol33/iss1/12>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in *Tulsa Law Review* by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

TULSA LAW JOURNAL

Volume 33

Fall 1997

Number 1

ARTICLES

THE NEW OKLAHOMA ADOPTION CODE: A QUEST TO ACCOMMODATE DIVERSE INTERESTS*

D. Marianne Brower Blair†

I.	INTRODUCTION	178
II.	JURISDICTION, CHOICE OF LAW, AND RECOGNITION	183
	A. <i>Subject Matter Jurisdiction</i>	183
	1. Rationale	183
	2. Bases for Jurisdiction	186
	3. Pending Action in Another State	191
	4. Effect of Prior Custody Order	192
	5. Relationship of § 7502-1.1 to Other Requirements of the Adoption Code, ICWA, and the PKPA	195
	B. <i>Personal Jurisdiction and Venue</i>	197
	C. <i>Choice of Law</i>	198

* OKLA. STAT. tit. 10, § 7501-1.1 to 7511-1.5.

† Associate Professor of Law, University of Tulsa College of Law. B.A. 1974, DePauw University; J.D. 1980, Ohio State University. Member, Oklahoma Adoption Law Reform Committee, 1995-98.

I would like to thank Louis Manuel Barrios, Lisa K. Gold, Patrick Hagestad, Scott Pawgan, and Heather Poole for the excellent research assistance they contributed to this article and to my work on the Adoption Law Reform Committee, and Sharon Miller for her assistance in the preparation of the manuscript. I would also like to gratefully acknowledge Sherri Finik and Representative Russ Roach, Co-Chairs of the Adoption Law Reform Committee; Kathy Muckala, Staff Attorney for the Oklahoma House of Representatives; and John O'Connor, Jack Petty, Gary Taylor, Mark Morrison, Joe Crosthwait, Jane Morgan, Michael Nomura, Judge April Sellers-White, Judge Glenn D. Carter, Susan Work, and Professor Robert Spector, my colleagues on the Committee, who each contributed tremendous time, talent, and effort to the passage of the Oklahoma Adoption Code. Although this article benefits greatly from their insights, any errors contained herein are my own.

D. <i>Recognition of Sister State and Foreign Decrees</i>	200
III. ADOPTION BY CONSENT, PERMANENT RELINQUISHMENT, OR WAIVER FOLLOWING NOTICE FOR PLAN FOR ADOPTION	202
A. <i>Birth Mothers and Fathers of Children Born in Wedlock</i>	202
B. <i>Putative Fathers</i>	206
1. Consent or Relinquishment Prior to or After Birth	206
2. Extrajudicial Consent	207
3. Notice of Plan for Adoption	208
C. <i>Revocation</i>	212
IV. ADOPTION WITHOUT CONSENT AND TERMINATION OF PARENTAL RIGHTS	215
A. <i>Procedure</i>	215
1. Right to Notice	215
2. Hearings	220
B. <i>Grounds</i>	225
V. THE ADOPTION PROCESS	229
A. <i>Home Studies</i>	229
1. Preplacement Home Study	229
2. Postplacement and Supplemental Home Studies	232
B. <i>Court Appointed Attorneys and Guardians ad Litem for the Child</i>	233
C. <i>Pleadings and Other Documents</i>	235
D. <i>Interlocutory and Finalization Procedure</i>	236
E. <i>Appeals and Direct and Collateral Attacks</i>	237
F. <i>Best Interests Hearing</i>	239
G. <i>Costs and Expenses</i>	242
1. Limitations on Expenses and Reporting	242
2. Prohibition on Retention of Child by Hospital	243
3. Tax Exemptions	244
VI. DISCLOSURE OF IDENTIFYING AND NONIDENTIFYING INFORMATION	245
A. <i>Disclosure of Birth Certificates</i>	246
B. <i>Mutual Consent Voluntary Registry</i>	250
C. <i>Confidential Intermediary Program</i>	253
D. <i>Medical and Social History</i>	257
1. Collection	261
2. Post-Decree Supplementation	266
3. Disclosure	268
VII. CONCLUSION	270

I. INTRODUCTION

Adoption has a profound impact on many lives—the adoptees, their descendants, the members of their birth families, and the members of their adoptive families. Clearly the creation of new families can be a source of great joy for adoptive parents and relatives, stability and love for adoptees, and comfort and reassurance for birth families. Nevertheless, as an institution which both severs

and creates parental bonds, it can also be a source of grief, conflict, or longing for genealogical identity. For decades American legislators and courts have struggled to structure adoption law to serve the best interests of the children who will be adopted, while also protecting the rights of birth parents and recognizing the concerns of adoptive parents.¹ Even in adoptions that take place under the best of circumstances, the interests of those affected may ultimately conflict, as evidenced by the vociferous public debate which has escalated in recent decades over the post-adoption disclosure of information.² Under the worst of circumstances, i.e., a contested adoption, these interests collide, often with tragic results.³ Perfect accommodation of the disparate interests of all adoptees, their descendants, their birth families, and their adoptive families may be as unattainable as was the dream of Don Quixote's quest.⁴ Oklahoma's new Adoption Code represents this state's most recent effort to address and balance the needs of all whose lives are affected by this important institution, and to achieve coherence in Oklahoma's adoption statutes.

The Oklahoma Adoption Code recodifies and significantly revises Oklahoma's former adoption statutes. The Adoption Code was proposed by the Adoption Law Reform Committee (Committee), a committee created by the Oklahoma Legislature⁵ and composed of a legislator, judges, directors of adoption agencies, social workers, lawyers, and law professors, as well as a legislative staff attorney who worked with the Committee. Over the course of two years, the Committee researched, conducted public meetings, and drafted the Adoption Code.⁶ The Code was enacted by the Legislature as House Bill 1241 and approved on June 10, 1997, with relatively few changes from the draft proposed by the Committee. Several overriding concerns dominated the Committee's work. The least controversial objective, but one vital to adoption

1. See generally JOEL D. TENNENBAUM, *Introducing the Uniform Adoption Act*, 30 FAM. L.Q. 333 (Summer 1996) (observing that the 1953 version of the Uniform Adoption Act and the 1971 revised version of the Uniform Adoption Act, both promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), were not widely adopted, and a Model State Adoption Act adopted by the American Bar Association's Family Law Section was not approved by the ABA House of Delegates); Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345, 345-351 (Summer 1996) (describing the bitter disagreements among the members of the 1994 Uniform Adoption Act drafting committee and the full Commission); HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, 888 (2d ed. 1988) (commenting on the difficulty states have encountered in striking an appropriate balance between the rights of parents and the protection of children in establishing grounds for termination of parental rights).

2. See generally *Promise Doe v. Sundquist*, 106 F.3d 702 (6th Cir. 1997) (suit by birth parents, adoptive parents, and an adoption agency challenging the constitutionality of Tennessee's new disclosure statute that would permit the disclosure of identifying information regarding past as well as future adoptions.) For a more detailed discussion of the case, see *infra*, note 438.

3. See generally *In re Doe*, 638 N.E.2d 181 (Ill. 1994), cert. denied, 513 U.S. 994 (1994) (Baby Richard); *In re Clausen*, 502 N.W.2d 649 (Mich. 1993), stay denied sub nom.; *DeBoer ex rel. Darrow v. DeBoer*, 509 U.S. 1301 (Stevens, J.), and stay denied, 509 U.S. 938 (1993) (Baby Jessica).

4. See MITCH LEIGH AND JOE DARION, *THE IMPOSSIBLE DREAM* (from DALE WASSERMAN, *MAN OF LA MANCHA*, based upon MIGUEL DE CERVANTES, *DON QUIXOTE DE LA MANCHA* (1605)).

5. See OKLA. STAT. tit. 10, §§ 7511-1.1 to 7511-1.5 (Supp. 1997) (formerly OKLA. STAT. tit. 10, §§ 60.51 to 60.53 (Supp. 1996)).

6. The Adoption Law Reform Committee also worked on legislation initially proposed by Representative Russ Roach, creating a tax exemption for adoptive parents, that was enacted in 1996. See OKLA. STAT. tit. 68, § 2358 (Supp. 1996).

professionals, was to fulfill the mandate given by the Legislature to reorganize and recodify Oklahoma's adoption statutes in a coherent manner.⁷ This was accomplished by the creation of Chapter 75 of Title 10, which is divided into eleven articles.⁸ Chapter 75 incorporates adoption statutes previously found in four or five different chapters of Title 10.⁹ In addition to rearranging the statutory framework, the Committee attempted to disentangle some of the procedural snarls that have burdened the adoption process, such as the interaction of the procedural requirements and grounds established for termination under former OKLA. STAT. tit. 10 § 29.1 with those established for adoption without consent proceedings under former OKLA. STAT. tit. 10 §§ 60.6 and 60.7.

A central tenet of the Committee's reconstruction of Oklahoma's adoption statutes was to promote the best interests of the children involved in adoptions.¹⁰ There is, however, no universal agreement about how best interests should be defined,¹¹ nor is there a general consensus among scholars, the courts, or others personally involved with the adoption process about how this objective can best be accomplished.¹² The Committee's belief, as well as the Oklahoma Legislature's belief, that children's interests are best served by promoting the finality of adoptions is evident throughout the Code. The grounds and time periods for withdrawal of consent were dramatically circumscribed,¹³ stricter time limitations upon challenges to the validity of an adoption were

7. See OKLA. STAT. tit. 10, § 7511-1.3 (Supp. 1997) (directing the Committee to create a new article, to consolidate, renumber, and incorporate into it as many adoption statutes found throughout the Oklahoma Statutes as practicable, to update existing statutory language and references, and to repeal obsolete or duplicative statutes or those declared unconstitutional by the courts; formerly OKLA. STAT. tit. 10, § 60.53) (Supp. 1996).

8. See OKLA. STAT. tit. 10, § 7501-1.1 (Supp. 1997).

9. The Oklahoma Adoption Code replaces the former Oklahoma Adoption Act, originally enacted in 1957. The Oklahoma Adoption Act closely followed the original 1953 version of the Uniform Adoption Act (1953 UAA), which was drafted and approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL). See OKLA. STAT. tit. 10, §§ 60.26 to 60.56 (Supp. 1996). Since 1957 Oklahoma has substantially revised its adoption laws many times, and added important provisions not only to former OKLA. STAT. tit. 10, §§ 60 to 60.23 (Supp. 1996), the former Oklahoma Adoption Act, but also to OKLA. STAT. tit. 10, §§ 40.1 to 40.6 (Supp. 1996) (Indian Child Welfare Act), OKLA. STAT. tit. 10, §§ 55 to 58 (Supp. 1996) (Adoption), former OKLA. STAT. tit. 10, §§ 60.26 to 60.56 (Supp. 1996), and OKLA. STAT. tit. 10, §§ 60.51 to 60.56 (Supp. 1996) (Compact on Adoption and Medical Assistance), and OKLA. STAT. tit. 10, §§ 7001-1.1 to 7006-1.5 (Supp. 1996) (Oklahoma Children's Code). Although not all statutes related to adoption, such as the Oklahoma Indian Child Welfare Act, could practicably be removed, to the extent adoption law could be extracted from other chapters, this was done.

10. See OKLA. STAT. tit. 10, § 7501-1.2(a)(1) (Supp. 1997). Section 7501-1.2 is the "mission statement" of the Oklahoma Adoption Code which lists as the first purpose of the Code "to [e]nsure and promote the best interests of the child in adoptions . . ."

11. Barbara Bennett Woodhouse, in a thought-provoking article entitled *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1754-57 (1993), suggests courts should take what she terms a "generist" perspective, making decisions for and about children by focusing upon the solution that will best meet children's needs for nurturing and caregiving. She distinguishes this from a children's rights based approach, which can characterize children as adult-modeled "autonomous rights-bearers in an adversarial system." *Id.* at 1756. She distinguishes her own perspective from that of other scholars who assimilate children's interests with their mothers', or those who assess children's interests in narrower terms of relational values. *Id.* at 1821-1826.

12. See Hollinger, *supra* note 1, at 356 (Professor Hollinger observes that even under a best interest standard, in a contest between a thwarted birth parent and a custodial adoptive parent, when balancing short-run versus long term interests, the appropriate decision is by no means clear).

13. See OKLA. STAT. tit. 10, § 7503-2.7 (Supp. 1997).

imposed,¹⁴ and the deadlines for many steps in the appellate review process were shortened.¹⁵ In addition, a provision for a best interests custody hearing following denial of an adoption petition was incorporated.¹⁶ To facilitate prebirth planning and early permanent placement, putative fathers may now give valid consent prior to birth.¹⁷ Putative fathers can also be required, upon notice, to register their desire for notice of adoption proceedings with the paternity registry, or lose their right to notice or ability to veto if they fail to register.¹⁸ In order to better ensure that children will be placed in a stable, loving family, preplacement home studies will now be required.¹⁹ In any contested adoption, an attorney must be appointed for the child, and a guardian ad litem may, in the court's discretion, also be appointed.²⁰

In addition, the Committee recognized that the right to participate in the rearing of one's child is deemed fundamental and must be afforded special protection under the Federal Constitution.²¹ Thus, another important objective was to ensure that the Oklahoma Adoption Code provided procedural and substantive protections for birth parents. New provisions in the Code include detailed requirements for the contents of permanent relinquishment and consent forms and accompanying judicial certifications, which are included in an effort to ensure that a birth parent's consent or relinquishment is both informed and voluntary.²² Notice of preadoption termination or adoption proceedings must be served upon all parents and putative fathers, regardless of the commitment they have demonstrated, unless the right to notice has been waived or the parent's rights to the child involved have previously been terminated.²³ The court is directed to make a special inquiry to find an unknown putative father.²⁴ The Code creates a statutory right to appointed counsel for indigent parents and putative fathers who request counsel at consent proceedings²⁵ or in termination and adoption without consent proceedings brought pursuant to the Code.²⁶ Grounds for adoption without consent or termination prior to adoption are still carefully delineated.²⁷

14. See OKLA. STAT. tit. 10, §§ 7503-2.7, 7505-7.2 (Supp. 1997).

15. See OKLA. STAT. tit. 10, § 7505-7.1 (Supp. 1997).

16. See OKLA. STAT. tit. 10, § 7505-6.4 (Supp. 1997).

17. See OKLA. STAT. tit. 10, § 7503-2.6 (Supp. 1997).

18. See OKLA. STAT. tit. 10, § 7503-3.1 (Supp. 1997).

19. See OKLA. STAT. tit. 10, § 7505-5.1 (Supp. 1997).

20. See OKLA. STAT. tit. 10, § 7501-1.2 (Supp. 1997).

21. See *M.L.B. v. S.L.J.*, No. 95-853, slip op. at 14 (U.S. Dec. 16, 1996), 117 S. Ct. 555, 565 (1996); *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982).

22. See OKLA. STAT. tit. 10, §§ 7503-2.3 to 7503-2.4 (Supp. 1997).

23. See OKLA. STAT. tit. 10, §§ 7505-2.1, 7505-4.1 (Supp. 1997). This statutory right to notice extends beyond the constitutional requirement recognized by the U.S. Supreme Court in *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) and the Oklahoma Supreme Court in *In re C.J.S.*, 903 P.2d 304, 307-309 (Okla. 1995), both of which denied a constitutional right to notice to putative fathers who did not develop a parent-child relationship with the child and whose actions did not "demonstrate a full commitment to the responsibilities of parenthood." *Lehr*, 463 U.S. at 261; *In re C.J.S.*, 903 P.2d at 307 (quoting *Lehr*, 463 U.S. at 261).

24. See OKLA. STAT. tit. 10, § 7505-4.3 (Supp. 1997).

25. See OKLA. STAT. tit. 10, §§ 7503-2.3 to 7503-2.4 (Supp. 1997).

26. See OKLA. STAT. tit. 10, §§ 7505-2.1, 7505-4.1 (Supp. 1997).

27. See OKLA. STAT. tit. 10, § 7505-4.2 (Supp. 1997).

The interests of adoptive parents are served by the finality provisions described above, as well as by the provisions for prebirth consent or waiver of interest by putative fathers that facilitate prebirth planning. In addition, the risk that adoptive parents or adoption agencies will incur substantial medical expenses for newborns who cannot be adopted is diminished. Formerly hospitals frequently required prospective adoptive parents or agencies to pay all of the hospital expenses related to the birth prior to discharge of the child, which was often before the necessary consents to adoption had been signed and it could reasonably be determined that the adoption could proceed. Under the Adoption Code hospitals are now required to discharge a child with written authorization of the birth mother and are thus precluded from holding children placed for adoption "hostage" until all hospital bills have been paid.²⁸

Finally, the Committee sought to create mechanisms for disclosure of both nonidentifying and identifying information. This was done to facilitate broader access to this information by adoptees and their birth and adoptive families at appropriate times, while still ensuring that the privacy rights of all parties would be protected. The health of adoptees, as well as the health of their descendants, is better protected by the new requirements for the collection of a detailed medical and social history,²⁹ as well as by extensive provisions for supplementation and disclosure of medical history to adult adoptees, adoptive parents, and birth relatives.³⁰ Those who are adopted after the Code goes into effect may choose as adults to obtain identifying information listed on their original birth certificates, unless the birth parent has filed written objection to the disclosure.³¹ A statewide reunion registry and a confidential intermediary program have been created to assist all adoptees and birth family members to reunite or communicate, when reunion is mutually desired.³² Nevertheless, disclosure under all of these provisions is strictly regulated to ensure that the confidentiality of adoption proceedings and records is preserved.³³

The purpose of this article is to examine the substantial impact the new Adoption Code will have on adoption practice in Oklahoma, with a particular focus on how the interests of adoptees and their birth and adoptive families will be affected by the new provisions. In addition to highlighting the major procedural and substantive changes in the new Code, the article discusses the background and policy implications of these changes and addresses interpretive difficulties that may arise. This article does *not* propound a neutral critique of

28. See OKLA. STAT. tit. 10, § 7509-1.1 (Supp. 1997).

29. See OKLA. STAT. tit. 10, § 7504-1.1 (Supp. 1997).

30. See OKLA. STAT. tit. 10, § 7504-1.2 (Supp. 1997).

31. See OKLA. STAT. tit. 10, § 7505-6.6 (Supp. 1997).

32. See OKLA. STAT. tit. 10, §§ 7508-1.2 to 7508-1.3 (Supp. 1997).

33. See OKLA. STAT. tit. 10, § 7005-1.2 (Supp. 1997) (amended in 1996 in response to legislation proposed by the Adoption Law Reform Committee in H.B. 2975, prohibiting disclosure of juvenile court records, agency records, district attorney records, nondirectory education records, law enforcement records, and social records pertaining to adoptions except as permitted by the Oklahoma Adoption Code). See also OKLA. STAT. tit. 10, § 7505-1.1 (Supp. 1997) (requiring that the confidentiality of adoption hearings and records be preserved and creating a misdemeanor for unauthorized disclosure).

Oklahoma's new Adoption Code. While that task is an important one, it is better left to others who were not heavily involved in the creation of the new Code. What this author can provide, from the vantage of one who has participated in the drafting of the Code,³⁴ is some insight into the Code's legislative history and the rationale of its originators.

II. JURISDICTION, CHOICE OF LAW, AND RECOGNITION

A. Subject Matter Jurisdiction

1. Rationale

Prior to the enactment of the Oklahoma Adoption Code, the subject matter jurisdiction of the Oklahoma courts to hear adoption proceedings had not been specifically addressed in the Oklahoma statutes,³⁵ and had received scant attention from the Oklahoma courts in published opinions.³⁶ Whether the Uniform Child Custody Jurisdiction Act (UCCJA) was intended to apply to adoptions was an open question in Oklahoma,³⁷ and one that generated debate nationwide.³⁸ In order to fill that vacuum, the Oklahoma Adoption Code, in Section

34. The author, Prof. Marianne Blair, has been a member of the Adoption Law Reform Committee since its inception. In that capacity, she has drafted substantial portions of the Oklahoma Adoption Code and the Adoption Law Reform Committee Comments to the Adoption Code.

No piece of legislation when proposed by a Committee of fourteen members and revised by staff attorneys, legislators, and legislative committees, reflects in its entirety the views and priorities of any one Committee member or legislator. As with any major piece of legislation developed through compromise, every member of the Committee (including the author of this article) disagrees strenuously with some provisions of the new Code. Nevertheless, the provisions of the Oklahoma Adoption Code received the support of the majority of the Committee members that considered each issue, and relatively few changes were made by the Legislature to the Committee's proposals.

35. See OKLA. STAT. tit. 10, § 60.2 (1991) (repealed 1997) (former section 60.2 provided that "Any child present within this state at the time the petition for adoption is filed, irrespective of place of birth or place of residence, may be adopted."). Former section 60.2 did not refer to subject matter jurisdiction, nor is there a substantial body of case law that interprets it in this context. See also OKLA. STAT. tit. 10, § 60.4 (1991) (amended and recodified at OKLA. STAT. tit. 10 § 7502-1.2 (Supp. 1997)). Former section 60.4 provided that adoption proceedings must be brought in the court "having jurisdiction in the county where the petitioners . . . reside," and was treated as a venue statute. The Oklahoma Uniform Child Custody Jurisdiction Act, OKLA. STAT. tit. 43, §§ 503, 504(3) (1991 & Supp. 1996), does not specifically list adoptions in the list of proceedings to which the Act applies, although adoptions could be interpreted to fall within the broad category of "custody proceedings." This interpretation was ultimately adopted after the enactment of the Oklahoma Adoption Code by the Oklahoma Supreme Court in *In re L.S.*, 943 P.2d 621 (Okla. 1997).

36. See *In re Adoption of A.D.P.*, 932 P.2d 51, 54 n.6 (Okla. Ct. App. 1996) (comment in footnote number six (6) that the Uniform Child Custody Jurisdiction Act is not relevant to adoption proceedings in Oklahoma brought under the Oklahoma Adoption Act).

37. See *In re L.S.*, 943 P.2d 621 (determining that over one month after the enactment of the new Adoption Code, the UCCJA was applicable to adoption proceedings).

38. Most courts that have considered the issue have held that the UCCJA applies to adoptions. See *In re Adoption of Zachariah K.*, 8 Cal. Rptr. 2d 423, 428 (Cal. Ct. App. 1992); *Rogers v. Platt*, 245 Cal. Rptr. 532, 540 (1988); *Souza v. Superior Court*, 238 Cal. Rptr. 892, 895 (1987); *In re Custody of K.R.*, 897 P.2d 896, 899 (Colo. App. 1995); *In re Adoption of K.C.P.*, 432 So. 2d 620, 622 (Fla. Dist. Ct. App. 1983); *Gainey v. Olivo*, 373 S.E.2d 4, 6 (Ga. 1988); *Noga v. Noga*, 443 N.E.2d 1142, 1145 (Ill. App. Ct. 1982); *In re Adoption of Baby Girl B.*, 867 P.2d 1074, 1077-78 (Kan. Ct. App. 1994); *In re Clausen*, 502 N.W.2d 649, 651 (Mich. 1993); *Foster v. Stein*, 454 N.W.2d 244, 246-47 (Mich. Ct. App. 1990); *In re Adoption of J.P.S.*, 876 S.W.2d 762, 765 (Mo. App. 1994); *In re Adoption of Child by T.W.C.*, 636 A.2d 1083, 1086-87 (N.J. Super. Ct. App. Div. 1994); *State ex rel Torres v. Mason*, 848 P.2d 592, 595 (Or. 1993); *In re Adoption of B.E.W.G.*, 549 A.2d 1286, 1290 (1988). At least one case has held that the UCCJA does not apply to custody

7502-1.1,³⁹ establishes the permissible bases upon which Oklahoma courts can

proceedings. See *In re Johnson*, 415 N.E.2d 108 (Ind. Ct. App. 1981).

A few states explicitly include adoptions in their statutory provisions listing the proceedings to which the UCCJA applies. See, ALA. CODE § 26-10A-21 (1996); D.C. CODE § 16-4502 (1997); GA. CODE ANN. § 19-9-42 (1997); MONT. CODE ANN. § 40-7-103 (1996); OR. REV. STAT. §109.309 (1997) (adopts UCCJA for adoptions but modifies jurisdictional bases); TENN. CODE ANN. § 36-1-111 (1996). Others specifically exclude adoptions from UCCJA coverage. See N.H. REV. STAT. ANN. §458-A:2 (1995); N.Y. DOM. REL. LAW § 75-c (McKinney 1997).

Although earlier commentators urged application of the UCCJA to adoptions, see Bernadette W. Hartfield, *The Uniform Child Custody Jurisdiction Act and the Problem of Jurisdiction in Interstate Adoption: An Easy Fix?*, 43 OKLA. L. REV. 621, 653 (1990); HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, 873-74 (2d ed. 1988); more recent commentators have taken the position that the UCCJA is not well suited to direct application to adoption proceedings. See Greg Waller, *When the Rules Don't Fit the Game: Application of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act to Interstate Adoption Proceedings*, 33 HARV. J. ON LEGIS. 271, 289-301 (1996); Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 CAL. L. REV. 703, 729-30, 744-52 (1996) (concluding that the 1994 UAA, with some suggested modifications, rather than the UCCJA, would better regulate interstate adoption disputes).

39. See OKLA. STAT. tit. 10, § 7502-1.1 (Supp. 1997) provides:

A. Except as otherwise provided in this section, a court of this state has jurisdiction over proceedings to terminate parental rights and proceedings for the adoption of a minor commenced pursuant to the Oklahoma Adoption Code if:

1.

- a. immediately preceding commencement of the proceeding, the minor lived in this state with a parent, a guardian, a prospective adoptive parent, or another person acting as parent, for at least six (6) consecutive months, excluding periods of temporary absence, or
- b. in the case of a minor under six (6) months of age, lived in this state from soon after birth with any of those individuals and there is available in this state substantial evidence concerning the minor's present or future care;

2. Immediately preceding commencement of the proceeding, the prospective adoptive parent lived in this state for at least six (6) consecutive months, excluding periods of temporary absence, and there is available in this state substantial evidence concerning the minor's present or future care;

3. The child-placing agency that placed the minor for adoption is located in this state and it is in the best interest of the minor that a court of this state, assume jurisdiction because:

- a. the minor and the minor's parents, or the minor and the prospective adoptive parent, have a significant connection with this state, and
- b. there is available in this state substantial evidence concerning the minor's present or future care;

4. The minor and the prospective adoptive parent are physically present in this state, and the minor has been abandoned or it is necessary in an emergency to protect the minor because the minor has been subjected to or threatened with mistreatment or abuse or is otherwise neglected; or

5. It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs 1 through 4 of this subsection, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to hear a petition for adoption of the minor, and it is in the best interest of the minor that a court of this state assume jurisdiction.

B. A court of this state shall not exercise jurisdiction over a proceeding for adoption of a minor if, at the time the petition for adoption is filed, a proceeding concerning the custody or adoption of the minor is pending in a court of another state exercising jurisdiction substantially in conformity with the Uniform Child Custody Jurisdiction Act or the Oklahoma Adoption Code, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for another reason.

C. If a court of another state has issued a decree or order concerning the custody of a minor who may be the subject of a proceeding for adoption in this state, a court of this state shall not exercise jurisdiction over a proceeding for adoption of the minor unless:

1. The court of this state finds that the court of the state which issued the decree or order:

- a. does not have continuing jurisdiction to modify the decree or order under jurisdictional prerequisites substantially in accordance with the Uniform Child Custody Jurisdiction Act or has declined to assume jurisdiction to modify the decree or order, or
- b. does not have jurisdiction over a proceeding for adoption substantially in confor-

exercise subject matter jurisdiction in adoption proceedings and imposes limitations upon the courts' exercise of jurisdiction when custody or adoption proceedings are pending in another state, or when a custody order concerning the prospective adoptee has been issued by another state's court.

The language of Section 7502-1.1 is virtually identical to the jurisdictional provisions of Section 3-101 of the 1994 Uniform Adoption Act (1994 UAA).⁴⁰ It parallels the jurisdictional scheme of the UCCJA, and yet departs from the UCCJA in significant respects.⁴¹ The 1994 Uniform Adoption Act was chosen as a model for subject matter jurisdiction requirements, rather than the UCCJA, for several reasons. Uniformity in the area of subject matter jurisdiction is particularly critical, in order to minimize protracted interstate jurisdictional battles that can leave a child in limbo for several years.⁴² The 1994 UAA is the most recent uniform act by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to address the thorny jurisdictional issues that plague interstate adoption.⁴³ Although to date most of the state courts and legislators that have addressed the issue have found the UCCJA applicable to adoptions, almost all of these decisions and amendments predate NCCUSL's approval of the new 1994 UAA.⁴⁴ Moreover, a revised version of the UCCJA, which specifically excludes application of the UCCJA to adoptions, was in the final stages of consideration by the NCCUSL Drafting Committee at the time that the Oklahoma Adoption Code was enacted, and has since been approved by NCCUSL at its Annual Meeting in August 1997.⁴⁵ In addition, Section 3-101 of the 1994 UAA, although similar to the UCCJA, better addresses the distinctive characteristics of adoption proceedings and avoids some of the interpretive pitfalls encountered by courts that attempted to apply the UCCJA to interstate adoption disputes.⁴⁶

mity with paragraphs 1 through 4 of subsection A of this section or has declined to assume jurisdiction over a proceeding for adoption; and

2. The court of this state has jurisdiction pursuant to this section over the proceeding for adoption.

40. UNIF. ADOPTION ACT § 3-101, 9 U.L.A. 39 (Supp. 1997).

41. See UNIF. ADOPTION ACT § 3-101 cmt., 9 U.L.A. 38 (Supp. 1997).

42. For example, *Rogers v. Platt*, 814 F.2d 683 (D.C. Cir. 1987) involved an interstate dispute between a prospective adoptive couple from the District of Columbia that refused to return a child to a California birth mother who never consented to adoption and requested the return of her child shortly after his birth. When the birth mother ultimately prevailed after appellate proceedings in both California and the District of Columbia, the child was four and one-half years old, and the birth mother, Marita Rogers, permitted him to remain with the Platts. See Kay, *supra* note 38, at 718-19.

43. Thus far, only Vermont has enacted substantial portions of the 1994 Uniform Adoption Act. See UNIF. ADOPTION ACT Prefatory Note, 9 U.L.A. 4 (Supp. 1997). Vermont's version of § 3-101, has been modified slightly from the original 1994 Uniform Adoption Act approved by NCCUSL. See VT. STAT. ANN. tit. 15A, § 3-101 (1997).

44. See *supra* note 38.

45. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) specifically provides in Section 103 that the Act "does not govern an adoption proceeding." *Draft For Approval, Uniform Child Custody Jurisdiction And Enforcement Act, § 103(1)* (August 1997) <<http://www.law.upenn.edu/library/ulc/uccjea/chldcust.htm>>. This draft was approved at the August 1997 Annual Meeting of NCCUSL. Telephone Interview with Julia Trice, staff member, NCCUSL (Sept. 8, 1997). Because the UCCJA has now been enacted in all fifty states, the Committee anticipated that the UCCJEA will also be widely adopted.

46. See UNIF. ADOPTION ACT § 3-101 cmt., 9 U.L.A. 38 (Supp. 1997).

2. Bases for Jurisdiction

Section 7502-1.1 of the Oklahoma Adoption Code establishes five alternative bases upon which Oklahoma courts may exercise subject matter jurisdiction over proceedings to terminate parental rights⁴⁷ and adoption proceedings commenced pursuant to the Adoption Code. These bases are similar to the bases established by the UCCJA, with modifications that respond to the unique circumstances of adoption proceedings. The UCCJA was designed for divorce proceedings, in which the choice is typically between two parents and the issue is to determine what custody and visitation arrangement would best serve the interests of the child involved.⁴⁸ The intent of the drafters of the UCCJA in formulating these bases was to choose a forum with "optimum access to relevant evidence about the child and family."⁴⁹ Adoption proceedings also require in every case a determination as to whether placement with the prospective adoptive parents is in the best interests of the child.⁵⁰ The relevant evidence on that issue typically would be in the state in which the prospective adoptive parents reside. Contested adoptions, however, require resolution of a separate issue, i.e., whether the parental rights of a birth parent can properly be terminated. This issue is rarely resolved by applying a best interests test,⁵¹ but rather focuses on specific conduct or omissions by the birth parent, evidence of which would be located in the birth parent's state.⁵² Thus, the goal of achieving optimum access to the evidence necessary to resolve these disparate issues in contested adoptions would point in opposite directions.

47. A proceeding to terminate the rights of a putative father may be initiated pursuant to OKLA. STAT. tit. 10, § 7505-2.1 (Supp. 1997) of the Adoption Code prior to the initiation of an adoption proceeding. Termination of the rights of a putative father may also be ordered at a separate hearing prior to finalization of the adoption, pursuant to OKLA. STAT. tit. 10, § 7505-4.1 (Supp. 1997) of the Adoption Code. The subject matter jurisdiction requirements of the Adoption Code, OKLA. STAT. tit. 10, § 7502-1.1 (Supp. 1997), would apply to termination proceedings commenced pursuant to either of these sections.

The UCCJA, OKLA. STAT. tit. 43, § 501-27 (1991), rather than Section 7502-1.1 of the Adoption Code, would govern the subject matter jurisdiction of the courts in termination of parental rights proceedings commenced pursuant to the Oklahoma Children's Code, OKLA. STAT. tit. 10, § 7001-1.1 (Supp. 1996), and in divorce proceedings or other proceedings that are not commenced pursuant to the Adoption Code in which termination of parental rights are sought. See OKLA. STAT. tit. 43, § 504 (1991).

48. See Kay, *supra* note 38, at 712-713; Waller, *supra* note 38, at 274, 292.

49. UNIF. CHILD CUSTODY JURISDICTION ACT § 3 cmt., 9 U.L.A. 144, 145 (1988). See also Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1218 (1969) (Professor Bodenheimer, Reporter for the UCCJA drafting committee, wrote in summary of the UCCJA: "The basic scheme of the Act is simple. First, one court in the country assumes full responsibility for custody of a particular child. Second, for this purpose a court is selected which has access to as much relevant information about the child and family in the state as possible.").

50. See OKLA. STAT. tit. 10, § 7505-6.3(E) (Supp. 1997) ("The court may enter a final decree of adoption, if the court is satisfied that the adoption is in the best interests of the child.").

51. See Santosky v. Kramer, 455 U.S. 745, 760 n.10 (1982) ("Nor is it clear that the State constitutionally could terminate a parent's rights *without* showing parental unfitness."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" quoting Smith v. Organization of Foster Families, 431 U.S. 816, 862-863 (1977) (Stewart, J., concurring in judgment)).

52. See Waller, *supra* note 38, at 292-98.

The drafters of the 1994 UAA resolved this dilemma by fashioning the five alternative bases to favor jurisdiction in the state with the most substantial evidence about the prospective adoptive family,⁵³ when there is no pending or prior custody or adoption proceeding in another state. The Oklahoma Adoption Law Reform Committee consciously approved this approach when it incorporated the language of 1994 UAA § 3-101 into its own proposed legislation, reasoning that a determination of the best interests of the child is required in all adoptions, contested and uncontested, and this determination can best be made in the state in which the prospective adoptive parents reside. Members of the Committee specifically favored this approach so that the judges handling the proceedings would be familiar with the social workers who conducted home studies on the adoptive parents.⁵⁴ The Committee chose to address the concern that birth parents might be judged by standards that they had no ability to foresee through Section 7502-1.3 of the Adoption Code, which governs the choice of law provisions, rather than through the jurisdictional requirements for adoption.

The first basis for adoption jurisdiction created by Section 7502-1.1⁵⁵ is the "home state" basis. Like the UCCJA home state basis,⁵⁶ it permits the exercise of jurisdiction if the child has lived in Oklahoma for six consecutive months immediately preceding the filing of the adoption or termination proceeding, but broadens the categories of individuals with whom the child may live to satisfy this basis.⁵⁷ Under the new Adoption Code the categories include not only parents and persons acting as parents, but also guardians and prospective adoptive parents.⁵⁸ The other significant departure from the UCCJA home state basis is the provision applying to infants under six months of age. Although the UCCJA requires that the home state of such infants is the state in which the infant has lived "from birth," Section 7502-1.1, following the lead of 1994 UAA § 3-101, permits Oklahoma courts to exercise adoption jurisdiction over such infants if they have lived in Oklahoma "from soon after birth with [a parent, guardian, prospective adoptive parent, or person acting as a

53. See Hollinger, *supra* note 1, at 369.

54. See OKLA. STAT. tit. 10, § 7502-1.1 cmt. (Supp. 1997).

55. For full text, see *supra* note 39, Subsection (A)(1).

56. See OKLA. STAT. tit. 43, § 504(5) (1991).

57. Prospective adoptive parents have not always been found to be persons acting as parents. In *Rogers v. Platt*, 245 Cal. Rptr. 532, 537 (Cal. Ct. App. 1988), the court found that prospective adoptive parents were not "persons acting as parents" because they did not have a colorable claim to custody. They had taken the child with the birth mother's permission, but without her consent to adopt, and had refused to return the child when the birth mother requested his return shortly after his birth.

The birth mother filed a petition for habeas corpus in California for the return of her child. As the first filed action, the California court, which had jurisdiction on the basis of significant connection, ultimately was found to be the court with proper jurisdiction to resolve the dispute. It should be noted that, although Oklahoma's Section 7502-1.1 does include prospective adoptive parents in the category of those whose custody of the child could create a home state, Section 7502-1.1 should reach a similar jurisdictional resolution because it requires that an Oklahoma court defer to a pending custody action in another state exercising jurisdiction under the Uniform Child Custody Jurisdiction Act. *But cf. In re Weathersby*, 892 P.2d 991, 997 (Or. 1995) (where birth mother consented to adoption and later sought return of child, prospective adopted parents were "persons acting as parents").

58. See Okla. Stat. tit. 10, § 7502-1.1(A)(1)(a) (Supp. 1997).

parent] and there is available in [Oklahoma] substantial evidence concerning the [infant's] present or future care." This definition of an infant's home state avoids the interpretive difficulties encountered by courts of other states that applied the UCCJA home state definition in the context of infant adoptions and found that an infant who was taken to another state shortly after birth by prospective adoptive parents had no home state.⁵⁹ Section 7502-1.1 thus affords prospective adoptive parents who have brought a newborn to Oklahoma shortly after birth the opportunity to commence adoption proceedings in Oklahoma on a home state basis without the necessity of waiting for the child to have lived in Oklahoma for six months prior to filing their proceeding.⁶⁰

Conspicuously absent from the home state provision in the Adoption Code is the UCCJA's "left behind parent" alternative. Under the UCCJA, a state may exercise jurisdiction as the home state if: (1) it has been the child's home state within the six months preceding the commencement of the proceeding, (2) the child has been removed from or retained outside the state, and (3) a parent or person acting as parent continues to reside in the forum state.⁶¹ Retention of this alternative in the Adoption Code would have created home state jurisdiction in a state where the child was born or resided for six months, if a birth parent continued to reside in that state, for up to six months after the child left the state. Deletion of this alternative home state basis is consistent with the preference in 1994 UAA § 3-101 and Section 7502-1.1 to establish jurisdiction in the state in which the child will reside with the adoptive parents, and reduces the opportunity for two states to simultaneously have adoption jurisdiction on the home state basis or different bases.⁶²

The second and third bases under Section 7502-1.1 are variations of the UCCJA's significant connection/substantial evidence basis. Jurisdiction may be exercised under Section 7502-1.1(A)(2) if the prospective adoptive parents have lived in Oklahoma for six months immediately prior to commencement of the adoption proceeding and there is substantial evidence in Oklahoma concerning the child's present or future care. When home state basis is not available be-

59. See *In re Zachariah K.*, 8 Cal. Rptr. 2d 423, 430 (Cal. Ct. App. 1992); *In re Adoption of Child by T.W.C.*, 636 A.2d 1083, 1088 (N.J. Super. Ct. App. Div. 1994); *Rogers v. Platt*, 641 F. Supp. 381, 386 (D.D.C. 1986) (construing similar provisions in the Parental Kidnapping Prevention Act (PKPA)), *rev'd on other grounds*, 814 F.2d. 683 (D.C. Cir. 1987). See Kay, *supra* note 38, at 717-720, 745 (describing the jurisdictional problems created by application of the UCCJA to the interstate adoption of newborns).

60. See UNIF. ADOPTION ACT §3-101 cmt., 9 U.L.A. 38, 39 (Supp. 1997).

61. See OKLA. STAT. tit. 43, § 505 (1991).

62. If the "left behind parent" provision had been included in Section 7502-1.1, a child who was lawfully taken to another state shortly after birth might have two home states. A court could conceivably find that the state in which the child was born was a home state, because the child had lived there from birth until the child's removal and a birth parent remains in the state. The state to which the child was brought by prospective adoptive parents would also be a home state, under Section 7502-1.1's provision that permits the adoptive parents' state to be the home state of an infant brought to the state by prospective adoptive parents soon after birth.

The "left behind parent" provision would also create home state status for a state where a child lived with a birth parent for six months before the child left the state. Jurisdiction might simultaneously exist in the adoptive parents' state under Section 7502-1.1(A)(2) or (3), if the adoptive parents had lived there for six months, or if the child had been placed with them by an adoption agency located in the adoptive parents' state.

cause the child was not placed with prospective adoptive parents "soon after birth," this basis will afford Oklahoma courts a ground to exercise jurisdiction, regardless of whether the child was born in Oklahoma or elsewhere, without waiting for the child to have lived in Oklahoma for six months.⁶³ Even if neither the child nor the prospective adoptive parents have lived in Oklahoma for six months prior to the commencement of the adoption proceeding, Section 7502-1.1 (A)(3) permits Oklahoma courts to assume jurisdiction if the child was placed by an agency located in the state, if there is significant evidence in the state concerning the child's present or future care, and if the child and the child's birth parents or the child and a prospective adoptive parent have a significant connection with Oklahoma.⁶⁴ Thus, both the second and third bases, like the home state basis, facilitate the prompt exercise of jurisdiction in the state in which the child will live with her prospective adoptive family.

Moreover, the third basis is the only basis, other than the default basis,⁶⁵ that can confer jurisdiction upon the courts of the birth parent's state if the child has permanently moved from the state with prospective adoptive parents or anyone else prior to commencement of the proceeding. Because it can be used by Oklahoma courts only for adoptive placements facilitated by an Oklahoma agency, and because it requires both a significant connection with and substantial evidence in Oklahoma, its application is very limited. Thus, the ability of out-of-state adoptive parents to choose to file their adoption proceeding in Oklahoma is greatly restricted, even if the child is born in Oklahoma and a birth parent resides here.⁶⁶

A fourth basis for exercise of jurisdiction over adoption proceedings is emergency jurisdiction. Section 7502-1.1(A)(4) permits the exercise of jurisdiction if both the child and the prospective adoptive parent are physically in the state and the child has been abandoned or an emergency requires the protection of the child from mistreatment, abuse, or neglect. Because this provision was included in the 1994 UAA § 3-101, it was incorporated in the Oklahoma Adoption Code in the interests of uniformity. Although modeled after the emergency jurisdiction provision of the UCCJA,⁶⁷ quite frankly the need for this basis in

63. See Kay, *supra* note 38, at 747.

64. See Kay, *supra* note 38, at 746-47 (questioning the inclusion of the significant connection requirement in the third basis and its omission from the second in 1994 UAA § 3-101).

65. See OKLA. STAT. tit. 10, § 7502-1.1(A)(5) (Supp. 1997).

66. If the child has been placed with the prospective adoptive parents outside of the birth parent's state before the commencement of the proceeding, the birth parent's state could no longer be the home state because the child would not live in that state immediately prior to the commencement of the action. Even if the prospective adoptive parents tried to file in Oklahoma before leaving the state with the child, they may well encounter venue problems. The petitioners would not reside in Oklahoma, so venue would only be valid if the child resided in the county in which the action was filed. While this might create venue for an action involving an older child, Oklahoma case law provides no guidance about how a court might apply that provision to the adoption of a newborn who is placed with adoptive parents directly from the hospital. A venue defect, of course, can be waived if no objection is raised. Emergency jurisdiction, set forth in OKLA. STAT. tit. 10, § 7502-1.1 (Supp. 1997), would also enable a prospective adoptive parent to file in the birth parent's state, under appropriate circumstances, but its application is very limited.

67. See OKLA. STAT. tit. 43, § 505(3) (Supp. 1997). The requirements for emergency jurisdiction under OKLA. STAT. tit. 10, § 7502-1.1 (Supp. 1997) and the 1994 UAA §3-101 require the physical presence in the

the Adoption Code is uncertain.⁶⁸ The purpose of the provision in the UCCJA is to permit state agencies, such as the Department of Human Services, to take temporary custody,⁶⁹ and if necessary adjudicate dependency and neglect proceedings when a child with no significant connection to the state is abandoned or endangered in Oklahoma.⁷⁰ Termination of parental rights in dependency and neglect proceedings initiated by the Department of Human Services, however, would be governed by the Children's Code⁷¹ and by the jurisdictional provisions of the UCCJA.⁷² When a child is placed for adoption through a private agency or through direct placement,⁷³ an abandonment or emergency due to the child's preplacement circumstances has been resolved by the placement itself and the adoption can proceed in the state in which the adoptive parents reside, within or outside Oklahoma, under the other bases.⁷⁴ Perhaps the primary justification for this basis is to permit the adoption proceeding to be filed in the state in which evidence concerning the abandonment, abuse, mistreatment or neglect is located, since adoptions initiated under these circumstances may be more likely to be contested.

Finally, Section 7502-1.1(A)(5), like the UCCJA, permits Oklahoma courts to exercise jurisdiction if assumption of jurisdiction would serve the child's best interests and no other state would have jurisdiction under one of the other bas-

forum state of both the prospective adoptive parent and the child, whereas the corresponding requirements for emergency jurisdiction under the UCCJA require only the physical presence of the child in the forum state.

68. The Comment to 1994 UAA § 3-101 does not discuss the emergency basis for jurisdiction. *See* UNIF. ADOPTION ACT § 3-101 cmt., 9 U.L.A. 38-39 (Supp. 1997).

69. When emergency jurisdiction is invoked under the UCCJA, Oklahoma courts may choose to issue a temporary custody order for a specified period of time and direct the parties back to the state that would have jurisdiction on home state or significant connection/substantial evidence basis for a permanent custody order or a permanent modification proceeding. *See* *Holt v. District Court*, 626 P.2d 1336 (Okla. 1981); *Majers v. Majers*, 645 P.2d 1039 (Okla. Ct. App. 1982).

70. *See* *Kay*, *supra* note 38, at 747-49. The Oklahoma Supreme Court has determined that Oklahoma courts have the discretion to issue permanent custody orders exercising jurisdiction on an emergency basis, if there is no pending proceeding in another state and modification of another state's order is not involved. *See In re C.O.*, 856 P.2d 290 (Okla. 1993).

71. *See* OKLA. STAT. tit. 10, § 7001-1.2 (Supp. 1997). Dependency and neglect proceedings are now known as deprived child proceedings. *See* OKLA. STAT. tit. 10, § 7001-1.3(10) (Supp. 1997).

72. *See* OKLA. STAT. tit. 43, § 504(3) (Supp. 1997) (defining custody determinations covered by the UCCJA to include child neglect and dependency proceedings).

73. *See* OKLA. STAT. tit. 10, § 7501-1.3 (Supp. 1997) (defining a direct placement adoption as one in which a "minor is not placed for adoption by the Department of Human Services or a child-placing agency"). This type of adoption is often referred to as an "independent adoption," and in Oklahoma is typically facilitated by a private attorney.

74. Professor Herma Hill Kay, in her recent article analyzing adoption jurisdiction under the 1994 UAA, refers to the emergency basis as "superfluous" and calls for its omission. *See* *Kay*, *supra* note 38, at 750. She expresses concern that the emergency jurisdiction basis will be used to "end-run around the preferable 'home state' provision." *Id.* She cites as an example a decision by the Arizona Supreme Court in which the Arizona court deferred to the Florida court's first filed adoption proceeding, finding that Florida, where the prospective adoptive parents resided, could exercise jurisdiction because the pediatrician who treated the child when she first arrived in Florida characterized her rash and low weight as an emergency. *See id.* at 747-750 (discussing *J.D.S. v. Franks*, 893 P.2d 732 (Ariz. 1995)). Her assessment appears well founded that the application of emergency jurisdiction in that case seems far afield from the original vision of emergency jurisdiction, because it permits jurisdiction in a state other than the one in which the actions creating the "emergency" were undertaken. It should be noted, however, that had Section 3-101 of the 1994 UAA been in force, it would have permitted the prospective adoptive parents to exercise jurisdiction in Florida anyway, on the substantial evidence basis, if they lived in Florida for six months prior to filing the proceeding.

es, or another state declines jurisdiction for the reason that Oklahoma is the more appropriate forum. It is possible that no other state would have jurisdiction in a direct placement adoption if the prospective adoptive parents live outside of the United States and file an action in Oklahoma to adopt a child born in Oklahoma after the child has left Oklahoma. Similarly, no other state would have jurisdiction if prospective adoptive parents who have not lived in their state of residence for six months sought to adopt a child older than six months through an independent adoption and filed the action after the child had left Oklahoma.⁷⁵ If the basis for jurisdiction is that another state has declined jurisdiction in favor of an Oklahoma court, written notification that the sister state yields jurisdiction to the Oklahoma court should be filed in the Oklahoma proceeding.⁷⁶

3. Pending Action in Another State

Section 7502-1.1 also contains a simultaneous proceedings rule that prohibits the Oklahoma courts from exercising jurisdiction if, at the time the petition for adoption is filed,⁷⁷ a custody or adoption proceeding is pending in another state exercising jurisdiction "substantially in conformity" with the UCCJA or the 1994 UAA § 3-101.⁷⁸ Like the analogous provision in the UCCJA, the statute thus gives priority to the first action commenced, unless that court stays its proceedings in favor of an Oklahoma court.⁷⁹ Sections 7505-3.1 and 7505-6.2 of the Adoption Code⁸⁰ require that knowledge about pending proceedings be provided to the court in the petition for adoption, and prior to the final hearing the court must be provided with a certified copy of any existing court order or petition in a pending proceeding concerning custody of or visitation with the child, and any court order terminating parental rights.

The Oklahoma Supreme Court's interpretation of the UCCJA simultaneous proceedings rule provides guidance regarding how this provision in Section 7502-1.1 may be applied. First, noting that the word "pending," as used in the

75. Both of the cases in these illustrations would have venue problems, since neither the prospective adoptive parents nor the child would reside in the county in which the action is filed. Venue objections, however, can be waived if not raised at the proper time.

76. See *In re* C.A.D., 839 P.2d 165 (Okla. 1992) (rejecting reliance solely upon an oral communication between judges and requiring the filing of a written notification from the other state court expressly yielding jurisdiction in order to satisfy the PKPA and UCCJA when simultaneous proceedings occur and the sister state has priority as the first action filed).

77. Because Section 7502-1.1 applies both to adoption proceedings and proceedings to terminate parental rights, the failure to include reference to a petition to terminate parental rights filed pursuant to Section 7505-2.1 of the Oklahoma Adoption Code in this subsection (B) and subsection (C) was an oversight. The clear intent of the Adoption Law Reform Committee was that all three subsections of Section 7502-1.1 would apply to adoption proceedings and proceedings to terminate parental rights initiated pursuant to Section 7502-1.1 before an adoption proceeding is filed.

78. Because the jurisdictional provisions of the Oklahoma Adoption Act are almost identical to the jurisdictional provisions of the 1994 UAA § 3-101, exercise of jurisdiction by other states in substantial conformity with the 1994 UAA § 3-101 would be in substantial conformity with the Oklahoma Adoption Code. To date only Vermont has adopted substantial provisions of the 1994 UAA. See VT. STAT. ANN. tit. 15A § 3-101 (1997).

79. Compare *Kay*, *supra* note 38, at 751.

80. OKLA. STAT. tit. 10, §§ 7505-3.1, 7505-6.2 (Supp. 1997).

UCCJA and the Parental Kidnapping Prevention Act (PKPA)⁸¹ is interpreted differently in different states, the court in *In re C.A.D.*⁸² determined that Oklahoma courts must look to the law of the state in which the first action is filed to determine if the action would be considered pending, or commenced, under that state's law. In many states, as in Oklahoma, filing commences an action;⁸³ in others something more, such as service of process, is required. Second, the inquiry to determine whether the first court is exercising jurisdiction in substantial conformity with the UCCJA should focus on the pleadings filed in the first action; an evidentiary hearing by the Oklahoma court to determine the truth of the allegations in the pleadings in the first action is not appropriate.⁸⁴ Third, Oklahoma courts must defer to a pending first commenced action unless a written notification, in the form of an order or written communication staying the action or yielding jurisdiction to the Oklahoma court, is secured for the record.⁸⁵

4. Effect of Prior Custody Order

When another state has issued a custody decree or order concerning the prospective adoptee, Section 7502-1.1 (C) prohibits Oklahoma courts from exercising jurisdiction over an adoption proceeding⁸⁶ unless the Oklahoma court has a basis to exercise jurisdiction *and* the court that issued the decree or order (1) does not have continuing jurisdiction to modify its custody order under the UCCJA or jurisdiction to hear an adoption proceeding under the 1994 UAA § 3-101, or (2) that court declines to assume jurisdiction to modify or to hear an adoption. This section is intended to fulfill the same goals as the UCCJA restrictions on the modification of custody decrees granted by courts of other states,⁸⁷ i.e., to avoid forum shopping and conflicting orders issued by courts of different states.⁸⁸

Unfortunately, Section 7502-1.1(C), which incorporates verbatim the language of 1994 UAA § 3-101, is subject to significant interpretive difficulties when the decree-issuing state *does* have continuing jurisdiction to modify its custody decree or order, but *does not* have jurisdiction to hear an adoption proceeding under the bases established in Section 7502-1.1(c).⁸⁹ Consider, for

81. 28 U.S.C. § 1738A (1994).

82. 839 P.2d 165, 172-73 (Okla. 1992).

83. See OKLA. STAT. tit. 12, § 2003 (1991).

84. See *In re C.A.D.*, 839 P.2d at 173-74.

85. See *id.* at 174-75.

86. Because Section 7502-1.1 applies both to adoption proceedings and to proceedings to terminate parental rights, the failure to include reference to a petition to terminate parental rights filed pursuant to Section 7505-2.1 of the Oklahoma Adoption Code in Subsection C was an oversight. The clear intent of the Adoption Law Reform Committee was that all three subsections of Section 7502-1.1 would apply to adoption proceedings and proceedings to terminate parental rights initiated pursuant to Section 7505-2.1 before an adoption proceeding is filed.

87. See OKLA. STAT. tit. 43, § 516 (1991).

88. See UNIF. CHILD CUSTODY JURISDICTION ACT § 14 cmt., 9 U.L.A. 292 (1988).

89. Because the jurisdictional provisions of Section 7502-1.1(a) of the Oklahoma Adoption Act are almost identical to the jurisdictional provisions of the 1994 UAA § 3-101(a), exercise of jurisdiction by other

example, the facts presented to the Oklahoma Supreme Court this summer in *In re L.S.*⁹⁰ A divorce decree issued by a Texas court awarded custody of the child to his father, who subsequently remarried and moved to Oklahoma.⁹¹ The mother remained in Texas and initiated several post-decree proceedings in an attempt to enforce her right to visitation.⁹² More than six months after the child and his father had moved to Oklahoma, the father and stepmother filed an action in an Oklahoma court seeking adoption of the child by the stepmother.⁹³ The Oklahoma Supreme Court determined that the UCCJA prohibited the Oklahoma court from exercising jurisdiction because Texas still had continuing jurisdiction over the custody proceeding.⁹⁴ Had that action been filed after November 1, 1997, the effective date of the Oklahoma Adoption Code, the resolution would not be as clear.⁹⁵ Texas would have continuing jurisdiction to modify the order,⁹⁶ but would not have jurisdiction to hear an adoption proceeding under any of the bases established by Section 7502-1.1(A).⁹⁷ As noted above,⁹⁸ the bases created for adoption jurisdiction favor jurisdiction in the state of the prospective adoptive parents' residence. Thus, if Section 7502-1.1(C) is interpreted to mean that Oklahoma courts may exercise adoption jurisdiction if the decree-issuing state lacks either continuing jurisdiction to modify

states in substantial conformity with the 1994 UAA § 3-101 would be in substantial conformity with the Oklahoma Adoption Code. To date only Vermont has adopted substantial provisions of the 1994 UAA. See VT. STAT. ANN. tit. 15A § 3-101 (1997).

90. *In re L.S.*, 943 P.2d 621 (Okla. 1997).

91. *See id.* at 622.

92. *See id.*

93. *See id.*

94. *See id.* at 624.

95. When the adoption proceeding of *In re L.S.* was filed, the Oklahoma Adoption Code was not in effect. Therefore, the Oklahoma Supreme Court applied the UCCJA to the case. Adoption proceedings filed after November 1, 1997, should be governed by the jurisdictional provisions of Section 7502-1.1 of the Oklahoma Adoption Code, and not the UCCJA.

96. The Oklahoma Supreme Court in *In re L.S.* determined that the Texas court had continuing jurisdiction by applying the test established in *G.S. v. Ewing*, 786 P.2d 65, 69 (Okla. 1990). *See In re L.S.*, 943 P.2d at 624-25. While the court's conclusion that Texas had continuing jurisdiction was probably correct, it would have been preferable if the Oklahoma Supreme Court had applied Texas law to make that determination. Because the facts of the case suggest that Texas was the home state of the child at the time that the divorce proceeding was filed, the PKPA as well as the UCCJA protected the decree from modification. The PKPA requires that a state may not modify another state's decree unless, among other things, the decree-issuing state no longer has jurisdiction under its own law. See 28 U.S.C. § 1738A (1994). The Oklahoma Supreme Court in *In re L.S.* approvingly cited cases from other jurisdictions which held the PKPA applicable to adoption proceedings which could affect a custody decree or order of another state. *In re L.S.*, 943 P.2d at 624. Thus, the PKPA required Oklahoma to apply Texas' law to determine if Texas courts had continuing jurisdiction. Even if the Oklahoma Supreme Court were to interpret the PKPA as inapplicable to this case, since the second proceeding was an adoption rather than a motion to modify, sound policy and precedent from other states suggest that in order to respect the continuing authority of another state's courts, the determination about whether the other state has continuing jurisdiction should be made pursuant to the law of the other state. *See Rosics v. Heath*, 746 P.2d 1284, 1286 (Wyo. 1987); IRA MARK ELLMAN, ET AL., FAMILY LAW 655 (1991).

97. Texas was not the state where the child had lived for the six months preceding the filing of the adoption proceeding, nor was it the state in which the prospective adoptive parents had lived for the preceding six months. *See In re L.S.*, 943 P.2d at 622. The child was not placed by an agency, there was no emergency or abandonment, and the default provision would be inapplicable, because Oklahoma was in fact the child's home state. Unless the Oklahoma court declined jurisdiction, Texas would not satisfy any of the bases set forth in Section 7502-1.1. *See OKLA. STAT.* tit. 10, § 7502-1.1(A) (Supp. 1997).

98. *See supra* notes 53-54 and accompanying text.

or jurisdiction under one of the five bases for adoption jurisdiction established in Section 7502-1.1(A), the result in *In re L.S.* under the Oklahoma Adoption Code would be to permit Oklahoma to proceed with the adoption. On the other hand, if Section 7502-1.1(C) is interpreted to prohibit an Oklahoma court from exercising adoption jurisdiction if either (1) the decree-issuing state has continuing jurisdiction to modify or (2) the decree-issuing state has jurisdiction over the adoption under one of the five bases established in Section 7502-1.1(A), then the Oklahoma court would continue to be prohibited from hearing the adoption under the circumstance of *In re L.S.* Unfortunately, the official comments to the 1994 UAA §3-101⁹⁹ are totally silent on this issue and there are no published cases to date which interpret this provision.

There are, however, strong arguments for adopting the latter interpretation that would preclude the exercise of adoption jurisdiction. As the Oklahoma Supreme Court emphasized in *In re L.S.*, adoption is the "ultimate and final custody determination."¹⁰⁰ It makes little sense to prohibit a custodial parent from seeking a modification of visitation in a second state when the decree-issuing state still has a basis for jurisdiction to modify, and yet to permit that custodial parent to terminate the parental rights of the noncustodial parent in a second state through a stepparent adoption proceeding. The goals of the UCCJA, to avoid interstate disputes and forum shopping, would be thwarted. If the initial decree had been issued consistently with the PKPA, an interpretation that permits a second state to exercise adoption jurisdiction when the decree-issuing state still has continuing jurisdiction under the PKPA¹⁰¹ may also be precluded by the Supremacy Clause.¹⁰²

Moreover, there is support for the position that creation of an "end run" around the UCCJA was not what the drafters of the 1994 UAA § 3-101 had in mind. Professor Joan Hollinger, reporter for the 1994 Uniform Adoption Act, in a recent article reflecting on the interaction of the UCCJA and the 1994 UAA §3-101, wrote the following:

To establish proper jurisdiction over an adoption of an older child or a stepchild in the state where the would-be adopters live, UAA §3-301(c) [sic, 3-101(c)] therefore requires that the state that issued the prior custody or visitation order either no longer have jurisdiction to modify or decline to exercise it. Implicitly, the UAA suggests that if the original state

99. UNIF. ADOPTION ACT § 3-101 cmt., 9 U.L.A. 38-39 (Supp. 1997).

100. *In re L.S.*, 943 P.2d at 623.

101. If an adoption proceeding is considered a custody determination under the PKPA, 28 U.S.C. § 1738A (1994), and if the court that made the custody determination in the first state, State A, still has continuing jurisdiction to adjudicate custody under State A's own law (which would be its version of the UCCJA), and if a parent or the child still reside in State A, then the PKPA prohibits a court in a second state, State B, from modifying, through an adoption, a custody determination made consistently with the PKPA by another court in State A. Although several scholars have suggested that the PKPA should not be applied to adoption proceedings, see Kay, *supra* note 38, at 713-728; Waller, *supra* note 38, at 284-298, most courts addressing the issue have found the PKPA applicable. See Waller, *supra* note 38, at 284-85; UNIF. ADOPTION ACT § 3-101 cmt., 9 U.L.A. 38-39 (Supp. 1997).

102. U.S. CONST. art. VI, § 2 (preempting state laws if they conflict with federal law). See also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 3-4, 284, 297-300 (1997).

continues to have jurisdiction to modify under the PKPA and the UCCJA, but does not have jurisdiction over the proposed adoption, the adoption petition should be filed where the adopters live, but stayed in order to first terminate or modify the custody or visitation order in the original state. [emphasis added]

Professor Herma Hill Kay, another scholar who recently analyzed the jurisdictional provisions of the 1994 UAA, similarly concluded that an adoption proceeding cannot proceed in a second state if the decree-issuing state has continuing jurisdiction to modify its custody order, even if it does not have a basis for adoption jurisdiction, unless the decree-issuing state declines jurisdiction or itself issues the necessary orders terminating parental rights.¹⁰³

Thus, properly interpreted, Section 7502-1.1 of the Oklahoma Adoption Code should require the same result in a case such as *In re L.S.* that the Oklahoma Supreme Court reached applying the UCCJA. Oklahoma courts must defer to the jurisdiction of the court of another state that issued a prior custody order regarding a child who is the subject of an adoption proceeding, unless that court declines jurisdiction or itself terminates the parental rights of the parent or parents whose rights must be terminated in order for the Oklahoma adoption action to proceed.

5. Relationship of § 7502-1.1 to Other Requirements of the Adoption Code, ICWA, and the PKPA

The ethnic heritage and origin of a prospective adoptee may require that jurisdictional statutes in addition to Section 7502-1.1 be consulted. In an action to adopt or readopt a child who was born in a foreign nation, Section 7502-1.4(B)¹⁰⁴ of the Oklahoma Adoption Code requires that at least one of the petitioners for adoption be a citizen of Oklahoma and that the child reside in Oklahoma at the time that the petition for adoption is filed, in addition to fulfilling the requirements of Section 7502-1.1. If a child is an Indian child, as defined by the Federal Indian Child Welfare Act¹⁰⁵ and the Oklahoma Indian Child Welfare Act,¹⁰⁶ a tribal court will have exclusive jurisdiction of an action to adopt or terminate the rights of parents of the child if the child is a ward of the tribal court or resides or is domiciled on a reservation of the tribe.¹⁰⁷ Proceedings to adopt or terminate the rights of parents of other Indian children must be transferred to a tribal court if a request for transfer is made by a parent, Indian custodian, or the child's tribe, unless the state court finds good cause to

103. See Kay, *supra* note 38, at 751-52.

104. OKLA. STAT. tit. 10, § 7502-1.4(B) (Supp. 1997).

105. 25 U.S.C. § 1903 (1994) (defining an "Indian child" as "any unmarried person who is under the age of eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.").

106. OKLA. STAT. tit. 10, § 40.2 (1991) (defining "Indian child" as "any unmarried or unemancipated person who is under the age of eighteen (18) and is either (a) a member of an Indian tribe, or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe").

107. See 25 U.S.C. § 1911(a) (1994).

keep jurisdiction, a parent objects to the transfer, or the tribal court declines jurisdiction.¹⁰⁸

The interrelationship between Section 7502-1.1 and the federal Parental Kidnapping Prevention Act¹⁰⁹ is complex. Although the bases of adoption jurisdiction under Section 7502-1.1 differ from the bases for jurisdiction over custody proceedings established in the PKPA,¹¹⁰ the limited scope of the PKPA should minimize potential preemption problems. The PKPA is a full faith and credit statute, and does not purport to confer jurisdiction on state courts.¹¹¹ Rather, it requires state courts to enforce and refrain from modifying the custody determinations of courts of other states that are made consistently with PKPA guidelines. Although adoption decrees entered by courts exercising jurisdiction on some of the bases set forth in Section 7502-1.1 would not be entered consistently with the PKPA¹¹² and would thus not be entitled to PKPA protection, those adoption decrees do not need PKPA protection. Unlike custody and visitation orders, which are modifiable until a child reaches the age of majority, an adoption decree is not modifiable.¹¹³ It is a final judgment entitled to full faith and credit under the Full Faith and Credit Clause of the Federal Constitution.¹¹⁴

Section 7502-1.1(B)'s prohibition against exercising jurisdiction when a proceeding is pending in another state's court exercising jurisdiction in conformity with the UCCJA or Section 7502-1.1 is broader than the simultaneous proceedings prohibition of the PKPA.¹¹⁵ It may prohibit the exercise of jurisdiction in situations in which the PKPA would not prohibit the exercise of jurisdiction, such as when the first court took jurisdiction on a substantial evidence basis even though another home state existed.¹¹⁶ Nevertheless, this should not present a preemption problem. The PKPA does not require courts to exercise jurisdiction, it merely prohibits it in certain instances. In virtually any case in which the PKPA would prohibit the exercise of jurisdiction, Section 7502-1.1 would also.

The exercise of jurisdiction over the adoption of a child who was the sub-

108. See 25 U.S.C. § 1911(b) (1994).

109. 28 U.S.C. § 1738A (1994).

110. The PKPA bases for jurisdiction generally conform to the UCCJA bases for jurisdiction, with one major exception. In order to exercise jurisdiction consistently with PKPA guidelines, a court cannot exercise jurisdiction using the significant connection/substantial evidence basis if another state is the home state at the time that the action is filed. See *id.* No such prioritization exists in Section 7502-1.1(A), so exercise of jurisdiction under Section 7502-1.1(A)(2) or (3), in those rare instances in which another home state existed, would not be in conformity with the PKPA. In addition, exercise of jurisdiction under Section 7502-1.1(A)(2), if the child had no significant connection with the forum state, would also not satisfy the PKPA.

111. See generally Waller, *supra* note 38, at 281-82.

112. See *supra* note 111.

113. Similarly, an order terminating parental rights, if entered pursuant to a petition filed under OKLA. STAT. tit. 10, § 7505-2.1 (Supp. 1997), would not be modifiable and is a final order from which an appeal may be taken. See Waller, *supra* note 38, at 295-96.

114. See Kay, *supra* note 38, at 714-715; Waller, *supra* note 38, at 295; Hollinger, *supra* note 1, at 371-72.

115. See 28 U.S.C. § 1738A(g) (1994).

116. See *supra* note 111.

ject of a custody decree or order issued in another state presents the greatest potential for conflict. If the first court was exercising jurisdiction in conformity with the PKPA, and if the PKPA applies to interstate adoption proceedings,¹¹⁷ an Oklahoma court would be precluded by the PKPA from exercising jurisdiction in the adoption proceeding if the first court has a basis for exercising continuing jurisdiction to modify under its own law, and a parent or the child is living in the first state at the time that the adoption proceeding is filed.¹¹⁸ However, if the Oklahoma Supreme Court interprets Section 7502-1.1(C) to prohibit the exercise of adoption jurisdiction whenever the first court has continuing jurisdiction under its own UCCJA, as suggested above,¹¹⁹ then Section 7502-1.1(c) will act in harmony with the PKPA and no conflict should arise.

B. Personal Jurisdiction and Venue

The Oklahoma Adoption Code does not address the requirements for personal jurisdiction in adoption proceedings. Oklahoma courts in general are authorized by statute to exercise personal jurisdiction to the full extent permitted by the Due Process Clause.¹²⁰ The U.S. Supreme Court has not specifically addressed the requirements of due process in the context of adoption proceedings. The Oklahoma Supreme Court, however, in *In re J.L.H., Jr.*¹²¹ has held that the constitutional requirements for in personam jurisdiction over a nonresident birth parent need not be satisfied because adoption proceedings, like divorce actions, are status proceedings. Under the doctrine established by the U.S. Supreme Court in *Williams v. North Carolina*,¹²² a court may constitutionally adjudicate the status of the parties to a relationship if at least one party to the relationship is domiciled in the forum state.¹²³ Thus, in *J.L.H.* the Oklahoma Supreme Court recognized the ability of an Oklahoma court to terminate the parental bond between a nonresident parent and her child, a bona fide resident of Oklahoma,¹²⁴ even if the parent had no minimum contacts with Oklahoma nor any other basis upon which Oklahoma could exercise personal juris-

117. Although several scholars have suggested that the PKPA should not be applied to adoption proceedings, see Kay, *supra* note 38, at 713-728; Waller, *supra* note 38, at 284-298, most courts addressing the issue have applied the PKPA to interstate adoption disputes. See Waller, *supra* note 38 at 284-85; UNIF. ADOPTION ACT §3-101 cmt., 9 U.L.A. 38-39 (Supp. 1997).

118. See 28 U.S.C. § 1738A(a), (c), (d), (f) (1994).

119. See *supra* notes 89-104 and accompanying text.

120. OKLA. STAT. tit. 12, § 2004(F) (1994) (providing "A court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States").

121. 737 P.2d 915 (Okla. 1987).

122. 327 U.S. 287 (1942).

123. The holding of *Shaffer v. Heitner*, 433 U.S. 186 (1977), called into question the continued validity of the holding of *Williams*, because the court in *Shaffer* abolished the constitutional distinction between the due process requirements for *in rem* and *in personam* actions and held that the standards of *in personam* jurisdiction would be applied in all assertions of state court jurisdiction. Nonetheless, in a footnote the court explicitly excepted status determinations, stating that "We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness." *Shaffer*, 433 U.S. at 208, n.30.

124. The court emphasized that if the children had been brought to Oklahoma illegally or under a legal cloud, they would not be bona fide residents of Oklahoma and the *Williams* doctrine conferring jurisdiction would not apply. *In re Adoption of J.L.H., Jr.*, 737 P.2d at 919-20.

diction over that parent. Despite recent criticism from scholars,¹²⁵ this appears to be the prevailing approach in other states as well.¹²⁶

Venue over adoption proceedings remains unchanged by the Adoption Code. Venue is proper in the county where the petitioners or the child to be adopted reside.¹²⁷

C. Choice of Law

Section 7502-1.3 codifies choice of law provisions applicable to adoption proceedings and termination proceedings initiated prior to the filing of an adoption pursuant to Section 7505-2.1. As is true in the majority of states,¹²⁸ the general rule is that Oklahoma law will be applied, regardless of whether the prospective adoptee is born within or outside of Oklahoma.

On the issue of termination of parental rights, however, Section 7502-1.3 requires application of the law of the birth mother's state of residence at the time that the acts or omissions that constitute the grounds for termination occurred. This is clearly a major departure from former Oklahoma practice.¹²⁹ Because the standards for subject matter jurisdiction in Section 7502-1.1 and the Oklahoma Supreme Court's requirements for personal jurisdiction¹³⁰ permit Oklahoma courts in actions brought under the Adoption Code to terminate the rights of birth parents who have never resided in Oklahoma and have no minimum contacts with the state, it was the judgment of the Committee that fairness dictates that the birth parent be judged by standards that are ascertainable at the time that the conduct constituting the ground for termination occurred.¹³¹ Frequently birth parents who reside in other states are not aware during pregnancy that their child will be placed for adoption in Oklahoma. Even after a child is born, birth parents, and particularly putative fathers, may be unaware of the state in which their child was placed. Applying the law of the state of residence of the birth mother, at the time the acts or omissions constituting grounds for termination occurred, clearly affords the mother of an infant or older child the opportunity to determine the grounds for termination of parental rights in her own state of residence and conduct herself accordingly.

The Legislature adopted the Committee's recommendation that the law of

125. See Kay, *supra* note 38, at 732-41 (arguing that because adoption terminates parental rights, the requirements of *in personam* jurisdiction should be met in order to exercise jurisdiction over parents and putative fathers who have satisfied the demonstrated commitment test of *Lehr v. Robertson*, 463 U.S. 284, 262 (1983)). *But see*, Clark, *supra* note 1, at 861-62, 875 (arguing that requiring *in personam* jurisdiction over birth parents would be unworkable, particularly when the location of a birth parent is unknown).

126. See Clark, *supra* note 1, at 861-62, 875; Kay, *supra* note 38, at 732.

127. See OKLA. STAT. tit. 10, § 7502-1.2 (Supp. 1997). The only change from former OKLA. STAT. tit. 10, § 60.4 (1991) is deletion of the reference to "specially created courts having jurisdiction," an anachronism left over from before 1968, when the Oklahoma district courts assumed adoption jurisdiction. Compare OKLA. STAT. tit. 20, § 91.1 (1968).

128. See Waller, *supra* note 38, at 300-01; RESTATEMENT (SECOND) OF CONFLICTS § 289 (1969) ("A court applies its own local law in determining whether to grant an adoption.").

129. See *In re. J.L.H., Jr.*, 737 P.2d 915 (Okla. 1987).

130. See *supra* notes 121 to 127 and accompanying text.

131. See OKLA. STAT. tit. 10, § 7502-1.3 cmt. (Supp. 1997).

the state of residence of the birth mother be applied to the birth father as well. In many instances in infant adoptions it would be impossible to determine the state of residence of a putative father. In some instances the putative father is unknown. By contrast, regardless of whether a child is placed by an agency or through direct placement, the residence of the birth mother would be discoverable. Applying to the putative father the grounds for termination of the birth mother's state of residence is consistent with one of the underlying premises of the Adoption Code, which is that a man who engages in sexual intercourse should be aware a pregnancy might occur and assumes the duty "to inform himself of the existence and needs" of any child who is created and "to exercise parental responsibilities toward that child even before birth."¹³² Imposing upon a putative father the duty to inform himself of the state of residence of a woman he has impregnated, and judging his conduct according to the standards of that state, affords him greater notice of the standards to which he will be held than to terminate his rights by applying Oklahoma's grounds for termination based upon conduct or omissions that occurred before he could possibly have known that the birth mother, an agency, or an attorney would place his child for adoption in Oklahoma.¹³³

Quite frankly, the Committee was focusing primarily on infant adoptions when it debated its recommendation to hold the birth father to the standards of the birth mother's state of residence. Applying the same rule in the context of stepparent adoptions of children born in wedlock or to adoptions of older children whose fathers have established a relationship with them may create an Equal Protection¹³⁴ problem that the Committee¹³⁵ did not consider.¹³⁶ For example, out-of-state noncustodial mothers of children who are the subject of adoption proceedings instituted by a stepmother will be held to the standards of their own state of residence at the time that the conduct constituting the ground for termination occurred. Out-of-state noncustodial fathers of children who are

132. OKLA. STAT. tit. 10, § 7501-1.2 (Supp. 1997).

133. See OKLA. STAT. tit. 10, § 7502-1.3 (Supp. 1997).

134. See U.S. CONST. amend. XIV, § 1. Gender classifications are subject to an intermediate standard of review, requiring that they serve important governmental objectives and be substantially related to those objectives in order to be sustained. See JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW 773-74 (5th Ed. 1995).

135. The reference to the Committee here includes this author!

136. The United States Supreme Court has afforded fathers of children born in wedlock, and fathers of children born out of wedlock, who have demonstrated commitment and active participation in the rearing of their children, the same constitutional rights as mothers. In *Caban v. Mohammed*, 441 U.S. 380, 393 (1979), the Court held that a New York statute violated the Equal Protection Clause by permitting children born out of wedlock to be adopted without the consent of their father, who had established a substantial relationship with the children and contributed to their support, while requiring the consent of a mother in the same circumstances. In *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965), a decision decided on procedural due process rather than equal protection grounds, the U.S. Supreme Court held that a father of a child born in wedlock was clearly entitled to notice and an opportunity to be heard in an adoption proceeding, whereas in *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) that same right to notice and an opportunity to be heard was denied to a father of a child born out of wedlock because the father had not demonstrated a commitment to the responsibilities of parenting. The court in *Lehr* rejected the father's Equal Protection argument, asserting that the father and mother were not similarly situated because the mother had established a relationship with the child and the father had not.

the subject of adoption proceedings instituted by a stepfather, however, under the language of Section 7502-1.3, would be held to the standards of the mother's state of residence, which presumably would be Oklahoma, since the stepfather is instituting the adoption action here. Creating this disparity in the treatment of parents of children born in wedlock or children whose dads have been actively participating in raising them was not a result intended by the Committee, and needs to be addressed by the Committee and the Legislature this coming year.

Another issue that deserves clarification is whether an attempted revocation of consent given outside of Oklahoma, or issues governing the validity of an out-of-state consent, should be resolved under Oklahoma law, pursuant to Section 7502-1.3(A), or the law of the state of residence of the mother at the time that the consent was given, pursuant to Section 7502-1.3(B). Strict construction of Section 7502-1.3 would suggest that Oklahoma law would apply, since the giving of consent would not be an act or omission constituting a ground for termination. This would be consistent with the approach taken by the courts of several other states that have judged issues related to the validity or revocation of consent using the law of the state in which the adoption was filed, particularly if the consenting parent knew the state in which the child would be placed.¹³⁷ Nevertheless, application of Oklahoma law to issues of revocation and validity of an out-of-state consent, particularly if the consenting parent is unaware the child will be placed in Oklahoma, is somewhat inconsistent with the spirit of Section 7502-1.3(B), in that a parent executing a consent is more likely to be advised of the bases for revocation and grounds for invalidity existing under the law of the state in which the consent is executed rather than the law of the state in which the child will be placed.

D. Recognition of Sister State and Foreign Decrees

Section 7502-1.4 of the Adoption Code, like its predecessor,¹³⁸ affords recognition to adoptions granted by the courts of other states or nations, and

137. See *In re Adoption of C.L.W.*, 467 So.2d 1106, 1111 (Fla. Dist. Ct. App. 1985) (applied Florida law on revocation to consent executed in Pennsylvania when mother knew child would be placed in Florida); *In re Adoption of a child by T.W.C. & P.C.*, 636 A.2d 1083, 1085-90 (N.J. Super. Ct. App. Div. 1994) (applied New Jersey law on revocation to consent executed in New York, when mother knew child would be placed in New Jersey, in action in which birth mother sought to apply the law of New Jersey and adoptive parents sought to apply the law of the place of consent, New York); *In re Weathersby*, 869 P.2d 893, 898-99 (Or. Ct. App. 1994) (issue of validity and revocation of consent executed in Washington determined by Oregon law, when mother knew child would be placed in Oregon); *K.N. v. Cades*, 432 A.2d 1010, 1014 (Pa. Super. Ct. 1981) (Pennsylvania law applied to revocation of Pennsylvania consent in adoption proceeding filed by adoptive parents in Pennsylvania court, even though adoptive parents resided in Connecticut); *In re Adoption of M.M.*, 652 P.2d 974, 978-79 (Wyo. 1982) (Wyoming law applied to issue of revocation of New York consent, when mother knew adoptive parents resided in Wyoming). *But see In re Pima County Juvenile Action*, 577 P.2d 723, 724 (Ariz. Ct. App. 1977) (Arizona court must apply Arkansas law to revocation of Arkansas consent, when placement of child did not authorize removal of child from Arkansas, birth parents were told at time of consent that adoption would be filed in Arkansas, and child was moved to Arizona by Arkansas adoptive parents).

138. See OKLA. STAT. tit. 10, § 60.20 (Supp. 1996) (recodified as amended at Okla. Stat. tit. 10 § 7502-1.4 (Supp. 1997)).

requires that, as to matters within the jurisdiction of the Oklahoma courts, the rights and obligations of the parties be determined as though an Oklahoma court had granted the adoption. Recognition of adoption decrees issued by courts of sister states, of course, is required by the Full Faith and Credit Clause of the Federal Constitution.¹³⁹ In order to fully afford recognition to adoptions granted by foreign nations, the language of Section 7501-1.4 was broadened¹⁴⁰ to include "judgements" and "final orders," as well as decrees, issued by a court or "other governmental authority with appropriate jurisdiction."¹⁴¹

Even though adoptions performed in foreign nations will be recognized, the Adoption Code permits the adoptive parents to readopt their child under Oklahoma law, if one or both of the adoptive parents and the child reside in Oklahoma at the time that the petition for adoption is filed. Although readoption under Oklahoma law is not required or necessary, many adoptive parents prefer to readopt in order to obtain an Oklahoma certificate of foreign birth or to avoid anxiety about future international incidents or political upheavals in the country of origin that could conceivably motivate a foreign government to retroactively annul their own decrees.¹⁴² The adoptive parents might also wish to readopt to avoid future problems if they should move to a state that has not enacted a comity statute affording recognition to foreign decrees.¹⁴³ The risk of a subsequent collateral challenge over the distribution of property is also greater if no American readoption has taken place.¹⁴⁴ In addition, if only one spouse travels to the foreign country and is physically present for a foreign adoption by a married couple, INS regulations require that an American adoption proceeding take place before U.S. citizenship will be granted to the child.¹⁴⁵ Agencies specializing in international adoption and those with expertise in the field thus often recommend readoption.¹⁴⁶

In a proceeding to initially adopt or readopt a foreign child, Section 7502-1.4(D)(1) gives effect not only to a foreign decree of adoption, but also to a decree of termination of parental rights that occurred in a foreign nation and to other documents from a foreign government stating that parental rights of a parent have been terminated, that a parent has consented to the adoption or relinquished the child, or that the child has been abandoned. Presentation of these documents to an Oklahoma court permits the court to dispense with the

139. See *supra* note 115 and accompanying text.

140. See OKLA. STAT. tit. 10, § 60.20 (Supp. 1996) (recodified as amended at OKLA. STAT. tit. 10 § 7502-1.4 (Supp. 1997)). Former section 60.20 required recognition of "a decree of adoption of a court of any other state or nation . . ."

141. Some foreign nations permit adoptions to be granted by governmental authorities other than courts.

142. The author is not suggesting that she is aware of any instances in which this has actually happened.

143. See Richard R. Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317, 341, 352-53, 361 (1988) (observing that readoption is prudent, and that, in the past, even states that recognize foreign decrees as a matter of comity have sometimes denied recognition if the foreign proceeding was inconsistent with the state's requirements for termination of parental rights).

144. See *Id.* at 356.

145. See *In re Adoption of W.J.*, 942 P.2d 37 (Kan. 1997) (citing 8 U.S.C. § 1101(b)(1)(F) (1994); 8 C.F.R. § 204.3 (1997); 62 Fed. Reg. 613, 614 (1997) (to be codified at 22 C.F.R. pt. 42)).

146. See Elizabeth Barthelet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIM. LAW. 181, 189 (1996); Carlson, *supra* note 144, at 341, 352.

requirements of giving notice to and obtaining consent from such a parent. A copy of the decree or document from the foreign nation must be filed with the petition for adoption, along with a translation and a certification of the accuracy of the translation.¹⁴⁷

III. ADOPTION BY CONSENT, PERMANENT RELINQUISHMENT, OR WAIVER FOLLOWING NOTICE FOR PLAN FOR ADOPTION

A. *Birth Mothers and Fathers of Children Born in Wedlock*

Regardless of whether a child is born in or out of wedlock, the child may not be adopted without consent to the adoption or permanent relinquishment for adoption by both parents,¹⁴⁸ unless the parental rights of a parent have been terminated, the parent is dead, or consent is otherwise not required for one of the limited grounds set forth in Section 7505-4.2 of the Adoption Code.¹⁴⁹ Consent or relinquishment must be obtained from all mothers and from fathers of children born in wedlock *after* the birth of the child who is placed for adoption. Consents or relinquishments taken from such parents before birth will not be valid.¹⁵⁰ Of course, if the child is an Indian child, valid consent may not be given by a birth parent either before birth or within ten days after the child's birth.¹⁵¹

Both a permanent relinquishment executed for purposes of adoption pursu-

147. OKLA. STAT. tit. 10 § 7502-1.4 (Supp. 1997) also specifically provides for waiver of an interlocutory decree of adoption and the six month waiting period in an action to readopt if the child has been in the petitioners' home for at least six months prior to the commencement of the adoption proceeding and a postplacement report has been submitted to the court. Aside from these modifications, proceedings to adopt or readopt a child born outside of the United States should proceed in the same manner as domestic adoptions under the Adoption Code.

148. "Parent" is defined in the Adoption Code as "an individual who is the biological or adoptive parent of a child or who is legally recognized as a mother or father of a child. The term 'parent' does not include an individual whose parental relationship to a child has been terminated." OKLA. STAT. tit. 10, § 7501-1.3(9) (Supp. 1997).

149. See OKLA. STAT. tit. 10, § 7503-2.1 (Supp. 1997). Section 7503-2.1 recodified former OKLA. STAT. tit. 10, § 60.5 (Supp. 1996). This section determines from whom consents must be obtained, including birth parents, parents or guardians of birth parents under the age of sixteen, legal guardians of the person of the child, legal custodians of the child, executive heads of child-placing agencies to whom a child has been relinquished, and minor adoptees twelve years of age and older. The section was significantly reorganized, and clarifies the principle that, regardless of whether a child is born in or out of wedlock, the child is not eligible for adoption unless the consent or relinquishment of both parents is obtained, or the nonconsenting parent is dead, or has lost parental rights through previous termination, or the consent is otherwise not required because one of the grounds for adoption without consent is present. This principle was accepted by Oklahoma courts, e.g., *In re Adoption of Baby Boy W*, 831 P.2d 643 (Okla. 1992), but was less than clearly stated in the language of the former statute.

Only minor substantive changes were made to this section. The requirement that the consent of a minor adoptee over the age of eleven, formerly found in OKLA. STAT. tit. 10, § 60.11 (1991) (repealed 1997), was consolidated with this section, and the court was given the discretion to waive this requirement upon a finding that it is not in the minor's best interest. The Legislature also added new provisions concerning methods of taking consent in foreign countries. See *infra* notes 171 to 173 and accompanying text.

150. See OKLA. STAT. tit. 10, § 7503-2.2 (Supp. 1997). Section 7503-2.2 for the first time codifies the limitations governing when a consent may be taken from birth parents, putative fathers, a child's guardian, a child-placing agency, and a minor adoptee over the age of eleven.

151. See 25 U.S.C. § 1913(a) (1994).

ant to Section 7503-2.3¹⁵² and a consent to adoption executed pursuant to Section 7503-2.4¹⁵³ authorize the adoption of a child without the necessity of obtaining any further permission from the executing parent. A permanent relinquishment, however, also relinquishes all of the parent's rights with respect to the child, including legal and physical custody of the child. By contrast, a parent who executes only a consent forfeits no rights the parent may have to the child until such time as the court enters an order in the adoption proceeding transferring physical and legal custody. As a result, permanent relinquishments may be made only to the Department of Human Services (D.H.S.), a child-placing agency, or any other person with written consent of D.H.S. or the court, to ensure that an agency or court-approved custodian is available to provide care for the child.¹⁵⁴ Under prior law, the procedures for relinquishment were outside of the Oklahoma Adoption Act, resulting in some confusion about whether provisions governing consent were applicable to relinquishment and vice versa. The statutory provisions governing the execution of a permanent relinquishment for purposes of adoption have now been brought into the Adoption Code,¹⁵⁵ and, with the two differences noted above, were intended to be identical to the statutory provisions for obtaining a consent from a birth parent.¹⁵⁶

Sections 7503-2.3 and 7503-2.4 contain new requirements for the content of consent and relinquishment forms and the accompanying verification from the judge before whom the consent or relinquishment is taken. The goal of this increased specificity is to ensure that the consent or relinquishment is voluntary and informed. The forms must state, *inter alia*, that the execution is voluntary, that the individual executing the form believes that the adoption is in the child's best interest, and that he or she has not been promised anything of value in return for the signature, other than payments authorized by law. The judge before whom the consent or permanent relinquishment is executed must also certify that the consent is voluntary, that the individual executing the form has testified that he or she did not receive any unauthorized payment, and that the

152. See OKLA. STAT. tit. 10, § 7503-2.3 (Supp. 1997).

153. See OKLA. STAT. tit. 10, § 7503-2.4 (Supp. 1997).

154. Relinquishments are typically utilized more frequently in adoptions facilitated by agencies, which often recruit temporary foster families to provide care for infants in the interim. Relinquishments can also be used in direct placement adoptions, however, with written permission from the court.

155. Under former OKLA. STAT. tit. 10, §§ 25-38 (1991 & Supp. 1996), relinquishment for purposes of adoption was included in the provisions for relinquishment of custody. Former OKLA. STAT. tit. 10, § 29.1 (Supp. 1996) which addressed relinquishment for adoption by a birth mother and subsequent termination of the parental rights of the birth father, has been repealed. All provisions relating to permanent relinquishment for adoption are now contained in the Adoption Code. The remaining provisions of OKLA. STAT. tit. 10, § 25-38 (1991 & Supp. 1996) are irrelevant to relinquishments given for purposes of adoption, and govern only other relinquishments of custody.

156. Unfortunately, another difference was created unintentionally. See OKLA. STAT. tit. 10, § 7503-2.3(a)(2) (Supp. 1997) which provides that a permanent relinquishment may be executed in the state of residence of an individual who resides out of state, in the manner required by the Oklahoma Adoption Code or in the manner prescribed by the laws of the state of the individual's residence. A similar provision was intended to be included in OKLA. STAT. tit. 10, § 7503-2.4 (Supp. 1997), and was omitted or deleted by oversight. Correction of this oversight should be high on the Committee's agenda this year.

individual has further represented to the court that he or she is not under the influence of alcohol, medication, or other substances affecting competence.¹⁵⁷

To ensure that the individual executing the consent or permanent relinquishment is knowledgeable, the forms must also contain instructions on the limited grounds upon which the consent or relinquishment can be revoked¹⁵⁸ and a statement that the individual executing the form understands its finality. A permanent relinquishment form must expressly state that by executing the individual is relinquishing all rights with respect to the child, including legal and physical custody rights and the right to consent to the adoption of the child. Both consent and relinquishment forms must also instruct the individual that execution of the form does not terminate any duty to support the child until the adoption is completed. Both Sections 7503-2.3 and 7503-2.4 require a court before whom a consent or relinquishment is executed to appoint counsel for an indigent parent or guardian who requests an attorney, and the forms require a statement that the individual executing the consent or relinquishment is represented by counsel or has waived the right to counsel. Moreover, the judge must certify that the consequences of the consent or relinquishment and the limited circumstances under which it could be revoked were explained by the judge to the individual executing it, that the executing individual understands the consequences of adoption, and that the executing individual fully understands and communicated in English or that all information was translated for the individual.

The forms must also contain identifying information, including the social security number of the person executing the form.¹⁵⁹ The forms must also identify whether the individual executing it is a member of an Indian tribe, and whether the child who is the subject of the intended adoption is eligible for membership or a member of an Indian tribe. The proceeding at which a consent or permanent relinquishment is taken is often the last time contact is made with a birth parent, and it is vital to obtain this information at this juncture in a document that will be placed in the record, to assist in a later determination regarding the applicability of the federal and Oklahoma Indian Child Welfare Acts.¹⁶⁰ Although nothing in the consent form refers to collection of medical and social history, the agency or attorney facilitating the adoption should also review the medical and social history information collected from the birth parent¹⁶¹ prior to the consent or relinquishment hearing, and take that opportunity to obtain any missing information, for the same reason, i.e., that contacting the birth parent may be difficult or impossible after the hearing has taken place.

157. See OKLA. STAT. tit. 10, §§ 7503-2.3 to 7503-2.4 (Supp. 1997).

158. See *infra* notes 205 to 214 and accompanying text.

159. The social security number may help confirm the identity of the individual who executes the form, if a question of identity should subsequently arise. In addition, there are instances in which a consent is executed, but an adoption is never finalized for a variety of reasons. The social security number is important to assist in subsequent child support enforcement proceedings.

160. See 25 U.S.C. §§ 1901-1963 (1994); OKLA. STAT. tit. 10, §§ 40-40.9 (1991 & Supp. 1996).

161. See *infra* notes 489 to 508 and accompanying text.

The manner in which a consent or permanent relinquishment must be taken in Oklahoma is also set forth in Sections 7503-2.3 and 7503-2.4. The consent or relinquishment must be in writing, executed in the presence of an Oklahoma district court judge, and recorded by a court reporter.¹⁶² The transcript of the proceedings is now required by statute to be placed in the court record.

A new task assigned to judges presiding over consent or relinquishment hearings is to advise birth parents that children whose adoptions are finalized after November 1, 1997 will be able to obtain an uncertified copy of their original birth certificates after their eighteenth birthday.¹⁶³ This means, of course, that adult adoptees will have access to any identifying information concerning the birth parents that is contained in the original birth certificate. The judge must advise a birth parent that if he or she objects to the disclosure of identifying information, the parent may file, that day or thereafter,¹⁶⁴ an affidavit of nondisclosure, which, if unrevoked,¹⁶⁵ would prevent the State Registrar of Vital Statistics from releasing identifying information about the parent who signed the affidavit.¹⁶⁶ The State Registrar of Vital Statistics would refuse to release the certificate altogether only if both birth parents filed affidavits of nondisclosure that remained unrevoked at the time the request by the adult adoptee is made. The judge must certify in the judge's acknowledgment of each consent or relinquishment taken from a birth parent that such advice was given.¹⁶⁷ Section 7503-2.5 also assigns the judge¹⁶⁸ the duty to ascertain whether the birth parent desires to execute an affidavit of nondisclosure, and if so, to provide the form so that it may be executed before the judge along with the consent or relinquishment. The statute further provides that if an affidavit of nondisclosure is signed contemporaneously with the consent or relinquishment, it is to be filed in the action along with the consent or relinquishment, a task

162. Sections 7503-2.3 and 7503-2.4 codify the directive of the Oklahoma Supreme Court in *In re Adoption of Robin*, 571 P.2d 850 (Okla. 1977) that a record be made of every proceeding in which a parent consents to or relinquishes a child for adoption.

163. See OKLA. STAT. tit. 10, §§ 7503-2.3 to 7503-2.5 (Supp. 1997).

164. Although the draft submitted by the Committee would have allowed birth parents to file an affidavit of nondisclosure only up until the time that the adoption was finalized, the Legislature instead provided in OKLA. STAT. tit. 10, § 7503-2.5(B)(3)(4) (Supp. 1997) that affidavits of nondisclosure may be filed while the adoption action is pending or after the final decree of adoption has been entered. Affidavit of nondisclosure forms will be available in the court clerks' offices and may be filed in the adoption action in the court in which the action is pending, if they are not executed at the time that consent or relinquishment is given. In response to the Legislature's changes, the Committee will need to propose new provisions next year that will clarify the process for filing affidavits of nondisclosure after an adoption is finalized. The logical place to file such affidavits would be directly with the State Registrar of Vital Statistics.

165. An affidavit of nondisclosure may be revoked by the birth parent who executed the affidavit by filing a revocation with the State Registrar of Vital Statistics. See OKLA. STAT. tit. 10, § 7503-2.5 (C) (Supp. 1997).

166. See *infra* notes 422 to 433 and accompanying text.

167. See OKLA. STAT. tit. 10, §§ 7503-2.3(G), 7503-2.4(F) (Supp. 1997).

168. In order to ensure that the advice and offer came from a neutral individual, who would neither attempt to persuade a birth parent to exercise this option nor dissuade the birth parent from doing so, the judge was assigned the task of advising and ascertaining the desires of the birth parents regarding the affidavit of nondisclosure. Moreover, including a certification requirement, which demonstrates that the task was accomplished, with the judge's acknowledgment to the consent or relinquishment, better ensures that this important task will not be overlooked.

which would fall to the attorney for petitioners, who typically is the one to file the consent or relinquishment.

Relinquishments taken in another state may be taken pursuant to the Oklahoma Adoption Code or the law of the state in which the relinquishment is signed, if it is the state of residence of the individual executing the relinquishment. A similar provision was intended to be included in Section 7503-2.4 to apply to consents, and was omitted due to oversight, an error the Committee will almost certainly endeavor to correct at its earliest opportunity during the next legislative session.

Section 7503-2.1(D)¹⁶⁹ governs the manner in which consents may be taken outside of the United States. Although most of these provisions remain substantially unchanged, the Legislature added a provision in Section 7503-2.1(D)(2)(b) permitting a consent to be executed before an officer of the Judge Advocate General's Office or before an officer of the United States Embassy if a foreign country does not involve itself in adoption matters. The statute specifies that a consent obtained in this manner may only be used if the execution of such consent is not in violation of the laws of the foreign county, international law, or a treaty between the foreign country's government and the United States.¹⁷⁰ Before considering an adoption under these circumstances, extensive research must be conducted into the law of the foreign country, international law, the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, and other applicable treaties. In some countries, for example, all adoption is illegal, and in others international adoption is prohibited.¹⁷¹ Most importantly, strict attention must be paid to INS regulations pertaining to the immigration of foreign children for the purposes of adoption. A significant hurdle under the circumstances in which this new provision is likely to be utilized may be the "orphan restriction," requiring either that both parents have died or abandoned the child, or that the sole surviving parent is unable to care for the child.¹⁷² In short, extreme caution is warranted, and obtaining advice from a reputable, experienced international adoption agency or an attorney specializing in international law is recommended before entering into an adoption in which consent is obtained under this new provision.

B. Putative Fathers

1. Consent or Relinquishment Prior to or After Birth

Putative fathers, as defined in the Adoption Code,¹⁷³ include fathers of children born out of wedlock and fathers of children whose mothers were mar-

169. These provisions were originally a part of OKLA. STAT. tit. 10, § 60.5 (Supp. 1996), which was recodified as OKLA. STAT. tit. 10, § 7503-2.1 (Supp. 1997), and were simply retained in this section after recodification.

170. This provision was not endorsed by the Committee.

171. See Barholet, *supra* note 147, at 185.

172. *Id.* at 187-188.

173. See OKLA. STAT. tit. 10, § 7501-1.3(11) (Supp. 1997).

ried to another man at the time of their birth, or within ten months prior to their birth.¹⁷⁴ Although, of course, only one putative father is the biological father of a child, a child may have more than one putative father until an actual determination of paternity is made. The definition of putative father in the Adoption Code includes, without limitation, any man "who has acknowledged or claims paternity of a minor," or who is "named by the [birth] mother" as the father, or "who is alleged to have engaged in sexual intercourse" with the birth mother during the possible time of conception.¹⁷⁵

A putative father may give consent to or permanent relinquishment for adoption in the same manner as a mother or a father of a child born in wedlock, as described above.¹⁷⁶ A putative father, however, is now permitted by the Adoption Code to give a valid consent or permanent relinquishment either *prior to* or after the birth of the child.¹⁷⁷ In *Quilloin v. Walcott*,¹⁷⁸ the United States Supreme Court upheld differential treatment of fathers of children born in and out of wedlock against an Equal Protection challenge, observing that they were not similarly situated. Although the majority of states do not statutorily authorize consent to adoption to be given prior to birth, several states do permit prebirth consent, particularly from fathers.¹⁷⁹ Permitting prebirth consent or relinquishment by putative fathers facilitates prebirth adoption planning by birth mothers, prospective adoptive parents, and adoption intermediaries, i.e., adoption agencies and attorneys who provide assistance with adoptions. Prebirth consent by a putative father of an Indian child, however, will not be valid, because the federal Indian Child Welfare Act invalidates consent given before birth or within ten days after the birth of a child covered by that Act.¹⁸⁰

2. Extrajudicial Consent

Adoption professionals report that they have frequently worked with putative fathers who have no objection to a planned adoption, but for various reasons refuse to appear before a judge in order to give their consent. In order to facilitate adoption planning and to avoid the unnecessary expense of proceedings to adopt without consent¹⁸¹ in this situation, Section 7503-2.6 of the

174. The husband of the mother of a child born during the marriage or within ten months after termination of the marriage is presumed to be the father of the child, but the presumption is rebuttable. *See* OKLA. STAT. tit. 10, § 2 (Supp. 1996).

175. *See* OKLA. STAT. tit. 10, § 7501-1.3(11) (Supp. 1997).

176. *See supra* notes 149 to 173 and accompanying text.

177. *See* OKLA. STAT. tit. 10, § 7503-2.2(C) (Supp. 1997).

178. 434 U.S. 246, 255-56 (1978).

179. *See* ALA. CODE § 26-10A-12 (1992 & Supp. 1996) (mother or father may give prebirth consent, revocable within 5 days after child's birth); NEV. REV. STAT. § 127.070 (1995) (fathers may give consent prior to birth); N.C. GEN. STAT. § 48-3-701(b) (1996) (fathers may give consent prior to birth); OR. REV. STAT. § 109.116 (1995) (fathers may give consent prior to birth); PA. CONS. STAT. § 2711(c) (Supp. 1997) (putative fathers may execute consent prior to birth). *See also* N.J. STAT. ANN. § 9:3-41 (West Supp. 1997) (surrender by denial of paternity may be given before birth); N.Y. DOM. REL. LAW § 111(2)(e) (McKinney 1988 & Supp. 1997) (putative father may execute prebirth instrument denying paternity, which vitiates any need to obtain his consent); TEX. FAM. CODE ANN. § 161.106 (West 1996) (man may execute prior to birth an affidavit disclaiming paternity and interest in child and waiving notice).

180. *See* 25 U.S.C. § 1913(a) (1994).

181. In the absence of consent, it would be necessary to bring proceedings to terminate the parental rights

Adoption Code¹⁸² permits such putative fathers to sign an extrajudicial consent in the presence of a notary public, either before or after the birth of the child who is placed for adoption.¹⁸³

An unrevoked extrajudicial consent has the same effect as a permanent relinquishment executed in the presence of a judge pursuant to Section 7503-2.3. Through an extrajudicial consent, the putative father surrenders any rights he possesses with respect to the child, including any right to legal or physical custody, and consents to the adoption of the child. Because the putative father who signs an extrajudicial consent does not have the benefit of instruction directly from a judge, an extrajudicial consent, unlike a permanent relinquishment or consent executed before a judge,¹⁸⁴ may be revoked within fifteen calendar days after it is executed. To revoke the extrajudicial consent, the putative father must file a notice of revocation and register with the Paternity Registry operated by the Department of Human Services.¹⁸⁵ A copy of the revocation notice must be provided to the birth mother at the time that the notice is filed with the Paternity Registry. After the fifteen day period expires, the extrajudicial consent is irrevocable, except upon the limited grounds set forth for all consents and relinquishments in Section 7503-2.7 of the Adoption Code.¹⁸⁶ The necessary contents of an extrajudicial consent form are specified in Section 7503-2.6, and parallel the content requirements for permanent relinquishments and consents set forth in Sections 7503-2.3 and 7503-2.4, with the exception of the unique revocation provisions and the absence of a judicial verification.

An extrajudicial consent will not be valid if the child who is to be adopted is an Indian child. The federal Indian Child Welfare Act requires that a consent to adopt a child to whom ICWA applies must be executed and recorded before a judge.¹⁸⁷

3. Notice of Plan for Adoption

In addition to affirmatively consenting to an adoption through permanent relinquishment, consent, or extrajudicial consent, a putative father may waive his right to notice of adoption or termination proceedings and the necessity of

of the putative father pursuant to OKLA. STAT. tit. 10, § 7505-2.1 (Supp. 1997) or OKLA. STAT. tit. 10, § 7505-4.1 (Supp. 1997). Another option would be to schedule a hearing for adoption without consent, pursuant to OKLA. STAT. tit. 10, § 7505-4.1 (Supp. 1997), and to serve the putative father with notice. Although the Adoption Code requires the appointment of an attorney for the child if a parent actually enters an appearance to contest, recent case law has been interpreted to require the appointment of an attorney for the child in every proceeding involving adoption without consent. See *infra* note 313 to 315 and accompanying text.

182. See OKLA. STAT. tit. 10, § 7503-2.6 (Supp. 1997).

183. The Committee's consensus to recommend a procedure to take extrajudicial consent from putative fathers was formed after examination of New York's consent statute, N.Y. DOM. REL. LAW § 115-b (McKinney 1988 & Supp. 1997), which permits extrajudicial consents, as well as Texas' Affidavit of Waiver of Interest statute, TEX. FAM. CODE ANN. § 161.106 (West 1996), which allows such affidavits by putative fathers to be used as a basis for termination of the putative father's parental rights.

184. See *infra* notes 204 to 207 and accompanying text.

185. See OKLA. STAT. tit. 10, § 7506-1.1 (Supp. 1997) (regulating the operation of the Paternity Registry by the Department of Human Services).

186. See OKLA. STAT. tit. 10, § 7503-2.7 (Supp. 1997).

187. See 25 U.S.C. § 1913(a) (1994).

obtaining his consent by filing a form with the D.H.S. Paternity Registry affirmatively surrendering these rights, or by failing to timely file a form with the Paternity Registry asserting these rights, after receipt by the father of a Notice of Plan for Adoption. The Notice of Plan for Adoption procedure, set forth in Section 7503-3.1 of the Adoption Code,¹⁸⁸ was created in response to the need expressed by adoption professionals to determine before the birth of a child or soon thereafter the intentions of a putative father regarding a planned adoption. Several other states have created similar procedures that require some action on the part of a putative father, after receiving notice of a planned adoption, in order to retain his right to further notice or to contest the adoption.¹⁸⁹

Pursuant to Section 7503-3.1, the Department of Human Services, a licensed adoption agency, or an attorney representing prospective adoptive parents, may choose to serve upon a putative father a Notice of Plan for Adoption (Notice) and a form to return to the Paternity Registry.¹⁹⁰ The documents must be personally served by in-hand service to the putative father or served by certified mail, with the receipt signed only by the putative father.¹⁹¹ Because failure to respond results in waiver of fundamental rights, this restriction on the permissible methods of service is essential to ensure that the putative father actually receives the Notice and accompanying form. The Notice identifies the mother and informs the putative father of her pregnancy, her estimated date of delivery, and her plan to place the infant for adoption. Accompanying the Notice is a preaddressed form which the father is instructed to mail or deliver to the D.H.S. Paternity Registry within thirty days of the service of the Notice upon him. He is also instructed to mail a copy of the form to the agency or

188. See OKLA. STAT. tit. 10, § 7503-3.1 (Supp. 1997).

189. See ARIZ. REV. STAT. § 8-106 (West Supp. 1996) (failure to file paternity action within 30 days of notice of planned adoption bars assertion of any interest by putative father in child); 705 ILL. COMP. STAT. 405/4-28 (West 1992) (failure to file declaration of paternity or request for notice with court clerk within 30 days of receipt of notice of intended adoption waives all legal rights to child, including right to notice of adoption proceeding); IND. CODE ANN. §§ 31-19-3-1, 31-19-3-4 (West Supp. 1997) (father must file paternity action within 30 days of receipt of prebirth notice of adoption plan); MICH. COMP. LAWS ANN. § 710.34 (West 1993) (failure to file notice of intent to claim paternity after receipt of notice of adoption plan and before expected date of confinement or birth of child, whichever is later, waives right to notice of adoption and constitutes a denial of interest in the child, which will result in termination of father's rights); 1997 Mont. Laws ch. 480, § 59 (putative father must file notice of intent to claim paternity before expected date of birth of child after receiving notice of birth mother's intent to place child for adoption). See also Carol A. Gorenberg, *Father's Rights vs. Children's Best Interests: Establishing a Predictable Standard for California Adoption Disputes*, 31 FAM. L.Q. 169, 202-204 (1997) (recommending a requirement that putative fathers assert parental rights within thirty days of date of prebirth notice of plan for adoption).

190. No obligation to serve a putative father with a Notice of Plan for Adoption is created by Section 7503-3.1. In fact Subsection H of Section 7503-3.1 specifically provides that the failure to give such notice does not constitute grounds for the putative father to establish that he was denied knowledge of the pregnancy pursuant to OKLA. STAT. tit. 10 § 7505-4.2(E)(2) (Supp. 1997), a defense he might attempt to assert in response to an application for termination or adoption without consent sought on grounds of failure to contribute to the support of the child and mother.

191. With the exceptions of personal delivery directly to the putative father and certified mail with a receipt actually signed by the putative father, the normal methods of service permitted in a civil action pursuant to OKLA. STAT. tit. 12, § 2004 (1991 & Supp. 1996) will not suffice. Residence service to another person living in the home, delivery to an agent, certified mail signed by another living in the home, and the other methods permitted by § 2004 cannot sufficiently guarantee that the Notice of Plan for Adoption and accompanying form are received by the putative father.

attorney who served him with the Notice.

The putative father must choose one of five options presented by the form. He may: (1) request notice of adoption or termination proceedings; (2) indicate his intent to claim paternity and request notice of adoption or termination proceedings; (3) acknowledge paternity and request notice of adoption or termination proceedings; (4) deny paternity, waive the right to notice of adoption or termination proceedings, and surrender any rights to the child in connection with the adoption and any right to contest the adoption; or (5) acknowledge that he may be the father of the child, waive the right to notice of adoption or termination proceedings, and surrender any rights he may have to the child in connection with the adoption and any right to contest the adoption. If the putative father returns the form so that it is received by the Paternity Registry, or the agency or attorney who served him with the notice,¹⁹² within thirty days of the date the Notice was served upon him, and if he selects one of the first three options on the form, he will retain his right to notice of future adoption or termination proceedings and his right to contest termination of his rights and the adoption of the infant. The first option creates no evidence that could be used against him in a future paternity proceeding. This option was included to afford a putative father the opportunity to retain any rights he may have, even though he may legitimately have doubts about whether he is the biological father. Because he must return the form within the thirty day time limit, which may expire before the birth of the child,¹⁹³ he may choose this option and avoid forfeiture of his rights until he can discover the child's paternity through testing after the infant's birth. The second and third options existed under prior law for registrants of the D.H.S. Paternity Registry.¹⁹⁴ The difference between a notice of intent to claim paternity and an acknowledgement of paternity is that an acknowledgement cannot be revoked.¹⁹⁵

If neither the D.H.S. Paternity Registry nor the attorney or agency that served the Notice receives the form within thirty days of the date that the Notice was served upon the putative father, the failure to file the form constitutes

192. Although the statute requires the putative father to both return the form to the D.H.S. Paternity Registry and to return a copy to the agency or attorney who sent the Notice to the putative father, receipt of the form by either the Paternity Registry or by the attorney or agency within the thirty days will preserve the rights of the putative father, if he elected one of the first three options on the form. The requirement that copies be mailed to both, with the provision that receipt by either will suffice, is intended to protect against the loss of one of the notices in the mail. The likelihood that both forms would be lost in the mail is extremely remote. The Committee decided not to require the putative father to return the form by certified mail, since that might require him to take off work in order to mail the form during the post office's limited hours of operation. Nevertheless, it would be prudent for the putative father to return the form by certified mail so that he has proof that it was mailed.

193. Although nothing in the statute precludes sending a Notice of Plan for Adoption after the birth of the child, there would be little benefit in doing so. If the child is placed after birth, initiation of the adoption proceedings or a petition to terminate parental rights pursuant to OKLA. STAT. tit. 10 § 7505-2.1 (Supp. 1997) of the Adoption Code, and an expeditious hearing on the petition to terminate, or the application for adoption without consent or to terminate pursuant to OKLA. STAT. tit. 10 § 7505-4.1 (Supp. 1997) would achieve a resolution of the putative father's rights as quickly as sending a Notice of Plan for Adoption and waiting thirty days to determine the response.

194. See OKLA. STAT. tit. 10, § 55.1 (1991)(repealed 1994).

195. See OKLA. STAT. tit. 10, § 7506-1.1 (Supp. 1997).

(1) a waiver of the right to notice of proceedings to terminate his parental rights or adopt the child, and (2) a denial of interest in the child, which will result in the termination of his parental rights and adoption of the child without his consent, if an adoption proceeding is later filed and the court approves the adoption. Selection of options four or five and timely return of the form will achieve the same result.

Section 7503-3.1 specifies the instructions that must be included in the Notice regarding the consequences of failure to timely return the form in a timely manner, and the consequences of choosing the various options. Moreover, the Notice must advise the putative father that filing the form will not, by itself constitute "the bearing of parental responsibilities"¹⁹⁶ nor establish parental rights, and that the duty to support the mother and child during pregnancy and after the child's birth is unaffected by the filing of or failure to file the form. In addition, the Notice must inform him that neither service of the Notice nor return of the form obligates the birth mother to proceed with the adoptive placement, and that if the child is placed for adoption and a petition to adopt is not filed within twelve months of the placement, failure to return the form will not affect his rights.

It would be unwise, however, to use a Notice of Plan for Adoption to effect a waiver of rights of the father of an Indian child, as this may violate the notice requirements of the Oklahoma Indian Child Welfare Act¹⁹⁷ (Oklahoma ICWA) and provisions regarding the termination of parental rights set forth in the federal Indian Child Welfare Act¹⁹⁸ (federal ICWA). Although the federal ICWA does not include in its definition of "parent"¹⁹⁹ putative fathers who have not acknowledged or established paternity, some provisions of the federal act could still conceivably be applicable. In addition, the Oklahoma ICWA does not define "parent" at all,²⁰⁰ and thus its provisions regarding notice could be construed to apply to putative fathers as well.

The Adoption Code's new provisions permitting prebirth consent, extrajudicial consent, and waiver of a right to notice and to contest an adoption by putative fathers are intended to serve several interests. They benefit birth mothers who desire to place their infants with adoptive families, by providing reassurance that they will not face the uncertainty of a contested adoption following the placement. They benefit the child, by eliminating a potential risk of a disrupted placement months or years after the child has bonded with the adoptive parents. They clearly serve the interests of adoptive parents, whose worst nightmare is to lose a child after the child has been placed with them. For the father who would have given consent anyway under Section 7503-2.4, they may have little effect, other than to reach an earlier resolution of the matter. Moreover,

196. OKLA. STAT. tit. 10, § 7503-3.1 (Supp. 1997).

197. See OKLA. STAT. tit. 10, § 40.4 (Supp. 1996).

198. See 25 U.S.C. § 1912 (1994).

199. See 25 U.S.C. § 1903(9) (1994).

200. See OKLA. STAT. tit. 10, § 40.2 (1991).

for the father who was unaware of the pregnancy and wishes to undertake responsibility for the financial support of the child and mother, notification of the pregnancy prior to the child's birth enhances his opportunity to do so. He can refuse to consent or return his form and can commence efforts to provide support.

Unquestionably, however, the interests of putative fathers who surrender their rights through one of these procedures and experience a change of heart are not well served. The putative father who gives prebirth consent may find that he feels differently after the child is born. The putative father who signs an extrajudicial consent forfeits the benefit of the judge's counsel regarding the finality and consequences of his actions. Most threatened is the putative father who ignores the Notice of Plan for Adoption, and finds that he has forfeited his right to notice and to contest the adoption of his child. Unlike the statutes of some states that require the father to file a paternity action to retain his rights,²⁰¹ the response required of a putative father under Section 7503-3.1 is not onerous, requiring only the cost of a postage stamp. Nevertheless, the consequences of inaction are severe. After months of examination of this issue, the majority of the Committee approved the recommendation for this procedure, determining that the benefits warranted the burden. Approval of this provision reflects the sentiment of the Legislature and the Committee, expressed in Section 7501-1.2,²⁰² the mission statement of the Adoption Code, that biological fathers must exercise responsibility for the children whom they create even before their birth.

C. Revocation

With the exception of extrajudicial consents, which may be revoked for any reason within fifteen days after execution,²⁰³ consents and permanent relinquishments are now irrevocable when executed, with only three extremely limited exceptions. This is a major departure from prior law, which permitted withdrawal of a consent within thirty days after the consent was executed if the court found that withdrawal would be in the best interest of the child.²⁰⁴

201. See ARIZ. REV. STAT. ANN. § 8-106 (West Supp. 1996) (failure to file paternity action within 30 days of notice of planned adoption bars assertion of any interest by putative father in child); IND. CODE ANN. §§ 31-19-3-1 to 31-19-3-7 (West Supp. 1997) (father must file paternity action within 30 days of receipt of prebirth notice of adoption plan). Some states have gone further, and withhold rights from putative fathers who fail to register with a paternity registry within a specified period of time, without requiring that specific notice be sent to them. See ALA. CODE §26-10C-1(i) (Supp. 1996) ("Any person who claims to be the natural father of a child and fails to file his notice of intent to claim paternity . . . prior to or within 30 days of the birth of a child born out of wedlock, shall be deemed to have given an irrevocable implied consent in any adoption proceeding."); OHIO REV. CODE ANN. § 3107.07 (Banks-Baldwin Supp. 1997) (consent not required from putative father who fails to register within 30 days of child's birth); S.D. CODIFIED LAWS § 25-6-1.1 (Michie 1992) (putative father has no right to notice of adoption if he has not been identified by the mother or unless he has affirmatively asserted paternity within 60 days of the birth of the child).

202. OKLA. STAT. tit. 10, § 7501-1.2(A)(6) (Supp. 1997).

203. See OKLA. STAT. tit. 10, § 7503-2.6(C) (Supp. 1997).

204. See OKLA. STAT. tit. 10, § 60.10 (1991) (recodified as amended in OKLA. STAT. tit. 10 § 7503-2.7 (Supp. 1997)).

The principal concern with the thirty-day withdrawal period was that it was not consistently applied across the state, creating the risk of misunderstanding by birth parents and adoptive parents concerning the finality of the consent. Some judges interpreted the statute to permit revocation for any reason, as long as the birth parent was not unfit. Other judges, sometimes within the same county, would rarely, if ever, find the withdrawal of consent to be in the child's best interests. Although neither interpretation was incorrect, the disparity led some birth parents to believe they had thirty days to change their minds, only to learn after executing consent that a withdrawal was rarely permitted by the judge who would hear their petition. In other instances, adoptive parents' expectations of finality proved to be unfounded. Adoption professionals on the Committee believed that a time period for revocation diminishes the sense of finality that is critical to convey to a birth parent who is about to sign a consent. Some contended that the revocation period inhibits the birth parent's ability to achieve closure on this emotional decision.²⁰⁵ Eliminating this withdrawal period brings consistency and certainty to the adoption process and enhances the bonding that is beginning to form in the new adoptive family.²⁰⁶

Under Section 7503-2.7 of the Adoption Code²⁰⁷ a consent or permanent relinquishment may be set aside only if it would be in the best interests of the child *and* one of three grounds is established by the individual who executed the relinquishment or consent. First, consent or relinquishment may be set aside if, without good cause shown, a petition to adopt was not filed within nine months after the child was placed for adoption. Creation of this ground was inspired by the 1994 UAA § 2-408,²⁰⁸ which permits revocation if a petition is not filed within sixty days of placement. The rationale for extending the time to nine months was the perception that a longer period of adjustment prior to filing a petition is appropriate for placements of older or special needs children, who now encompass a significant percentage of the children placed for adop-

205. See Hollinger, *supra* note 1, at 359, 360 & n.41 (quoting a NCCUSL Commissioner who echoed sentiments expressed by some Oklahoma Committee members: "The mothers I have dealt with do not want to have too long a chance to change their minds. It prolongs things for them to have to rethink about the decision. They would like that period to be short.").

206. See Hollinger *supra* note 1 at 359-60. The decision to completely eliminate the revocation period was not without its opponents, who argued that birth mothers, in particular, are subject to many pressures immediately after birth. See Hollinger, *supra* notes 41 and 42 and accompanying text.

The Oklahoma Adoption Law Reform Committee, at the same time that it approved elimination of the withdrawal period, approved a provision that would have invalidated consent obtained from a birth mother within 72 hours of birth. The Oklahoma Legislature, however, rejected this provision, and it was not included in the final House bill. Many other states have waiting periods of at least 72 hours after birth before valid consent from the birth mother, and sometimes from either parent, may be obtained. See KY. REV. STAT. ANN. § 199.500 (Michie 1995) (72 hours); LA. REV. STAT. ANN. § 1122 (West Supp. 1997) (5 days for mother); MASS. GEN. LAWS ANN. ch. 210, § 2 (West Supp. 1997) (4 days); MINN. STAT. ANN. § 259.24 (West 1992 & Supp. 1997) (72 hours); MISS. CODE ANN. § 93-17-5 (1994) (3 days); NEV. REV. STAT. § 127.070 (1995) (72 hours for mother); N.H. REV. STAT. ANN. § 170-B:7 (1994) (72 hours); N.J. STAT. ANN. 9:3-41 (West Supp. 1997) (72 hours); OHIO REV. CODE ANN. § 3107.08 (Banks-Baldwin 1997) (72 hours); 23 PA. CONS. STAT. ANN. § 2711 (West 1991 & Supp. 1997) (72 hours for mother); VA. CODE ANN. § 63.1-220.3 (Michie 1995) (10 days); W. VA. CODE § 48-4-3a (Supp. 1997) (72 hours).

207. OKLA. STAT. tit. 10, § 7503-2.7 (Supp. 1997).

208. UNIF. ADOPTION ACT § 2-408, 9 U.L.A. 36 (Supp. 1997).

tion. In most cases, nine months should provide adoptive parents and the child sufficient time to determine whether an adoption will be pursued. The existence of this ground may encourage adoptive parents to move forward, foster permanency for the child, and permit birth parents who subsequently determine they are able to raise their child the opportunity to do so if the prospective adoptive parents are unwilling or unable, without good cause, to make a commitment to the child.

The second ground for revocation is that another consent or relinquishment was not obtained, or the parental rights of the other parent were not terminated.²⁰⁹ Many adoption practitioners customarily put a similar condition in their consent and relinquishment forms to protect the ability of a consenting birth parent to seek custody if the adoption does not occur because the other birth parent did not consent and the court failed to terminate his or her parental rights. It is only fair that if an adoption fails because one birth parent successfully vetoed it, the other parent should not be prevented from seeking custody.

Proof by clear and convincing evidence that a consent or permanent relinquishment was obtained by fraud or duress, the third ground for revocation under Section 7503-2.7, has long been recognized in Oklahoma as a ground to set aside a consent.²¹⁰ The time period in which to challenge an adoption on this ground, however, is shortened under the new Adoption Code. In the past the Oklahoma Supreme Court applied a discovery rule to the former statute establishing a limitation of one year upon challenges to adoption decrees,²¹¹ holding that the one year did not commence until the individual who signed the consent or relinquishment knew, or with reasonable diligence should have known, about the fraud practiced upon that individual.²¹² Section 7503-2.7 now requires that a motion to set aside a permanent relinquishment or consent on the ground of fraud or duress must be filed before a decree of adoption is issued. If fraud is the basis of the challenge, however, the motion to set aside the permanent relinquishment or consent must be filed before the decree of adoption is issued, or within three months of the discovery of the fraud, whichever is later.²¹³ Reducing the time period during which fraud may be raised to set aside a consent or relinquishment fosters finality, a goal thought by the Committee to serve both the best interests of the child and the adoptive family. Birth parents who discover fraud practiced upon them clearly are not benefited by the shorter window created by the more restrictive time limitation. Nevertheless,

209. See UNIF. ADOPTION ACT § 2-406(f), 9 U.L.A. 34 (Supp. 1997) and UNIF. ADOPTION ACT § 2-408, 9 U.L.A. 34 (Supp. 1997), which also inspired this ground for revocation with a similar provision.

210. See *Wade v. Geren*, 743 P.2d 1070 (Okla. 1987) (fraud); *In re Adoption of Lori Gay*, 589 P.2d 217 (Okla. 1979) (fraud); *In re Adoption of Robin*, 571 P.2d 850 (Okla. 1977) (fraud and duress). See also *In re Baby Boy Fontaine*, 516 P.2d 1333 (Okla. 1972) (emotional stress, persuasion by agency, and misapprehension about parents' reaction not sufficient to invalidate consent).

211. See OKLA. STAT. tit. 10, §58 (1991) (recodified subsequently in former OKLA. STAT. tit. 10, § 60.18b (Supp. 1996) (Section 60.18b has been recodified as amended in OKLA. STAT. tit. 10 § 7505-7.2 (Supp. 1997))).

212. See *Wade v. Geren*, 743 P.2d 1070, 1072-73 (Okla. 1987); *In re Adoption of Lori Gay*, 589 P.2d 217, 221-22 (Okla. 1979).

213. See OKLA. STAT. tit. 10, § 7503-2.7 cmt. (Supp. 1997).

birth parents are still afforded the opportunity to seek revocation promptly after discovery of the fraud, even if the discovery occurs after finalization.

If a motion to withdraw consent or relinquishment upon any of the three grounds is filed, notice and an opportunity to be heard must be provided to the adoptive or prospective adoptive parents and DHS or any agency participating in the adoption. Allocation of costs and legal fees of the petitioners for adoption, the Department or an agency that is involved, and the individual seeking revocation of consent or relinquishment may be awarded at the court's discretion in any manner that is just, depending upon the equities of the particular situation.

IV. ADOPTION WITHOUT CONSENT AND TERMINATION OF PARENTAL RIGHTS

If a consent or relinquishment is not obtained from both parents,²¹⁴ the court must find that grounds exist to permit adoption without consent or to terminate the parental rights of any nonconsenting parent,²¹⁵ in order for the adoption to proceed.²¹⁶ Prior to finalization, the court may schedule a separate hearing in the adoption proceeding to determine whether an adoption may be granted without the consent of any parent, including a putative father.²¹⁷ Alternatively, termination of the rights of a putative father may be sought under the Adoption Code in a separate proceeding brought prior to the initiation of an adoption action,²¹⁸ or at a separate hearing in the course of a pending adoption proceeding.²¹⁹

A. Procedure

1. Right to Notice

The Oklahoma Adoption Code affords every nonconsenting parent a statutory right to notice of an adoption proceeding and an opportunity to be heard on the issue of whether the parent's rights should be terminated or whether an adoption may be granted without that parent's consent.²²⁰ This is true regardless of whether the child to be adopted is born in or out of wedlock.

The Adoption Code thus preserves the right to notice that existed for most parents under prior law, but significantly extends it to all putative fathers, including those to whom a right to notice was previously denied. Former OKLA.

214. See *supra* note 149 for the definition of "parent" under the Oklahoma Adoption Code. Under that definition, a "parent" does not include an individual whose parental relationship to a child has already been terminated.

215. The term "nonconsenting parent" is used herein to refer to a parent who has neither consented to nor relinquished a child for adoption, and whose parental rights have not previously been terminated.

216. See OKLA. STAT. tit. 10, §§ 7503-2.1, 7505-4.1 (Supp. 1997).

217. See *id.*

218. See OKLA. STAT. tit. 10, § 7505-2.1 (Supp. 1997).

219. See OKLA. STAT. tit. 10, § 7505-4.1 (Supp. 1997).

220. See OKLA. STAT. tit. 10, §§ 7505-2.1(B), 7505-4.1(B), 7505-4.3 (Supp. 1997).

STAT. tit. 10, § 60.7,²²¹ like Section 7505-4.1 of the new Code, required that notice of a hearing on an application for adoption without consent be given to any parent whose consent was allegedly unnecessary. Former OKLA. STAT. tit. 10, § 29.1,²²² however, which permitted a termination action against a putative father to be filed prior to initiation of an adoption proceeding, afforded a right to notice only to certain categories of putative fathers. In 1995 the Oklahoma Supreme Court concluded in *In re C.J.S.*²²³ that putative fathers who were not included within those categories had no statutory right to notice. Moreover, the court held that only putative fathers who had demonstrated a commitment to their children and had exercised responsibility for rearing them had a right protected by due process to notice of an adoption proceeding. The approach taken by the Oklahoma Supreme Court mirrored the position of the U.S. Supreme Court, which has similarly denied a constitutional right to notice of adoption proceedings to putative fathers who have failed to demonstrate a full commitment to the responsibilities of parenthood.²²⁴

Extension of a statutory right to notice of adoption proceedings to all parents, including all putative fathers, serves not only the interests of putative fathers, but also the need of the child and the adoptive family for finality. The likelihood of an erroneous determination in the initial proceeding regarding the father's involvement is substantially increased when the father is given no notice and no opportunity prior to finalization to be heard on the issue of his relationship with his child.²²⁵ If the father's only opportunity to submit evidence of his support of and involvement with his child is in a post-decree challenge, after he has subsequently learned of the adoption, two unfortunate scenarios are likely to occur with greater frequency. When the father can prove the requisite relationship entitling him to constitutional protection, the child and adoptive family are subjected to the emotional devastation of a disrupted adoption.²²⁶ Conversely, a court's understandable reluctance to disturb an adoptive placement after finalization may cause it to require a higher threshold to prove the constitutionally required commitment, thus jeopardizing a father's fundamental right to a relationship with his child. Affording all putative fathers notice thus reduces the risk of successful post-adoption challenges, as well as the risk of a wrongful deprivation of parental rights. Moreover, the fact that all putative fathers are now entitled to notice does not mean that all putative fathers can therefore block the adoption. A putative father whose conduct or

221. See OKLA. STAT. tit. 10, § 60.7 (1991) (repealed by 1997 OKLA. SESS. LAWS c. 366 § 60 (1997)).

222. See OKLA. STAT. tit. 10, § 29.1 (1991) (repealed by 1997 OKLA. SESS. LAWS c. 366 § 60 (1997)).

223. 903 P.2d 304, 306-07 (Okla. 1995).

224. See *Lehr v. Robertson*, 463 U.S. 248 (1983).

225. Obviously, the father can make no "demonstration" of his commitment when he has been given no notice and is not before the court. The court's determination in the initial action, as exemplified in both *Lehr*, 463 U.S. 248 (1983), and *In re C.J.S.*, 903 P.2d 304 (Okla. 1995), is thus based upon the testimony of a mother who desires the adoption, whether by a step-parent as in *Lehr* or by nonrelatives as in *In re C.J.S.*, to proceed.

226. See *In re Adoption of Lori Gay*, 589 P.2d 217, 220 (1978) (observing that even the statutory limitation on challenges to adoption could not be interpreted to bar a proceeding brought beyond the limitation period where the challenge is based on the denial of a due process right to notice).

omissions create a ground for termination or adoption without consent under Section 7505-4.2²²⁷ will continue to have no ability to veto the adoption.

Accurately identifying a putative father is, of course, frequently problematic. The necessity of doing so, however, was made tragically apparent by the recent cases of "Baby Jessica" and "Baby Richard," who were transferred from their adoptive homes at ages 2 1/2 and 3 to the custody of fathers who had not initially received notice because the birth mothers had failed to identify them to the court at the outset.²²⁸ To minimize the risk of such heartbreaking disruptions, Section 7505-4.3²²⁹ of the Adoption Code imposes upon the court²³⁰ a duty to make an independent inquiry to determine the identity of any father or putative father who may not have received notice of an adoption or termination proceeding. The inquiry should include, at the time that a birth mother appears before the court to give consent or for any other purpose, questions posed directly to the birth mother by the judge regarding (1) whether the birth mother was married at the time of conception or thereafter; (2) the identity of any man with whom the mother was cohabiting at the probable time of conception; (3) whether any payments or promises of support have been made to the mother by

227. The grounds for termination have been expanded under the new Adoption Code. See *infra* notes 269 to 286 and accompanying text.

228. See *In re Clausen*, 502 N.W.2d 649 (Mich. 1993); *In re Doe*, 638 N.E. 2d 181 (Ill. 1994), *aff'd sub. nom.*; *In re Kirchner*, 649 N.E.2d 324 (Ill. 1995). These two cases galvanized public attention on the issue of adoption reform as a result of the massive media coverage of the heartrending transfers of these preschoolers back to their biological fathers. The successful challenges by both fathers stemmed originally from the failure of the birth mothers to accurately identify the birth fathers to the court when they originally placed their newborns for adoption.

229. See OKLA. STAT. tit. 10, § 7505-4.3 (Supp. 1997), which provides:

A. If, at any time in a proceeding for adoption or for termination of a relationship of parent and child pursuant to the Oklahoma Adoption Code, the court finds that an unknown father or putative father of the child may not have received notice, the court shall determine whether he can be identified. The determination must be based on evidence that includes inquiry of appropriate persons in an effort to identify an unknown father or putative father for the purpose of providing notice.

B. The inquiry required by subsection A of this section must include whether:

1. The woman who gave birth to the child was married at the probable time of conception of the child, or at a later time;
2. The woman was cohabiting with a man at the probable time of conception of the child;
3. The woman has received payments or promises of support, other than from a governmental agency, with respect to the child or because of her pregnancy;
4. The woman has named any individual as the father on the birth certificate of the child or in connection with applying for or receiving public assistance; and
5. Any individual has formally or informally acknowledged or claimed paternity of the child in a jurisdiction in which the woman resided during or since her pregnancy, or in which the child has resided or resides, at the time of the inquiry.

C. If inquiry pursuant to subsection B of this section identifies as the father or putative father of the child an individual who has not received notice of the proceeding, the court shall require notice to be served upon him pursuant to Section 23 or 26 of this act.

D. If, in an inquiry pursuant to this section, the woman who gave birth to the child fails to disclose the identity of a possible father or reveal his whereabouts, she must be advised that the proceeding for adoption may be delayed or subject to challenge if a possible father is not given notice of the proceeding and that the lack of information about the father's medical and genetic history may be detrimental to the child.

230. The responsibility to make such inquiries at the outset, of course, rests with the attorneys representing petitioners and the birth mother, and any agency facilitating the adoption. Unfortunately, prospective adoptive parents and their counsel, birth mothers and their counsel, and agencies may at times be motivated to conceal the identity of a putative father. Thus, it is important for the judge, who is free of such influences, to conduct an independent inquiry regarding the possible existence of an unknown or putative father.

anyone other than a governmental agency as the result of the pregnancy; and (4) whether anyone has been named as the father on a birth certificate or application for public assistance. As a precautionary measure, it would be a good practice to pose these questions to a birth mother, even if someone has been identified as a father, to ensure there are no additional putative fathers who should be notified. In addition, if a concern arises about an unknown or misidentified father at any time prior to finalization when the birth mother is unavailable to the court, these and any other relevant questions should of course be directed to any other appropriate persons, such as attorneys involved in the proceeding, prospective adoptive parents, or agency personnel, who may have relevant knowledge.

Section 7505-4.3 also requires that whenever a concern arises regarding a father or putative father who may not have received notice, the court should confirm that the attorney for petitioners has checked the paternity registries of the child's state of residence and of any state in which the child has ever resided or in which the mother has ever resided since the time of conception. Checking these paternity registries should become standard practice for the attorney for petitioners in any adoption in which paternity has not previously been judicially determined.

Section 7505-4.3 also requires that a birth mother who fails to disclose the identity or location of a putative father must be advised of the consequences of her refusal, i.e., that the adoption may be delayed or challenged and that the child may be disadvantaged in the future by the unavailability of the father's genetic and medical history. This instruction should come directly from the court, if possible, to ensure its maximum effectiveness. The Adoption Law Reform Committee struggled at length with the issue of how to address the recalcitrance of a birth mother who refuses to identify or misidentifies a father. Although criminal prosecution for perjury²³¹ could potentially be filed against a mother who misidentifies a father under oath, it was suggested that additional criminal liability should be created. Ultimately this suggestion was rejected as unlikely to be effective and overly punitive. There may be instances in which a history of prior physical abuse creates a legitimate fear of a father that motivates a birth mother's silence. By creating a procedure in which the court directly addresses the identification of the father with the birth mother, the Committee hoped to provide an opportunity for the court to structure the adoption in a way that would obviate risk to the birth mother. Criminalizing silence, however, would be particularly inappropriate in such a situation. Even when the motivation to conceal the father is less pure, it is doubtful that potential criminal remedies would be persuasive and the more likely effect would be to deter adoptive placement in Oklahoma. Thus, the Committee and Legislature chose through Section 7505-4.3 to impose the requirements that the court make an

231. If the identification of a father is made under oath, whether at a trial, hearing, investigation, deposition, certification, or declaration, a knowing false identification would be perjury, *see* OKLA. STAT. tit. 21, § 491 (1991); and punishable by imprisonment. *See* OKLA. STAT. tit. 21, § 500 (1991).

independent inquiry, that relevant paternity records be checked, and that the court directly instruct the mother concerning the risks to her child, medically and emotionally, of withholding the father's identity, in the hope that these measures would more effectively motivate an accurate identification and reduce the risk of birth fathers subsequently appearing to challenge adoption proceedings.²³²

Notice of both proceedings to terminate the parental rights of putative fathers and hearings to determine if an adoption can proceed without consent must be given to a parent or putative father in the same manner in which summons is served in other civil proceedings²³³ at least fifteen days before the hearing.²³⁴ The necessary contents of the notice are virtually identical for the two proceedings and are specified in Subsection B(2) of Sections 7505-2.1 and 7505-4.2. Although in general they are derived from the requirements in effect under prior law, the name of the child is no longer required in the notice if the name of the putative father is known.²³⁵ Because a child born out of wedlock is often given the surname of the mother for purposes of an adoption proceeding, use of the child's name, particularly when notice is given by publication, violates the mother's interest in privacy and is unnecessary when the putative father's name is known. If the identity or location of a parent, including a putative father, is unknown, and cannot be ascertained following the inquiry required by Section 7505-4.3, service can be made by publication at least fifteen days before the hearing. No order terminating parental rights can become final, however, for at least fifteen days after the date of the order, when notice is given by publication.²³⁶

232. Substantial portions of Section 7505-4.3 are modeled after Section 3-404 of the 1994 UAA. There are significant differences, however. For example, Subsection (C) of Section 7505-4.3 requires that notice be served upon every father or putative father who is identified, whereas the corresponding subsection of Section 3-404 of the 1994 UAA would not mandate publication in every instance in which the location of a father is unknown. In addition, the Oklahoma Adoption Law Reform Committee departed in spirit, to a degree, from the sentiment expressed in the Committee Comment to Section 3-404, 1994 UAA, 9 U.L.A. 49 (Supp. 1997). In the view of the NCCUSL Committee, Section 3-404 protects the right of the birth mother "to remain silent in response to a request to name the father or to reveal his whereabouts." *Id.* While the Oklahoma Committee recognized the reality that some birth mothers will absolutely refuse to disclose the identity or location of a child's father, and acknowledged that there might be certain instances in which a threat of physical abuse makes such a refusal understandable, the Committee's primary motivation in recommending Section 7505-4.3 was not to protect an unqualified "right" to remain silent, but rather to counter efforts to keep the father's identity hidden.

233. See OKLA. STAT. tit. 12, § 2004 (Supp. 1996).

234. See OKLA. STAT. tit. 10, §§ 7505-2.1(B), 7505-4.1(B) (Supp. 1997). These provisions alter the former notice period in some circumstances. Under former OKLA. STAT. tit. 10, § 60.7, notice of a hearing on an application for adoption without consent had to be served ten days prior to the hearing if the parent resided in the county in which the adoption was filed, and fifteen days prior to the hearing if the parent resided outside of the county. Notice to putative fathers of proceedings to terminate parental rights instituted prior to commencement of an adoption proceeding had to be served ten days prior to the hearing. To achieve uniformity, fifteen days was selected as the minimum notification period under the new Adoption Code for both proceedings, regardless of where the father lives. The longer period seemed appropriate, in light of the fundamental nature of the interests at stake, and the fact that defendants in other civil actions are given twenty days to respond to civil process under OKLA. STAT. tit. 12, § 2012 (Supp. 1996).

235. Former OKLA. STAT. tit. 10, § 60.7(B) (1991) required that the name of the child be contained in the notice of a hearing on an application for adoption without consent.

236. See OKLA. STAT. tit. 10, §§ 7505-2.1(B)(3), 7505-4.1(B)(3) (Supp. 1997).

A parent can waive the right to notice, as under former Okla. Stat. tit. 10, § 29.1, by signing a waiver statement affirming the parent's understanding that the waiver constitutes grounds for ordering adoption without consent or termination of parental rights.²³⁷ A putative father can also waive notice by signing an extrajudicial consent,²³⁸ by waiving notice on a form filed with the paternity registry, or by failing to return the form as required in Section 7503-3.1 after receiving a Notice of Plan for Adoption.²³⁹

2. Hearings

To adopt a child whose parents have not both consented or relinquished, an application for adoption without consent must be filed in the adoption action by a petitioner for adoption, a consenting parent, or a legal guardian or legal custodian of the child.²⁴⁰ The hearing on the application for adoption without consent is generally scheduled prior to and separate from the final hearing on the adoption petition.²⁴¹ If the application is granted and the court subsequently grants the petition for adoption, the parental rights of the parents will be terminated when the final decree of adoption is issued.²⁴² If the nonconsenting parent is a putative father, however, petitioners have two additional options through which they may seek termination of his parental rights prior to issuance of the final decree.

As under prior law,²⁴³ D.H.S., an agency, or a prospective adoptive parent to whom a child born out of wedlock has been relinquished by a birth mother,²⁴⁴ may file an action to terminate the parental rights of a putative father before an adoption proceeding is commenced. Adoption agencies, in particular, desired to retain this procedure in order to be able to delay placement with adoptive parents until after termination of a nonconsenting father, so that they can place the child with relative assurance that the placement will not be disrupted. The primary drawback of the former provision, OKLA. STAT. tit. 10, § 29.1, was that it was procedurally inconsistent with former OKLA. STAT.

237. See OKLA. STAT. tit. 10, §§ 7505-2.1(B)(4), 7505-4.1(B)(4) (Supp. 1997); OKLA. STAT. tit. 10, § 29.1(E) (Supp. 1996) (repealed 1997).

238. See *supra* notes 182 to 188 and accompanying text.

239. See *supra* notes 189 to 201 and accompanying text.

240. See OKLA. STAT. tit. 10, § 7505-4.1(A) (Supp. 1997). Under former OKLA. STAT. tit. 10, § 60.7(A) (1991), an application for adoption without consent could only be filed by a consenting parent, a legal guardian, or a legal custodian of the child. Permitting the petitioner for adoption to file the application, however, is not a major shift from prior practice, since formerly a petitioner could become a legal custodian by seeking temporary legal custody in the adoption action.

241. See *Merrel v. Merrel*, 712 P.2d 35, 37-38 (Okla. 1985) (interpreting former OKLA. STAT. tit. 10, § 60.7 (1991), predecessor to OKLA. STAT. tit. 10, § 7505-4.1 (Supp. 1997)).

242. See OKLA. STAT. tit. 10, § 7505-6.5(B) (Supp. 1997) (formerly OKLA. STAT. tit. 10, § 60.16(B)(1996)).

243. See OKLA. STAT. tit. 10, § 29.1 (Supp. 1996) (repealed 1997).

244. See OKLA. STAT. tit. 10, § 7505-2.1(A) (Supp. 1997) (which permits a petition to terminate parental rights to be filed by an "agency, attorney, or prospective adoptive parent" to whom a mother has permanently relinquished a child born out of wedlock. Section 7505-2.1 is more specific than former OKLA. STAT. tit. 10, § 29.1 (Supp. 1996) (repealed 1997), which permitted a petition to be brought by "the person or agency to whom a relinquishment was made . . .").

tit. 10, § 60.7,²⁴⁵ which governed applications for adoption without consent, thereby creating much confusion. Section 7505.2-1 of the Adoption Code²⁴⁶ preserves preadoption termination as an option, but amends the former statute so as to create virtually identical substantive and procedural rights in all proceedings for termination of parental rights or adoption without consent initiated pursuant to the Adoption Code. To serve the convenience of all interested parties, the permissible venues for preadoption termination proceedings initiated under Section 7505.2-1 have been broadened.²⁴⁷

After an adoption is commenced, a petitioner for adoption, consenting parent, or legal guardian or custodian of the child may file an application to terminate the parental rights of a putative father in the adoption action itself. This application may be adjudicated at a hearing prior to the final hearing on the petition for adoption. Section 7505-4.1 thus effects a significant change by permitting the parental rights of putative fathers to be terminated during an ongoing adoption proceeding prior to the final hearing. Utilization of this procedure spares the petitioners the cost of a second service of notice and a second contested hearing. These costs are normally incurred after a hearing on an application for adoption without consent because, unlike a parent whose rights are terminated, a parent whose consent is found unnecessary is still entitled to notice of the final hearing and an opportunity to be heard on the issue of whether the adoption is in the best interests of the child.²⁴⁸

The Committee and Legislature chose to limit the option of prefinalization termination of parental rights to putative fathers, however, and not to extend it to other parents. Children born in wedlock are most frequently adopted by relatives or stepparents. The parents whose rights are terminated in these adoptions often have had a significant relationship with their child. Even though grounds for termination, which are identical to the grounds for adoption without consent, can be established, it is particularly important that these parents have an oppor-

245. See OKLA. STAT. tit. 10, § 60.7 (1991) (repealed 1997).

246. See OKLA. STAT. tit. 10, § 7505-2.1 (Supp. 1997).

247. Under former OKLA. STAT. tit. 10 § 29.1(A) (Supp. 1996) (repealed 1997), an action to terminate parental rights had to be filed in the county in which the mother had executed her relinquishment. While this may be a convenient county, it could just as easily be inconvenient for the adoptive parents, the putative father, the agency, the attorneys involved, and even for the birth mother, who may or may not be a resident of the county in which she signed her relinquishment. Section 7505-2.1(A) permits venue in the county in which the relinquishment was executed or in the county in which the putative father, the petitioner, or the child resides at the time of the filing of the petition.

248. See *In re Adoption of J.R.M.*, 899 P.2d 1155, 1161 (Okla. 1995) (finding that a parent whose consent is found unnecessary, at a hearing on an application for adoption without consent, still has a constitutionally protected right to notice of the subsequent hearing on the petition for adoption and the opportunity to be heard at that hearing).

Termination proceedings initiated under former OKLA. STAT. tit. 10, § 29.1 (Supp. 1996) prior to commencement of an adoption action were generally utilized only in agency adoptions. Thus the costs of notice and another contested hearing fell disproportionately on direct placement adoptions, even though the circumstances of the putative fathers involved were virtually identical to those whose rights were terminated in a § 29.1 hearing. Under OKLA. STAT. tit. 10, §§ 7505-2.1 and 7505-4.1 (Supp. 1997), the opportunity to obtain an order terminating the parental rights of a putative father prior to finalization exists regardless of whether the termination proceeding is brought before or after the petition for adoption is filed and whether the adoption is facilitated by an agency or direct placement.

tunity to be heard on the issue of whether the adoption is in the child's best interests. A parent who has not complied with support obligations, for example, may still have a relationship with the child of such quality that termination would be detrimental to the child.

Sections 7505-2.1 and 7505-4.1 create a statutory right to court appointed counsel for all indigent parents, including putative fathers, who (1) are the subject of proceedings for adoption without consent or termination of parental rights brought under the Adoption Code, (2) appear at the hearing, and (3) desire counsel. For almost twenty years the Oklahoma Supreme Court has recognized an indigent parent's right to court appointed counsel in termination proceedings initiated under the Children's Code. In *In re Chad*²⁴⁹ the court held that in dependency and neglect proceedings in which parents are threatened with deprivation of their fundamental right to a relationship with their children, the right of an indigent parent to court appointed counsel is guaranteed not only by statute,²⁵⁰ but also by due process. Moreover, the court held that when the right to counsel is constitutionally required, counsel must be appointed unless knowingly and intelligently waived. The right to counsel does not depend upon a request.²⁵¹ Proceedings for adoption without consent and termination of parental rights brought under the Adoption Code, like juvenile proceedings, threaten parents with deprivation of their fundamental right. Creation of a statutory right to counsel for all indigent parents, including putative fathers, in the Adoption Code itself resolves any ambiguity that may have existed under prior law²⁵² regarding the existence of this right. Sections 7505-2.1 and 7505-4.1 further provide that in counties with county indigent defenders, those attorneys shall be appointed for representation in adoption proceedings.

If a putative father appears at a hearing on an application or petition to terminate parental rights brought under the Adoption Code, three options are available to the court. If the putative father chooses to sign a consent or relinquishment, of course, the court may conduct a consent or relinquishment proceeding²⁵³ pursuant to Sections 7503-2.3 or 7503-2.4.²⁵⁴ If the putative father

249. 580 P.2d 983, 985-86 (Okla. 1978). See also *In re Guardianship of S.A.W.*, 856 P.2d 286, 288-89 (Okla. 1993) (a post-*Delaney* decision in which the Oklahoma Supreme Court reaffirms the holding of *Chad*); *In re D.D.F.*, 784 P.2d 89, 90 (Okla. Ct. App. 1989) (right to court appointed counsel extends to appellate stage). But see *In re Delaney*, 617 P.2d 886, 890 (Okla. 1980) (no constitutional right to state provided lawyer in deprived status proceeding).

250. See OKLA. STAT. tit. 10, § 7003-3.7 (Supp. 1997) ("If the parents, guardian, or other legal custodian of the child requests an attorney and is found to be without sufficient financial means, counsel shall be appointed by the court if a petition has been filed alleging that the child is a deprived child or if termination of parental rights is a possible remedy, provided that the court may appoint counsel without such request, if it deems representation by counsel necessary to protect the interest of the parents, guardian, or other legal custodian.").

251. See *In re Chad*, 580 P.2d at 986.

252. See OKLA. STAT. tit. 10, § 24 (1991) (providing "When it appears to the court that the minor or his parent or guardian desires counsel but is indigent and cannot for that reason employ counsel, the court shall appoint counsel."). Although § 24 was not part of the former Oklahoma Adoption Act, many courts may have relied upon it to appoint counsel for indigent parents in adoption proceedings in the past.

253. Although only Section 7505-2.1(D) lists this as an option, and Section 7505-4.1(D) does not specifically refer to this option, the omission in Section 7505-4.1 was in no way intended to imply that a parent, including a putative father, appearing at a hearing on an application for adoption without consent or termina-

does not consent or relinquish and the court finds that termination is in the best interests of the child and that a ground for termination exists under Section 7505-4.2, the court may determine that the consent of the putative father to the adoption is not required and order that the putative father's parental rights be terminated.²⁵⁵ If the court determines that the putative father is the biological father of the child, that the adoption cannot proceed without the consent of the putative father, that the putative father's rights should not be terminated, and that the putative father is unwilling to consent or relinquish, then the court must schedule a separate hearing to determine the custody of the child.

The provision for a separate custody hearing at this juncture is new.²⁵⁶ If the putative father's rights are not terminated, obviously the adoption cannot proceed. At this point, custody of the child must be resolved. The birth mother, even if she has consented or relinquished, may choose to seek custody.²⁵⁷ The prospective adoptive parents, who may have had custody of the child for a substantial period of time, may also choose to seek custody.²⁵⁸ Sections 7505-2.1 and 7505-6.4 require that when a court determines not to terminate the rights of a putative father in a proceeding brought prior to the commencement of an adoption action, or when the court denies a petition for adoption in the adoption proceeding itself, the court must schedule a separate hearing and give notice of the hearing to each parent at least fifteen days prior to the hearing. If termination is sought prior to commencement of an adoption, fifteen days notice must also be given to the child-placing agency or attorney who filed the petition to terminate. If termination is sought in the adoption proceeding itself, fifteen days notice must be given to the prospective adoptive parents. Biological parents who signed a consent or relinquishment must be served with their fifteen day notice of the custody hearing in the manner provided for service of civil summons.²⁵⁹ This added protection is to ensure that the parent who previously consented receives the notice, since such a parent may not have been aware of or participating in the subsequent termination proceeding. At the custody hearing, the court shall award custody of the child according to the best interests of the child.²⁶⁰

tion brought under that section could not choose at the hearing to give a consent or relinquishment. If the parent desired to do so, it would be appropriate for the court, as it was under prior law, to accept the consent or relinquishment at that hearing.

254. See *supra* notes 149 to 177.

255. See OKLA. STAT. tit. 10, §§ 7505-2.1(D)(2), 7505-4.1(D) (Supp. 1997).

256. Section 3-704 of the 1994 UAA establishes a similar best interest hearing following denial of a petition for adoption. UNIF. ADOPTION ACT § 3-704, 9 U.L.A. 61 (Supp. 1997). For further discussion of the best interest hearing, see *infra* notes 357 to 376 and accompanying text.

257. See OKLA. STAT. tit. 10, § 7503-2.7 (Supp. 1997) (allowing the revocation of a consent or relinquishment if the court decides not to terminate the parental rights of the other parent and the other parent refuses to consent or relinquish).

258. In a few states, courts have been permitted in the past to consider an award of custody to a child's prospective adoptive parents after an adoption petition was unsuccessful. See *In re Custody of C.C.R.S.*, 892 P.2d 246 (Colo. 1995); *In re Adoption of Kelsey S.*, 823 P.2d 1216, 1238 (Cal. 1992) (if adoption is denied on remand, question of child's custody must be addressed); *Sorentino v. Family & Children's Soc'y*, 378 A.2d 18 (N.J. 1977).

259. See OKLA. STAT. tit. 12, § 2004 (Supp. 1996).

260. See OKLA. STAT. tit. 10, § 7505-6.4 (Supp. 1997). Although OKLA. STAT. tit. 10, § 7505-2.1(D)(3)

At a hearing on an application to permit adoption without consent of a parent, including a putative father, the court could, of course, take a consent or relinquishment if the parent was willing to give one.²⁶¹ If not, the court may determine that the adoption may proceed without the consent of the parent, if a ground for such a determination in Section 7505-4.2 exists. Alternatively, the court may determine that the adoption cannot proceed without the consent of the parent, in which case the petition for adoption will be denied.²⁶² At that point, pursuant to Section 7505-6.4, the court must schedule a separate custody hearing and give at least fifteen days notice of the hearing to the petitioners for adoption and each parent of the child. Again, consenting parents must be served with their fifteen day notice in the manner provided for service of civil summons, to ensure that the notice is actually received. At the hearing, custody is to be awarded according to the best interests of the child.²⁶³

If a putative father fails to appear at a hearing on a petition or application to terminate parental rights or waives notice of such a hearing, the court is directed by Sections 7505-2.1(E) and 7505-4.1(E) to terminate his parental rights. Section 7505-4.2 contains a similar provision that allows a court to permit adoption without consent if a parent fails to appear at a hearing on an application for adoption without consent. Both Sections 7505-2.1(B)(2) and 7505-4.1(B)(2) require that the notice of the hearing served upon a parent, including a putative father, must clearly state that failure to appear at this hearing may result in the granting of the adoption without the parent's consent or in termination of his parental rights. Under prior law, a termination order entered based on the nonappearance of the putative father could not be vacated.²⁶⁴ Sections 7505-2.1(F) and 7505-4.1(F) retain this restriction for parents who fail to appear at hearings on applications for adoption without consent or putative fathers who miss a termination hearing,²⁶⁵ with one exception. If the parent or putative father applies for vacation of the order within ten days of the hearing and can establish by clear and convincing evidence²⁶⁶ that the failure to appear was due to unavoidable circumstances, the court may set aside the order permitting adoption without consent or the termination order and schedule another hearing.

(Supp. 1997) is less specific as to the standard, the hearing specified therein was intended to parallel the custody hearing that would take place after a failed adoption under OKLA. STAT. tit. 10, § 7505-6.4 (Supp. 1997), and the standard for awarding custody, the best interests of the child, is applicable to a Section 7505-2.1(D)(3) hearing as well.

261. Unlike Section 7505-2.1, this option is not actually mentioned in Section 7505-4.1. Its omission is certainly not meant to preclude taking a consent or relinquishment at this time, if the parent against whom the application was filed is willing to give one. Rather, the omission merely reflects the assumption that when an application for adoption without consent is filed, generally petitioners have been unable to obtain a consent or relinquishment from the parent against whom the application is filed. It was therefore not anticipated that this option will be available with any frequency.

262. See OKLA. STAT. tit. 10, § 7505-4.1(D) (Supp. 1997).

263. See OKLA. STAT. tit. 10, § 7505-6.4(A) (Supp. 1997).

264. See OKLA. STAT. tit. 10, § 29.1(G) (1991 & Supp. 1996) (repealed 1997).

265. An order permitting adoption without consent or a termination order issued on the basis of a waiver of notice by a parent or putative father also cannot be vacated. See OKLA. STAT. tit. 10, §§ 7505-2.1(F), 7505-4.1(F) (Supp. 1997) (derived from former OKLA. STAT. tit. 10, § 29.1(G) (1991 & Supp. 1996)).

266. See OKLA. STAT. tit. 10, §§ 7505-2.1(F), 7505-4.1(F) (Supp. 1997).

The Committee recommended this change because the former absence of discretion had the potential to result in an unjust divestiture of a fundamental right. Nevertheless, finality is one of the goals of the Adoption Code. The Committee regarded this as an extremely narrow exception. The type of "unavoidable circumstance" the Committee envisioned was the rare instance in which a parent has an accident on the way to the hearing and ends up in a coma for three days. Even when such extraordinary circumstances occur, the application to vacate the order must still be filed within ten days of the hearing at which the parent failed to appear, so that the prospective adoptive parents, agency, birth mother, or other interested parties can within a short period of time rely with assurance upon the order permitting adoption without consent or terminating parental rights and proceed with the adoption.

Because orders terminating parental rights are final orders, Sections 7505-2.1(G)(H) and 7505-4.1(G)(H) set forth the deadlines that apply to appeals of such orders issued under these sections. These deadlines are identical to those established for appeals of other orders, judgments, or decrees rendered pursuant to the Adoption Code, as set forth in Section 7505-7.1.²⁶⁷

B. Grounds

Under the Adoption Code the grounds for adoption without consent and termination of the parental rights of putative fathers are identical.²⁶⁸ The grounds are substantially the same as those that existed under former Section 60.6 of Title 10,²⁶⁹ with a few significant changes.

The requisite time limit for willful nonsupport,²⁷⁰ perhaps the most common ground for adoption without consent and termination, has been altered. Former Section 60.6 required willful nonsupport for a period of twelve months immediately preceding commencement of the adoption action. Section 7505-4.2(B) now requires willful nonsupport "for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption" The intent of this amendment is to preclude a last

267. See OKLA. STAT. tit. 10, § 7505-7.1 (Supp. 1997). For a discussion of these deadlines, see *infra* notes 342 to 354 and accompanying text. The Committee debated whether to address the appealability of orders permitting adoption without consent, and decided not to attempt that during the past legislative term. Despite the Oklahoma Supreme Court statement based upon the interpretation of appellate court rules in effect at the time, that an order declaring a child eligible for adoption without consent is a final and appealable order, see *Merrell v. Merrell*, 712 P.2d 35, 39 (Okla. 1985); *In re Adoption of E.S.P.*, 584 P.2d 209, 210 (Okla. 1978), some Committee members felt that the question was less clear today and merited additional reflection.

268. See OKLA. STAT. tit. 10, §§ 7505-2.1(D)(2), 7505-4.1(D) (Supp. 1997).

269. See OKLA. STAT. tit. 10, § 60.6 (1991 & Supp. 1993-96) (recodified as amended in OKLA. STAT. tit. 10, § 7505-4.2 (Supp. 1997)).

270. The Oklahoma Supreme Court affirmed the constitutionality of permitting adoption without consent on the ground of failure to provide court ordered support in *In re Adoption of J.R.M.*, 899 P.2d 1155, 1160-61 (Okla. 1995) (rejecting a challenge that use of this basis violates a parent's right to substantive due process guaranteed by the Fourteenth Amendment of the Federal Constitution and Art. 2, § 7 of the Oklahoma Constitution, the court held that the fundamental interest of parents in maintaining relationships with their children must be balanced with the government's compelling interest in ensuring that children receive adequate support).

minute payment from preventing an adoption, when a parent has willfully failed to pay support in substantial compliance with a court order or in accordance with the parent's financial ability for a period of at least one year.²⁷¹

Provisions relating to grounds for termination or adoption without consent of a putative father of an infant placed for adoption have been reorganized and clarified.²⁷² Of course, as under prior law, a putative father who is determined by the court not to be the biological father has no ability to prevent the adoption.²⁷³ The putative father who is found to be the biological father is subject to termination or adoption without his consent if he is unable to prove that he has exercised parental rights or duties towards the infant.²⁷⁴ If the child is placed for adoption within ninety days of birth, proof of his failure to contribute to the support of the birth mother during her pregnancy to the extent of his financial ability is sufficient by itself to terminate his parental rights or permit adoption without his consent.²⁷⁵ This is not the only conduct that is relevant to

271. When used as a ground for termination of the rights of a putative father in a proceeding filed pursuant to Section 7505-2.1 prior to the commencement of an adoption action, the relevant time period should be twelve consecutive months out of the last fourteen months immediately preceding the filing of the petition to terminate parental rights. The Committee failed to clarify this in the draft it submitted to the Legislature. In reality, this ground would rarely be used in a termination filed pursuant to Section 7505-2.1, since the provision could apply only to children at least fourteen months of age, and Section 7505-2.1 is normally used when newborns are placed for adoption.

272. See OKLA. STAT. tit. 10, § 7505-4.2(C) (Supp. 1997) providing:

C. Consent to adoption is not required from a father or putative father of a minor born out of wedlock if:

1. The minor is placed for adoption within ninety (90) days of birth, and the father or putative father fails to show he has exercised parental rights or duties towards the minor, including, but not limited to, failure to contribute to the support of the mother of the child to the extent of his financial ability during her term of pregnancy; or
- 2.

a. The minor is placed for adoption within fourteen (14) months of birth, and the father or putative father fails to show that he has exercised parental rights or duties towards the minor, including, but not limited to, failure to contribute to the support of the minor to the extent of his financial ability, which may include consideration of his failure to contribute to the support of the mother of the child to the extent of his financial ability during her term of pregnancy, and

b. Pursuant to subparagraph a of this paragraph, failure to contribute to the support of the mother during her term of pregnancy shall not in and of itself be grounds for finding the minor eligible for adoption without such father's consent.

273. This provision was contained in former OKLA. STAT. tit. 10, § 60.6(3)(b) (1991 & Supp. 1996), in the portion dealing with failure of putative fathers to exercise parental responsibilities. Under the Adoption Act, it was removed from the corresponding subsection, OKLA. STAT. tit. 10, § 7505-4.2(C) (Supp. 1997), and placed in Subsection (O)(2) of that Section.

274. The U.S. Supreme Court in *Quilloin v. Walcott*, 434 U.S. 246, 255-56 (1978) held that an out-of-wedlock child of a putative father could be adopted without the father's consent if the adoption was in the child's best interests. A finding of unfitness, the Court determined, is not constitutionally compelled by either substantive due process or equal protection if the putative father has not exercised significant responsibility for the rearing of the child. In *Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983), the Court reaffirmed that only an unwed father who "demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child" is entitled to substantial protection under the Due Process Clause. If he fails to do so, a court is not constitutionally compelled to even "listen to his opinion on where his child's best interests lie." *Id.* In OKLA. STAT. tit. 10, § 7505-4.2(C) (Supp. 1997), the Legislature has directly adopted this constitutional standard, the failure to exercise parental right or duties towards the child, as its ground for termination or adoption without consent of a putative father of a child born out of wedlock who is placed for adoption between birth and the age of fourteen months.

275. See *In re Adoption of Baby Boy D.*, 742 P.2d 1059, 1068 (Okla. 1985) (child may be adopted without consent of or notice to putative father who made no attempt to provide for the mother during pregnancy, nor to learn where and when the child was to be born, nor to make arrangements for the payment of the birth-

establishing a failure to exercise parental rights or duties, however. Other conduct, such as failure to acknowledge paternity or to legally establish paternity or to otherwise exercise rights and duties toward the child,²⁷⁶ may also be considered.²⁷⁷

If an infant is placed for adoption between the ages of ninety days old and fourteen months old, failure to contribute to the support of the birth mother during pregnancy may be considered along with failure to contribute to the support of the child after birth or other evidence of failure to exercise parental duties; however, failure to contribute to the birth mother's support during pregnancy will not alone constitute a ground for termination or adoption without consent. It was the opinion of the Committee that if a father had been consistently financially supporting a child from birth or shortly after birth up until the time that the child was placed for adoption, and the child was at least ninety days old when the child was placed, the failure to support during pregnancy alone should not be a ground for termination or adoption without consent. On the other hand, if the father has not consistently supported the child from birth, a failure to support the birth mother to the extent of his financial ability during pregnancy can be considered along with his intermittent or complete failure to support the child as a ground for termination or adoption without consent.

If a child is at least fourteen months old when the child is placed for adoption, failure to pay support for the child in substantial compliance with a court order or according to his financial ability, for twelve consecutive months out of the last fourteen months immediately preceding the filing of the petition, becomes the relevant test for termination or adoption without consent on the grounds of nonsupport. The Committee reasoned that for a child who is placed for adoption after fourteen months of age, the father's contribution to the support of the child during the child's lifetime, rather than the father's failure to support the birth mother during pregnancy, should be the relevant factor in the decision to terminate or permit adoption without consent.

In addition to the modifications of the existing grounds described above, two new grounds for termination or adoption without consent were added. The first is the willful failure of a parent to maintain a significant relationship with a child "through visitation or communication for a period of twelve (12) consecu-

related expenses of the child or mother).

276. See *In re Adoption of Baby Girl M.*, 942 P.2d 235, 240-41 (Okla. Ct. App. 1997) (rejecting an argument by a putative father that former OKLA. STAT. tit. 10, § 60.6(3) (1991 & Supp. 1996) required his consent to an adoption if he could prove, without more, that he undertook any one of the three acts enumerated, (1) acknowledging the child as his, (2) taking legal action to establish paternity, or (3) exercising parental rights; and instead holding that the acknowledgement, paternity action, or exercise of parental rights and duties must be accompanied by support of the mother to the extent of his financial ability during pregnancy in order to preserve his rights). See also *In re Adoption of Baby Boy W.*, 831 P.2d 643, 646 (Okla. 1992) (observing that under former Section 60.6 the exercise of parental rights and duties "includes contributing to the support of the mother during the pregnancy and contributing to the support of the child after its birth").

277. As under prior law, proof that he has been denied knowledge of the child, or of the opportunity to exercise parental rights and duties, may constitute a defense to termination or adoption without consent, if the putative father can establish that he made sufficient attempt to discover that he fathered a child or sufficient attempt to exercise his parental rights and duties. See OKLA. STAT. tit. 10, § 7505-4.2(E)(2) (Supp. 1997).

tive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption"²⁷⁸ Although the financial support of a child is an important part of exercising parental responsibilities, the emotional component is no less significant. Increasingly, the payment of child support by parents who are regularly employed is accomplished through automatic wage withholding.²⁷⁹ Thus, child support can be paid by a parent who has made no effort through visitation or regular communication to maintain a significant relationship with his or her child. Even a parent, such as a member of the military, who lives overseas and is unable to visit for lengthy periods can still maintain a meaningful relationship by mail or phone. When a parent has willfully failed to make the effort to maintain such a relationship, that parent should not be allowed to veto an adoption by a prospective adoptive parent who is ready and willing to meet both the emotional and financial needs of the child.²⁸⁰ Many other states have enacted a similar ground for termination or adoption without consent.²⁸¹

278. See OKLA. STAT. tit. 10, § 7505-4.2(I) (Supp. 1997). Because this ground could not be applied to the adoption of a child under twelve months of age, it will not frequently be used as a ground to terminate the rights of a putative father pursuant to Section 7505-2.1 (Supp. 1997). When it is used for this purpose, the relevant time period should be the fourteen months immediately preceding the filing of the petition for termination of parental rights.

279. Federal and state law require that every child support order must contain an "income assignment" order that will be sent to a "payor," who is the obligor's employer or any other person or entity who owes the obligor periodic income, earnings, or other periodic payments. This order requires the payor to withhold child support, and a specific amount of arrearages, if any, from the wages or other periodic payments that the payor owes to the obligor, and to send them, directly or through a centralized collection and disbursement unit of the state's IV-D agency, when it becomes operational, to the person entitled by the court order to receive the support. 42 U.S.C. § 666 (1994); OKLA. STAT. tit. 12, §§ 1170, 1171.3 (1991 & Supp. 1996); OKLA. STAT. tit. 43, § 115 (1991 & Supp. 1996). See Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L. Q. 519, 539-551 (1996).

280. The lack of contact would not be willful, of course, if the parent has been thwarted from exercising visitation or contact by a custodial parent or guardian. See generally *State v. Stonecipher*, 879 P.2d 1258, 1264 (Okla. Ct. App. 1994) (Louisiana did not lose jurisdiction because of lack of significant contact between father and children, where mother thwarted contact by filing sexual abuse charges and father pursued proceedings in two states in an effort to be with his children).

281. See ALASKA STAT. § 25.23.050(a)(2)(A) (Michie 1996) (consent to adoption not required of parent who has failed significantly without justifiable cause for a period of at least one year to communicate meaningfully with the child); ARK. CODE ANN. § 9-9-207(a)(2)(i) (Michie 1993) (consent to adoption not required of parent who has failed significantly without justifiable cause for a period of at least one year to communicate meaningfully with the child); COLO. REV. STAT. § 19-5-105(3.1)(b) (1997) (parent who has not established a substantial, positive relationship with the child is subject to termination of parental rights; factors include whether parent has maintained regular and meaningful contact with child, whether parent has openly lived with child for at least six months out of past year, and whether parent has openly held out child as his or her own child); HAW. REV. STAT. § 578-2(c)(1)(C) (1993) (consent not required from parent who has failed to communicate with child for at least one year when able to do so); IDAHO CODE § 16-2005(a) (Supp. 1997) (termination can be based upon willful failure to maintain a normal parental relationship, one indicia of which is failure to maintain regular personal contact); IND. CODE § 31-19-9-8(a)(2) (1997) (consent not required from parent who fails without justifiable cause to communicate significantly with child when able to do so for period of at least one year); LA. CIV. CODE ANN. art. 1245b(3) (West 1995) (consent not required when custody has been granted to grandparent, and parent has refused or failed to visit, communicate, or attempt to communicate with child without just cause for period of two years); MD. CODE ANN., FAM. LAW § 5-312(b)(2), (4)(i) (1997) (consent not required if parent has not had custody for at least a year and has not maintained meaningful contact with child during time petitioner has had custody despite opportunity to do so); MISS. CODE ANN. § 93-15-103(3)(c)(i) (1994) (grounds for termination include failure to exercise reasonable available visitation with child who has been in custody of agency for at least one year); N.Y. DOM. REL. LAW § 111 (McKinney 1988 & Supp. 1997) (consent not required from father who has failed to visit, or, if unable to visit, failed to communicate); N.D. CENT. CODE § 14-15-06 (1991) (consent not required of parent

In addition, as discussed above,²⁸² the failure of a putative father to return the response form to the Paternity Registry or to the attorney or agency that sent the form, within thirty days from the date that a Notice of Plan for Adoption was served upon him, constitutes a ground for termination of his parental rights or adoption without his consent. Return of the form to the Paternity Registry or to the attorney or agency, indicating by the selection of option (d) or (e) the intent to waive parental rights, including the right to consent to adoption, will also serve as the basis for the court to permit adoption without the putative father's consent or to terminate his parental rights.²⁸³

The standard of proof necessary to establish any of the grounds to permit adoption without consent or termination of parental rights, new or old, listed in Section 7505-4.2, is clear and convincing evidence.²⁸⁴ The burden of proof is on the party seeking the adoption without consent or the termination of parental rights.²⁸⁵

V. THE ADOPTION PROCESS

A. Home Studies

1. Preplacement Home Study

One of the most important protections for children who will be placed for adoption is the new requirement under the Adoption Code that a favorable written home study of a prospective adoptive family must be completed before a child can be placed in their home. The home study must contain a finding that the prospective adoptive parent or parents are suited to be adoptive parents, either generally or for a particular child who will be placed. It must be completed or updated within the twelve months prior to placement.²⁸⁶

who fails significantly without justifiable cause to communicate with child for at least one year); OHIO REV. CODE ANN. § 3107.07 (Banks-Baldwin Supp. 1997) (consent not required from parent who, without justifiable cause, fails to communicate with child for at least one year); S.C. CODE ANN. § 20-7-1690 (Law Co-op. Supp. 1996) (consent not required from putative father of child placed when over 6 months of age if father has failed to visit at least monthly or regularly communicate); UTAH CODE ANN. § 78-30-4.14 (1996) (consent not required from putative father of child placed when over 6 months of age if father has failed to visit at least monthly or regularly communicate).

282. See *supra* notes 189-201 and accompanying text.

283. The Committee approved an additional new ground to recommend to the Legislature, that would have permitted the adoption of a child without the consent of a parent who had voluntarily placed the child in the care of a licensed child care institution or child placing agency, if the child had remained in out of home care for eighteen months or more, and the parent had failed to substantially comply for twelve consecutive months out of the fourteen month period immediately preceding the filing of the petition for adoption with a written plan of care. In order to satisfy this ground, the plan must have contained notice that failure to substantially comply constitutes grounds for adoption without consent. This proposal was made late in the Legislative process and did not make it to the floor of the Legislature. This or a similar proposal may be reconsidered by the Committee this legislative term.

284. See *In re Adoption of J.R.M.*, 899 P.2d 1155 (Okla. 1995); *In re Termination of Parental Rights of Sara O.*, 847 P.2d 768 (Okla. 1993); *In re Adoption of Darren Todd H.*, 615 P.2d 287 (Okla. 1980); *Santosky v. Kramer*, 455 U.S. 745 (1982).

285. See *In re Adoption of Darren Todd H.*, 615 P.2d at 287.

286. See OKLA. STAT. tit. 10, § 7505-5.1(A) (Supp. 1997).

One of the primary goals of the new Adoption Code is to ensure that adoptions arranged both through agencies and direct placement satisfy the highest professional standards. Experts in the field of adoption have uniformly called for home studies prior to placement,²⁸⁷ and a similar requirement is included in the 1994 Uniform Adoption Act²⁸⁸ and in the adoption statutes of several other states.²⁸⁹ Although preplacement home studies have long been the standard practice in agency adoptions, they often were not performed in direct placement adoptions. Prior law only required that a home study be ordered when a petition for adoption was filed and that it be completed within 60 days from issuance of the order, unless the time was extended.²⁹⁰ Thus, a prospective adoptive family could have custody of a child for several months before a home study was completed and submitted to the court. This practice placed a child at some risk during the initial months of placement, and fostered reluctance to remove a child from a less than favorable placement once the child had already been placed, due to the emotional trauma that disruption would cause all concerned.

Section 7505-5.1 creates two exceptions to the requirement of a preplacement home study. The court may waive the requirement for good cause, in which case a home study must still be completed during the pendency of the adoption action. Illustrations of the circumstances in which its use might be appropriate are found in the Committee Comments to Section 2-201 of the 1994 UAA,²⁹¹ which was the model for Section 7505-5.1.²⁹² If a birth mother selected a particular adoptive family and gives birth prematurely before the family has had the opportunity to complete the evaluation, good cause would exist. If a child is placed by D.H.S. with a foster family who wishes to adopt after termination of the parents' rights, the fact that the adoption home study was not

287. Charlotte Vick, *The 1994 Uniform Adoption Act: The Wrong Model for Positive Change*, ADOPTALK 4 (Winter 1995) (crediting the 1994 UAA, with which author disagrees on other grounds, for requiring positive preplacement home studies, but faulting UAA's requirement that they may be completed 18 months prior to placement); Memorandum from the Child Welfare League of America, *Analysis of the Proposed Uniform Adoption Act 3-4* (no date) (on file with author) (favoring preplacement evaluation but critical of 1994 UAA for requiring update study within 18 months of placement, rather than requiring update within 30 days of placement); Memorandum from Ann Sullivan, *The Uniform Adoption Act: What Price Uniformity?* (no date) (on file with author) (favoring preplacement home studies but critical of 1994 UAA's exceptions for kinship adoptions and good cause, and 1994 UAA's failure to require update within 30 days of placement); Memorandum from the National Council for Adoption, *What is the Uniform Adoption Act and What Does it Do?* 1 (1994) (on file with author) (complimenting 1994 UAA on its requirement for preplacement investigation of prospective adoptive family).

288. See Unif. Adoption Act § 2-201, 9 U.L.A. 19-20 (Supp. 1997). OKLA. STAT. tit. 10, § 7505-5.1 (Supp. 1997) and Section 2-201 of the 1994 UAA are virtually identical, with one exception. Section 7505-5.1 requires that the home study be completed within twelve months before placement, rather than eighteen months, to address the criticism leveled against the 1994 UAA that eighteen months was too long. See *supra* note 288.

289. See ALA. CODE § 26-10A-19(a) (1992); CAL. FAM. CODE § 224.50(c) (West 1997); FLA. STAT. ch. 63.092(2) (1997); IDAHO CODE § 16-1506(3) (1997); IND. CODE § 31-19-7-1 (1997); IOWA CODE § 600.8(1)(a) (1996); KY. REV. STAT. ANN. § 199.473(1) (Michie 1995); NEV. REV. STAT. § 127.285 (1995).

290. See OKLA. STAT. tit. 10, § 60.13 (Supp. 1996) (recodified as amended at OKLA. STAT. tit. 10, § 7505-5.4 (Supp. 1997)).

291. See UNIF. ADOPTION ACT § 2-201, 9 U.L.A. 17-18 (Supp. 1997).

292. See *supra* note 289.

completed prior to transfer of the child to the physical custody of the foster family should not create a barrier to the adoption. A good cause exception would clearly be warranted. Nevertheless, the good cause exception was intended to be a narrow exception. If used routinely to obviate the need for preplacement home studies in direct placement adoptions, the purpose of the new statutory requirement would be thwarted. Since agencies already conducted preplacement home studies, adoptions facilitated by private attorneys were clearly the major focus of the Committee's attention when drafting this provision. Private attorneys who work with prospective adoptive families must become aware of this provision, and advise their clients to initiate a home study when a possible placement is anticipated.²⁹³

A preplacement home study is also not required when a parent or guardian of a child places a child directly with a relative for purposes of adoption. Simply as a practical matter, a requirement that a home study be completed before the child is transferred to the physical custody of the relative would be virtually impossible to enforce, and preclusion of adoptions in such circumstances would not be appropriate. Kinship adoptions have many advantages for a child whose parents are unable or unwilling to raise the child, and should not be discouraged. By definition, stepparent adoptions also need no "preplacement" home study under normal circumstances, because the child is not "placed" for adoption. The child remains in the home of the custodial parent and stepparent, where the child would otherwise reside if no adoption were contemplated. A home study that would satisfy the criteria of a preplacement home study, however, must be performed during the pendency of both relative²⁹⁴ and stepparent²⁹⁵ adoptions.²⁹⁶

The requirements for the contents of an initial home study²⁹⁷ and the qualifications for the individuals who may perform home studies²⁹⁸ are now set forth in separate statutes. The new Adoption Code makes no substantive changes to these provisions.²⁹⁹

293. A family who is waiting for a specific child should clearly be advised to complete their home study well before the actual due date. Attorneys who facilitate adoptions with some regularity should also consider maintaining a "short list" of families who have completed home studies so that placements can be arranged quickly when a child becomes available on short notice.

294. OKLA. STAT. tit. 10, § 7505-5.1(C) (Supp. 1997) establishes the requirement that a home study be performed during the pendency of the adoption when a preplacement home study is not conducted. This section contains an unfortunate error. The word "preplacement" was inadvertently inserted to describe the home study which must be performed when the adoption is pending. The insertion will create confusion and does not fit the context of the sentence. The intent of the provision is that a home study that fulfills the requirements of Subsection (A) of OKLA. STAT. tit. 10, § 7505-5.3 (Supp. 1997) must be completed if no preplacement home study was performed.

295. Home studies must be performed in stepparent adoptions, unless the court waives the home study requirement upon finding that all of the prerequisites for waiver set forth in OKLA. STAT. tit. 10, § 7505-5.2(B) (Supp. 1997) are satisfied. See *infra* notes 303 to 305 and accompanying text.

296. See OKLA. STAT. tit. 10, §§ 7505-5.1(C), 7505-5.2 (Supp. 1997).

297. See OKLA. STAT. tit. 10, §§ 7505-5.3(A), (B) (Supp. 1997).

298. See OKLA. STAT. tit. 10, § 7505-5.3 (Supp. 1997).

299. The Adoption Law Reform Committee approved a proposed recommendation to remove clergy as a separate category from the list of professionals qualified to perform home studies. Of course, had that recommendation been implemented, clergy who satisfied one of the other criteria would still have been able to

2. Postplacement and Supplemental Home Studies

Whenever a preplacement home study is waived or not required by Section 7505-5.1, a home study satisfying the same criteria must be completed while the adoption action is pending. This postplacement home study must be ordered by the court upon the filing of the petition,³⁰⁰ and must be completed within sixty days from issuance of the order, unless the court extends the deadline.³⁰¹

The only situation in which an adoption may be granted without the completion of a home study is a stepparent adoption in which the court by order specifically waives the requirement. Such a waiver may not be granted, however, unless the court makes three specific findings in the order: (1) that the waiver is in the best interest of the child; (2) that the child's parent and stepparent have been married for at least one year and the child has lived in their home for at least one year; and (3) that the stepparent petitioner has never been convicted of a felony and has never been convicted, nor adjudicated guilty in a juvenile proceeding, of child abuse or neglect or domestic violence, and no protective orders have been issued against the stepparent.³⁰² This is a major departure from prior law, which did not require a home study in any stepparent adoptions.³⁰³ For the Committee, the conviction that home studies are an essential component of good adoption practice made recommendation of even the narrow waiver a difficult decision. A professional home study, while not infallible, provides some assurance that a prospective adoptive parent is suitable and will pose no physical or psychological risk to the child. Nevertheless, the Committee was concerned that the cost of a home study might prevent a step-parent adoption that would be in the child's best interest. Moreover, unlike other types of adoptions, the child is likely to remain in the home of the stepparent for the duration of the marriage of the child's parent to the stepparent, regardless of whether an adoption occurs or not. Thus, the waiver provision attempts to balance these considerations by limiting the court's discretion to waive a home study to situations in which the court specifically finds that waiver is in the child's best interests, the family has some track record of stability (one year), and the stepparent has no record of the commission of a serious crime, or of any crime or juvenile offense involving child abuse or neglect or domestic abuse, or of a protective order issued against the stepparent.³⁰⁴

conduct home studies. The Committee's concern is that, unlike the other categories of professionals eligible to conduct home studies, members of the clergy may or may not have received the specialized training necessary to perform a home study for purposes of adoption. There are no minimal degree or certification requirements in some denominations to be a member of the clergy, and the training received by clergy varies tremendously. The Committee's recommendation in this regard was deleted, however, during the legislative process.

300. Counsel filing a petition for adoption for prospective adoptive parents who have not undergone a home study, either because it was waived for good cause or because the petitioner is a relative or stepparent, should prepare a proposed order for the home study that can be signed by the court when the petition is filed, in order to comply with Section 7505-5.2.

301. See OKLA. STAT. tit. 10, § 7505-5.2(A) (Supp. 1997).

302. See OKLA. STAT. tit. 10, § 7505-5.2(B) (Supp. 1997).

303. See OKLA. STAT. tit. 10, § 60.13(G) (Supp. 1996) (recodified as amended at OKLA. STAT. tit. 10, § 7505-5.4 (Supp. 1997)).

304. See OKLA. STAT. tit. 10, § 7505-5.2(B) (Supp. 1997).

In addition to an initial home study, whether preplacement or postplacement, a supplemental home study must be performed prior to issuance of the final decree, in which the investigator reports on his or her observations of the child in the home of the prospective adoptive family, the availability of the child for adoption, and any other "circumstances or conditions which may have a bearing on the granting of the final decree of adoption."³⁰⁵ Unless the interlocutory order is waived,³⁰⁶ the supplemental home study must be performed after the interlocutory order is granted. Since an interlocutory order will not be granted until the court has had the opportunity to review the initial home study,³⁰⁷ in most cases two reports, the initial home study and a supplemental report, will be required. Only in those cases in which a preplacement home study is not required³⁰⁸ and the interlocutory order is waived would it be possible to combine the components of the initial home study and the supplemental report into one report.

B. Court Appointed Attorneys and Guardians ad Litem for the Child

Section 7505-1.2 creates a statutory right to court appointed counsel for any child who is the subject of a contested proceeding brought pursuant to the Adoption Code,³⁰⁹ and gives the court the discretion to appoint counsel for the child in uncontested proceedings.³¹⁰ A contested proceeding, as defined by the Adoption Code, is one in which an interested party enters an appearance to contest the petition.³¹¹ In many cases the Adoption Code would not mandate the appointment of counsel until the date of the hearing on the petition or application to terminate parental rights or the application for adoption without consent, because that would be the earliest time that the court could determine that the parent or putative father will enter an appearance rather than default. Consequently, under the intended statutory scheme, on those occasions when it becomes apparent on the initial hearing date that counsel must be appointed for the child, the actual hearing would need to be continued to a later date to give counsel for the child the opportunity to prepare. Although the statutory scheme thus may cause some delay, often a contested hearing would need to be rescheduled anyway as the result of the court's docket, and the expense of appointed counsel is avoided in those cases that will not be contested.

This May, however, while the Adoption Code was in the final stages of the legislative process, the Oklahoma Supreme Court recognized a constitutional right to court appointed counsel which may be broader than the statutory right.

305. See OKLA. STAT. tit. 10, § 7505-5.3(C) (Supp. 1997).

306. See OKLA. STAT. tit. 10, § 7505-6.3(B) (Supp. 1997).

307. See OKLA. STAT. tit. 10, § 7505-6.1 (Supp. 1997).

308. See *supra* notes 292 to 297 and accompanying text.

309. This would include an adoption proceeding or a proceeding initiated by a petition to terminate parental rights of a putative father under OKLA. STAT. tit. 10 § 7505-2.1 (Supp. 1997).

310. See OKLA. STAT. tit. 10, § 7505-1.2(A) (Supp. 1997).

311. See OKLA. STAT. tit. 10, § 7501-1.3(5) (Supp. 1997).

In *In re Adoption of K.D.K.*,³¹² the court held that a child has a constitutional right to independent court appointed counsel in proceedings for adoption without consent or termination of parental rights. Although the court's rationale was to provide an attorney to represent the child in a contested proceeding, i.e., to "present testimony and to cross-examine as an independent advocate for the best interests of the child,"³¹³ the literal language of the opinion did not limit appointments to proceedings in which a contesting parent actually enters an appearance.³¹⁴ *K.D.K.* might thus be read broadly by the courts to constitutionally require the appointment of counsel for children in all proceedings to terminate parental rights or to permit adoption without consent, regardless of whether the affected parent enters an appearance or not.

In contested proceedings, in addition to the court appointed attorney that must be provided, Section 7505-1.2(B) of the Adoption Code authorizes the appointment of a guardian ad litem for the child, and requires a guardian ad litem to be appointed if requested by the child or the child's attorney.³¹⁵ The Committee envisioned the role of the child's attorney to be that of advocate for the child, particularly when the child is old enough to express preferences. By contrast, the Committee viewed the role of the guardian ad litem to be that of an independent investigator and advocate for the best interests of the child. The Committee's views in this regard are consistent with the views of scholars who have examined this role division.³¹⁶ The Committee may need to revisit this issue this year in light of the Oklahoma Supreme Court's observation this summer in *K.D.K.*³¹⁷ that the role of the child's attorney is to serve as an independent advocate for the best interests of the child,³¹⁸ although the court may not

312. 940 P.2d 216, 217-18 (Okla. 1997).

313. *Id.* at 218.

314. In *K.D.K.* and the cases cited therein, however, the contesting parents had in fact entered an appearance. *See id.* at 217.

315. *See* OKLA. STAT. tit. 10, § 7505-1.2(B) (Supp. 1997).

316. *See* Alexandra Dylan Lowe, *Parents and Strangers: The Uniform Adoption Act Revisits the Parental Rights Doctrine*, 30 FAM. L. Q. 379, 422 (1996). The author describes the role of a guardian ad litem as an investigator who interviews parents, teachers, and others to assess the child's home life and family dynamics, and who reviews medical and psychological records and evaluates the impartiality and competence of experts who have expressed opinions. Following the investigation, the guardian submits a report to the judge summarizing the guardian's recommendations for placement. The author portrays the attorney for the child as one who is expected to represent the child as a party for the case, serving as an advocate for the child who calls witnesses and crossexamines witnesses at trial on the child's behalf. The author observes that the "guardian ad litem's responsibility is to represent the child's 'best interests' as he or she sees them, which may or may not correspond to the child's wishes." *Id.* at 422 n.176. The child's attorney is expected to represent the child's expressed opinion. *See also* Linda Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L. Q. 53 (1992).

317. 940 P.2d at 217-18. *See supra* note 313 and accompanying text.

318. Section 7505-1.2(B) provides that the guardian ad litem may not be a district attorney or an employee of the district attorney, court, juvenile bureau, or any public agency with duties to or responsibilities for the child. It also creates a rebuttable presumption that the guardian ad litem is acting in good faith and provides that any guardian ad litem found to be acting in good faith is immune from civil liability. The statute guarantees guardians ad litem access to court files and all records and reports relevant to the case, including reports of examinations of the child's parents or custodians, but qualifies this access by providing that it is subject to any protective order regarding identifying information issued in the court's discretion. *See* OKLA. STAT. tit. 10, § 7505-1.2(B). The Committee discussed, as an example of such a protective order, that the court could withhold from the guardian the actual identity of prospective adoptive parents, but provide access to all home studies and other reports concerning them, with the names redacted. *See* OKLA. STAT. tit. 10,

have intended to imply a role division different from the one suggested above.

C. Pleadings and Other Documents

As under prior law, an adoption proceeding is commenced when petitioners file a verified petition for adoption.³¹⁹ In addition to the allegations required by former law,³²⁰ Section 7505-3.1 requires several additional categories of information concerning the consents which are attached or absent,³²¹ any prior adoption petitions that petitioners have ever filed,³²² jurisdictional allegations,³²³ and tribal membership of the child or a parent.³²⁴ An affidavit setting forth the costs expended by the adoptive parents should be attached to the petition, although Section 7505-3.2 permits it to be filed later any time before the final decree.³²⁵

A new statute, Section 7505-6.2,³²⁶ lists the documents that must be filed with the court before the final hearing on the petition for adoption.³²⁷ Al-

§ 7505-1.2(B) cmt. (Supp. 1997).

319. The Adoption Code no longer requires that it be filed in duplicate. *See* OKLA. STAT. tit. 10, § 7505-3.1 (Supp. 1997).

320. *See* OKLA. STAT. tit. 10, § 60.12 (Supp. 1996) (recodified as amended at Okla. Stat. tit. 10, § 7505-3.1 (Supp. 1997)).

321. The name or relationship to the child of anyone who has executed a consent, permanent relinquishment, or extrajudicial consent must be listed in the petition, and the consents or relinquishments must be attached to the petition. In addition, the name or relationship to the child of anyone whose consent is required and the facts or circumstances that excuse their lack of consent must be included. Thus, under the new law, everyone whose consent is necessary must be accounted for in the petition. Former law required only facts which excused the lack of consent of either or both parents. *See* OKLA. STAT. tit. 10, § 7505-3.1 (Supp. 1997).

322. Each petitioner must allege whether that petitioner has ever filed a petition to adopt in any court, and if so, the disposition of the previous petition. This requirement is derived from the UNIF. ADOPTION ACT § 3-304, 9 U.L.A. 45 (Supp. 1997). The intent of this provision is to alert the court to investigate more fully if a prior petition to adopt has been denied on the ground that it would not have been in the best interests of a child to be placed with petitioner.

323. OKLA. STAT. tit. 10, § 7505-3.1 (Supp. 1997) requires that the facts necessary to establish jurisdiction must be alleged in the petition. In addition, a description of any previous court order or litigation concerning custody, visitation, or adoption of the child, and any pending litigation involving the child must be alleged. This information will alert the court if there is any simultaneous proceeding or if another court might have continuing jurisdiction. Allegations regarding the county in which the child is currently residing, the places the child has lived for the past five years, and the names and addresses of the individuals with whom the child lived must also be included. These allegations help determine the presence of two jurisdictional bases, as well as information that might make it easier to determine who is entitled to notice and to object. The petition must also set forth anyone who is not a party to the adoption who has had physical custody or visitation rights with this child.

324. Petitioner must allege, to the best of petitioner's actual knowledge and belief as of the date of filing, whether the child is an Indian Child, as that term is defined by the Oklahoma Indian Child Welfare Act, OKLA. STAT. tit. 10, § 40.2 (1991), and the Federal Indian Child Welfare Act, 25 U.S.C. § 1903 (1994). If the child is a member, the child's known or suspected tribe must be included. When it is known that the child is an Indian child, the allegation to that effect alerts the court that the requirements of the federal and state Indian Child Welfare Acts must be satisfied. When the Indian status is not known, the requirement at least alerts petitioner's attorney and petitioners that this issue must be explored and resolved.

325. *See* OKLA. STAT. tit. 10, § 7505-3.2 (Supp. 1997). *See infra* notes 377 to 394 and accompanying text.

326. OKLA. STAT. tit. 10, § 7505-6.2 (Supp. 1997).

327. The following documents are required: (1) a certified copy of the child's birth certificate or another record of the date and place of the child's birth; (2) each consent, permanent relinquishment, or extrajudicial consent, and accompanying verifications, executed regarding the child; (3) a certified copy of any court order terminating the parental rights of the child's parents or guardian; (4) certified copies of any court orders or

though many of these documents were required under prior law, this compilation was intended to serve as a convenient checklist for the court, to ensure that all necessary documents are in the file and that all prerequisites to entering the final decree have been satisfied.³²⁸

D. Interlocutory and Finalization Procedure

The statutes providing for issuance or waiver of an interlocutory order were reorganized, but no major substantive changes were made. As under prior law,³²⁹ when the court has had the opportunity to review the initial home study, the court may issue an interlocutory decree.³³⁰ Six months after issuance of the interlocutory decree, petitioners may apply for a final decree and schedule a final hearing.³³¹ The interlocutory order and six month waiting period may be waived by the court for an adoption by a relative or stepparent, or if the court finds that waiver is in the best interests of the child. The statute now specifically grants the court the discretion to waive the balance of the six month waiting period as well, when an interlocutory order has been entered and a final decree is sought before the expiration of the six months.³³²

When a final hearing is scheduled, Section 7505-6.3 requires that at least ten days notice of the hearing must be served upon any biological parent whose rights have not been terminated, unless the parent has previously consented, relinquished, or waived notice. In 1995 the Oklahoma Supreme Court determined in *In re Adoption of J.R.M.*³³³ that provision of notice of the final hearing to such parents is constitutionally compelled, even though the court has previously determined that the adoption may proceed without their consent. Notice must also be given to D.H.S. or any agency that has custody of the child or that performed a home study for the adoption.

As under prior law,³³⁴ the petitioners and the child must appear at the fi-

petitions pending in any court proceeding concerning the custody or visitation of the child; (5) copies of all home studies and supplemental reports performed regarding the prospective adoptive family for this adoption; (6) a copy of any agreement with a public agency for adoption subsidy made in connection with this adoption; (7) a written verification from the individual or agency responsible for the preparation of the medical and social history report stating that the prospective adoptive parents have been furnished the report, as required by OKLA. STAT. tit. 10, § 7504-1.2(B)(C) (Supp. 1997); (8) the name and address of any person entitled to receive notice of the adoption; (9) the affidavit of expenditures; (10) any other document or information required by the court. Although the actual medical and social history report is not listed, this was an oversight. It also must be filed with the court prior to finalization, pursuant to OKLA. STAT. tit. 10, § 7504-1.2(D) (Supp. 1997). In addition, any affidavits of nondisclosure that have been signed by birth parents must be filed with the consent or relinquishment, if they were executed at the time that the consent or relinquishment is taken, pursuant to OKLA. STAT. tit. 10, § 7503-2.5 (Supp. 1997). If they are executed by the birth parents in the clerk's office prior to finalization, then it is the birth parents' responsibility to file them with the court. See *id.*

328. If one of the documents is not available, the individual responsible for furnishing the document is required to file an affidavit explaining its absence. See OKLA. STAT. tit. 10, § 7505-6.2(B) (Supp. 1997).

329. See OKLA. STAT. tit. 10, § 60.15 (Supp. 1996) (recodified as amended at Okla. Stat. tit. 10, § 7505-6.1 (Supp. 1997)).

330. See OKLA. STAT. tit. 10, § 7505-6.1 (Supp. 1997).

331. See OKLA. STAT. tit. 10, § 7505-6.3(A) (Supp. 1997).

332. See OKLA. STAT. tit. 10, § 7505-6.3(B) (Supp. 1997).

333. 899 P.2d 1155 (Okla. 1995).

334. See OKLA. STAT. tit. 10, § 60.15 (1991) (recodified as amended at OKLA. STAT. tit. 10, § 7505-6.1 &

nal hearing. The court may enter a final decree if the court finds that the adoption is in the best interests of the child.³³⁵ The legal consequences of a final decree of adoption have not been altered by the Adoption Code.³³⁶

Following finalization, the court clerk will prepare a certificate to be furnished to the State Registrar of Vital Statistics, if the adoptive parents desire to obtain a supplementary birth certificate. The supplementary birth certificate will be in the new name of the adoptee and will list the adoptive parents as the parents. The provisions under former law permitting the substitution of the city and county of residence of the adoptive parents as the location where the child was born, a different hospital as the place of birth, and a different attending physician, have been deleted.³³⁷ These provisions were enacted in a different era, when the prevailing attitude was that an adoption constituted a rebirth,³³⁸ and the birth certificate should reflect the illusion the adoptee was born into the adoptive family. This philosophy is no longer embraced by adoption professionals or the public. Creation of a family by adoption is now acknowledged and celebrated, not treated as something to be hidden.³³⁹

Section 7505-6.6 provides that the State Registrar may prepare a certificate of foreign birth for a child born in a foreign country, a practice that in fact was initiated by the State Registrar's office many years ago. The only other change to the birth certificate procedures is the requirement that affidavits of nondisclosure that have been filed in the action must be forwarded to the State Registrar with the certificate of adoption, and filed in the State Registrar's office with the original certificate of birth.³⁴⁰

E. Appeals and Direct and Collateral Attacks

It has not been uncommon for adoption appeals to reach final resolution in the Oklahoma courts for as long as two or three years after the petition to adopt was originally filed.³⁴¹ The uncertainty and trauma that this delay causes to children and their adoptive and biological families is heartrending. Few matters that come before the civil appellate courts can potentially wreak such devastating consequences.

To address this issue, in 1996 the Legislature enacted amendments to the

7505-6.3 (Supp. 1997)).

335. See OKLA. STAT. tit. 10, § 7505-6.3 (Supp. 1997).

336. See OKLA. STAT. tit. 10, § 60.16 (1991) (recodified as amended at OKLA. STAT. tit. 10, § 7505-6.5 (Supp. 1997)). The only substantive change to the prior statute was to clarify that a decree of adoption does not affect any right or benefit vested before the adoption is finalized.

337. See OKLA. STAT. tit. 10, § 7505-6.6 (Supp. 1997).

338. See JOAN HOLLINGER, ADOPTION LAW AND PRACTICE § 1.04 (1997).

339. See Sanford N. Katz, *Rewriting the Adoption Story*, 5 FAM. ADVOC. 9 (Summer 1982). See also H. David Kirk, *Foreword* to W. FEIGELMAN & A. SILVERMAN, CHOSEN CHILDREN: NEW PATTERNS IN ADOPTIVE RELATIONSHIPS xiv (Greenwood 1983).

340. See OKLA. STAT. tit. 10, § 7505-6.6 (Supp. 1997). For a discussion of an adoptee's right of access to the original certificate of birth, see *infra* notes 412 to 439 and accompanying text.

341. See *In re C.J.S.*, 903 P.2d 304 (Okla. 1995); *In re Adoption of Baby Boy W.*, 831 P.2d 643 (Okla. 1992); *In re Adoption of Baby Boy D.*, 742 P.2d 1059 (Okla. 1987); *In re Adoption of Baby Girl M.*, 942 P.2d 235 (Okla. Ct. App. 1997); *In re Adoption of D.R.W.*, 875 P.2d 433 (Okla. Ct. App. 1994).

former Oklahoma Adoption Act that shortened the normal civil appellate deadlines and called for expedited appeals in actions concerning the adoption of a child or the termination of parental rights for adoption purposes.³⁴² The Oklahoma Supreme Court cooperated fully, amending the Oklahoma Supreme Court Rules, effective January 1, 1997, to incorporate these new deadlines and to shorten an additional time period. All of these changes are now codified in Section 7505-7.1 of the Adoption Code.³⁴³

Unlike other civil appeals, in appeals concerning adoptions or termination of parental rights for adoption purposes the appellant's designation of record must be filed in the trial court within ten days after the date of the judgment, and appellee's counter designation must be filed in the trial court ten days after appellant's designation of record is filed.³⁴⁴ The petition in error, as in other civil cases,³⁴⁵ must be filed in the Supreme Court within thirty days of the filing of the order, judgment, or decree from which the appeal is taken, and the response to the petition in error must be filed within 20 days of filing the petition in error.³⁴⁶ The record on appeal must be completed within thirty days from the filing of the petition in error,³⁴⁷ which is substantially earlier than the deadline for general civil appeals.³⁴⁸

Although failure to advance costs for the transcript preparation is normally grounds for dismissal of a civil appeal,³⁴⁹ the U.S. Supreme Court ruled this past December in *M.L.B. v. S.L.J.*³⁵⁰ that a state may not deny appellate review of a judgment terminating the parental rights of an indigent parent in an adoption proceeding because the parent is unable to pay the costs of the record preparation. The Court determined that when appellate review is afforded generally, Due Process and Equal Protection prohibit denial of review on the basis of a parent's poverty, due to the fundamental nature of the rights at stake.³⁵¹

The briefing schedule is also accelerated. Appellant's brief in chief must be filed within twenty days after the Notice of Completion of Record is filed with the Supreme Court Clerk. Appellee's answer brief is due fifteen days after appellant's brief in chief is filed. Appellant's reply must be filed within ten days after Appellee's answer brief is filed.³⁵² If all deadlines are met and none

342. These amendments to former OKLA. STAT. tit. 10, § 60.19 (Supp. 1996) were proposed by the Adoption Law Reform Committee as part of H.B. 2975.

343. See OKLA. STAT. tit. 10, § 7505.7-1 (Supp. 1997).

344. OKLA. STAT. tit. 10, § 7505-7.1(B) (Supp. 1997); OKLA. SUP. CT. RULE 1.28(b)(4). Both of these deadlines are earlier than the normal civil deadlines, which require the designation of record to be filed by the appellant concurrently with or prior to filing the petition in error in the trial court. OKLA. SUP. CT. RULE 1.28(a), and appellee's counter designation of record to be filed within 20 days after appellant's designation of record is filed. OKLA. SUP. CT. RULE 1.28(c).

345. See OKLA. STAT. tit. 12, § 990A (Supp. 1996); OKLA. SUP. CT. RULE 1.21(a) (general deadline for filing petition in error in civil appeals); OKLA. SUP. CT. RULE 1.25(c) (deadline for response to petition in error in civil appeals).

346. See OKLA. STAT. tit. 10, § 7505-7.1(C) (Supp. 1997).

347. See OKLA. STAT. tit. 10, § 7505-7.1(C) (Supp. 1997); OKLA. SUP. CT. RULE 1.34(f).

348. See OKLA. SUP. CT. RULE 1.34(a) (six months from date of judgment or order appealed).

349. See OKLA. SUP. CT. RULE 1.28 (e).

350. 117 S. Ct. 555, 570 (1996).

351. For further discussion of *M.L.B.*, see Larry Catá Backer, 33 TULSA L. J. 135 (1997).

352. See OKLA. STAT. tit. 10, § 7505-7.1(D) (Supp. 1997); OKLA. SUP. CT. RULE 1.10(c)(4). The general

are extended, an appeal could be through the briefing stage and ready for resolution within 105 days from the date that the judgment or order from which the appeal is taken is filed. Although the deadline for ultimate resolution cannot be legislated, Section 7505-7.1(E) suggests that adoption appeals should be given priority and expedited by the Supreme Court.

The pendency of an appeal does not suspend the order of the district court regarding the child, nor does it have the effect of removing the child from the custody of the individual or agency with whom custody has been placed by the district court order, unless the Oklahoma Supreme Court specifically orders a custody change.³⁵³

Section 7505-7.2 recodifies the time limitations for direct and collateral attacks on adoption decrees that existed under prior law, with only one clarification.³⁵⁴ Consent to adoption or permanent relinquishment can be set aside even on direct or collateral attack, if the court finds clear and convincing evidence that the consent or relinquishment was obtained by fraud and the challenge is raised before the adoption decree is final or within three months of the discovery of the fraud, whichever is later. Creation of a discovery of fraud exception to the limitations statute is rooted in decisions of the Oklahoma Supreme Court, which interpreted a former version of the limitations statute to mean that the statute of limitation did not begin to run until the birth parent knew, or with reasonable diligence should have known about the fraud practiced upon the parent.³⁵⁵

F. Best Interests Hearing

If a petition for adoption is denied, Section 7505-6.4 requires that a separate custody hearing be scheduled to determine whom should be awarded legal and physical custody of the child.³⁵⁶ A similar provision is contained in Section 7505-2.1(D)(3), as discussed above,³⁵⁷ when a petition to terminate the parental rights of a putative father is denied. Section 7505-7.2 suggests that a similar result is intended when the court considers a direct or collateral attack upon an adoption decree.³⁵⁸

briefing schedule for civil appeals is that the Appellant's brief in chief must be filed within sixty days of the date on which the Notice of Completion of the Record is filed; the Appellee's answer brief is due forty days thereafter; and Appellant's reply brief must be filed twenty days after the filing of the Appellee's answer brief. *See* OKLA. SUP. CT. RULE 1.10(a).

353. *See* OKLA. STAT. tit. 10, § 7505-7.2(B) (Supp. 1997).

354. *See* OKLA. STAT. tit. 10, § 7505-7.2(A)(1) (Supp. 1997) (decree of termination of parental rights may not be challenged more than three months after interlocutory or final decree is rendered; no direct or collateral attack may be brought upon an adoption decree more than one year after entry of the decree).

355. *See* *Wade v. Geren*, 743 P.2d 1070 (Okla. 1987); *In re Adoption of Lori Gay*, 589 P.2d 217 (Okla. 1978).

356. *See* OKLA. STAT. tit. 10, § 7505-6.4(B) (Supp. 1997).

357. *See supra* notes 257-261, 263-264 and accompanying text.

358. OKLA. STAT. tit. 10, § 7505-7.2(C) (Supp. 1997) merely recodifies former OKLA. STAT. tit. 10, § 60.18b(D) (Supp. 1996), and was not part of legislation proposed by the Adoption Law Reform Committee. The subsection provides that in any challenge by direct or collateral attack, "the court shall not enter a decision which is contrary to the best interests of the adopted minor." OKLA. STAT. tit. 10, § 7505-7.2(C).

Public support for creation of a best interests hearing following a failed adoption swelled after the media attention given to the "Baby Jessica"³⁵⁹ case.³⁶⁰ The dissenting justice in the Michigan Supreme Court's opinion in that case, argued forcefully that the Michigan courts should resolve the custody issue through a best interests hearing.³⁶¹ Given the interstate jurisdictional issues involved in that case, Oklahoma's jurisdictional statute, Section 7502-1.1³⁶² and the UCCJA³⁶³ would preclude an Oklahoma court from entertaining a best interests hearing following an adoption litigated in another state under the precise circumstances of "Baby Jessica," even under the new Code. Nevertheless, in adoptions filed originally in Oklahoma with proper jurisdiction, the availability of a best interests hearing would potentially give prospective adoptive parents, particularly those with whom a child had resided for a lengthy period, as well as either biological parent,³⁶⁴ the opportunity to seek custody.³⁶⁵

A similar provision in the 1994 UAA³⁶⁶ received strong praise from some, who view it as an opportunity to save a child from the loss of "established ties" with the child's prospective adoptive parents.³⁶⁷ As one author forcefully argued, "[e]ven if the court finds that no grounds exist for terminating a birth parent's rights, a child is not a trophy to be handed over to the prevailing birth parent without further thought."³⁶⁸ A countervailing concern, however, is that the availability of the best interests hearing may motivate some adoptive parents to litigate to the "bitter end" in the hope that even if they lose, ultimately a court will grant them custody because the child has bonded to them in the intervening years. Certainly the DeBoer's decision to attempt relitigation in another state after Iowa denied them the decree resulted in Jessica's transfer at age two and one half, one and a half years after the Iowa Supreme Court decision.³⁶⁹ If the availability of the best interests hearing has this unintended effect, it will be most unfortunate.

The consequences of the best interests hearing remain to be seen. Certainly, it makes sense to create a separate hearing, with notice to all interested

359. See *In re Clausen*, 502 N.W.2d 649 (Mich. 1993).

360. See Deborah Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 968-69 (1994) (citing several media sources, including a USA/Gallop poll, that indicate the overwhelming majority of the public believed the courts erred in returning Jessica to the Schmidts, and prompted a public outcry to amend adoption laws to prevent similar outcomes).

361. See *In re Clausen*, 502 N.W.2d at 684-687.

362. See *supra* notes 35-120 and accompanying text.

363. OKLA. STAT. tit. 43, § 516 (1991).

364. OKLA. STAT. tit. 10, § 7505-6.4(B) (Supp. 1997) (requiring that the prospective adoptive parents and each parent of the child be given 15 days notice of the hearing, and that any biological parent who signed a consent or permanent relinquishment must be served in the same manner as civil summons, to ensure that those parents, who may no longer be involved with the litigation, receive notice).

365. In a few other jurisdictions, courts have been willing to consider an award of custody to unsuccessful prospective adoptive parents. See *supra* note 259.

366. Unif. Adoption Act § 3-704, 9 U.L.A. 61 (Supp. 1997).

367. See Lowe, *supra* note 317, at 420-21.

368. See Lowe, *supra* note 317, at 419.

369. Forman, *supra* note 361, at 1042.

parties, at which the court can consider carefully the important issues of custody and potential visitation with the child. Whether it will have the effect some advocates intended, i.e., frequent custody awards to prospective adoptive parents who have lost their bid to adopt, however, is uncertain. As the reporter for the 1994 UAA queried, "in a contest between a thwarted birth parent and a custodial adoptive parent, is the child better off remaining with the adoptive parent who is a biological stranger, or being transferred to the biological parent who is a psychological stranger? How are short-run as opposed to long-term interests to be weighed?"³⁷⁰ Judges applying the discretionary best interest standard may have differing views on this issue. Moreover, it is not clear how Section 7505-6.4's directive that custody at these hearings is to be decided according to the best interests of the child, will be interpreted by the Oklahoma courts. Section 7505-6.4 could conceivably be read in conjunction with OKLA. STAT. tit. 10, § 21.1,³⁷¹ which provides that custody is to be awarded in an order of preference, "in the best interests of the child," listing parents as the first preference and "persons in whose home the child has been living" as the fifth preference. Nor is it clear whether Oklahoma courts will apply prior precedent requiring a showing that a parent is affirmatively unfit before awarding custody to a parent over a nonparent.³⁷² Such an interpretation would appear to be at odds with the legislative intent that the court should consider the potential for detriment to the child if the child is removed from a home where the child has developed a significant bond.³⁷³ It is also unclear, in a contest between a putative father or a prospective adoptive parent and a birth mother who decides to seek custody once the planned adoption has failed, exactly how the best interests standard will interact with Okla. Stat. tit. 10, § 6,³⁷⁴ which provides that the mother of a child born out of wedlock is entitled to custody.³⁷⁵

370. Hollinger, *supra* note 1, at 356.

371. OKLA. STAT. tit. 10, § 21.1(A) (1991).

372. *See McDonald v. Wrigley*, 870 P.2d 777 (Okla. 1994).

373. One scholar, anticipating this problem with the application of the parallel 1994 UAA provision, observed:

The purpose and intent of section 3-704 would clearly be violated if a court were to read into that provision the traditional presumption that the child's best interests lie in being placed in the custody of the biological parent. Rather, section 3-704 plainly contemplates that the court will conduct a meaningful factual inquiry and will consider, among other things, the relationship between the child's birth parents, the length of time the child has been out of their custody, the recommendations of the child's guardian ad litem, and the willingness of the would-be adopters to serve as the child's legal guardians even though an adoption cannot be granted. However, the Act does not prejudge the outcome of such a contest. If the child has not developed a significant bond with the prospective adoptive family, the Act plainly permits the transfer of the child's custody to the birth parent.

See Lowe, supra note 317, at 421.

374. OKLA. STAT. tit. 10, § 6 (1991).

375. The argument could be made that OKLA. STAT. tit. 10, § 7505-6.4 (Supp. 1997), as the more specific statute addressed to this precise type of custody dispute, should prevail over the more general statutes of OKLA. STAT. tit. 10 § 6 (1991) and OKLA. STAT. tit. 10, § 21.1 (1991).

G. Costs and Expenses

1. Limitations on Expenses and Reporting

The list of permissible adoption-related costs and expenses is now found in Section 7505-3.2 of the Adoption Code.³⁷⁶ Reasonable attorney fees and court costs, reasonable medical expenses for the birth mother and child, reasonable home study expenses, reasonable agency fees, and reasonable adoption counseling expenses remain permissible expenses, with two caveats.³⁷⁷ Expenses for counseling occurring more than six months after the birth are precluded.³⁷⁸ The intent is to enable birth parents to seek needed counseling after the birth at the expense of the adoptive parents, but not to create indefinite liability.³⁷⁹ In addition, all court approved expenses must be commensurate with customary fees for similar services rendered by someone with equivalent experience and training.³⁸⁰

In the case of extraordinary need, reasonable expenses for necessities of a birth mother, incurred during or as a result of pregnancy, may be paid.³⁸¹ This new provision helps agencies and prospective adoptive parents meet the critical needs of birth mothers.³⁸² No dollar limitation was set, for fear the statutory maximum would quickly become a standard expectation. To avoid this, the statute specifies that living expenses are to be paid only in cases of extraordinary need and may not cover expenses incurred more than two months after placement of the child.³⁸³ Nor can payments be made for expenses which were incurred before the birth mother contacted the agency or attorney about the adoptive placement.³⁸⁴ All payments must be paid directly to a third-party provider of services or goods, rather than directly to a birth parent, unless the court orders otherwise.³⁸⁵ This reduces the risk that payments will be used improperly, as well as the risk that payments would be sought from multiple agencies or adoptive parents by the same birth parent.³⁸⁶

Reasonable costs for transportation of a birth mother or child for trips related to medical care or the adoption itself are also now permitted.³⁸⁷ In addition, expenses legally required by a governmental entity are now specifically included.³⁸⁸ Both foreign governments and the Immigration and Naturalization Service of our own government, for example, charge fees in international adop-

376. OKLA. STAT. tit. 10, § 7505-3.2(B)(D) (Supp. 1997). The list was formerly found in OKLA. STAT. tit. 21, § 866 (1991) (concerning the crime of trafficking in children).

377. See OKLA. STAT. tit. 10, § 7505-3.2(B)(1) (Supp. 1997).

378. See OKLA. STAT. tit. 10, § 7505-3.2(B)(1)(c) (Supp. 1997).

379. See OKLA. STAT. tit. 10, § 7505-3.2 cmt. (Supp. 1997).

380. See OKLA. STAT. tit. 10, § 7505-3.2(B)(2) (Supp. 1997).

381. See OKLA. STAT. tit. 10, § 7505-3.2(B)(1)(e) (Supp. 1997).

382. See OKLA. STAT. tit. 10 § 7505-3.2(B) cmt. (Supp. 1997).

383. See *id.*

384. See OKLA. STAT. tit. 10, §§ 7505-3.2(B)(3), 7505-3.2(B)(4) (Supp. 1997).

385. See OKLA. STAT. tit. 10, § 7505-3.2(B)(5) (Supp. 1997).

386. See OKLA. STAT. tit. 10, § 7505-3.2 cmt. (Supp. 1997).

387. See OKLA. STAT. tit. 10, § 7505-3.2(B)(1)(f) (Supp. 1997).

388. See OKLA. STAT. tit. 10, § 7505-3.2(B)(1)(h) (Supp. 1997).

tions that might not otherwise fall within the category of reasonable attorney fees and court costs.³⁸⁹ The court may permit additional costs or extend the time periods, beyond those provided above, based on unusual circumstances or need.³⁹⁰

Prior to finalization, an affidavit disclosing all adoption-related costs expended or expected to be expended must be submitted to the court.³⁹¹ The court may not grant the decree unless the affidavit has been reviewed. The court may disapprove any unreasonable or illegal expenditures, and could even order reimbursement.³⁹²

Any expenses paid to or on behalf of a birth parent exceeding \$500 require prior court approval.³⁹³ If approval is necessary before an adoption petition is filed, a petition may be filed in the district court in which the adoption will be filed requesting an order for authorization. The court must hear the petition for authorization within ten days of filing it. Although the filing fee will be the same as for filing an adoption, if an adoption is later filed it can be filed with an amended petition in the same case and no additional costs will be required.

A new ground for prosecution for trafficking in children was also added to OKLA. STAT. tit. 21, § 866,³⁹⁴ which prohibits the receipt of money for adoption related expenses by a parent who at the time of receipt had no intent to consent to an eventual adoption.

2. Prohibition on Retention of Child by Hospital

In the past Oklahoma hospitals have frequently refused to release infants who have been placed for adoption until the prospective adoptive parent or agency actually paid the hospital bill. This practice frequently forced adoptive parents or agencies to pay large sums before either biological parent had signed a consent or relinquishment. If the birth mother decided not to proceed with the adoption, or if the putative father declined to consent and objected, the prospective adopted parent or agency was thus forced to pay substantial sums for a child they would never be able to adopt or place for adoption. The parents or agencies would often be forced to wait months before the hospitals would return their money; in other instances the funds were never returned. These practices thus created financial hardship for agencies and for prospective adoptive parents, who found it financially difficult to try again to adopt. They may also have resulted in pressure, subtle or not so subtle, for a birth parent to sign a consent or relinquishment before the infant leaves the hospital. This is particularly inappropriate since consents and relinquishments are now irrevocable.³⁹⁵ Adoptive parents should undertake liability for birth related expenses that are

389. See OKLA. STAT. tit. 10, § 7505-3.2(B) cmt. (Supp. 1997).

390. See OKLA. STAT. tit. 10, § 7505-3.2(B)(4) (Supp. 1997).

391. See OKLA. STAT. tit. 10, § 7505-3.2(C) (Supp. 1997).

392. See OKLA. STAT. tit. 10, § 7505-3.2(C)(4) (Supp. 1997).

393. See OKLA. STAT. tit. 10, § 7505-3.2(D) (Supp. 1997).

394. OKLA. STAT. tit. 21, § 866 (1991).

395. See OKLA. STAT. tit. 10, § 7503-2.7 (Supp. 1997).

not otherwise covered by insurance, but only for children whom they will be permitted to adopt, and not for children whom they must return to biological parents shortly after birth.

To abolish this practice, Section 7509-1.1 of the Adoption Code³⁹⁶ unequivocally states that it is the policy of this state that an infant who will be placed for adoption shall be discharged from a medical facility as soon after birth as is medically prudent, in order to facilitate the placement that has been arranged. It is unlawful for a physician, hospital, or any other individual to condition discharge of an infant from a medical facility upon payment of any expense.³⁹⁷ Implicit in this restriction is a prohibition against conditioning discharge upon the execution of any documents assuming liability for the payment of any expenses. The medical facility is directed by the statute to release an infant to the person or agency designated upon receipt of a written authorization by the birth mother.

Violations of this prohibition subject the hospital or individual to civil liability for compensatory and punitive damages, injunctive remedies, attorney fees and costs.³⁹⁸ In addition, a violation constitutes grounds for a state licensing board or agency to suspend the license or charter to practice or conduct business of any violator.³⁹⁹

3. Tax Exemptions

Beginning in tax year 1997, adoptive parents may be eligible for a federal tax credit of up to \$5000 per eligible child for qualified adoption expenses, or up to \$6000 for expenses related to adoption of a special needs child.⁴⁰⁰ The credit may be taken for domestic adoptions during the earlier of the year after the expenses were paid or incurred, or the year the adoption becomes final. For adoptions of a child born outside of the United States, the credit can only be taken in the year the adoption becomes final. The credit phases out for taxpayers who have a Modified Adjusted Gross Income between \$75,000 and \$115,000.⁴⁰¹ After 2001, the adoption credit will apply only to an adoption of a child with special needs and will not apply to an adoption of a foreign child.⁴⁰² This tax credit does not apply to stepparent adoptions.⁴⁰³

Recent amendments to Oklahoma tax law permit an income tax deduction of up to \$10,000 on the Oklahoma Income tax return for certain nonrecurring adoption expenses.⁴⁰⁴ Specifically excluded from expenses eligible for the de-

396. OKLA. STAT. tit. 10, § 7509-1.1 (Supp. 1997).

397. See OKLA. STAT. tit. 10, § 7509-1.1(B) (Supp. 1997).

398. See OKLA. STAT. tit. 10, § 7509-1.1(C) (Supp. 1997).

399. See *id.*

400. Internal Revenue Service, *U.S. Dep't Of Treasurer, Publication 968 Tax Benefits for Adoption 4* (1997).

401. SCOTT PILGRIM, RECENT CHANGES IN FEDERAL AND OKLAHOMA TAX LAWS AFFECTING ADOPTION 2-3 (1997).

402. See Pub. No. 968, *supra* note 401, at 1.

403. See Pub. No. 968, *supra* note 401, at 1.

404. See OKLA. STAT. tit. 68, § 2358 (Supp. 1996).

duction are attorney fees incurred for the purpose of litigating a contested adoption.⁴⁰⁵

VI. DISCLOSURE OF IDENTIFYING AND NONIDENTIFYING INFORMATION

Perhaps no issue related to adoption has generated more controversy in recent decades than the postadoption disclosure of identifying and nonidentifying medical and social information. The topic has been vigorously debated in legislative bodies,⁴⁰⁶ among adoption experts and lobbying groups,⁴⁰⁷ and in the media.⁴⁰⁸ Oklahoma has been no exception. At least eighty to ninety percent of the comments on adoption law reform received by the Committee at the two public meetings held in the fall of 1996 were made by adult adoptees, and their birth and adoptive relatives, who called for greater access to identifying information regarding the adoptee's birth families and medical history. Virtually all states have modified their statutes regarding the disclosure of health information in recent decades⁴⁰⁹ and created mutual con-

405. See *id.*

406. Professor Joan Hollinger, Reporter for the 1994 UAA, commented that during discussions of the early drafts of this statute, provisions related to the disclosure of medical information prompted a great deal of discussion and divergent views. Telephone Interview with Joan Hollinger, Reporter for 1994 Uniform Adoption Act (Nov. 5, 1990). See Hollinger, *supra* note 1, at 377 (Reporter for 1994 UAA describes NCCUSL's discussions of the disclosure of identifying information as "bitterly contested"); *Matter of Birth and Rights*, CHI. TRIB., April 21, 1997, at 12 (fierce controversy in Illinois legislature over bill that would open past and future adoption records to adult adoptees); Andrew Park, *Adoptees Seek Access to Genetic History*, NEWS & OBSERVER RALEIGH, N.C., June 20, 1997, at A1 (bill establishing mutual consent registry foundering in North Carolina Legislature for third legislative session in a row); Tennenbaum, *supra* note 1, at 340 (ABA Liaison to NCCUSL 1994 UAA Committee observes that the most controversial aspects of the 1994 UAA were the confidentiality provisions).

407. See Hollinger, *supra* note 339, at 13-9 to 13-11 & n.24, 28 (citing authorities with opposing views on disclosure); Hollinger, *supra* note 339, at 13-13 (Supp. 1997) (American Adoption Congress, Concerned United Birthparents, Donor Offspring, and thousands of individual birth parents, adult adoptees, and adoptive parents, joined by a growing number of state legislators, are working for legislation that would grant adult adoptees access to identifying information, while "controversy about psychosocial effects of consensual or mandatory disclosure of identifying information rages at conferences of adoption specialists . . ."); Hollinger, *supra* note 1, at 347, n.5 (National Council for Adoption, a lobbying organization for adoption agencies, remains committed to sealed adoption records and anonymity between birth and adoptive families).

408. See e.g., *Adoption Bill Backers Persevere*, NEWS AND OBSERVER, June 26, 1997, at A3 (frustration over North Carolina's failure to enact registry law); Sara Feigenhotz, *Adoptees' Needs*, CHI. TRIB., April 12, 1997, at 10 (legislator who is adult adoptee defends her open records bill); Laura Frank, *Women's Choices Might Be Swayed by Open Records*, THE TENNESSEAN, August 19, 1996, at 1A (summarizing arguments for and against open records); Maureen Hart, *Another Voice in the Adoption Triangle Seeks a Hearing*, CHI. TRIB., March 27, 1997, at 1 (adult adoptee opposes open records bill); *Matter of Birth and Rights*, CHI. TRIB., April 21, 1997, at 12 (editorial opposing open records bill); Park, *supra* note 407 at A1 (reporting reaction to failure of North Carolina registry bill); Bonnie Miller Rubin, *Opposition Forces Cite Mom's Privacy, State Bill Would Let Adult Adoptees Fill in Missing Parts of Their History*, CHI. TRIB., March 17, 1997, at 1 (summarizing pros and cons of open records); Gretchen Schultert, *Adoption Reunions Too Restrictive*, CHI. TRIB., May 9, 1997, at 26 (adoption professionals supportive of open records for future adoptions, not past); Deborah Schwarz, *Adoptee Fears 'Draconian' Bill*, MORNING CALL, April 16, 1997, at A18 (adult adoptee opposes Pennsylvania bill that would criminalize "searching"); Steven R. White, *For Open Adoption*, CHI. TRIB., April 26, 1997, at 24 (adoptive parent writes in favor of open records). See also HOLLINGER, *supra* note 339, at 13-12, n. 29 (Supp. 1997).

409. See D. Marianne Brower Blair, *The Uniform Adoption Act's Health Disclosure Provisions: A Model That Should Not Be Overlooked*, 30 FAM. L.Q. 427, 479-80 (1996) (Appendix A; list of health disclosure statutes by state); D. Marianne Brower Blair, *Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health-related Information in Adoption*, 70 N.C. L. REV. 681 (1992) (overview of

sent registries or other search mechanisms, and several have debated and/or enacted legislation permitting greater disclosure of identifying information.⁴¹⁰

The Oklahoma Legislature and Adoption Law Reform Committee devoted more time to these issues than any other area of reform, striving to balance the needs of adult adoptees who desire information regarding their heritage with the privacy interests of birth parents. The outcome was legislation that (1) permits those adopted in the future to obtain access to their original birth certificates as adults, absent a written veto by a birth parent; (2) creates a statewide mutual consent registry and confidential intermediary search program to assist all adoptees to communicate with their families of origin, measures intended to address the needs of those adopted in the past; and (3) revises the former statutes related to the collection and disclosure of medical and social history to intensify collection efforts and facilitate disclosure, under appropriate circumstances, to adoptees and their birth and adoptive families.

A. *Disclosure of Birth Certificates*

Beginning in the 1920s, a movement led by adoption professionals prompted the vast majority of states to enact confidentiality laws sealing adoption records from both the public and the parties involved, i.e., the adoptees, their birth parents, and their adoptive parents.⁴¹¹ Rejecting the prior custom permitting adoptive placements to be handled informally by birth parents and adopters who often knew each other,⁴¹² adoption professionals in the early twentieth century favored placements facilitated by agencies, following preplacement investigations of prospective adoptive parents, in which anonymity was maintained between birth and adoptive parents. Proponents of anonymity argued that birth mothers and adoptees were protected from stigmatization, bonding was facilitated between adoptive parents and the child, and all parties were insulated from unwanted interference in their lives.⁴¹³

statutes governing disclosure of nonidentifying information).

410. See HOLLINGER, *supra* note 339, at Appendix 13-A, 77 (Supp. 1997) (listing states with Mutual Consent Registries (19), states that release identifying information without a formal registry (6), states with Confidential Intermediary Services (19), and states with access to birth certificates upon request from adult adoptees (4)). Since the Appendix was updated, it appears that at least two more states allow adult adoptees a right to identifying information under certain conditions. See IND. CODE ANN. §§ 31-19-25-2, 31-19-25-3 (West 1997); Va. Code Ann. § 63.1-236.01 (1995). See also *Matters of Birth and Rights*, CHI. TRIB., April 21, 1997, at 12 (editorial reporting debate in Ill. legislature over bill that would open adoption records, past and present).

411. See HOLLINGER, *supra* note 339, §13.01 [1][b] at 13-5 to 13-6.

412. See HOLLINGER, *supra* note 339, §13.01 [1][b] at 13-5 to 13-6. Prior to the 1920s, secrecy was not the norm. In the early nineteenth century, adoptions were performed by private agreement, similar to a conveyance of real estate, that was authenticated by making a public record and, in some cases, undergoing a name change proceeding. See Ruth-Arlene W. Howe, *Adoption Practice, Issues, & Laws 1958-1983*, 17 FAM. L.Q. 173, 175-76 (1983); Sanford N. Katz, *Rewriting the Adoption Story*, 5 FAM. ADVOC. 9 (1982). Massachusetts passed the first statute establishing judicial supervision over adoption in 1851. *Id.* Prior to the 1920's, it was a common practice for adoptive parents to be chosen by the birth mother's family, and for the birth mother to stay with the adoptive family during pregnancy. In fact, newspapers routinely reported details of adoption proceedings during the late nineteenth century. See LINCOLN CAPLAN, AN OPEN ADOPTION 85 (1990). See also HOLLINGER, *supra* note 339, §§ 1.03[4], 13.01[1][b].

413. HOLLINGER, *supra* note 339, at § 13.01[1][b].

In recent decades the sealing of records from the adult adoptees themselves has come under vigorous attack. Although not all adult adoptees desire a reunion,⁴¹⁴ many assert a right and a compelling psychological need for access to information concerning their heritage, including knowledge of the identity of their birth parents.⁴¹⁵ Of particular importance to them is information concerning medical history that is unavailable in records of the older adoptions, and can only be obtained directly from birth relatives.⁴¹⁶ Moreover, as attitudes towards premarital pregnancy and adoption have changed, the majority of birth parents and adoptive parents now support opening adoption records to adult adoptees.⁴¹⁷

Nevertheless, proposals to open past records encounter sincere concern that taking such a step would infringe on the privacy rights of birth parents who fervently desire that their privacy be protected. Many argue that opening past records would renege on a promise of confidentiality that was made to these parents by the state many years ago.⁴¹⁸ Similarly, the proposal that future re-

414. Estimates of the percentage of adoptees who wish to learn the identities of their birth parents vary. See HOLLINGER, *supra* note 339, at § 13.01[1][b] n.28 (citing National Committee for Adoption, *Adoption Factbook 66* (1985) (2%) and M.A. Jones, *The Sealed Adoption Record Controversy: A Survey of Agency Policy, Practice and Opinions*, CWLA Research Center (1976) (40%)). See also, HOLLINGER *supra* note 339 at § 13.01[1][c] n.28 (reporting on results of 1988-89 survey by Maine Task Force on Adoption which found that only 5% of the 164 adoptees who responded did not want to be found); Melissa Fletcher Stoeltje, *Adopted Teens Seek Answers*, HOUS. CHRON., May 28, 1997, at 1 (reporting that 65% of adopted adolescents say they want to meet their birth parents one day). Cf. Hart, *supra* note 409, at 1 (adult adoptee writes in opposition to open records law).

415. See HOLLINGER, *supra* note 339, at § 13.01[1][c] (reporting on research describing identity crisis of some adopted adolescents and young adults that is manifested by social and psychological dysfunction for a few, and a distinctive version of the normal curiosity about one's origins for most that is characteristic of attaining psychological maturity); H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHOL. 133, 133-41 (1964) (describing state of confusion and uncertainty in adoptees who become obsessed with questions about their biological roots). See also Bruce Dodd, *The Missing 'Peace' Should We Continue to Keep Adoption Records Secret*, CHI. TRIB., Apr. 18, 1997, at 29 ("I learned while doing these stories that for some children and parents in adoption, a huge emptiness engulfs them as they grow older. Sometimes it hits the adoptees when they have children of their own. Sometimes it hits the parents when they grow up, get married. 'We're walking around with dual identities, one of which we're prohibited from knowing.'" One searcher, an adult adoptee who is an Illinois state legislator, stated "Do I have guilt about breaking the law and lying? When the law lies to me? Absolutely not. Get the handcuffs out. I have no guilt. I have no guilt. The compelling need to do this outweighs any guilt."); Rubin, *supra* note 409, at 1 (quoting an adult adoptee, "I was adopted as an infant, I had nothing to do with the contract written about me. Now that I'm an adult, why should I be bound by agreements that I did not participate in?").

416. Recent changes to adoption laws requiring collection of medical history are insufficiently comprehensive and too late to assist adult adoptees and adolescents. See, Blair, *supra* note 410 at 695, 732-53 (observing reform of health disclosure laws began in 1980s and commenting on deficiencies in these statutes); Feigenholtz, *supra* note 409, at 10 ("In the next century genetic information will be the most powerful tool to prevent or cure diseases, from cancer to Alzheimer's disease. Adoptive families must recognize the compelling need their adult children have for this information."); Park, *supra* note 407, at A1 (reporting on adult adoptee who discovered history of deadly cardiac disease in his biological family that was critical to his own medical care); Schwarz, *supra* note 409, at A18 (adult adoptee learned through search that every female on both sides of her family has suffered or died from breast cancer, information she credits with saving her life).

417. See HOLLINGER, *supra* note 339, § 13.01 [1][c] n.28 at 13-11 (Supp. 1997) (reporting on 1988-89 survey by Maine Task Force on Adoption that indicated that nearly all of the 130 birth parents who responded were willing to be found, and only 2% of adoptive parents who responded opposed reunions between their children and their children's birth parents); Rubin, *supra* note 409, at 1 (supporters of open records and foes both concede that only a small percentage of birth parents do not want to be found); White, *supra* note 409, at 24 (commentary by adoptive parent favoring open records).

418. See *Matters of Birth and Rights*, *supra* note 409, at 12; Dodd, *supra* note 416, at 29; Frank, *supra* note 408, at 1A (President of adoption agency opposing open records bill reports calls from two dozen clients

ords be made available to adult adoptees without exception prompted concern by some Committee members and legislators that some adoptions would be deterred⁴¹⁹ and that the privacy of some birth parents who oppose disclosure could still be endangered by the "proverbial knock at the door," threatening their future relationships or reputation.⁴²⁰

The resolution reached by the Oklahoma Legislature and the Committee is to permit adults adopted after November 1, 1997, the effective date of the Adoption Code, to obtain an uncertified copy of their birth certificate from the State Registrar of Vital Statistics, if three conditions are met.⁴²¹ First, the adult adoptee must submit satisfactory proof of identity to the State Registrar.⁴²² Second, the adoptee must submit an affidavit declaring that the adoptee has no biological sibling under the age of eighteen who is also adopted and whose location is known to the adoptee seeking the birth certificate.⁴²³ This requirement was motivated by a concern that information about birth parents could reach younger adopted siblings who have not yet reached adulthood and might not be emotionally prepared for the information or its consequences. Third, information will not be released concerning a biological parent who has filed an unrevoked affidavit of nondisclosure.⁴²⁴

Birth parents who consent or relinquish before a judge will be advised by the judge that the birth certificate will be available to an adult adoptee, unless an affidavit of nondisclosure is executed by the parent and not thereafter revoked. At the consent or relinquishment hearing, the birth parent will be given the opportunity to execute an affidavit of nondisclosure, if the birth parent desires to do so.⁴²⁵ Birth parents may also execute an affidavit of nondisclosure form in the office of the court clerk in the county in which the adoption is pending.⁴²⁶ Although the Committee's proposed draft of the Adoption Code did not permit birth parents to execute affidavits of nondisclosure after the

who placed children for adoption, including some well-known in the music industry, who are concerned about open records bill).

419. Opponents of disclosure argue that some mothers will choose not to place a child for adoption, or even abortion rather than adoption, if records are not confidential. Frank, *supra* note 409, at 1A; *Matters of Birth and Rights*, *supra* note 409, at 12; Dodd, *supra* note 416, at 29. Proponents of open adoption point to the fact that Alaska and Kansas, two states that have had open records laws for many years, have lower abortion rates and higher adoption rates than surrounding states with closed records. In Alaska, after records were opened in 1986 to adult adoptees, adoptions increased and the abortions declined. Frank, *supra* note 409, at 1A; White, *supra* note 409, at 24.

420. See Tennenbaum, *supra* note 1, at 340-41 (observing that when the 1994 UAA was under consideration, many NCCUSL commissioners heard from birth parents who "felt they had contracted with an agency on condition of confidentiality and privacy and did not want the proverbial knock on the door eighteen years later at a time when they may have established a life with a new family that knows nothing of the existence of the child.").

421. See OKLA. STAT. tit. 10, § 7505-6.6(D) (Supp. 1997).

422. See OKLA. STAT. tit. 10, § 7505-6.6(D)(1) (Supp. 1997).

423. See OKLA. STAT. tit. 10, § 7505-6.6(D)(2) (Supp. 1997).

424. See OKLA. STAT. tit. 10, § 7505-6.6(D)(3) (Supp. 1997). Indiana and Washington also both permit the disclosure of identifying information to adult adoptees, unless a birth parent files a written form objecting to the release of identifying information. See IND. CODE ANN. §§ 31-19-25-2, 31-19-25-3 (West 1997); WASH. REV. CODE ANN. 26.33.345 (West Supp. 1997).

425. See *supra* notes 164 to 169 and accompanying text.

426. See OKLA. STAT. tit. 10, § 7503-2.5(B)(3) (Supp. 1997).

adoption was finalized, the Legislature rejected that proposal and instead provided in the final bill that an affidavit of nondisclosure may be filed by biological parents after a final decree of adoption is entered.⁴²⁷ A biological parent may revoke an affidavit of nondisclosure at any time by filing a revocation with the State Registrar of Vital Statistics, who must file the revocation with the affidavit and other original records.⁴²⁸

If both biological parents have unrevoked affidavits of nondisclosure on file when the adoptee seeks a copy of the original birth certificate, the State Registrar of Vital Statistics is prohibited from releasing the birth certificate.⁴²⁹ The only option then available to the adult adoptee is to seek a court order permitting the release of the records for good cause,⁴³⁰ an option that existed under prior law.⁴³¹ If an unrevoked affidavit of nondisclosure of only one biological parent is on file, an uncertified copy of the original birth certificate may be released with all identifying information concerning the biological parent who filed the affidavit deleted. The original surname of the adoptee may also be deleted, if that is also the name of the parent who filed the affidavit of nondisclosure. Although the possibility exists that if a reunion or communication with one biological parent subsequently occurs, the identity of the other will be revealed, the wishes of one parent should not preclude facilitation of a reunion with another parent who desires it. The same result would occur if the adoptee found one biological parent through the mutual reunion registry. Management of a registry to preclude such an outcome would be unworkable and unfair to the parties who both desire to communicate. Moreover, biological parents who consent or relinquish are now advised by the judge at the consent or relinquishment hearing that an affidavit by only one parent will result in the release of the birth certificate with the information pertaining to that parent deleted,⁴³² so they will be aware of the possibility that the other birth parent might be found.

Disclosure of birth certificates and medical information, as described below,⁴³³ and operation of the mutual consent and confidential intermediary programs does not mean, however, that adoption records will be thrown open to whoever wishes to pursue them. Adoption records remain strictly confidential, and unauthorized disclosure by those who have access to these records will be criminally punished.⁴³⁴ In fact, the Adoption Code deleted a former provision

427. See *id.* Unfortunately, because the provision was added late in the legislative process, there is no specific provision as to how this is to be accomplished. Although the current language implies that it is to be done in the court clerk's office, the parent may not know in which office the adoption was filed if the parent consented in a different county. Moreover, there is no current provision directing court clerks to transmit to the State Registrar copies of such affidavits filed after adoption decrees have been entered. To ensure that such affidavits are filed in the records of the State Registrar, the Adoption Code will need to be amended next term to provide a mechanism for filing these affidavits after finalization.

428. See OKLA. STAT. tit. 10, § 7503-2.5(C) (Supp. 1997).

429. See OKLA. STAT. tit. 10, § 7505-6.6(D)(3) (Supp. 1997).

430. See OKLA. STAT. tit. 10, §§ 7505-1.1(C), 7505-6.6(E) (Supp. 1997).

431. See OKLA. STAT. tit. 10, § 60.17(C) (1991 & Supp. 1996) (recodified as amended at Okla. Stat. tit. 10, § 7505-1.1(C) (Supp. 1997)).

432. See OKLA. STAT. tit. 10, § 7503-2.5(A)(3) (Supp. 1997).

433. See *infra* notes 472 to 517 and accompanying text.

434. See OKLA. STAT. tit. 10, § 7505-1.1 (Supp. 1997).

allowing personnel of the court, the Department of Human Services, or other state or federal agencies access to adoption files to conduct investigations concerning the child or birth parents, because the exception was too broad.⁴³⁵ The Adoption Code permits the release of the identity of a birth parent to an adult adoptee only if the birth parent has not vetoed this disclosure, and permits a birth parent or other relative to search for an adult adoptee only through the mutual consent reunion registry or confidential intermediary program, which permits contact only to the extent that the adult adoptee permits it.⁴³⁶ In light of recent decisions upholding the constitutionality of state statutes that permit disclosure of past adoption records to adult adoptees even though no veto of the release of identifying information is available⁴³⁷ and other registry programs,⁴³⁸ the protection Oklahoma's statutory scheme affords to the privacy rights of all concerned appears to be on firm constitutional footing.

B. Mutual Consent Voluntary Registry

Prior to the enactment of the Adoption Code, the Department of Human Services maintained a reunion registry available only to adoptees whose adoptions were arranged by the Department. The absence of any other statewide registry in Oklahoma left the majority of Oklahoma adoptees and their birth

435. Representatives of the Department of Human Services assured the Committee that they already had access to any records they needed to conduct their own investigations, without this broad provision, and observed that the provision could be misused, particularly by federal agencies conducting investigations that had nothing to do with the adoption or the child adopted. Moreover, the existence of such a broad provision created grave concern that the collection of medical and social history would be inhibited if files were open to any governmental agency that wished to pursue them, for reasons totally unconnected to the adoption itself. Given the confidential nature of the information that these files might contain, such a broad exception truly would be inappropriate.

436. See *infra* notes 440 to 471 and accompanying text.

437. In *Doe v. Sundquist*, 106 F.3d 702, 708 (6th Cir. 1997), *cert. denied*, 65 U.S.L.W. 3238, 66 U.S.L.W. 3254 (1997), the court upheld the lower court's denial of a preliminary injunction sought by an adoption agency, adoptive parents, and two birth mothers to enjoin implementation of a new Tennessee law that makes previously confidential records of past, as well as future adoptions, available to adoptees over the age of twenty-one, and to certain other relatives of the adoptee, with the adoptee's permission. The law provides for a "contact veto," in which a relative of the adoptee can veto contact by the adoptee with the person who registers the veto or any of that person's relatives. *Doe*, 106 F.3d at 705. Before disclosure, the state must make a diligent effort to notify the relatives whose identity will be disclosed to give them opportunity to register a contact veto. *Id.* Disclosure of their identity, however, cannot be vetoed. *Id.*

In examining the claims of the plaintiffs that the Tennessee law would violate their rights of privacy under the Federal Constitution, the court found that the law did not infringe on the constitutional right of familial and reproductive privacy, as people in Tennessee were still free to marry, raise children, adopt, and place their children for adoption. *Id.* at 705-06. The court also rejected plaintiffs' claims that the law violated their constitutional right to avoid disclosure of confidential information, finding that this right, hinged on dicta in *Whalen v. Roe*, 429 U.S. 589 (1977), has never been fleshed out by the U.S. Supreme Court and should be construed narrowly, and observing that the Constitution does not encompass a general right to "nondisclosure of private information." *Whalen* at 600. Also rejected, without discussion, was a claim by plaintiffs, apparently not briefed, that the law violated plaintiff's right to equal protection. See *id.* at 604. The court remanded the case to the district court to dismiss with prejudice the plaintiffs' claims under the federal constitution, and with instructions to decline supplemental jurisdiction with respect to issues raised concerning the constitutionality of the law under the Tennessee Constitution. See *id.* at 606.

438. In *Axelrod v. Laurino*, 548 N.Y.S.2d 405, 406-07 (1989), the court held that New York's Adoption Information Registry statute, administered by the New York State Department of Health, which discloses nonidentifying information to adoptees but does not disclose the names of birth parents without their consent, does not violate constitutionally protected privacy rights or other due process or equal protection rights.

families with no easily accessible program to locate each other, even when both desired contact. Under Section 7508-1.2 of the Adoption Code the Department of Human Services Mutual Consent Voluntary Registry will now be expanded to provide adult biological relatives who have been separated by any adoption or termination of parental rights proceeding brought in Oklahoma the opportunity to find each other and/or exchange information, without invading the privacy of those who desire confidentiality.⁴³⁹

The categories of persons entitled to register include adoptees and their biological relatives, as well as adoptive parents or guardians of adoptees who are minors or have been declared mentally incompetent, the descendants of deceased adoptees, and the parents or guardians of minor or mentally incompetent descendants of deceased adoptees.⁴⁴⁰ In addition, the registry has been expanded to include adults whose parent's parental rights have been terminated, their biological relatives, their descendants or parents or guardians of their minor or mentally incompetent descendants if they are deceased, and their own legal parent or guardian if they are mentally incompetent or minors. Adults whose parent's parental rights have been terminated are the waiting children who grew up before they could be adopted. Because they have no adopted family, their need to reconnect with some biological relatives may in many instances be even greater than an adoptee's. Although they may desire no contact with particular relatives, such as an abusive parent, they may fervently desire to locate siblings, grandparents, or other relatives. The registry specifically allows a registrant to indicate, by name or relationship, to which eligible relatives the registrant wishes to be identified.⁴⁴¹ The registry is open to those who were separated from biological relatives by a termination of parental rights regardless of the type of termination, voluntary or involuntary, and regardless of whether the termination order was issued in an adoption, juvenile, guardianship, or domestic relations proceeding. To an adult who wishes to be reunited with a parent or other biological relative, the type of proceeding in which the parent's rights were terminated is irrelevant.

There are several restrictions upon who may register. First, all registrants must be adults. Second, in order to protect younger siblings from gaining access to identifying information or contacts before they are ready for it, the registry may not be used by adoptees or individuals whose parent's parental rights have been terminated if a minor biological sibling is in the same family as the potential registrant or in an adoptive or foster placement whose location is known to the potential registrant.⁴⁴² Third, the administrator of the registry is prohibited from processing a match with any biological relative of a biological parent who has filed an affidavit of nondisclosure with the State Registrar of Vital Statistics, with whom the administrator is required to check, in order to protect the

439. See OKLA. STAT. tit. 10, § 7508-1.2 (Supp. 1997).

440. See OKLA. STAT. tit. 10, § 7508-1.2(B) (Supp. 1997).

441. See OKLA. STAT. tit. 10, § 7508-1.2 (Supp. 1997).

442. See OKLA. STAT. tit. 10, § 7508-1.2(C) (Supp. 1997).

privacy of biological parents who do not want identifying information concerning them disclosed.⁴⁴³ Finally, proposed regulations by the Department of Human Services indicate that the Department will not register a person whose adoption or termination of parental rights did not occur in Oklahoma.⁴⁴⁴

In order to register, an eligible person must submit a notarized affidavit on a form provided by the Department of Human Services,⁴⁴⁵ providing the registrant's current name, address, telephone number, and indicating the registrant's willingness to be identified to some or all eligible relatives, identified by name or relationship, who also register. In order to facilitate a match, the registrant may also provide information on previous and current names of specific individuals the registrant wishes to locate, the place and date of birth of the adoptee or the person whose parent's parental rights were terminated, and the name and address of any agency, intermediary, or any other person who made the adoptive placement or took custody after the parent's rights were terminated. If the registrant is an adoptee or an individual whose parent's parental rights have been terminated, the registrant must also sign a statement that the registrant does not have a minor biological sibling living in the registrant's family or in an adoptive or foster family whose location is known to the registrant. The registration form must also indicate the method of notification the registrant desires if a match occurs⁴⁴⁶ and whether the registrant desires release of identifying information after the registrant's death.⁴⁴⁷

Along with a registration form, the registrant must submit satisfactory proof of identity and a registration fee.⁴⁴⁸ Registrants may revise their address, telephone number, and desired method of notification at any time, and may remove themselves from the registry by verified written request.⁴⁴⁹

The administrator will attempt to match each registrant with any other eligible person who has registered and consented to have his or her identifying information released to the registrant. In order to process a match, the administrator may have access to agency records if available. When agency records are not available, the administrator may have access to court records, in order to verify whether registrants match. Section 7508-1.1 of the Adoption Code requires all records of any agency or person who arranges or facilitates an adoption to be maintained for 22 years.⁴⁵⁰ Agencies, attorneys, or other adoption

443. See OKLA. STAT. tit. 10, § 7508-1.2(D) (Supp. 1997).

444. Department of Human Services, proposed regulation 340:75-15-132 (draft).

445. Department of Human Services, proposed regulation 340:75-15-132, Form DCFS-22 (draft).

446. DHS is not required to use any method of notification that would require it to incur unreasonable expense. See OKLA. STAT. tit. 10, § 7508-1.2(E) (Supp. 1997).

447. See OKLA. STAT. tit. 10, § 7508-1.2(E) (Supp. 1997).

448. Proposed draft of Regulation 340:75-15-133 of the Department of Human Services indicates that the initial fee will be \$20 to register.

449. See OKLA. STAT. tit. 10, § 7508-1.2(E) (Supp. 1997).

450. See OKLA. STAT. tit. 10, § 7508-1.1 (Supp. 1997). The proposed legislation recommended by the Committee had provided that the records be maintained for 99 years, as required by TEX. FAM. CODE ANN. § 162.006 (Supp. 1997). The Legislature, however, amended the Committee's proposal to require retention of records for twenty-two years, which guarantees access to information for four years beyond the minority of an adoptee who was adopted as an infant. Unfortunately, destruction of any records after this time will greatly impair operation of both the mutual voluntary consent registry and the confidential intermediary search pro-

facilitators who cease operations must transfer their records to the Adoption Division of the D.H.S., or following notification to D.H.S., to a transferee agency that assumes responsibility for preservation of the records.⁴⁵¹

If a match occurs, the administrator must notify each registrant by the registrant's desired method of notification only. Before any identifying information is released, the administrator must obtain the registrant's consent to an exchange of identifying information. Adoption professionals from DHS reported to the Committee that it has been their experience that registrants sometimes change their minds when confronted with the reality that a relative has been found. Although only an individual who has taken the step of registering would be contacted,⁴⁵² the second stage of obtaining consent to the release of identifying information affords the registrant time for reflection and thus provides some assurance that the registrant is psychologically prepared.

Affidavits and any other information contained must be retained by the Department for twenty-two years following the date of registration.⁴⁵³ To safeguard the confidentiality of these records and the privacy of the registrants, the Act creates a criminal penalty for disclosure of information from the registry in a manner not permitted by the Code.⁴⁵⁴

C. Confidential Intermediary Program

Although the Mutual Consent Reunion Registry will facilitate communication between two eligible individuals who have registered, it is not alone sufficient to meet the needs of all adults who were adopted or whose parent's rights were terminated who wish to meet or exchange information with biological relatives. In many cases, one party is unaware of the registry, functionally incapable of registering, or indifferent to the prospect. Although Sections 7504-1.1⁴⁵⁵ and 7504-1.2⁴⁵⁶ provide access to fairly detailed medical and social history to those adopted after June 1996, and adults adopted after November 1, 1997, will be entitled, in the absence of an unrevoked affidavit of nondisclosure, to obtain identifying information on their birth certificates,⁴⁵⁷ the needs of those previously adopted, for whom little or no medical information was collected, will not be adequately served by the registry alone. Even those who obtain an original birth certificate may require assistance in locating biological

gram, as well as implementation of the exchange of supplemental medical information. *See infra* notes 509 to 511 and accompanying text.

451. *See* OKLA. STAT. tit. 10, § 7508-1.1(B) (Supp. 1997).

452. State and local departments, agencies, institutions, or contractors, and employees thereof are strictly prohibited from contacting anyone to solicit their consent for the release of identifying information if that person has not registered with the registry. *See* OKLA. STAT. tit. 10, § 7508-1.2(F) (Supp. 1997).

453. *See* OKLA. STAT. tit. 10, § 7508-1.2(G) (Supp. 1997).

454. *See* OKLA. STAT. tit. 10, § 7508-1.2(H) (Supp. 1997).

455. *See* OKLA. STAT. tit. 10, § 7504-1.1 (Supp. 1997).

456. *See* OKLA. STAT. tit. 10, § 7504-1.2 (Supp. 1997). *See infra* notes 473 to 517 and accompanying text.

457. *See supra* notes 412 to 439 and accompanying text.

relatives. To respond to these needs, Section 7508-1.3⁴⁵⁸ directs the Department of Human Services to create a confidential intermediary search program, which will enable those eligible to use the program to locate adult biological relatives with whom contact has been severed through adoption or termination of parental rights proceedings.

The list of those eligible to search or be the subject of a search closely parallels the list of those eligible for the registry, but is slightly more restrictive. The program may be used by adult adoptees and adults whose parental rights have been terminated, and their adult descendants or parents or legal guardians of their mentally incompetent or minor descendants if the adoptee or individual whose parent's rights were terminated is deceased. Biological parents, regardless of whether their rights were terminated voluntarily or involuntarily and regardless of the type of proceeding in which the termination occurred, may initiate or be the subject of searches. The list of other biological relatives who may use the confidential intermediary program, however, is more limited than those who can use the registry, due to the expense of operating the program. Only the biological parents' siblings, if the biological parents are deceased, and biological siblings or grandparents of the adoptee or individual whose parent's rights were terminated may search or be the subject of a search.

As in the registry program, there are several restrictions upon those eligible to apply for or be the subject of a search. First, to ensure that resources are used appropriately, no one may apply for a search by a confidential intermediary until the applicant has been registered with the mutual consent voluntary registry for at least six months.⁴⁵⁹ Second, only adults may apply for a search or be located through the program. Third, to protect younger siblings from discovering identifying information through older siblings, a search may not be performed on behalf of an adult adoptee or an adult whose parent's parental rights have been terminated who has a minor biological sibling living in the same home or in an adoptive or foster family whose location is known to the registrant. Fourth, to protect the privacy of biological parents, anyone who has previously initiated a search for a biological parent who refused to share identifying information, communicate, or meet may not initiate a subsequent search for a biological relative of that biological parent. For the same reason, the administrator must check with the State Registrar of Vital Statistics and refrain from searching for or on behalf of any biological relative of a parent who has filed an unrevoked affidavit of nondisclosure, unless the biological parent who filed the affidavit is deceased.⁴⁶⁰

To initiate a search, an eligible individual must complete an application, provide satisfactory proof of identity by producing a photocopy of an original birth certificate, a current driver's license, or a social security card, and pay the search fee.⁴⁶¹ The administrator of the program will then appoint a confiden-

458. OKLA. STAT. tit. 10, § 7508-1.3 (Supp. 1997).

459. See OKLA. STAT. tit. 10, § 7508-1.3(C) (Supp. 1997).

460. See OKLA. STAT. tit. 10, § 7508-1.3(D) (Supp. 1997).

461. See OKLA. STAT. tit. 10, § 7508-1.3(G)(1) (Supp. 1997); Department of Human Services, proposed

tial intermediary who has been certified by the Department of Human Services.⁴⁶²

An important characteristic of the program is that no direct contact is permitted between the individual who initiates the search and the confidential intermediary until such time, if ever, that the initiator and the subject of the search have both consented in writing to communicate or meet. The intermediary is trained, certified, and assigned to a specific search by the administrator of the program. While it is true that the intermediary's fee is paid out of the application fee paid by the search initiator, no money is paid directly by the initiator to the intermediary. The report on the search is given by the intermediary to the program administrator, who then reports back to the search initiator. The program is designed to avoid situations in which the intermediary perceives herself as an employee or advocate of the search initiator, or feels loyalty to the initiator rather than to the confidentiality requirements of the program. By constructing the program in this manner, the Committee hoped to minimize any temptation on the part of the intermediary to breach the program's security, in the event that the subject of the search objects to disclosure or contact.

The confidential intermediary may inspect all court records, records of the State Registrar, and records of the D.H.S. relevant to the adoption or termination proceeding, upon presentation of proof of the intermediary's certification and referral to the custodian of the records. Records of private agencies or attorneys may be inspected if permitted by the agency or attorney.⁴⁶³ While the search is being conducted, the intermediary will be required by program regulations to keep records of all actions taken by the intermediary in conducting the search, and to furnish copies of those records to the administrator.⁴⁶⁴

If the intermediary is able to locate the subject of the search, the interme-

regulation 340:75-15-133(11) (draft). The proposed regulations for the program indicate that the fee for an initial search for one eligible person will be \$400, and an additional \$200 for any subsequent searches for eligible persons by the same requester. Department of Human Services, proposed regulation 340:75-15-133(11) (draft). Section 7508-1.3(O) permits the initiator to be charged for the actual expenses incurred in providing the service, and a reasonable fee for the compensation of the intermediary and the administration of the program. A small portion of the expenses of the confidential intermediary program and the mutual consent registry program will also be born by a \$20 increase in the filing fee for adoptions, as provided in OKLA. STAT. tit. 28, § 152(A), (C) (1997).

462. DHS proposed regulations require that confidential intermediaries must be twenty-one years of age or older, with a minimum of two years college at an accredited college or university and two years experience, as a professional or volunteer, in the legal or psychological aspects of adoption and adoption search. They must also demonstrate through written references, approved training, and personal interview, (1) sensitivity to adoption-related issues; (2) the ability to maintain confidential files and information; (3) the ability to work within established legal, ethical, and administrative boundaries; (4) excellent written and verbal communication and listening skills; (5) the ability to work with individuals from diverse backgrounds and cultures; (6) the ability and insight necessary to maintain professional neutrality; and (7) general and specific knowledge of search procedures and techniques to be utilized to successfully locate the subject of a search. In addition, a confidential intermediary must provide a criminal background check indicating no record of arrests or convictions, and attend the requisite continuing education and training. Department of Human Services, proposed regulation 340:75-15-133(5) (draft). In addition, a confidential intermediary must sign an oath of confidentiality with the Department of Human Services, the contents of which are set forth in detail in OKLA. STAT. tit. 10, § 7508-1.3(F) (1977).

463. See OKLA. STAT. tit. 10, § 7508-1.3(G)(4) (Supp. 1997).

464. Department of Human Services, proposed regulation 340:75-15-133(7) (draft).

diary must make a discreet inquiry by personal and confidential contact to determine whether the subject is willing to share identifying information, communicate, or meet with the person who initiated the search. The intermediary is not permitted to reveal the identity of the initiator of the search to the subject of the search at this point. If the subject of the search is willing to meet, communicate, or share identifying information, the intermediary must obtain consent in a written document that is dated and signed by the subject. If the subject is not willing to meet, communicate, or share identifying information with the initiator of the search, the intermediary should attempt to obtain any nonidentifying medical and social history requested by the search initiator.

The intermediary must prepare a written report to the program administrator conveying the results of the search, and containing any consent or nonidentifying information that the intermediary obtained. If the intermediary discovers that the subject of the search is deceased, that information must be included. If the deceased subject is a biological parent, the intermediary must also include the identity of the biological parent. If the intermediary is unable to locate the subject of the search, the intermediary must report this and include a description of the search efforts. If the intermediary discovers that the identity of the birth father is unknown and was not revealed by the birth mother, this information should also be included.⁴⁶⁵

After the program administrator receives the report of the intermediary, the administrator must contact the individual who initiated the search. If the subject agreed to share identifying information, communicate, or meet, the administrator must relay this information. Before arranging for the transfer of identifying information, communication, or meeting, the administrator must obtain the written consent of the search initiator. Although application for the search might seem to convey a resolve to obtain identifying information, communicate, or meet, professionals with experience regarding reunions relate that searchers sometimes change their minds when confronted with the actual opportunity to realize their initial goal. Just as with the registry program, requiring this second level of permission from the initiator affords the initiator time for reflection and psychological preparation. When consent is obtained from both the initiator and the subject of the search, the administrator may utilize the services of the intermediary to facilitate communication or a meeting.

If the subject did not consent to meet, communicate, or share identifying information, the administrator must so inform the initiator and provide the initiator a copy of any nonidentifying information that was obtained. The initiator may then choose to apply to the court for an order for the release of identifying information for good cause shown,⁴⁶⁶ but is under a statutory duty to advise the court of the results of the search. Upon the request of the court, the administrator must disclose to the court the search report, including any information

465. See OKLA. STAT. tit. 10, § 7508-1.3(H), (I) (Supp. 1997).

466. See OKLA. STAT. tit. 10, § 7505-6.4(E) (Supp. 1997).

concerning why the subject objected to disclosure or contact.⁴⁶⁷

If the subject is deceased or could not be located, the administrator must so advise the initiator. If the deceased subject is a biological parent, identifying information about that parent may be released to the initiator after obtaining the initiator's written consent to receive the information.⁴⁶⁸

Information obtained by an intermediary during the search is specifically designated by statute as confidential and may only be released as provided in Section 7508-1.3. Any other disclosure of information obtained through a search made under this program is a misdemeanor.⁴⁶⁹ Reports and information collected as a result of the search must be retained by the program for twenty-two years following the date of the initial application for the search.⁴⁷⁰

D. Medical and Social History

One of the first tasks undertaken by the Adoption Law Reform Committee was to draft two comprehensive statutes regulating the collection, supplementation, and disclosure of medical and social history in adoptions. Enacted by the Legislature in 1996,⁴⁷¹ these statutes were recodified with only minor revisions as Article IV of the Adoption Code.

The tragic consequences of inadequate collection and disclosure of medical and social history nationwide prompted the Committee's early attention to this topic. Beginning in the 1920's with the reform movement favoring anonymity,⁴⁷² and peaking during the 1950's through the 1970's, agencies increasingly withheld nonidentifying medical and social information concerning birth parents and the children themselves from adoptive parents.⁴⁷³ As a result, medical and psychological diagnosis was impaired. Adopted children failed to receive appropriate treatment they desperately needed because information that was readily available to the agency was not revealed to the adoptive parents.⁴⁷⁴ Without

467. See OKLA. STAT. tit. 10, § 7508-1.3(K) (Supp. 1997).

468. See OKLA. STAT. tit. 10 § 7508-1.3(I), (K) (Supp. 1997).

469. See OKLA. STAT. tit. 10, § 7508-1.3(L), (M) (Supp. 1997).

470. See OKLA. STAT. tit. 10, § 7508-1.3(N) (Supp. 1997).

471. See OKLA. STAT. tit. 10, §§ 60.5B, 60.5C (Supp. 1996) (recodified as amended at Okla. Stat. tit. 10, §§ 7504-1.1 and 7504-1.2 (Supp. 1997)).

472. See *supra* notes 412 to 414 and accompanying text.

473. In conformity with the philosophy that adoption constituted a rebirth, agencies provided very little about the child's medical and social background or the biological family. HOLLINGER, *supra* note 339, at §16.01[1]. See also ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE* 35-36 (1978); Karen Fernau, *Lawsuits Filed over Adoptions, Information on Children Withheld, Parents Say*, PHOENIX GAZETTE, July 5, 1993, at A1 ("Conventional thinking before the mid-1980s was that the biological parents' rights to privacy often took precedence over adoptive parents' desires to have information released."); Rob Karwath, *Teenager's Parents Sue in 'Wrongful Adoption'*, CHI. TRIB., Dec. 29, 1989, at D1 (David Schneidman, spokesperson for the Illinois Department of Children and Family Services, stated that prior to the enactment of the Illinois disclosure law in 1985, the conventional wisdom of adoption agencies was that adoptive parents and adopted children were better off not knowing background information.). Cf. E. Wayne Carp, *Adoption and Disclosure of Family Information: A Historical Perspective*, 74 CHILD WELFARE 217, 219, 225, 230 (1995) (author concludes that in the first half of the twentieth century the majority of adoption agencies disclosed what little family information was available, but in 1950's a marked change among social workers and agencies occurred causing agencies to increasingly disclose to adoptive parents only favorable medical and social information, or none at all).

474. For example, children with "attachment disorder," many of whom exhibit psychopathic behavior,

proper treatment, some children mutilated themselves; others attempted suicide.⁴⁷⁵ Some children who could have been successfully treated at a young age were ultimately institutionalized as adolescents.⁴⁷⁶ Children with physical or genetic disorders underwent painful and sometimes hazardous testing that might have been avoided,⁴⁷⁷ experienced delayed recovery, or suffered permanent disability.⁴⁷⁸ Siblings in adoptive families have been tortured, sexually

have a substantially higher chance of a successful therapy outcome if diagnosed when young. Psychiatrists who work with these children report that for children over seven, the chances of success are only about 50%, and for children over the age of eleven the likelihood of success is even lower. KEN MAGID & CAROLYN A. MCKELVEY, *HIGH RISK* 149, 216 (1987). Similarly, knowledge of the occurrence of schizophrenia or manic-depression in biological relatives can hasten diagnosis and appropriate drug therapy. Deborah Franklin, *What a Child is Given*, N.Y. TIMES, Sept. 3, 1989, §6 (Magazine), at 36.

475. David Postman, *Sins of Silence*, SEATTLE TIMES, Jan. 14, 1996, (News), at A1 (child whose violent past was allegedly undisclosed hurt herself with pins and needles and became obsessed with knives); Jack Friedman, *He's Not Our Son*, PEOPLE, July 11, 1988, (magazine) at 38, 40-41 (adoptee, whose extensive records of a psychiatric disorder were not revealed to adoptive parents, repeatedly attempted to set fires, mutilate himself, and commit suicide); RICHARD P. BARTH & MARIANNE BERRY, *ADOPTION AND DISRUPTION: RATES, RISKS AND RESPONSES* 176 (1988) (eight year old who practiced satanic worship and sliced his penis was placed with adoptive father unaware of the likelihood of this behavior); Marshall Marvelli, *Tom and Janice Colella*, PEOPLE, Aug. 1, 1988 at 6 (describes adopted daughter's self-abuse and preoccupation with fire) (letter to the editor).

476. See e.g., Postman, *supra* note 476, at A1 (adoptee whose violent past was undisclosed was subsequently institutionalized); Diane Klein, *An Adopted Boy-And Terror Begins*, L.A. TIMES, Jan. 4, 1988 §1 (Metro Desk), at 3 (Tommy Collella, whose diagnosis of fetal alcohol syndrome and psychotic behavior was not provided to his adoptive parents, was ultimately institutionalized. His adoptive mother observed, "[a]s awful as it was, we know that Tommy suffered more than we did. He was denied the treatment he needed. The system failed him."); Diane Klein, *'Special' Children, Dark Past Can Haunt Adoptions*, L.A. TIMES, May 29, 1988, § 1, at 1 (history of schizophrenia was withheld for years from adoptive family, while child received inappropriate treatment and was institutionalized); Karwath, *supra* note 474, at 12 (adoptive mother of institutionalized son learned twelve years after adoption that both biological parents had been institutionalized for mental problems, and observed, "If we had this information earlier maybe we could have been more aware of things to look for and gotten more expert help sooner"); Bonnie Jacob, *Raising Cain*, NEW DOMINION, May-June 1989, at 36 (adoptive father of institutionalized son suffering from fetal alcohol syndrome, from whom pre-placement evidence of brain damage was withheld, stated "The cruel thing is that not knowing about John's condition cost him so much time. Time we spent on therapies that didn't work, time wasted when doctors said, 'He's just a hyperactive normal kid. He'll grow out of it. Now it may be too late to help John, or it may take 10 times longer than it would have if we'd stated right in the first place."); Daniel Golden, *When Adoption Doesn't Work*, BOSTON GLOBE, June 11, 1989, §16 (Magazine), at 73 (despite state psychiatrist's recommendation that child receive long term psychiatric care instead of adoptive placement, child was placed for adoption and subsequently attempted to kill adoptive father before institutionalization).

477. Franklin, *supra* note 475, at 40-41 (adoptee Robert Morse underwent many painful tests until receiving diagnosis of juvenile chronic arthritis, a disease he later discovered was prevalent in his birth family); Ginny Whitehouse, *Consumer's Viewpoint: Panel Discussion*, GENETIC FAM. HIST.: AN AID TO BETTER HEALTH OF ADOPTED CHILDREN (Wisconsin Clinical Genetics Center and Waisman Center on Mental Retardation and Human Development University of Wisconsin-Madison, Madison, Wisconsin), Apr. 1994, at 19 (discovery of history of fibrous breast lumps by adult adoptee avoided repetition of otherwise unnecessary painful treatment). See also, John R. Ball & Gilbert S. Omenn, *Genetics, Adoption, and the Law*, GENETICS AND THE LAW II 269, 277 (Aubrey Milunsky & George J. Annas eds., 1980); Gilbert S. Omenn et al., *Genetic Counseling for Adoptees at Risk for Specific Inherited Disorders*, 5 AM.J. MED. GENETICS 157, 162 (1980).

478. See *Foster v. Bass*, 575 So.2d 967 (Miss. 1990) (ambiguous information provided to adoptive family and pediatrician led them to believe a test for phenylketonuria had been performed on adopted infant. It had not, and the child suffered severe permanent brain damage, which could have been avoided with proper diet and treatment.); *Young v. Francis*, 820 F. Supp. 940 (E.D.Pa. 1993) (parents alleged death of their child from Sudden Infant Death Syndrome might have been avoided if agency had released complete information indicating neurological abnormalities).

The severe impairments, including brain damage, which can result from several other hereditary disorders, such as homocystinuria, can also be largely avoided if diagnosed early and treated properly. See *STEDMAN'S MEDICAL DICTIONARY* 722 (25th ed. 1990); Ann T. Lamport, Comment, *The Genetics of Secrecy in Adoption, Artificial Insemination, and In Vitro Fertilization*, 14 AM. J.L. & MED. 109, 114 & n.32 (1988). Some hereditary diseases are life-threatening if not properly diagnosed and treated. Familial polyposis, for

molested, and threatened by adoptees whose parents were not given information about similar past behavior and psychiatric problems of the adoptee.⁴⁷⁹ Moreover, denial of information to prospective adoptive parents regarding known health or psychiatric problems or risks resulted in placements with families unprepared financially or emotionally to cope with their child's special needs. Unexpected destructive behavior by adoptees, such as firesetting, violence, and threats,⁴⁸⁰ contributed to a dysfunctional atmosphere in the adoptive home and marital stress.⁴⁸¹ The risk of disruption of adoptive placements and even revocations increased when incomplete or inaccurate disclosure was made.⁴⁸²

example, creating symptoms in late childhood, almost invariably leads to carcinoma of the colon if not discovered in time. Omenn, et al., *supra* note 478, at 162; STEDMAN'S MEDICAL DICTIONARY 1238 (25th ed. 1990).

479. See Postman, *supra* note 476, at 6-7 (adoptive family, who had not been told of son's psychiatric disorder, discovered the boy had repeatedly raped their daughter from the time she was four years old and threatened to kill her if she spoke of it; another family learned after their adopted daughter was institutionalized that she had sexually assaulted and tortured her adopted baby sister); Jane Hadley, *Parents Sue Over Adoptions, State Blamed for Failure to Disclose Children's Problems*, SEATTLE POST-INTELLIGENCER, Feb. 23, 1995, at B1 (adopted son sexually abused adopted daughter); Patricia Miller, *State Court Weighs Law to Protect Against Dishonest Adoption Agents*, PITTSBURGH POST-GAZETTE, April 17, 1994, at L4 (parents ultimately removed adopted son from their home after threats to their younger son, "fearing for the safety of their younger child."); Golden, *supra* note 477, at 79, (adopted son Jacob Clemons, in an apparent suicide attempt, killed his two younger brothers in a fire); Klein, *supra* note 477, at 1 (adopted daughter tried twice to suffocate baby sister); Catherine Clabby, *Adoption Woe, Parents Allege Sexual-Abuse Cover-Up*, ALBANY TIMES UNION, Dec. 20, 1992, at A-1 (adopted son sodomized an adopted brother). See also *In re Robert S.*, 647 N.E.2d 869 (Ohio Ct. App. 1994) (adopted son exhibited violent behavior toward newly adopted baby brother).

480. See Andrea Sachs, *When the Lullaby Ends*, TIME, June 4, 1990, at 82 (adopted son tried to cut off his cousin's arm, and on another occasion set fire to the cousin's room while he slept); Golden, *supra* note 477, at 16, 73, 82 (adopted daughter set fire that almost burned the home down, stole, and tried to poison her father with lysol, causing so much tension in home that sister's friends stopped coming over); Lisa Belkin, *Adoptive Parents Ask States for Help with Abused Young*, N.Y. TIMES, Aug. 22, 1988, at A1 (adopted child attempted to burn down home and threatened younger brother with knife; attacks by other children also described; in Colorado an organization founded for parents of adoptive children who are violent and mentally ill gained 2,000 members during its first five months).

481. Golden, *supra* note 477, at 82 (parents of Lisa G., whose violent and destructive behavior ultimately led to her institutionalization, separated, a few months after adoption was revoked); Golden, *supra* note 477, at 79 (One adoptive mother who leads workshops for adoptive families observed, "A lot of people stay in the [adoptive] commitment after it doesn't work out. And to me, that's really unhealthy because it affects the rest of the family. I've seen so many marriages break up over it."); Fernau, *supra* note 474, at 4 (quoting one adoptive mother, "I love this boy so much that the idea of giving him up is the last, last, last resort. One neurologist asked me if I was willing to destroy my family to save a child that can't be saved. We just don't know the answer yet."); Jacob, *supra* note 477, at 35 (previously well-adjusted sister began staying in her room due to adopted brother's behavior, stress related to son's behavior caused adoptive couple to fight continuously); Klein, *supra* note 477, at 16 (siblings lived in constant turmoil and fear because of violent behavior of adopted sister).

482. The term adoption disruption is used by social scientists to describe any adoptive placement that has ended, whether before or after finalization. Disruption causes tremendous instability and emotional upheaval for the child, which can be permanently damaging, and diminishes the child's chances for successful adoption thereafter. Social scientists studying adoption disruption found that "Among families that reported no information gaps, the disruption rate was only 19%. Among families reporting one or more gaps, the disruption rate was 46%." BARTH & BERRY, *supra* note 476, at 20, 108-109. See also KATHERINE NELSON, ON THE FRONTIER OF ADOPTION: A STUDY OF SPECIAL NEEDS ADOPTIVE FAMILIES 74-75 (1985).

Between 1983 and 1987, 69 adoption annulments in California were attributed to fraudulent misrepresentation by a county agency regarding a child. See Klein, *supra* note 477, at 32. Actions seeking annulment or revocation for failure to disclose medical information have been filed in several states in recent years. See *Christopher C. v. Kay*, 278 Cal. Rptr. 907 (Cal. Ct. App. 1991) (adoption revocation granted because adoptive parents had not been told of child's serious mental illness and expert opinions advising against adoption prior to placement); *M.L.B. v. Dept. of Health & Rehab. Serv.*, 559 So. 2d 87 (Fla. Dist. Ct. App. 1990)

Moreover, adult adoptees were denied information vital to their own health care and childbearing decisions, and those of their descendants.

As the consequences of the nondisclosure practices became apparent, adoption professionals by the late 1970s began endorsing full disclosure to adoptive parents and adoptees.⁴⁸³ Even professionals who place children with special needs concur that providing prospective adoptive parents with complete information is essential to ensuring that they are financially and emotionally able to cope with a child's special challenges.⁴⁸⁴ During the 1980s the majority of state legislatures,⁴⁸⁵ including Oklahoma's,⁴⁸⁶ responded by enacting statutes providing for the collection and disclosure of some health-related information during and subsequent to the adoption process. Since these initial efforts, most states in the last two decades have amended these statutes to more comprehensively regulate the collection and disclosure process.⁴⁸⁷ Similarly, the ultimate

(one year period for attack on validity of adoption does not preclude motion to set aside adoption on grounds of fraudulent concealment of child's psychiatric disorder); *County Dep't of Public Welfare v. Morningstar*, 151 N.E.2d 150 (Ind. App. 1958); *In re Leach*, 128 N.W.2d 475 (Mich. 1964); *In re Anonymous*, 213 N.Y.S.2d 10 (N.Y. Surr. Ct. 1961); *In re Adoption of Haggerty*, NO. CA-741, 1991 WL 115978 (Ohio Ct. App. 1991) (rejecting as not timely a motion to vacate an adoption decree made on ground of fraudulent nondisclosure of child's behavior and emotional problems); *In re Adoption of T.B.*, 622 N.E.2d 921 (Ind. 1993) (revocation request by adoptive parent refused because failure of county agency to reveal sexual abuse of child, who had threatened to kill adoptive mother, was a negligent failure to investigate and not fraudulent). For accounts of other revocation actions based upon misrepresentation, see Klein, *Special Children*, *supra* note 477, at 1; Belkin, *supra* note 481, at B8; Golden, *supra* note 477, at 82; Klein, *Adopted Boy's Hidden Past Led Family to Life of Terror*, L.A. TIMES, Jan. 4, 1988, §2, at 1; Marvelli, *supra* note 476, at 6 (attempted revocation); Miller, *supra* note 480, at 2 (pending revocation proceeding).

483. See HOLLINGER, *supra* note 339, at §§ 13.01[1][c], 16.01[2]; Carp, *supra* note 474, at 233-34 (reporting that in 1978, the Child Welfare League of America revised its standards and "eliminated completely the section on withholding adverse information from adoptive parents," and observing that the policy of adoption agencies to withhold negative medical and social information from adoptive parents waned in the early 1980s). See also CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE 37-39 (rev. ed. 1988).

484. Telephone interview with Diane Mahon, National Director, AASK American Adoption Exchange (Sept. 24, 1990); Telephone interview with Gloria Hochman, Communication Director, National Adoption Exchange (Sept. 18, 1990). See James A. Rosenthal, *Outcomes of Adoption of Children with Special Needs*, 3 THE FUTURE OF CHILDREN: ADOPTION 77, 84-85 (Spring 1993); Nelson, *supra* note 483, at 48-49 & 85-86 ("Arguably the parents' own informed opinion about the suitability of a placement is one of the best predictions of outcome. The most effective preparation, then, does not merely educate parents; it enables them to take charge of placement decisions."); BARTH & BERRY, *supra* note 476, at 175-76; Victor Groze, Mark Haines-Simeon & J. Curtis McMillen, *Families Adopting Children With or At Risk of HIV Infection*, 9 CHILD & ADOLESCENT SOC. WORK J., 409, 411 (1992).

Psychologists who treat disturbed children reach the same conclusion. MAGID & MCELVEY, *supra* note 475, at 153 ("Agencies should fully disclose to adoptive parents the background of the child and fully prepare prospective parents if they are to receive an unattached child."). See also *A Child is Waiting: The Report of the Binsfield Commission on Adoption* 28 (1992) (Commission in Michigan delegated to study special needs adoption recommends disclosure of "nonidentifying medical, genetic, and health history of the child and his or her biological parents.").

485. See Blair, *supra* note 410, at 686, n. 17 and accompanying text.

486. In 1984 Oklahoma enacted a statute permitting the court to order a parent consenting to adoption to fill out a medical history form to be filed with the court. See OKLA. STAT. tit. 10, § 60.5(A) (1991) (repealed 1996). In 1990 another statute was amended to permit adoption agencies to release medical information to prospective adoptive parents, but it did not require disclosure. See OKLA. STAT. tit. 10, § 57(D) (1991) (repealed 1996). In 1993 the statutes were again amended to require the court to release the medical history form to adoptive parents and prospective adoptive parents, adult adoptees, and adoption agencies. See OKLA. STAT. tit. 10, § 60.17 (D)(E) (Supp. 1994) (recodified as amended at OKLA. STAT. tit. 10, § 7505-1.1 (Supp. 1997)).

487. See Blair, *supra* note 410, at 479, Appendix A, for a list prepared in 1996 of the health collection and disclosure laws of each state.

goals of the 1996 amendments to Oklahoma's medical and social history statutes were (1) to ensure that a more complete history is obtained, (2) to create a mechanism for supplementation of the history, and (3) to ensure that the information will be disclosed to those with a legitimate interest when they need it.

1. Collection

Section 7504-1.1⁴⁸⁸ requires the preparation of a comprehensive medical and social history report in every adoption, including adoptions by relatives and stepparents. In fact, a final decree of adoption may not be granted until a completed medical and social history report is filed with the court.⁴⁸⁹ Responsibility to prepare the report is placed upon the professional facilitating the adoption. If the child is placed for adoption by the Department of Human Services or a child-placing agency, DHS or the agency must compile the report. In a direct placement adoption, the attorney representing the prospective adoptive parents in the adoption proceeding has the statutory obligation to compile the report. In the extremely rare situation in which the prospective adoptive parent in a non-agency adoption is not represented by an attorney, the person placing the child must compile the report. By allocating responsibility to trained professionals who can be held accountable and are subject to high professional standards, the likelihood of a thorough collection effort is enhanced.

The report consists of three parts. The first part is the Medical and Social History Report, subdivided into sections collecting information on the medical and social history of the child (yellow pages), the medical and social history of the birth mother (pink pages), and the medical and social history of the birth father (blue pages). The form was prepared by members of the Committee, incorporating substantial portions of a Model Medical/Genetic Family History Form for Adoptions prepared by the Education Committee, Genetics and Adoption Subcommittee of the Council of Regional Networks of Genetic Services, and was reviewed by geneticists at Children's Medical Center in Tulsa and the Oklahoma Department of Health in Oklahoma City prior to its publication by the Department of Health.

Comprehensive information regarding prenatal and neonatal health issues, as well as subsequent medical history of the child, is requested. Prenatal history and the history of labor, delivery, and neonatal evaluation are essential to the diagnosis and treatment of many subsequent problems.⁴⁹⁰ Subsequent medical

488. See OKLA. STAT. tit. 10, § 7504-1.1 (Supp. 1997).

489. See OKLA. STAT. tit. 10, § 7504-1.2(D) (Supp. 1997). If required information or records are missing from the report, the court may accept the report and proceed with the adoption only if the court makes a finding that the information or records cannot be obtained by the reasonable efforts of the agency or individual charged with the duty to prepare the report.

490. See Don Hadley & Barbara Petterson, *Family History Workshop*, GENETIC FAMILY HISTORY: AN AID TO BETTER HEALTH IN ADOPTIVE CHILDREN, (Wisconsin Clinical Genetics Center and Waisman Center on Mental Retardation and Human Development University of Wisconsin-Madison, Madison, Wisconsin) Apr. 1984, 100, 108; Renata Laxova, *Minor Signs of Major Problems*, GENETIC FAMILY HISTORY: AN AID TO BETTER HEALTH IN ADOPTIVE CHILDREN, (Wisconsin Clinical Genetics Center and Waisman Center on Mental Retardation and Human Development University of Wisconsin-Madison, Madison, Wisconsin) Apr. 1984,

history is also essential. Over half of all children adopted through domestic unrelated adoption in the United States are over the age of two; over one-fourth of these are special needs adoptions.⁴⁹¹ Transmission of their medical and psychological history is critical in order to ensure continuity of care and to facilitate future assessment.⁴⁹² Specifically required is information concerning any physical, sexual, or emotional abuse suffered by the child, which is critical to ensuring that the child receives proper diagnosis and treatment when subsequent mental, emotional, or behavioral problems emerge.⁴⁹³ The form also seeks information regarding criminal convictions of either parent or juvenile or other proceedings against them related to child abuse, neglect, or abandonment. This information may provide insight into whether the child has ever been the victim of or witnessed abuse.

Also required is information concerning a child's developmental history, behavior problems, and criminal record or juvenile delinquency adjudications. This information will enable a prospective adoptive family to be better prepared to provide support services the child might need. Information concerning the child's educational history, residential history and significant relationships will enable the adoptive family to facilitate the child's adjustment into the new home and school and support the child through the grieving process the child might experience. Also required is any other information necessary to determine the child's eligibility for state or federal benefits.⁴⁹⁴

Information requested in the second two sections regarding the medical and genetic history of the birth parents includes information concerning other children of the birth parents and their ancestors and other blood relatives. This is important, as many medical problems skip generations or may not be apparent from the medical histories of birth parents who are young at the time of place-

69; 72; American Academy of Pediatrics Comm. on Early Childhood, Adoption, and Dependent Care, *Initial Medical Evaluation of an Adopted Child*, Publ. No. RE 9219, 88 PEDIATRICS 642 (1991).

491. See Kathy S. Stolley, *Statistics on Adoption in the United States*, THE FUTURE OF CHILDREN: ADOPTION, 29 (1993).

492. See Blair, *supra* note 410 at 732-735.

493. Psychologists are developing increasingly effective therapies for abused children, but proper implementation is aided by specific knowledge of the abuse. See John McInturf, *Preparing Special Needs Children for Adoption Through Use of a Life Book*, 65 CHILD WELFARE 373, 376, 378, 381 (1986); BARTH & BERRY, *supra* note 476, at 15 (observing that a child's history of abuse is critical to pre-adoption assessment); Rosenthal, *supra* note 485, at 81 (history of physical and particularly sexual abuse prior to adoption is key predictor of increased risk for adoption disruption).

494. Adoption assistance benefits may include the payment of nonrecurring adoption expenses, regular cash payments, medical assistance, and social services, and are funded through federal and state programs. For a more in depth discussion of these programs, see Hollinger, *supra* note 339, at Ch. 9. The requirement that information necessary to determine eligibility for these programs be furnished reminds agencies or attorneys preparing the report of their obligation to ensure that prospective adoptive families be provided with the information they need to apply for such assistance. In general parents may be unable to negotiate for benefits after an adoption is completed. See Hollinger, *supra* note 339, at § 9.04(6); see also *Nierengarten v. Dept. of Health and Social Services*, 549 N.W. 287 (Wis. Ct. App. 1996) (adoption assistance for treatment for bipolar disorder, ADHD, and post-traumatic stress disorder diagnosed after finalization was denied because application was filed after final decree, contrary to Wisconsin's statutory requirement); *but cf. Ferdinand v. Dept. for Children and Their Families*, 768 F. Supp. 401 (R.I. 1991) (interpreting federal law to provide that failure of the State to properly explain adoption assistance program to adoptive family provided extenuating circumstances necessary to permit grant of adoption assistance after decree).

ment.⁴⁹⁵ Of particular significance are the requests for information concerning mental illness, psychiatric or psychological evaluations or treatment, including alcohol or drug addiction,⁴⁹⁶ and significant emotional or behavioral history. Psychological history in particular has been susceptible to nondisclosure in the past and has generated much litigation.⁴⁹⁷ Social history of the birth parents and grandparents is also requested, including information on education, occupation, ethnicity, noteworthy accomplishments, talents, hobbies, and special interests. This information is important to fostering an adopted child's sense of identity and self esteem, which is critical to healthy emotional development.⁴⁹⁸ Information concerning ethnicity and a general physical description of the parents can also have diagnostic significance.⁴⁹⁹ The form also requests a description of the circumstances leading to the adoption, information which is intended to assist adoptive parents and adoptees to answer the inevitable questions that arise as the adoptee matures concerning why he or she was placed for adoption.

The report also must include copies of all medical, dental, psychological, and educational records of the child. Adopted children often go through several placements before ending up in a permanent adoptive home. Even infants have hospital records of tests that are relevant to their medical history. Although the Medical and Social History Report might refer to major problems the child has

495. See *Meracle v. Children's Servs. Soc'y*, 437 N.W.2d 532 (Wis. 1989) (birth father was only a teen at time of placement and had not yet exhibited symptoms of Huntington's Disease, which adopted child contracted by the age of seven); Catherine A. Reiser, *Basic Principles of Genetics: A Human Approach*, GENETIC FAMILY HISTORY: AN AID TO BETTER HEALTH IN ADOPTIVE CHILDREN (Wisconsin Clinical Genetics Center and Waisman Center on Mental Retardation and Human Development University of Wisconsin-Madison, Madison, Wisconsin) Apr. 1984, 63, 65-66 (provides information on generation-skipping conditions). While many genetic diseases are relatively rare, information on more common diseases prevalent in the family, such as heart disease, cancer, and diabetes, have significant health planning benefits for an adoptee.

496. See Franklin, *supra* note 475, at 41 (Robert Plomin, a developmental psychologist at Pennsylvania State University, has observed that it is just as important to tell an adoptee that a birth parent was an alcoholic as it is to share information concerning a genetic disease, because if people know their genetic history and see signs of alcoholism developing, they are more likely to get help early. Adoptee Robert Morse echoed this sentiment with the comment, "Like a lot of kids in college, I used to go out and drink a lot on weekends. Now I know that's a danger for me, and I've stopped.")

497. See *Zernhelt v. Lehigh County Office of Children and Youth Services*, 659 A.2d 89 (Pa. Commw. Ct. 1995) (failure to disclose history of mental illness of both parents); *Juman v. Louise Wise Services*, 211 A.D.2d 446 (N.Y. App. Div. 1995) (failure to disclose severe psychiatric problems of birth mothers); *Mallette v. Children's Friend and Service*, 661 A.2d 67 (R.I. 1995) (failure to disclose birth mother's macrocephaly, retardation, and genetic history); *Mohr v. Commonwealth*, 653 N.E.2d 1104 (Mass. 1995) (failure to disclose birth mother's schizophrenia and institutionalization); *Burr v. Board of County Commissioners*, 491 N.E.2d 1101 (Ohio 1986) (failure to disclose birth mother's mental health history and institutionalization); *Kreuger v. Leahy*, Case NO. 89L 18751 (Cir. Ct. Cook County, Illinois, filed Dec. 28, 1989) (failure to disclose birth parents institutionalization); Paul Marcotte, *Wrongful Adoption, Couple Sues Agency for Hiding Adoptive Son's Background*, A.B.A. J. 22 (April 1990); Fernau, *supra* note 474, at 1 (adoptive family in Arizona sues Catholic Family and Community Services for failure to disclose birth mother's history of retardation, depression, multiple personalities, hyperactivity, and institutionalization; and another sues the Roman Catholic Diocese of Phoenix for agency's failure to disclose birth mother's mental illness); Andrew Fegelman, *Suit Accuses Jewish Social Service Agency of Adoption Fraud*, CHI. TRIB., Feb. 10, 1993, at 1 (failure to disclose mother's psychiatric problems and hospitalization).

498. See Rita B. Black, *Genetics and Adoption: A Challenge for Social Work*, SOCIAL WORK IN A TROUBLED WORLD 193, 198 & 203-05 (1981); Whitehouse, *supra* note 478, at 20.

499. See Hadley & Petterson, *supra* note 491, at 103, 104. For example, Tay Sachs and spina bifida occur more frequently among those of Jewish ancestry, cystic fibrosis is more common among Caucasians, and sickle cell anemia more frequently afflicts African Americans. See *id.*

experienced, the records will contain additional information that will be helpful to the child's future medical caregivers and educators. This provision is an effort to ensure that the child's new physicians and schools will have the same records available that would be available if the child had been raised in the adoptive home since birth. The provision requires that the professional preparing the report must gather all of these records and delete the identifying information contained therein if this is a closed adoption. It must be emphasized that the records required are those of the child placed for adoption. There is no requirement that medical or educational records of birth parents or other birth relatives be gathered or disclosed.

To obtain the child's records, consents authorizing the release of the records should be obtained from a parent or legal guardian who voluntarily relinquishes or consents. Children adopted following involuntary termination are normally in state custody in non-stepparent adoptions, so the release to obtain the records may be signed by the appropriate state official.

The court may request that a birth parent, relative, school, or medical, dental, or psychological care provider for the child supply information or records required by this section.⁵⁰⁰ The statute uses the word "request" rather than order. Medical information and social information is often extremely personal. Under some circumstances, ordering a person to reveal their own medical and psychological history, or someone else's, could invade their right to privacy. The courts do not as a matter of course order birth parents who raise their birth children to reveal their medical histories to their children. There may be situations in which a court order is appropriate, such as an order to a school to release a child's educational records to DHS, when DHS is the current legal custodian of the child. However, the general intent of this provision is to assist the preparer of the report in obtaining information in situations in which an official request might be helpful.

The information required for collection in stepparent and relative adoptions is more limited. If the child will continue to live with a birth parent and the stepparent after the adoption, only the medical and social history of the parent whose parental rights will be terminated by the adoption, and that parent's biological relatives, must be compiled in the medical and social history report.⁵⁰¹ While the collection of this information may be painful for the parent facing loss of his or her parental rights, the information is just as critical to an adoptee in a stepparent adoption as in a stranger adoption. The knowledge of the biological parent who will remain with the child will in many instances be limited, and a child who loses contact with one side of the child's birth family at a young age may otherwise lose the ability to retrieve that information when it becomes critical in later life. The same rationale applies to the limitation enacted this year for relative adoptions. Only the medical and social history of the parent who is not related to the petitioner and that parent's biological rela-

500. See OKLA. STAT. tit. 10, § 7504-1.1(F) (Supp. 1997).

501. See OKLA. STAT. tit. 10, § 7504-1.1(H) (Supp. 1997).

tives must be compiled for the medical and social history report.⁵⁰²

Sections 7504-1.1 and 7504-1.2 impose a duty to make reasonable efforts to collect the information.⁵⁰³ The statute requires the preparer of the report to obtain all of the required information that is "reasonably available"⁵⁰⁴ from each birth parent and from any person who has had legal or physical custody of the child placed for adoption. Foster parents or relatives who have cared for a child for a significant period of time often have information about the child that the birth parents won't have. While this is most critical in adoptions handled by DHS, which often involve children who have been in many placements, it is applicable to other adoptions as well.

If the information required by the form cannot be reasonably obtained from the birth parents and prior custodians, the statute then requires that reasonable efforts be made to obtain it from relatives or other individuals who can provide the information. Thus, there is no requirement that birth grandparents be interviewed in every case. Only if the information cannot otherwise be obtained must the investigator consult other relatives or possibly medical providers for the child. What is reasonable depends upon the circumstances. There may be situations where the birth mother does not want her family informed of the adoption, and her confidentiality must be respected.

Whenever it is feasible, birth parents, custodians, birth relatives, and others should be assisted in providing the information by trained professionals employed by the agency or attorney preparing the report.⁵⁰⁵ Handing a birth parent a form and asking her to return it would not satisfy this provision, and would be far less effective in eliciting complete and accurate information. Preferably, a professional should set aside a special time with the birth parent to interview the parent about the medical and social history. The professional should be the one to actually fill out the form. Many of the terms on the form will be confusing to a birth parent. A trained professional, who could be a paralegal, or a trained staff member of an agency, can answer questions, ask follow-up questions, and explain the importance of particular information as well as the confidentiality and immunity provisions. These explanations can be given far more effectively in person than in print.⁵⁰⁶

Obtaining information from birth fathers may in some instances be more

502. *See id.*

503. OKLA. STAT. tit. 10, § 7504-1.2(D) (Supp. 1997) (providing that if a completed medical and social history report is not filed, a final decree may not be granted unless the court finds that the missing information or records cannot be obtained with reasonable efforts). *See also* OKLA. STAT. tit. 10, § 7504-1.1 cmt.(Supp. 1997).

504. OKLA. STAT. tit. 10, § 7504-1.1(A)(1)(a) (Supp. 1997).

505. *See* OKLA. STAT. tit. 10, § 7504-1.1(E) (Supp. 1997).

506. *See* Thomas J. Mick, *Social Work Practice Issues*, GENETIC FAMILY HISTORY: AN AID TO BETTER HEALTH OF ADOPTION CHILDREN (Wisconsin Clinical Genetics Center and Waisman Center on Mental Retardation and Human Development University of Wisconsin-Madison, Madison, Wisconsin), Apr. 1984, 31, 34; Diane Knight, *Working with the Resistant or Reticent Client Workshop*, GENETIC FAMILY HISTORY: AN AID TO BETTER HEALTH OF ADOPTION CHILDREN (Wisconsin Clinical Genetics Center and Waisman Center on Mental Retardation and Human Development University of Wisconsin-Madison, Madison, Wisconsin), Apr. 1984, 56, 57-58.

problematic. Where birth fathers refuse to cooperate, information may have to be gathered from the birth mother or paternal relatives about the paternal side of the family. This should be a last resort, however, not standard practice. Although less preferable than an interview, a birth father who refuses to meet with an agency employee or attorney may still be willing to fill out a form and provide information in that manner.

Section 7504-1.1(G) creates a transactional immunity for information contained in the medical and social history report. The immunity prevents the information from being used in criminal proceedings against the individual who furnished the information. The purpose of the immunity is to motivate more accurate responses on such critical issues as drug or alcohol ingestion or physical or sexual abuse. The immunity will not prevent prosecution for the transactions about which information is supplied, if the evidence to convict did not result from the information provided in the report.⁵⁰⁷

2. Post-Decree Supplementation

Despite superb collection efforts, vital medical and genetic information often becomes available only after an adoption is finalized. Symptoms of a genetic disorder, such as Huntington's Disease, which would have significance for future diagnosis or treatment of the adoptee, or affect the adoptee's child-bearing decisions, may emerge in a birth parent, another child of the birth parent, or another birth relative for the first time years after the adoption. Conversely, the adopted child may at some point in life be diagnosed with a hereditary disorder that would be of critical importance to the medical care or child-bearing decisions of birth relatives.⁵⁰⁸ Section 7504-1.2⁵⁰⁹ therefore creates a system for acquiring, retaining, and releasing supplemental information that becomes available after the medical and social history report is disclosed.

The investigator who collects the information for the medical and social history report is required by Section 7504-1.1(E)(2) to advise the adoptive parents and the birth parents, custodians, and anyone else who submits information for the report, that additional information about the adoptee, the birth parents, or the adoptee's genetic history that becomes available may be submitted to the agency or attorney who prepared the initial medical and social history report, or, if the location is known to them, to the clerk of the court that issued the decree of adoption. The location of the court, however, should not be disclosed for this purpose, unless it is otherwise known. Particularly in small counties, revelation of the county in which the adoption is or will be filed may facilitate

507. Section 2-106(e) of the 1994 UAA, 9 U.L.A. 17 (Supp. 1997) creates a similar immunity for medical and social history that applies to both civil and criminal proceedings. Application of the immunity to civil proceedings raised a concern by Committee members that termination proceedings might be inhibited, because it would be difficult to draw a line between information provided in the course of the juvenile proceeding and information provided for a medical and social history report.

508. See Lamport, *supra* note 479, at 114 (reporting on a physician who was unable to alert birth parents to a diagnosis of Meckel Syndrome, a generally lethal genetic illness, in an adopted child).

509. OKLA. STAT. tit. 10, § 7504-1.2(E)(F)(G) (Supp. 1997).

a search for the child that could be inappropriate in a closed adoption and potentially put a child at risk in a situation in which the adoption follows an involuntary termination of parental rights, such as in a juvenile proceeding.

Any such additional information that is submitted to the court clerk must be filed with the court's permanent records of the adoption. The clerk is prohibited from charging a fee for filing this supplemental information. In addition, an adoptive parent, a birth parent, a legal guardian of an adopted child, or an adult adoptee may file a current mailing address with the court clerk without fee, and the legal guardian may file proof of legal guardianship without a fee.

If the court clerk receives supplemental information about the birth parents or other birth relatives, the court clerk must send notice to an adoptive parent or legal guardian of an adopted child or to an adult adoptee, by ordinary mail at the most recent address in the court file. The notice shall state only that supplemental information has been received and is available upon request. The notification should be in an envelope, rather than a postcard, to further preserve privacy. The nature of the supplemental information should not be revealed in the notification, so that confidentiality shall not be jeopardized. If supplemental information is filed by an adoptive parent or by the adoptee that may be genetically significant for a birth relative, the court clerk must similarly send notice to the birth parents by ordinary mail, to the most recent address, if any, listed in the court records, taking similar precautions to preserve confidentiality.

If DHS, the agency, or the attorney or individual who prepared the report receives supplemental information, that individual or entity must:

- (1) retain the information with their other records of the adoption for as long as the records are maintained;
- (2) file a copy of the information with the court clerk; and
- (3) furnish a copy of the supplemental information to the parent or legal guardian of an adopted child or to the adult adoptee, if their location is known to the agency or attorney; or, if the information is submitted by the adoptive parent or adult adoptee, furnish a copy of the supplemental information to the biological parents, if the location of either is known.

While this statutory scheme creates some duplication, the duplication is necessary. In many cases the birth relative who wishes to submit supplemental information will not know in which county the adoption was filed, and in fact Section 7504-1.1(E) specifies that this information need not be revealed for this purpose if it is not otherwise known. Thus, the agency or attorney who prepared the initial report will be the only logical place for the birth relative to contact to submit supplemental information. Moreover, they may have a greater ability to locate the individuals who must receive notification. Permitting information to be filed with the adoption court, requiring the court clerk to retain it and notify, and requiring an agency or attorney who receives supplemental information to file it with the court, however, is also essential. Agencies go out of business, attorneys die or move. Thus, channeling the information to the court ensures better access if it is needed in subsequent years.

In order to ensure that these and other records of adoptions are available

when needed, Section 7508-1.1 of the Adoption Code requires all agencies and other individuals who arrange or facilitate adoptions, which would include attorneys, to maintain their adoption records for twenty-two years after the adoption is finalized.⁵¹⁰ Agencies or attorneys who cease to operate or to practice in Oklahoma must transfer their adoption records to the Adoption Division of DHS, or, upon giving notice to DHS, to a transferee agency that is assuming responsibility for the preservation of the agency's adoption records.

3. Disclosure

Whenever medical and social history information is disclosed pursuant to the Adoption Code, all identifying information must be deleted from the reports or records disclosed.⁵¹¹ Under the Adoption Code, the Mutual Voluntary Consent Registry, the Confidential Intermediary Search Program, and the release of birth certificates when permitted by Section 7505-6.6, are the proper vehicles for transmitting identifying information. Transmission of medical and social history is not to be used for this purpose. The exception to this requirement is an open adoption, in which a birth parent and an adoptive parent have agreed in writing to share identifying information. In such cases, when the identities of each are known to the other, it would be a waste of effort to delete all identifying information from the records and reports. However, care must be taken that identifying information is released under this exception only to the extent specifically permitted by the written agreement.

Prospective adoptive parents must be furnished a copy of the Medical and Social History Report as early as practicable before the prospective adoptive parents meet the child, and before the prospective adoptive parents accept physical custody of the child.⁵¹² Early disclosure permits prospective adoptive parents to make an informed decision about whether to pursue a particular adoptive placement, before they and the child have bonded and a subsequent disruption would cause the child emotional pain. Moreover, early disclosure facilitates medical and psychological care for the child during the post placement interim until the final decree.

Some of the information and records required by Section 7504-1.1, however, may be unavailable prior to the date that the prospective adoptive parents meet or accept custody of the child. In such instances a supplemental report must be furnished to the prospective adoptive parent before the final hearing on the adoption petition, containing the information or records that were not reasonably available when the original report was furnished. The agency or individual responsible for preparation of the report must also file with the adoption

510. The Committee recommended ninety-nine, to ensure the records would be available throughout the expected lifetime of the adoptee, but the Legislature substituted twenty-two, to ensure that records were available at least four years after an individual adopted as an infant reaches adulthood.

511. See OKLA. STAT. tit. 10, § 7504-1.2(A) (Supp. 1997).

512. If placement of the child with the prospective adoptive parent who has been furnished the report does not subsequently occur, the report must be returned by the prospective adoptive parent to the agency or individual who provided it. See OKLA. STAT. tit. 10, § 7504-1.2(B) (Supp. 1997).

court, before the final hearing, a verified document stating that the petitioner for adoption has been furnished a copy of the medical and social history report.⁵¹³ A copy of the report, and any supplemental report that is prepared, must also be filed with the clerk of the court in which the adoption is pending before a final decree of adoption is granted.⁵¹⁴

After an adoption is finalized, the court clerk or the Department, agency, or individual who prepared the report must furnish upon request a copy of the Medical and Social History Report, and any additional medical and social history information in its possession to (1) an adoptive parent or legal guardian of a minor adoptee or (2) to an adult adoptee.⁵¹⁵ Once the adoptee has reached adulthood, restriction of disclosure to the adoptee protects the adoptee's right to privacy. Just as any parent would have no right to the medical records of an adult child, an adoptive parent's right of access ceases when the adoptee reaches eighteen.

In addition, a Medical and Social History report, if one exists, and any additional information in the possession of the Department, agency, or individual who prepared the report must be furnished upon request to an adult whose birth parents' parental rights were terminated and who was never adopted.⁵¹⁶ Those who are never adopted have the same need as those who are adopted for medical and social history, because termination of their birth parents' rights may have cut off access to that information by other means.

The court clerk or the Department, agency or individual who prepared the Medical and Social History Report must also disclose upon request the medical report and any additional medical information in its possession to an adult direct descendant of a deceased adopted person or a deceased person whose biological parent's rights were terminated, or to the parent or guardian of their minor direct descendants. Such descendants may have no direct contact with birth relatives who could provide necessary medical history, and the adoptee or individual whose parents' parental rights are terminated is deceased and therefore has no ability to obtain it for them. Access to medical information is permitted, as it could be significant to their own medical treatment or childbearing decisions. Disclosure of social history to this group, however, is not permitted. Its release would be of less importance to descendants than to an adoptee, and any interest they might have would be outweighed by the privacy interests of those whose social history is reported, particularly when it contains sensitive information.

The clerk of the court that issues a final decree of adoption or the Department, agency or individual who prepared the Medical and Social History Report must also furnish a copy of genetically significant supplemental information

513. See OKLA. STAT. tit. 10, § 7505-6.2(A)(7) (Supp. 1997).

514. See OKLA. STAT. tit. 10, § 7504-1.2(D)(E) (Supp. 1997).

515. See OKLA. STAT. tit. 10, § 7504-1.2(G) (Supp. 1997).

516. In May of 1997, the Department of Human Services ("DHS") shared informally with the Committee that approximately 950 children in the custody of DHS were available at that time for adoption, over 700 of whom were over five years of age.

provided after the final decree of adoption or termination order was issued by an adoptive parent or adult adoptee, or about a person whose parent's parental rights were terminated, upon request by a birth parent or other birth relative. Birth relatives may not, however, use this provision to obtain a copy of the Medical and Social History Report. It would contain information about other birth relatives that is confidential in nature. Moreover, the requesting relative's access to the information by other means has not been precluded as a result of the adoption or termination order.

The court clerk is also required to provide a copy of any medical and social information contained in the court records to the Department or agency that placed a child for adoption or to an attorney representing an adoptive parent, upon request. This enables the adoption facilitators to keep their records current if additional information that they do not have is filed with the court.

DHS, agencies, and attorneys who facilitated or participated in adoptions prior to June 10, 1996, the effective date of the 1996 amendments, will not have prepared a Medical and Social History Report pursuant to the current requirement. Nevertheless, they may well have collected some, or even extensive, medical and social history as part of their customary practice. Section 7504-1.2⁵¹⁷ requires them to retain and disclose whatever medical and social history information that they do have to the same extent that retention and disclosure is required if they had prepared a Medical and Social History Report. They are also required to retain any supplemental information they are given, furnish it to appropriate parties, and file it with the court, just as they would be obligated to if they had been the preparer of a Medical and Social History Report under the Adoption Code.

No disclosure is permitted under Section 7504-1.2(G) unless satisfactory proof of identity and legal entitlement to disclosure can be furnished. A fee may be required, but it may be no greater than the reasonable and actual costs of providing the copy, i.e., duplication cost.⁵¹⁸

VII. CONCLUSION

Creation of a statutory scheme that fully satisfies the divergent interests of adoptees and all members of their birth and adoptive families is in all likelihood unachievable. Nevertheless, the Committee and the Legislature have devoted tremendous effort towards the goal of enacting an Adoption Code that is coherent and fairly balances the important interests of all concerned. In the remaining year of the Adoption Law Reform Committee's tenure, the Committee will endeavor to assess the results of its efforts, cure deficiencies, and address additional aspects of adoption law that have as yet not been thoroughly examined.

517. See OKLA. STAT. tit. 10, § 7504-1.2(H) (Supp. 1997).

518. See OKLA. STAT. tit. 10, § 7504-1.2(G)(5)(6) (Supp. 1997).

