

EVOLUTION OF THE "TRADITIONAL FAMILY": A COMPARATIVE ANALYSIS OF UNITED STATES' AND UNITED KINGDOM'S DOMESTIC AND INTERNATIONAL ADOPTION LAW

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I. INTRODUCTION

A family is "[a] group of persons connected by blood, by affinity, or by law, esp. within two or three generations . . . [a] group of persons who live together and have a shared commitment to a domestic relationship."¹ This definition demonstrates that the legal definition of family is not limited to a blood relationship or even to a socially acceptable relationship.² This definition also infers that an accepted definition of a family can be as non-traditional as a single parent and child³ or a homosexual couple⁴ seeking to raise a child and establish a family.⁵ It seems sensible to accept that these non-traditional parents,⁶ who have committed themselves to have and share in a relationship,

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1. BLACK'S LAW DICTIONARY 273 (2d ed. 2001). Family is further defined as "[a] group consisting of parents and their children." *Id.*

2. See generally D'Vera Cohn, *Single-Father Households on Rise; Census Report Reveals Trends in Custody, Adoption Cases*, WASH. POST, Dec. 11, 1998, at A1. The societal trends of acceptance are continually changing in the area of family law. See *id.* The 1998 Census Report reflects an increase in societal acceptance of single men as parents. See *id.* "The number of single fathers with children at home has increased by 25 percent in the past three years" *Id.* "People once looked at the two-parent family as being the ideal permanency plan . . . [b]ut people are becoming more enlightened about what constitutes a family." Ruth-Ellen Cohen, *Single Men Embrace Adoption*, BANGOR DAILY NEWS, Nov. 28, 1998.

3. See Cohn, *supra* note 2. While single women have historically had an easier transition becoming an acceptable adopter, no single parent is given preferential treatment. See Cohen, *supra* note 2. However, it seems that society is becoming more acceptable to the single parent. See *id.* See also Cohn, *supra* note 2, at A1. "[S]ociety is awakening to the importance of parenting . . . and that bodes well for single men who want a child in their lives." See Cohen, *supra* note 2.

4. "There has been a trend in recent years to make sexual orientation a protected class especially in employment and hate-crime statutes." BLACK'S, *supra* note 1, at 642. Sexual orientation is further defined as "[a] person's predisposition or inclination toward a particular type of sexual activity or behavior . . . homosexuality or bisexuality." *Id.*

5. See *id.* at 273.

6. The term "parent" will be used in this Note to portray a person seeking to adopt, alternatively, a potential adopter.

should not be barred from adoption⁷ simply based on their non-traditional status.⁸

Non-traditional parents have difficulty in many aspects of daily routine, not limited to the family law arena. These parents are likely to be discriminated against without the aid of an adoption arena. Yet, societal acceptance of the non-traditional family continues to be a great challenge for several cultures,⁹ including, but not limited to, the United States and United Kingdom.¹⁰ However, the inherent similarities between the two countries formulate an interesting area for analysis.

The inquiry into the adoption and family law operations of the United States¹¹ and the United Kingdom¹² is important in order to determine whether the current adoption practices are acceptable. An analysis of the two countries will determine if a less restrictive and less discriminatory adoption policy, coupled with a more acceptable practice toward non-traditional parents, creates a more beneficial environment for children and families in the United States and the United Kingdom. This Note will compare the domestic and international adoption policies of the United States and the United Kingdom

7. See BLACK'S, *supra* note 1, at 20. Adoption is defined as "[t]he creation of a parent-child relationship by judicial order between two parties who usu. are unrelated. This is accomplished only after a determination that the child is an orphan or has been abandoned, or that the parents' parental rights have been terminated by court order." *Id.*

8. Although there are additional types of parents who can be labeled into the category of non-traditional, the focus of this Note will be on homosexual and single parent adopters. Parents of a mixed race or ethnicity, parents seeking to adopt a child of a different race or ethnicity, parents with a disability and others can all be labeled as non-traditional. See Erika Lynn Kleinman, *Caring For Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 337 (1997). These groups have all experienced some level of discrimination and difficulty in their attempts to adopt children. See *id.*

9. Discrimination against homosexuals is apparent in China. See Adoption Programs Asia: China, available at http://www.planlovingadoptions.org/programs/asia_china1.html (last visited Oct. 29, 2003) [hereinafter China]. Discrimination against single persons is apparent in India. See Adoption Programs Asia: India, available at http://www.planlovingadoptions.org/programs/asia_india1.html (last visited Oct. 29, 2003).

10. See generally China, *supra* note 9.

11. See *The World Factbook 2002: United States*, available at <http://www.cia.gov/cia/publications/factbook/geos/us.html> (last visited Oct. 29, 2003) [hereinafter U.S. Background]. The United States is the most powerful economic country in the World. See *id.*

12. The official name of the United Kingdom is: The United Kingdom of Great Britain and Northern Ireland. See U.S. Department of State: Background Note: United Kingdom, available at <http://www.state.gov/r/pa/ei/bgn/3846.htm> (last visited Oct. 4, 2003) [hereinafter U.K. Background]. The population of the United Kingdom is approximated at slightly less than sixty million, which is not nearly comparable to the United States estimated population of over two hundred ninety million. See U.K. Background, *supra* note 11. Nevertheless, the United Kingdom is one of the closest allies to the United States and its social policies and government practices are also comparable to the United States. See *id.*

and the effects on the evolution of the notion of the traditional family¹³ within each country.

The scope of this Note will be limited to non-traditional adopters, specifically homosexual and single parents, with a particular focus upon gay and lesbian adoption. This approach of addressing non-traditional parents is in contrast to what is thought of as the more traditional parents that are young, heterosexual, married couples.¹⁴

Part II of the Note provides a brief introduction into the history and development of intercountry adoption as an option within the international community. This section includes a discussion of the development of international regulations and their subsequent affects on the international community with respect to intercountry adoption.

Part III of the Note examines the United States' policies and procedures for domestic adoptions and the effect on non-traditional parents. This section explores the history and development of domestic¹⁵ adoptions as well as the relevant case law in the area. This section also addresses the standard arguments against non-traditional adoption. Finally, this section addresses criticisms of the United States' current domestic adoption policy.

Part IV of the Note examines the United States' policy on intercountry adoption¹⁶ and the effect on non-traditional parents. Additionally, this section explores the history and development of intercountry adoption within the United States. The section continues with an explanation of the implementation of procedures for intercountry adoption within the United States. Finally, this section of the Note addresses criticisms of the United States' current

13. The notion of the traditional family is a statement that is commonly used. The adoption agencies and departments have historically looked for adoptive parents, which meet these common notions. See Elizabeth Bartholet, *Transracial Adoption, Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 DUKE J. GENDER L. & POL'Y 99, 104 (1995). Traditional notions of family are sought by agencies who look for "standards an adoptive parent must meet . . . [which] have historically reflected preference for marital, age, income, and religious participation requirements modeled after the ideal majoritarian family." Stephanie Sue Padilla, *Adoption of Alien Orphan Children: How United States Immigration Law Defines Family*, 7 GEO. IMMIGR. L.J. 817, 821 (1993).

14. See Cohen, *supra* note 2. The ranking system administered by many adoption processes places "young, happily married couples at the top [of the waiting list]; single, older, and disabled people in the middle; and those who are homosexual or severely disabled people near the bottom, or excluded entirely." Roseanne Romano, Comment, *Intercountry Adoption: An Overview for the Practitioner*, 7 TRANSNAT'L LAW. 545, 550 (1994).

15. Domestic adoptions are termed to reflect to each country's inner-country policies regarding adoption. See BLACK'S, *supra* note 1, at 218.

16. Intercountry adoption is referred to with respect and parallel to the term 'Convention' which is more formally the "Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993." The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1139 [hereinafter Hague Convention].

policy toward intercountry adoption with specific reference to non-traditional parents.

Part V of the Note examines the United Kingdom's policies and procedures for domestic adoptions and the resulting affect on non-traditional parents. This section explores the history and development of domestic adoptions and addresses the relevant case law in the area. This section also addresses the complexities involved with non-traditional parents. Finally, this section addresses the criticisms of the United Kingdom's current domestic adoption policy.

Additionally, Part V of the Note examines the United Kingdom's policy for intercountry adoption and the effect on non-traditional parents. This section of the Note explores the history and development of intercountry adoption within the United Kingdom. This section further explains the procedure for intercountry adoption within the United Kingdom. Finally, this section addresses the criticisms of the United Kingdom's current policy toward intercountry adoption.

In conclusion, Part VI provides some general suggestions to make each country's standard more effective for the non-traditional parent. More uniform standards and policy considerations will be suggested to eliminate some of the discriminatory practices of each country's current adoption regulations and proceedings with respect to their practices in adoption toward the non-traditional parent.

II. INTRODUCTION TO INTERCOUNTRY ADOPTION

Intercountry adoption is "a process by which a married couple or single individual of one country adopts a child from another country."¹⁷ In 1993, delegates from sixty-six countries met at The Hague to discuss the need for uniformity in dealing with intercountry adoptions.¹⁸ The resulting treaty entitled, The Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption¹⁹ (*Hague Convention*), sought to develop new standards for intercountry adoption and to apply those already in effect more consistently.²⁰ The Hague Convention had three general purposes: (1)

17. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, CHILDREN'S BUREAU, INTERCOUNTRY ADOPTION GUIDELINES 97 (1980).

18. The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1139.

19. *See id.*

20. *See id.* The Convention

purports to establish minimum standards for intercountry adoptions to prevent the abuses associated with such adoptions and to promote the welfare of homeless and abandoned children everywhere [which] represents a revolutionary step towards a global law, breaking down national walls to achieve a common goal: ensuring the welfare and rights of homeless children.

Lisa Hillis, *Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?*, 6 IND. J. GLOBAL LEGAL STUD. 237 (1998).

to create legal minimum standards for adoptive parents to meet when attempting to internationally adopt;²¹ (2) to create a binding agreement between the nations, in order to promote compliance with the standards;²² and (3) to relieve any difficulty or conflicts of law between the sending and receiving countries.²³

International adoptions rose to nearly 20,000 per year during the 1990's,²⁴ even though they were virtually unheard of prior to World War II.²⁵ The effects of the war on European families and children sparked the initial interests of intercountry adoption and led many people to open their homes to orphaned children.²⁶ The process was popularized further after the Korean War.²⁷ The devastation of that war and the fact that many American soldiers fathered children while they were stationed in Korea,²⁸ coupled with the Korean government's increased willingness to grant adoptions, motivated the increase in foreign parents adopting within the Korean society.²⁹ Yet, the popularity and exercise of international adoptions has continued to flourish throughout the World.³⁰ The increased number of impoverished countries in addition to the war torn countries account for the increased amount of children in need.³¹

21. See Hillis, *supra* note 20, at 240. "These standards include safeguards to prevent the abduction, sale, and trafficking of children." *Id.*

22. See *id.*

23. See *id.* at 241. The sending country is the country of the child's origin, while the receiving country is the country of the parent's origin. See *id.*

24. See *New Rules Could Govern International Adoptions*, CHI. TRIB., May 28, 1993, at N22.

25. See *id.*

26. See Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 191 (1994). The influx of adoptions was initiated primarily by the military who were spectators to the devastation and need. See *id.* at 192. Some European countries such as the U.S.S.R., Great Britain, and France were able to accommodate their children while others such as Germany, Japan, Italy, and Greece were unable, thereby creating the need for alternative options. See Bridget M. Hubing, Note, *International Child Adoptions: Who Should Decide What is in the Best Interests of the Family?*, 15 NOTRE DAME J.L. ETHICS & PUB POL'Y 655, 661 (2001). However, the international adoptions at this time were not only limited to the countries which were devastated by the war. See *id.* People adopted children from other affected and devastated countries, where children were in need. See *id.*

27. See Liu, *supra* note 26, at 192-93.

28. See Hubing, *supra* note 26, at 662. The fact that American soldiers fathered many of the children in need created a negative stigma against these children. See *id.*

29. See Michelle Van Leeuwen, Comment, *The Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Market of Infants from China)*, 8 PAC. RIM L. & POL'Y J. 189, 191 (1999). Between 1953 and 1981, the United States took in over 38,000 Korean children through international adoption. See *id.*

30. See generally Jennifer M. Lippold, Note, *Transnational Adoption From An American Perspective: The Need For Universal Uniformity*, 27 CASE W. RES. J. INT'L L. 465 (1995).

31. See *id.* The quality of life and conditions for orphaned children in several countries, not limited to such countries as Africa and Latin America, continue to decrease. See UNICEF, *The State of the World's Children*, 1998.

However, even non-poverished countries, such as China, provide a great resource for intercountry adoption.³² China's one child per family policy has been cited as the source of China's continued need for intercountry adoption.³³

While the continued need for child placement is apparent and continues to grow, whether intercountry adoption is a valid solution to this problem is greatly debated.³⁴ The major concern is the apparent diversity that intercountry adoption creates.³⁵ Transnational adoption, in most cases, creates a family that is made up of different cultures, ethnicities, and races.³⁶ Other concerns include the black market baby trade,³⁷ and the theory of imperialism.³⁸

Despite the debate over the legitimacy of intercountry adoption, it is apparent that "international adoption saves lives."³⁹ Intercountry adoption is the solution to the numerous children of the world in need of a family, as well as the answer to the difficulties inherent in the policies of domestic adoption.⁴⁰ Similar to domestic adoption, intercountry adoption is concerned with the best interest of the child. And while, "questions are generally raised regarding whether transplanting a child from one country to another is in the child's best interests, the bottom line is that these families are able to provide the children

32. See generally Sarah Jackson-Han, *Chinese Moves Put Foreign Adoptions in Doubt*, AGENCE FRANCE PRESSE, Jan. 12, 1997.

33. See *id.* While United States parents account for the majority of Chinese adoptions and approximately eighty to ninety percent of the intercountry adoptions, China continues to have overcrowded orphanages. See *id.* "China currently has more children needing homes than will be adopted throughout the world." Hubing, *supra* note 26, at 663.

34. See Hubing, *supra* note 26, at 663.

35. See *id.*

36. See *id.* at 665. The fact that the wealthier are more able to proceed with an international adoption creates the theory of exploitation, that the "taking by the rich and powerful of the children born to the poor and powerless . . . the adoption by the privileged classes in the industrialized nations, of the children of the least privileged groups in the poorest nations, the adoption by whites of black-and brown-skinned children from various Third World nations, and the separation of children not only from their birth parents, but from their racial, cultural, and national communities as well." Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIM. LAW. 181, 183 (1996).

37. See Hubing, *supra* note 26, at 665. The opposition to intercountry adoption tends to focus on the financial gain of illegitimate adoption agencies in the foreign countries, which profit from the process of black market baby selling. See *id.* While the use of the black market is definitely not in the best interest of the child or the parents involved, a more uniform international process, as formed by the Hague Convention seeks to alleviate such illegal practices. See Hague Convention, *supra* note 16, at 1140.

38. See Hubing, *supra* note 26, at 665. "Developing countries view international adoptions as a redistribution of children from poor, developing nations to the rich, industrialized nations of the world. 'First you want our labor and raw materials; now you want our children,' is a common response of developing nations to the practice of international adoption." Liu, *supra* note 26, at 194-95 (quoting JANE ROWE, PERSPECTIVES ON ADOPTION, IN ADOPTION: INTERNATIONAL PERSPECTIVES 6 (Euthymia D. Hibbs ed., 1991)).

39. Hubing, *supra* note 26, at 664.

40. See Liu, *supra* note 26, at 195.

with love and support and an adequate standard of living.”⁴¹ Furthermore, the focus should be “meeting the child’s basic needs, even if that did not occur in the child’s home nation.”⁴²

III. UNITED STATES: DOMESTIC ADOPTION

In the United States, individual states regulate domestic adoption policies.⁴³ Each state’s adoption policy is statutorily created and varies greatly throughout the country.⁴⁴ The choice to adopt is made by parents for a variety of reasons.⁴⁵ However, gay and lesbian couples wishing to start a family have a limited number of options available.⁴⁶ In addition, while a single person may be more capable than a homosexual couple to naturally conceive a child, adoption is also an available method to people willing to be single parents.⁴⁷

41. Hubing, *supra* note 26, at 665

42. Liu, *supra* note 26, at 193.

43. See generally 2 AM. JUR. 2d Adoption § 7 (1994). “[O]ne may be legally adopted as the child of another . . . by complying with the provisions of the adoption laws of the state in which such relationship [is] created . . .” *Id.* (emphasis added).

44. *Id.* The state statutes vary in several ways. See *id.* Some state statutes allow for homosexual parent adoptions, while others do not. See, e.g., FLA. STAT. § 63.042 (2002); N.H. REV. STAT. ANN. § 170-B:4 (2002); IND. CODE ANN. § 31-19-2-6 (2002) (illustrating the discrepancy among the state statutes in determining who is eligible to adopt). The Florida statute states that a potential adopter is ineligible if he or she is a homosexual, specifically prohibiting that “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.” FLA. STAT. § 63.042 (2002). The New Hampshire statute was amended in 1999 to state that:

[A]ny individual not a minor may adopt [specifically following the following guidelines]:

- I. Husband and wife together.
- II. An unmarried adult.
- III. The unmarried father or mother of the individual to be adopted.
- IV. Any foster parent.
- V. A married individual without the other spouse joining as a petitioner, if the individual to be adopted is not such married individual’s spouse . . .

N.H. REV. STAT. ANN. § 170-B:4 (2002). This statute was recently amended for the purpose of deleting the phrase, “any individual not a minor and not a homosexual may adopt” which preceded the above guidelines. *Id.* The Indiana statute lists several criteria that a potential adopter must include in its petition for adoption including:

[N]ame, age, and place of residence of a petitioner for adoption; and if married, place and date of their marriage. . . . Whether the petitioner for adoption has been convicted of a felony; or a misdemeanor relating to the health and safety of children; and, if so, the date and description of the conviction.

IND. CODE ANN. § 31-19-2-6 (2002).

45. See *Infertility Begets a Family*, available at <http://www.comeunity.com/adoption/infertility/family.html> (last visited Oct. 29, 2003) [hereinafter *Infertility*]. Infertility is a major reason for heterosexual couples to choose adoption. See *id.*

46. See generally Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91, 116 (1996).

47. See Bartholet, *supra* note 41, at 182. “[A]doption constitutes the major alternative to infertility treatment and infertility ‘by-pass’ arrangements such as donor insemination and surrogacy.” *Id.*

Once a potential adopter has decided against a natural conception method,⁴⁸ or with no other available options chosen to stay within the borders of the United States, they next have three types of domestic adoption options available to them.⁴⁹

Domestic adoptions are available and facilitated through private adoption agencies,⁵⁰ public agencies,⁵¹ and independent adoptions.⁵² Public adoption organizations are not-for-profit, funded, and ran by the guidance of the individual states.⁵³ Private agencies are profit organizations, which solicit both the potential adopters and the birth families through advertising.⁵⁴ Independent adoptions are generally initiated by a facilitator or attorney retained by the adoptive or birth parents.⁵⁵ Each of these different types can function as an open or closed adoption.⁵⁶

While all sectors of adoption agencies use some type of criteria requirement when determining if a potential adopter is eligible, there are certain agencies, which seem to use a more traditional approach than others.⁵⁷ Independent adoptions offer the least amount of restrictions for potential adopters and are the most popular method of domestic adoption in the United States.⁵⁸ There are various reasons for this. First, while the costs of an independent adoption are exponentially higher than either of the alternatives, the outcomes seem to be more reliable.⁵⁹ Second, the ultimate decision about child

48. *See id.* Natural methods other than pregnancy can include the choice of surrogacy. *See id.* Surrogacy includes a process of the parents contracting with a woman who will become pregnant and carry a child on behalf of the parents and relinquish her rights to the child upon its birth. *See id.* Non-traditional parents have often chosen the option of surrogacy as have traditional parents who are unwilling to undergo the difficult adoption process. *See id.*

49. *See* Charles Chejfec, Comment, *Disclosure of an Adoptee's HIV Status: A Return to Orphanages and Leper Colonies?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 343, 348-50 (1995).

50. *See id.*

51. *See id.* Both private and public agencies are regulated by statute. *See id.* at 348.

52. *See id.*

53. *See* Colleen Alexander Roberts, *Adoption Sources and Options*, in ADOPTION RESOURCES AND INFORMATION 3-5 (Adoptive Families of America ed., 1993). While the state funded status of the public adoption agencies may seem to provide more uniform application of adoption regimes, it may also damage the adoption process through its "overworked and understaffed personnel. [Such] problems create a long waiting period of several years for adoptive parents." Lippold, *supra* note 30, at 471.

54. *See* Kleiman, *supra* note 8, at 329-30. "A private agency may be bound less tightly to certain placement policies than a public agency." *Id.* at 330. However, public agencies may have "more flexible parent requirements than private agencies regarding age, income, marital status, number of current children, and religious affiliation." Roberts, *supra* note 53, at 3.

55. *See* Lippold, *supra* note 30, at 471-72.

56. *See id.* An open adoption is one in which the birth parents and adoptive parents are known to each other. A closed adoption includes anonymity among the parties. *See Open Adoption*, available at <http://www.adopt.adoption.com> (last visited Oct. 29, 2003).

57. *See* Kleiman, *supra* note 8, at 330.

58. Roberts, *supra* note 53, at 5.

59. *Id.* People seem to be willing to come up with funding more readily when they are given more security that adopting a child is significantly possible. *See id.* There are several options available to parents who need additional funding. *See* Adoption Funding Options,

placement within an independent adoption rests with the parties and not an independent agency.⁶⁰ Unlike other agencies, adoptive parents do not have to fulfill any requirements.⁶¹ However, a drawback of an independent adoption is the length of time involved in locating and placing a child, which can be as short as a few days and as long as several years.⁶²

No matter the method chosen to initiate the adoption process, a potential parent will be required to go through a substantial number of steps before they will be allowed to start a family.⁶³ First, the prospective parents will be required to fill out a large amount of paperwork and then endure and fulfill a home study or evaluation.⁶⁴ It is at this point where the discrepancies in policies and performance of ranking systems are apparent. Even if the statutory requirements seem to allow non-traditional parents the opportunity to adopt, there are still complications to overcome. While in the United States:

[D]iscrimination on the basis of age, race, religion, and disability is forbidden in most situations [discrimination on the] basis of marital status and sexual orientation is also prohibited. However, because most adoption statutes provide adoption agencies with the discretion to determine parental fitness, discrimination in this area has continued to abound.⁶⁵

While the adoption agencies are guided by statute and “[i]n theory. . . must follow statutory guidelines, . . . the governing standard in virtually all judicial decisions . . . is a determination of what is in the child’s ‘best interests’.”⁶⁶ The adoption agencies use ranking systems to determine a potential parent’s eligibility to receive a child.⁶⁷ The ranking systems are the point where discrimination toward non-traditional parents is the most evident.⁶⁸ The ranking systems are employed by the adoption agencies and they position potential adoptive parents “according to their eligibility for a

available at <http://www.chrysalishouse.com/funding.html> (last visited Oct. 29, 2003) [hereinafter Funding Options]. Loans are available for parents who are willing to request personal loans in order to adopt children. See Adoption Financing, available at <http://www.adoptionfinancing.com> (last visited Oct. 29, 2003). [hereinafter Financing].

60. See Bernadette Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 303-04 (1989).

61. See Roberts, *supra* note 53, at 5.

62. *Id.*

63. See *id.* These steps are similarly guided by statute, with each individual state’s requirements varying from the next state. See *id.* For instance, in Indiana, the requirements for the initial adoption petition are specifically laid out by statute. See IND. CODE ANN. § 31-19-2-6 (2002). However, the adoption petition requirements in New Hampshire are not as specific. See N.H. REV. STAT. ANN. § 170-B:4 (2002).

64. See FLA. STAT. ANN. § 63.112(2) (b) (2002).

65. Romano, *supra* note 14, at 551.

66. Kleiman, *supra* note 8, at 345.

67. See *id.*

68. See *id.*

child.”⁶⁹ These ranks are determined subjectively by the agencies and tend to “put young, happily married couples at the top of the waiting list . . . and homosexuals . . . at the bottom.”⁷⁰ The standards that a potential adoptive parent must meet “in order to provide for the best interests of a particular child have historically reflected preference for marital, age, income, . . . and family.”⁷¹ While these standards seem to put the child’s best interest first and may not seem to be discriminatory, they tend to extend the adoption process. Additionally, they increase the waiting time for both the child in need of a home and the parents seeking to adopt; yet, they ignore the parental capabilities of a non-traditional parent.⁷²

While it is important that the agencies sustain some criteria in order to meet the best interests of the child, non-traditional parents can arguably meet these interests.⁷³ “It is not sound policy to insist that a child can be parented only by an individual who is exactly like him or her . . . ‘a potential parent’s particular sexual orientation should not be used as a proxy for the special parenting skills that . . . children might require.’”⁷⁴ Furthermore, if a state statute is openly hostile to the homosexual community, it is not likely that a potential adopter will be honest about his or her sexual orientation.⁷⁵ Additionally, the restrictions imposed upon non-traditional parents will lead these parents, who would rather help a child in need of a home, to seek alternative options.⁷⁶ Such options include pregnancy, surrogacy, and international adoptions.⁷⁷ These alternative options tend to have less stringent policies and prohibitions toward the non-traditional parent.⁷⁸

There is no evidence or empirical data that the traditional family is better for a child, or in the child’s best interest.⁷⁹ Additionally, there is no proof that

69. *Id.* at 346.

70. *Id.* at 344. These agencies classify the young, happily married couples as “traditional notions of family.” *Id.*

71. Padilla, *supra* note 13, at 821.

72. This is similar to what has been termed “race-matching” policies, which has drastic effects particularly in a transracial adoption, where either the child is of a different race or ethnicity or the potential parents are of a different race. See Kleiman, *supra* note 8, at 344. “[B]ecause most agencies have very strong race-matching policies . . . a prospective parent whose race does not match that of the available children will have a long wait before a ‘match’ can be made.” *Id.* This analysis can also add that a child who does not match a potential parent based solely on the race criteria will have to wait as well. See *id.*

73. See Mishra, *supra* note 46, at 116.

74. *Id.* Furthermore, “it should be recognized that people possessing those special skills are found across the spectrum of human sexuality.” *Id.* at 116-17.

75. Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POL’Y 207, 209 (1995). Adequate records of the number of homosexual, adoptive parents are not available because “lesbian and gay people do not reveal their sexual orientation when adopting.” *Id.*

76. See *id.*

77. See *id.*

78. See generally Romano, *supra* note 14.

79. See *id.*

a single parent family or a homosexual parent family affects the development of children.⁸⁰

Yet, states such as Florida have continually upheld the validity of statutes, which explicitly prohibit the adoption of a minor by a homosexual.⁸¹ The Florida courts, most recently in *Lofton v. Kearney*,⁸² upheld the statute's validity, stating: "[T]he best interest of the child is to be raised by a married family."⁸³ This case involved a gay couple, two men, both registered nurses, who acted as foster parents for the state of Florida.⁸⁴ The men provided foster care for special needs children, particularly children with H.I.V.⁸⁵ The couple provided excellent care for the children.⁸⁶ One of the children in their foster care⁸⁷ was initially diagnosed with H.I.V. at infancy but no longer tested positive.⁸⁸ When this child was available for adoption, the couple was unable to adopt him because of Florida's statutory prohibition.⁸⁹ The court held that homosexuals are not a protected class and did not successfully meet the burden of proving the best interest of the child standard with regard to a married family placement and the homosexual prohibition in the statute.⁹⁰ The court further explained that a foster family relationship is contractual in nature and does "not warrant justified expectations of family unit permanency."⁹¹

The decision in *Lofton* is logically flawed in certain areas. The court stated that a main concern was the contractual nature of the foster parent-foster child relationship.⁹² While the ultimate goal of fostering should be child placement in a permanent home, it seems logical that the child's best interests

80. *See id.*

81. *See* FLA. STAT. ANN. § 63.042 (2002).

82. *See* *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (So. Dist. Fla., 2001). This case has received a considerable amount of media attention. Actress and comedian Rosie O'Donnell, a lesbian and a single parent adopter, has taken great interest in this case and provided much publicity for the gay parents involved. *See* Jane Meredith Adams, *Love vs. The Law*, *Rosie Magazine*, Apr. 2002, available at <http://www.rosiemagazine.com/people/archive.jsp> (last visited Oct. 29, 2003).

83. *Lofton*, 157 F. Supp. at 1384.

84. *See id.* at 1375.

85. *See id.*

86. *See id.* One of the foster parents received the Outstanding Foster Parenting Award from the Children's Home Society. *See id.*

87. *See id.* The child has lived with the men since he was voluntarily left with them by the child's biological father. *See* *Lofton*, 157 F. Supp. at 1375-76.

88. *See id.* at 1375. The child, called Doe in the case, "successfully sero-converted during infancy and no longer tests positive for H.I.V." *Id.*

89. *See* FLA. STAT. ANN. § 63.042 (2002).

90. *See* *Lofton*, 157 F. Supp. at 1382-84.

91. *Id.* at 1380. The court uses the permanency argument, yet the child was not made available for adoption until after he tested negative for H.I.V. in 1994 and had been living with his foster parents since he was a toddler. *See id.* at 1375-76.

92. *See id.* at 1380. The court stated that the foster family arrangement does "not warrant justified expectations of family unit permanency. Foster families are grounded in state law and contractual arrangements [F]oster care is typically a short term placement while the State seeks to find permanent placement in an adoptive home." *Id.*

standard should also be a central goal.⁹³ In keeping with the best interests of the child, it seems that it should be as important for the foster parent to develop more than a contractual relationship with the child. Feelings of love and security between the foster parent and child would most likely be more helpful for the positive development of the child than a sense of contractual obligation. The court also does not recognize the hypocrisy of allowing a homosexual couple to act as foster parents for H.I.V. infected children but explicitly prohibiting homosexual adoption.⁹⁴ The court stated its concern that homosexuals cannot prove the overall best interests of the child standard, which does not seem to take into account the short-term affects of foster care on a child.⁹⁵ If the court is concerned by homosexual care for the child, it seems to be ignoring that such short term foster care could cause potential harm. Furthermore, the court ignores the apparent reality that children in foster care can be there for years, possibly their entire childhood up to the age of majority, or alternatively, adulthood.⁹⁶ These issues that the court overlooks seem to outweigh the court's reasoning in upholding Florida's statute expressly prohibiting the adoption of children by homosexuals.⁹⁷

93. The best interests standard involved in adoption cases has historically been found to be the ultimate determination in the placement of a child. *See in re: Adoption/Guardianship No. 2633*, 646 A.2d 1036 (1994). The court reiterated the general concept accepted that, "a trial court must employ the 'best interest' standard. The determination as to what would most appropriately serve the welfare and best interests of the child is made at the [trial court]." *Id.* at 1043.

94. *See Lofton*, 157 F. Supp. at 1372. The gay couple currently provides permanent foster care for three foster children none of which, other than the boy in this case, had been freed for adoption due to their H.I.V. status. *See id.* This seems to illustrate that the gay couple is adequate to parent, as Florida is willing to let the couple ultimately raise the other three H.I.V. positive boys, who are not freed for adoption. *See id.*

95. *See* NANCY NEWTON VERRIER, *THE PRIMAL WOUND: UNDERSTANDING THE ADOPTED CHILD* (1993). Children in foster care generally seem to have difficulty adapting to new situations. *See id.* They have not generally been given a good foundation to grow on, many have abandonment issues and can present a challenge to both a foster or adoptive parent. *See id.* Moving from home to home is a difficult transition for children and many tend to feel that they are not wanted, creating even more difficult situations. *See id.* Furthermore, there is no guarantee that a foster placement will be short term. *See id.* Noting the difficulty of understanding the various situations of children affected by adoption, the author explains:

Adoption isn't a concept to be learned, a theory to be understood, or an idea to be developed. It is a real life experience about which adoptees have had and are continuing to have constant and conflicting feelings, all of which are legitimate. Their feelings are their response to the most devastating experience they are ever likely to have: the loss of their mother. Just because they do not consciously remember it does not make it any less devastating. It only makes it more difficult to deal with, because it happened before they had words with which to describe it (preverbal) and is, therefore, almost impossible to talk about.

Id.

96. *See id.* The time that a child remains in foster care is fluctuant. *See id.* Since adoption is a subjective process, there is no way to determine how long a child will remain in foster care. *See id.* However, it is possible to assume that a healthy baby will be placed with a permanent home rather quickly. *See id.*

97. *See* FLA. STAT. ANN. § 63.042 (2002).

A. *United States Domestic Adoption: Criticisms*

The decision to stay within the United States to begin a family is a difficult choice to make with the current practices and policies of the domestic adoption agencies. While not all people should be given the absolute right to adopt a child, when a potential parent chooses the option of adoption, there should be a presumption that the best interests of all involved should be met throughout the process, regardless of the traditional notions of family.

The best interests of a child in need of a loving home should come first over any discrimination based on a non-traditional status. If the states are not willing to provide equal opportunities to non-traditional parents by statute, the statutes should place more stringent guidelines upon the agencies to deter the ranking decisions based upon the traditional criteria. This criterion is detrimental to both the child and the potential adoptive parents, when neither meets the traditional notions of family.⁹⁸

Furthermore, the traditional arguments against adoption by gay and lesbian couples are without merit. There are several arguments against allowing adoptions by gay and lesbian couples. One argument is that children raised by homosexual parents are more likely to become homosexuals themselves.⁹⁹ Another argument is that children raised in a homosexual environment are more likely to encounter sexual abuse.¹⁰⁰ A third argument is that children raised by homosexual parents will be stigmatized and face a social bias.¹⁰¹ A final argument against homosexual parents' adoption of children is that homosexuality is "immoral, unnatural, or otherwise threatening to the survival of humanity."¹⁰²

These arguments, made by anti-homosexual adoption advocates,¹⁰³ is unwarranted by empirical research.¹⁰⁴ In fact, research shows that a parent's "sexual orientation is unrelated to parental ability."¹⁰⁵ There is no data to support the idea that a child raised by a homosexual parent is more likely to become a homosexual.¹⁰⁶ There is also no empirical data that supports the contention that a parent's sexual orientation affects a child's own sexual orientation.¹⁰⁷ Additionally, statistics demonstrate that heterosexual males

98. See Padilla, *supra* note 13, at 821.

99. See Hubing, *supra* note 26, at 668.

100. See *id.*

101. See *id.*

102. *Id.* at 669.

103. See *id.* at 668.

104. See *id.* at 669.

105. Hillis, *supra* note 20, at 246 (1998).

106. See Elovitz, *supra* note 75, at 213. Three research studies found that being raised by a gay or lesbian parent is not correlated with a child's sexual orientation. See *id.*

107. See Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 198 (1995).

encompass the majority of sexual abusers.¹⁰⁸ Furthermore, any discriminatory arguments related to the immoral nature of a homosexual relationship are derogatory in nature and should not be supported, as they are mere opinion and discrimination that are insufficiently supported. Finally, studies reveal that children raised by homosexual parents do not experience developmental deficiencies, nor do they perform any differently in social situations than children raised in a heterosexual environment.¹⁰⁹

Similarly, the traditional arguments against adoption by single parents are without merit.¹¹⁰ The primary argument against single parent adoption is that one parent cannot adequately provide for the best interests of the child.¹¹¹ One specific concern is what would happen to the child should the parent become unable to care for the child.¹¹² Yet, this similar concern can be made for several parents, as single parent households are increasingly common around the world.¹¹³

Several non-traditional parents have chosen to bypass the domestic arena because the prevalent issues surrounding domestic adoption in many countries. However, because of the continual changes in intercountry adoptions, and the discrimination against the non-traditional parents, the adopters are facing increasingly similar problems in the international arena.

IV. UNITED STATES' LAW

A. *United States' Policy for Intercountry Adoption*

International adoption has become an increasingly popular option for parents within the United States.¹¹⁴ The opportunities to go outside the borders of the United States to adopt a child have been increasing since World War

108. See Elovitz, *supra* note 75, at 216. A research study indicated that approximately five percent of children interviewed experienced harassment by other children. See *id.* at 215.

109. See Kleinman, *supra* note 8, at 345-46.

110. See *id.*

111. See Hubing, *supra* note 26, at 668.

112. See *id.*

113. See *id.* Non-traditional parents are adopting in unprecedented rates. See ADAM PERTMAN, ADOPTION NATION, HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA 161 (2000). "[S]ingle people are adopting at an unprecedented rate, as are those with disabilities who couldn't have dreamed of becoming parents before. It also means escalating numbers of overtly gay and lesbian adults are adopting . . . as same-sex couples." *Id.* However, the same source subsequently cites the growing number of states to impose restrictive legislation with respect to homosexual and single parent adoptions. See *id.* "[M]agistrates and social workers all over the country take it upon themselves to apply that same standard [that only straight, married couples can be foster homes] every day." *Id.* at 162 (emphasis added).

114. See PERTMAN, *supra* note 113. "Americans adopt more children internationally than do the inhabitants of the rest of the planet combined." *Id.* at 51. "An estimated 20,000 international adoptions take place worldwide every year. Nearly half of these adoptions involve U.S. citizens as the adoptive parents." Hubing, *supra* note 26, at 660.

II.¹¹⁵ This type of adoption has allowed several parents the opportunity to adopt a child more quickly and somewhat more easily than they could have through domestic adoption.¹¹⁶ The reasons behind the increase in intercountry adoptions within the United States is a subject of various opinions. Some credit the humanitarianism of United States citizens.¹¹⁷ Other theories involve the idea that there is a shortage of available American children in the United States.¹¹⁸ However, the most weight and credit toward this increase is the ability of a prospective parent, traditional or non-traditional, to easily adopt a child and avoid the difficulties inherent in the domestic system.¹¹⁹

The United States attended the Hague Convention in 1993.¹²⁰ However, the treaty was not signed until 1994.¹²¹ Furthermore, Congress did not pass the bills for implementation of the treaty until 2000, when they finalized and passed the Intercountry Adoption Act of 2000.¹²²

115. See Lippold, *supra* note 30, at 467. "Transnational adoptions have occurred for over forty years." *Id.* Before the war, intercountry adoption was not a conventional option for parents seeking to adopt a child. *See id.* The trend toward intercountry adoption began as a humanitarian act, adopting orphans from war torn countries. *See id.* Thus, avid numbers of children originally came from Korea, Romania, Yugoslavia, and Russia. *See Hillis, supra* note 20, at 237. The countries included in intercountry adoptions is not limited and often includes: "Brazil, Colombia, Korea, India, Chile, Guatemala, Peru, El Salvador, Albania, Bulgaria, and China." Lisa Katz, Comment, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT'L L. REV. 283, 287-88 (1995).

116. See Kleiman, *supra* note 8, at 333. However, this is not to ignore the difficulties involved in an international adoption. *See id.* "There are several risks and roadblocks associated with transnational adoptions, in addition to having to fulfill the diverse jurisdictional requirements [imposed by the United States]. These problems include war, changes in governments, changes in adoption laws and procedures, illegal baby trading, undisclosed medical histories, and racism." Lippold, *supra* note 30, at 486.

117. See Kleiman, *supra* note 8, at 333. After the Korean War, American's aided the orphaned children, by adopting them and bringing them home to the United States, which began the trend toward intercountry adoption. *See id.*

118. See Liu, *supra* note 26, at 198. The idea that there is a shortage of available American children is unwarranted really, unless you consider that the shortage is the lack of healthy, young Caucasian American babies. *See* Richard Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317, 334 (1988). The shortage might be removed if an acceptable system of transracial adoption were addressed and implemented. *See id.* "However, an increased use of contraception, legalization of abortion, and the tendency of single parents to keep their children have reduced the number of babies available for adoption in these countries." Hubing, *supra* note 26, at 659. *See* HOWARD ALSTEIN AND RITA SIMON, INTERCOUNTRY ADOPTION, A MULTINATIONAL PERSPECTIVE 8-10 (1991).

119. See Kleinman, *supra* note 8, at 333. Many parents feel like they have a better chance of successfully completing an international adoption over a domestic adoption. *See id.* Again, this view of many potential adopters does not address the complexities involved in an intercountry adoption, which will be discussed last in this note.

120. *See* Hague Convention, *supra* note 16, at 1134.

121. *Hague Convention on Intercountry Adoption*, available at <http://www.travel.state.gov/hagueinfo2002.html> (last visited Oct. 6, 2003) [hereinafter *Hague Outline*].

122. *See id.* The final legislation of the convention only applied small differences from the original agreement made at the Hague. *See id.*

President Clinton¹²³ signed the Intercountry Adoption Act on October 6, 2000.¹²⁴ Around the same time, Congress advised that the United States would ratify the treaty after the preparations for its implementation had been put into place by the United States.¹²⁵

Since that time, the United States has been actively pursuing the resources and developing the personnel and departments needed in order to comply with the Intercountry Adoption Act and the agreements made at the Hague Convention.¹²⁶ Complete implementation of these policies and regulations planned for the year 2004.¹²⁷

There are several benefits to implementing the Intercountry Adoption Act.¹²⁸ First, implementation provides a formal, uniform application of recognition for intercountry adoptions.¹²⁹ Second, it recognizes intercountry adoption as the source of an answer to the growing number of children in

123. *See id.*

124. *See* 42 U.S.C. § 14901 (2003). The Intercountry Adoption Act provides in relevant part:

- (a)(1) the international character of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (done at The Hague on May 29, 1993); and
- (2) the need for uniform interpretation and implementation of the Convention in the United States and abroad, and therefore finds that enactment of a Federal law governing adoptions and prospective adoptions subject to the Convention involving United States residents is essential.
- (b)(1) to provide for implementation by the United States of the Convention;
- (2) to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children's best interests; and
- (3) to improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States.

Id.

125. *See* Hague Outline, *supra* note 121. Federal regulations need to be set as to:
- (1) the requirements entities must meet to qualify for designation to accredit or approve adoption service providers as required by the Convention and the IAA [Intercountry Adoption Act];
 - (2) specify the standards to be met by agencies and individuals seeking to become Hague Convention accredited or approved to be able to provide adoption services for adoptions covered by the Convention; and
 - (3) set out the procedures to be followed for incoming and outgoing adoptions involving the United States that are safeguarded by the Hague Convention and the IAA.

Id.

126. *See* Hague Outline, *supra* note 121. The specific provisions relating to accreditation and approval in order to provide adoption services, in order to comply with the regulations of the Intercountry Adoption Act and the Hague Convention, within the United States can be found in 42 U.S.C. § 14921-14924 (2003).

127. *See id.*

128. *See id.*

129. *See id.*

need.¹³⁰ Third, it establishes internationally agreed upon "minimum requirements and procedures uniformly to govern intercountry adoptions in which a child moves from one Convention party country to another."¹³¹ Fourth, it requires creation of a Central Authority in each Convention country.¹³² This authority will be the source of information for the countries' citizens and will provide a place for the uniform application of the implemented laws and regulations.¹³³ This authority will also be better equipped to communicate and work with other convention countries, creating a more accessible place to receive answers regarding other convention countries.¹³⁴ Most importantly, the Intercountry Adoption Act will ensure that intercountry adoptions are provided for and regulated within the United States.¹³⁵ It will ensure that these adoptions are recognized in the other partner Convention countries, while at the same time, providing potential United States parents a safeguard and automatic naturalization in the United States, when they choose intercountry adoption as their ultimate option.¹³⁶

B. United States: Intercountry Adoption Procedure

When deciding to initiate an intercountry adoption, a potential parent must first determine whether to use a private agency, public agency, or independent adoptions.¹³⁷ However, with the new regulations implemented in the Intercountry Adoption Act,¹³⁸ it may become more difficult for smaller, private adoption agencies as well as independent agencies to assist with intercountry adoptions.¹³⁹ These new regulations are to ensure a uniform practice toward

130. *See id.*

131. *Id.*

132. *See* Hague Outline, *supra* note 121.

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.* In the years preceding the Intercountry Adoption Act, American parents who adopted a child internationally were required to petition the United States, requesting citizenship for their adopted child, even with a finalized adoption decree. *See id.* This step could sometimes take years to complete and was an agonizing step of the international adoption process. *See* Office of the Spokesman of U.S. Department of State, "Child Citizenship Act of 2000," available at <http://www.travel.state.gov/childcit.html> (last visited Oct. 29, 2003). With the implementation of the Intercountry Adoption Act and additionally, the Child Citizenship Act of 2000, internationally adopted children will automatically become citizens upon their admission into the United States. *See id.* Provided that certain specific conditions within the adoption proceedings have been successfully completed. *See id.*

137. *See* Hartfield, *supra* note 60, at 303-04. For a full discussion of the role of these agencies within United States domestic adoptions, see discussion *infra* section III.

138. *See* 42 U.S.C. § 14901 (2002).

139. *See* Hillis, *supra* note 20, at 243. The Hague Convention created the idea that the Central Authority would accredit and regulate the agencies that could legally assist an intercountry adoption. *See id.* The Intercountry Adoption Act provides a list of specific provisions that an entity must meet in order to be qualified as an agency that can assist in intercountry adoptions. *See id.* at 243-244. The implementation of these regulations may

intercountry adoptions and lowering the inconsistencies of the current system.¹⁴⁰

Next, the parent ordinarily must complete several forms, available from either an adoption agency, or available through the sending¹⁴¹ country. The sending country has a set list of guidelines that an adoptive parent must meet to be eligible to adopt from that country.¹⁴² Most countries' requirements include a home visit, or home evaluation and study, conducted by a trained and accredited agency.¹⁴³ Once the sending country receives the appropriate paper work, and approves the potential adopter, the country next begins the process of finding a child who best matches the parent.¹⁴⁴

"affect the ability of smaller private agencies to provide adoption services. Also, independent adoptions . . . may be [affected] by the accreditation requirements of the Convention." *Id.* at 243. Furthermore, independent adoption agencies have historically been and continue to be heavily criticized for their involvement with intercountry adoptions. *See id.* Several people criticize independent agencies for their reliance on the financial gain aspect of the adoption rather than the best interest of the child aspect. *See id.* The discussion of independent agencies turned into a serious debate during the 17th session of the Hague Convention. *See* Peter Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L.Q. 53, 67. (1994). Many believe that problems with intercountry adoption started with the independent adoption agencies, and many of the adoptee countries would like to eliminate the agencies from the intercountry adoption process completely. *See id.*

140. *See id.*

141. The sending country is the country of the child's origin. Generally, a parent choosing to adopt internationally will need to complete research, which is abundantly available through the internet, in order to best determine which country they would like to pursue an adoption.

142. These guidelines are available and vary from country to country. For instance, China requires that an adoptive parent have no more than fifteen percent body fat.

143. The Intercountry Adoption Act also provides the regulations with respect to the accreditation requirements for these steps of the intercountry adoption process. *See* 42 U.S.C. § 14922 (2002).

(a) Designation of accrediting entities.

(1) In general. The Secretary shall enter into agreements with one or more qualified entities under which such entities will perform the duties described in subsection (b) in accordance with the Convention, this title, and the regulations prescribed under section 203 [42 USCS § 14923], and upon entering into each such agreement shall designate the qualified entity as an accrediting entity.

(2) Qualified entities. In paragraph (1), the term "qualified entity" means—

(A) a nonprofit private entity that has expertise in developing and administering standards for entities providing child welfare services and that meets such other criteria as the Secretary may by regulation establish; or

(B) a public entity (other than a Federal entity), including an agency or instrumentality of State government having responsibility for licensing adoption agencies, that--

(i) has expertise in developing and administering standards for entities providing child welfare services;

(ii) accredits only agencies located in the State in which the public entity is located; and

(iii) meets such other criteria as the Secretary may by regulation establish.

Id.

144. The scope of this Note does not include the process or biases of the sending country.

C. Criticisms of the United States: Intercountry Adoption

The inherent and obvious problem of the implementation of the Hague Convention and the Intercountry Adoption Act¹⁴⁵ is the power retained by the individual adoption agencies within the states to determine the eligibility of the potential adopters.¹⁴⁶ The same institutions, which are capable of discriminating against the non-traditional parents in the domestic adoption arena, are seemingly placed in a similar position under the new provisions of the Intercountry Adoption Act.

V. UNITED KINGDOM LAW

A. United Kingdom: Domestic Adoption

Domestic adoption in the United Kingdom is regulated by the Adoption Act 1976.¹⁴⁷ The Adoption Act 1976 establishes that the local authorities are responsible for maintaining the services of adoption.¹⁴⁸ The Adoption Act 1976 also provides regulations that a local service must meet in order to become eligible to provide services.¹⁴⁹ The Act states that the duty of the organizations is to promote the welfare of the child involved.¹⁵⁰ The statute expressly states the requirements that each applicant parent must meet in order to be considered eligible to adopt.¹⁵¹

145. See 42 U.S.C. § 14901 (2003).

146. See Hillis, *supra* note 20, at 243.

147. See Adoption Act 1976, Ch. 36, s.1 (Eng.). The Adoption Act 1976 came into force on 1 January 1988. See *id.* The Adoption Act 1976 consolidated the law on adoption as found in the Adoptions Acts of 1958, 1960, 1964 and 1968 and the Children Act 1975. See *id.*

148. See Adoption Act 1976, Ch. 36, s.1 (Eng.). The Adoption Act 1976 further provides that it is the duty of the local service "to provide the requisite facilities, or secure that they are provided by [approved adoption societies]" *Id.* The facilities include "temporary board and lodging where needed by pregnant women, mothers or children; arrangements for assessing children and prospective adopters, and placing children for adoption; and counseling for persons with problems relating to adoption." *Id.* The Act also provides that these services shall be fully provided "so that help may be given in a coordinated manner without duplication, omission or avoidable delay." *Id.*

149. See *id.*

150. See Adoption Act 1976, Ch. 36, s.6 (Eng.). In determining placement of a child, the organization's first consideration should be "given to the need to safeguard and promote, the welfare of the child throughout his childhood; and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding." *Id.*

151. See Adoption Act 1976, Ch. 36, s.14-15 (Eng.). One party of a married couple must have attained the age of eighteen and the other attained the age of twenty-one. See Adoption Act 1976, Ch. 36, s.14. At least one of the parties must be domiciled in a part of the "United Kingdom, or in the Channel Islands or the Isle of Man." *Id.* Adoption by a single parent can also be made upon the showing that the party has attained the age of twenty-one, is domiciled in the "United Kingdom, or in the Channel Islands or the Isle of Man." Adoption Act 1976, Ch.

The United Kingdom's adoption laws do not expressly prohibit the adoption of children by non-traditional parents.¹⁵² However, the same discriminatory views and arguments against placing children in a non-traditional home exist as are present in the United States.¹⁵³ The lack of material addressing homosexual adoption and foster care within the United Kingdom provides a source of difficulty. The personal accounts of United Kingdom citizens provide an insight into the experiences of lesbians and gay men who have been successfully approved to care for children.¹⁵⁴

The current trend in the United Kingdom case law is that the courts are willing to free¹⁵⁵ an adoption order to non-traditional parents in certain situations. In *Re E*,¹⁵⁶ a eleven-year-old girl was placed with a lesbian who wished to adopt the child at some future point.¹⁵⁷ The local authority sought a freeing order to allow the foster parent the option to adopt.¹⁵⁸ The judge at first instance made the order and dispensed with the birth mother's consent and

36, s.15. The applicant must further show that he or she is not married, or if married can prove that the spouse can not be located, is separated from the party, or is too ill to make an adoption order. *See id.*

152. *See* Adoption Act 1976, Ch. 36, s.1 (Eng.).

153. For a refresher on what the ordinary arguments are regarding the non-traditional parents: homosexuals and single parents. *See* discussion *infra* Section IIB. *See also* STEVEN HICKS & JANET MCDERMOTT, *LESBIAN AND GAY FOSTERING AND ADOPTION: EXTRAORDINARY YET ORDINARY* 11 (1999). This book is a collection of stories involving lesbians and gay men who have attempted to adopt within the United Kingdom. *See id.*

154. *See id.* The highlighted accounts from the book demonstrate the continual discrimination which exists in general society of the United Kingdom. *See id.* Many people believe that gays and lesbians are "unnatural parents and believe that they should be actively barred from caring for children." *Id.* at 12. The stories provide accounts on a wide variety of situations including bi-racial lesbians, young gay men, older gay men; in a wide assortment of stories. *See id.* The ongoing theme of the difficulties stemmed from the discrepancies involved with the local adoption agencies. *See* HICKS & MCDERMOTT, *supra* note 153, at 11. The agencies tend to have control over who becomes eligible to adopt, with no apparent place to appeal. *See id.* Of course there are exceptions, as the book noted at least one adoption agency that actively recruits gay and lesbian parents. *See id.* at 38.

155. Freeing an adoption order means to grant an adoption order. In the case of a disputed adoption, the court has to look at two entirely separate matters:

The first question is whether adoption is in the best interests of the child. In that context the welfare of the child is the first consideration, and the test is set out in s 6 of the Adoption Act 1976. The second question is whether the court should dispense with the agreement of the parent, and the court must decide whether it has been established that this parent is withholding her agreement unreasonably on the test of the hypothetical reasonable parent. These two considerations are distinct and separate and, although they can be heard together, they must be decided separately.

Re E [1995] 1 FLR 382

156. *See id.*

157. *See id.*

158. *See id.*

birth mother appealed.¹⁵⁹ The Court of Appeal considered whether the judge had applied the correct principles to the evidence before him including expert evidence concerning possible effects upon a child being brought up in a lesbian household.¹⁶⁰ At first, the judge had reservations about the placement and said that in principle it would not be desirable for a child to be placed with a lesbian.¹⁶¹ Ultimately however, the judge decided that this case was a special one.¹⁶² The Court of Appeal was satisfied that the judge at first instance had exercised his discretion properly and the birth mother's appeal failed.¹⁶³

Similarly, in *Re W*,¹⁶⁴ a local authority had placed a girl who was subject to a care order with a lesbian couple who desired to adopt the child.¹⁶⁵ The justices determined that the child's parents had neglected her and exposed her to moral danger. Before being placed with the couple in 1995, she had been through several unsuccessful placements.¹⁶⁶ The local authority sought an order freeing the child for adoption and the birth mother objected on the grounds that it was contrary to public policy to make an adoption order in favor of a party living in a same-sex relationship.¹⁶⁷ A freeing order for adoption was made and the court stated that adoption provisions should be drawn widely and should not exclude, as a matter of public policy, a homosexual cohabiting couple or a single person with homosexual tendencies from applying to adopt a child.¹⁶⁸

Although a number of adoption orders have been made to gay men, there are no reported English cases concerning gay male applicants. In the Scottish case of *AMT*,¹⁶⁹ the court considered an application by a gay man to adopt a five-year-old disabled boy for whom he had been caring pursuant to permission from the English High Court.¹⁷⁰ The applicant was a nurse with experience in nursing children and adults with physical and mental disabilities, and had been involved in a stable relationship with his partner of ten years.¹⁷¹

At first instance, the Scottish application was refused mainly upon the basis of whether an adoption should be allowed in circumstances where a single gay man was going to bring up the child jointly with a male partner with whom he was cohabiting.¹⁷² However, the Lord President, Lord Hope, held

159. *See id.*

160. *See id.*

161. *See Re E* [1995] 1 FLR 382.

162. *See id.*

163. *See id.*

164. *Re W* [1997] 2 FLR 406.

165. *See id.*

166. *See id.* The prospective adopter was living with her lesbian partner of ten years, who was herself a mother. *See id.*

167. *See id.*

168. *See Re W* [1997] 2 FLR 406.

169. *AMT* [1997] 8 Fam. Law 225.

170. *See id.*

171. *See id.*

172. *See id.*

that "the suggestion that it is a fundamental objection to an adoption that the proposed adopter is living with another in a homosexual relationship finds no expression in the language of the statute."¹⁷³

The Courts of the United Kingdom also seem to be further developing the idea of a family with the recent decision in *Fitzpatrick v. Sterling*.¹⁷⁴ In *Fitzpatrick*, the appellant was the partner of a man who had died.¹⁷⁵ The appellant sought review of an order that did not allow him to succeed in tenancy of the residence.¹⁷⁶ The appellant's initial application to the county court was dismissed.¹⁷⁷ The appeal that followed affirmed the previous dismissal.¹⁷⁸ However, a majority of the House of Lords Court eventual decided that the partner was entitled to succession of tenancy of the flat.¹⁷⁹ The court recognized that a "a person living with another in a homosexual relationship may qualify as a member of the other's family."¹⁸⁰

B. Criticisms of the U.K.: Domestic Adoption

Similar to the criticisms of the United States, the current practice and policy of the domestic adoption agencies seem to discriminate against non-traditional parents. While the United Kingdom does not expressly prohibit the adoption of children by non-traditional parents, the agencies in charge of child placement have historically prohibited such adoptions. The ability for these agencies to solely determine the eligibility of a parent is detrimental to both the child and the potential adoptive parents. However, the case law of the United Kingdom, unlike the United States, seems to be more liberal in allowing the non-traditional adoption orders.

Although it is less difficult to find successful stories of adoption by non-traditional parents in the United Kingdom than in the United States, the few highly publicized examples do not negate the potential criticisms of the United Kingdom's domestic adoption policies.

173. *Id.*

174. *Fitzpatrick v. Sterling Hous. Assoc.*, [2000] 1 F.C.R. 21.

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *Fitzpatrick*, [2000] 1 F.C.R. 21. Although this case brings recognition of gay men within the definition of family. *See id.* This case also provided more stringent standards for the recognition of a same sex relationship. *See id.* With respect to the rent act involved in the above case, the surviving partner acquired a more inferior form of tenancy than a heterosexual couple. *See id.* The standards required that a homosexual couple must be living together for at least two years while there is no term requirement for heterosexuals, and finally, homosexual couples must provide some sort of evidence of the quality of the relationship. *See Alan Inglis, We are Family? The uneasy engagement between Gay Men, Lesbians and Family Law*, FAM L.J. 31 (2001).

Even when looking at instances of successful adoption by non-traditional parents a prevailing discriminatory mindset is still present. In *Re W*, even in rendering a decision allowing a lesbian to adopt the child, the court made it clear that this was an unusual instance and not something which the homosexual community should take for granted when it stated “[n]aturally, in a family law context, the fact of homosexual conduct cannot be ignored, but no more can the consequences of taking it into account be standardised.”¹⁸¹ While this statement indicates that the court is not willing to refuse adoption by non-traditional parents in all circumstances, neither is it willing to allow the adoption of children by homosexuals without further inquiry into the fact of the potential parents lifestyle.

Even when making decisions in favor of homosexual parents petitioning for permission to adopt, the courts show a tendency to use such phrases as “those whose sexual abnormalities have denied them the possibility of a normal family life”¹⁸² which certainly does not indicate that the Court is pleased to open the door to such petitioners. As a further example of the discriminatory mindset in the United Kingdom, in *Re P*,¹⁸³ the judge determined that custody by the lesbian birth mother would be acceptable as the woman was “not one of those homosexuals who, as many do nowadays, flaunt their homosexuality”¹⁸⁴ and a concurring justice stated that although the adoption should be allowed in this instance, it caused him “disquiet”¹⁸⁵ and that such a placement should “only be countenanced by the courts when it is driven to the conclusion that there is in the interests of the child no other acceptable form of custody.”¹⁸⁶ In addition to a mindset of discrimination present even in the best of circumstances, the United Kingdom, much like the United States, frequently allows adoption agencies to be the sole determiners of who is considered an eligible parent. Often, when a parent does not meet the traditional notions of family, they are denied eligibility.

However, in sharp contrast to the United States, there is no express prohibition of adoption by non-traditional parents. The absence of such a provision has increased the instances of non-traditional parents having their petitions to adopt granted in the judicial system.

181. *Re W* [1997] 2 FLR 406.

182. *Id.*

183. *Re P* [1983] 4 FLR 401.

184. *Id.*

185. *Id.*

186. *Id.*

VI. UNITED KINGDOM: INTERCOUNTRY ADOPTION

Similar to the United States, the popularity of intercountry adoption in the United Kingdom began mainly as a humanitarian embargo.¹⁸⁷ The Adoption (Intercountry Aspects) Act 1999¹⁸⁸ provides for the first time a statutory basis for the regulation of intercountry adoption in England, Wales and Scotland. When fully enacted, the Act will enable the United Kingdom to ratify the Hague Convention on Protection of Children and Co-operation in respect to intercountry adoption. This is similar to the goals of ratification in the United States. Both systems are attempting to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law and without any profit being made from the process. They are both establishing a system of co-operation amongst those who have ratified the Hague Convention to ensure that those safeguards are respected and thereby prevent the abduction of, the sale of, or traffic in children. Finally, the establishment of the Hague provisions secures the recognition of adoption orders between convention countries.

A. Criticisms of the U.K.: Intercountry Adoption

Similar to the United States, The Adoption (Intercountry Aspects) Act 1999,¹⁸⁹ gives power to the local agencies in determining whether a potential adoptive parent is eligible to adopt.¹⁹⁰ This power, which appears necessary, often goes unchecked and provides the source of much discrimination.¹⁹¹

VII. CONCLUSION

While the citizens of each country may not be willing to set aside their own feelings of discrimination, it is in the best interests of the children that they do so. The role that a capable, loving, non-traditional parent can play in a child's life must be examined as a higher priority than the alternative. The evolution of the traditional family is continuing. The role of family has been continually assumed by those not related by blood, and people of other races, ethnicities, and backgrounds.

Each country would be socially improved by implementing a friendly policy toward non-traditional adopters. Such a policy would eliminate the

187. See Peter Thurnham, *Inter-Country adoption: A view from the House of Commons*, in INTER-COUNTRY ADOPTION: PRACTICAL EXPERIENCES 138-39 (Michael Humphrey and Heather Humphrey, 1993).

188. See The Adoption (Intercountry Aspects) Act 1999 (Eng.)

189. See *id.*

190. See *id.*

191. See *id.*

need for the non-traditional parents to feel less worthy, or resort to lying about their sexual orientation. Overall, accepting the non-traditional as parents will hopefully become a wide spread practice, overcoming the discriminatory stigma attached to non-traditional parents.

To accomplish this, not only will the legislation regarding the prohibition of non-traditional parents need to be eliminated, but also the attitudes and policies of the adoption agencies will need to be altered. It is in this area of the adoption process in which the most discrimination occurs. While this change will likely be the most difficult to achieve, it would provide the best chance of success for placing children in non-traditional homes and illustrate that discrimination based on a non-traditional status is illogical.

