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INTERCOUNTRY ADOPTION AS A SOLUTION TO THE PROBLEM OF UNITED STATES FOSTER CARE CHILDREN WAITING TO BE ADOPTED

*Chelsie Morgan**

“I believe that if you show people the problems and you show them the solutions they will be moved to act.”¹ – *Bill Gates*

INTRODUCTION

Over the past few decades, intercountry adoption has been a solution for the pervasive problem of “children without families and families without children.”² The Hague Convention on Intercountry Adoption was enacted in the United States on April 1, 2008. The Intercountry Adoption Act of 2000 (IAA) was formed to put into place the Hague Convention. Contrary to what most people believe, the Hague Convention governs adoptions from the United States to Convention countries and not just adoptions to the United States.³ According to the United States Department of State (hereinafter “Department of State”), in 2012, there were a total of ninety-nine United States children adopted by foreign parents.⁴ The Department of State refers to adoptions from the United States to other countries as “Outgoing Cases.”⁵

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¹ Matthew d’Ancona, *Welcome Bill G8s, greatest philanthropist of our age*, THE TELEGRAPH, July 3, 2005, <http://www.telegraph.co.uk/news/uknews/1493269/Welcome-Bill-G8s-greatest-philanthropist-of-our-age.html>.

² Galit Avitan, *Protecting Our Children or Our Pride? Regulating the Intercountry Adoption of American Children*, 40 CORNELL INT’L L.J. 489, 489-90 (2007).

³ *The Hague Convention on Intercountry Adoption: A Guide to Outgoing Cases from the United States*, INTERCOUNTRY ADOPTION, BUREAU OF CONSUMER AFFAIRS, U.S. DEPARTMENT OF STATE, (December 2011) http://travel.state.gov/content/dam/aa/pdfs/OutgoingCasesFAQs_2011.pdf [hereinafter *The Guide*].

⁴ *FY 2012 Annual Report on Intercountry Adoption, January 2013*, OFFICE OF CHILDREN’S ISSUES, U.S. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS,

The IAA has set guidelines for Outgoing Cases. A case is an Outgoing Case if it has all of the following components:⁶ (1) the adoptive child is a United States resident; (2) the prospective adoptive parents are residents in a foreign Convention country; and (3) the prospective adoptive parents applied to the Central Authority in their country of residence for the adoption.⁷

Canadian and European agencies are increasingly looking toward America for adoptable babies; accordingly, in some situations, intercountry adoptions “provide the speediest solution for a safe permanent home.”⁸ One reason that birth parents may choose foreign families is because they believe their child will experience less racism in foreign countries than in the United States.⁹ Racism in adoptions is one of many dangers that are associated with a child remaining in foster care in the United States.¹⁰

In 2011, there were a total of 400,540 children in the United States’ foster care system;¹¹ 104,236 of these children were waiting to be adopted.¹² 61,361 of the children waiting to be adopted have already had parental rights terminated;¹³ these children are simply waiting in the foster care system for a permanent home. However, the unstable environment of temporary family care can have severe negative effects on a child’s development;¹⁴ including growth delays because of psychological stress, or behavioral and emotional disorders because of the instability of temporary family care.¹⁵ Profoundly, when a child is placed with a permanent family, many of these delays and disabilities begin to disappear.¹⁶

https://travel.state.gov/content/dam/aa/pdfs/fy2012_annual_report.pdf (last accessed May 1, 2013).

⁵ The Guide, *supra* note 3.

⁶ *Id.*

⁷ *Id.*

⁸ Avitan, *supra* note 2, at 499-501.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *The AFCARS Report No. 19*. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILDREN’S BUREAU, May 9, 2013, <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf>.

¹² *Id.*

¹³ *Id.*

¹⁴ Laura Matney Shapiro, *Inferring A Right to Permanent Family Care from the United Nations Convention on the Rights of the Child, the Hague Convention on Intercountry Adoption, and Selected Scientific Literature*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 191, 205 (2008).

¹⁵ *Id.*

¹⁶ *Id.*

The harms associated with temporary family placement do not stop when the child reaches adulthood; it follows the child for the rest of his or her life. Children who age out of foster care have an increased risk of being in jail, being homeless, having substance abuse problems, and becoming pregnant as a teenager.¹⁷ Twenty-two percent of all young people earn a bachelor's degree compared to *less than two percent* of former foster youth.¹⁸

After review of the harms associated with a child who remains in foster care, it is clear that it is in the child's best interest to find a permanent home as quickly as possible. The increase in Outgoing Cases in the past few years leads to the conclusion that we should look to the international community to find safe, permanent homes, for the thousands of youth stuck in domestic long term foster care. In Part II of this comment, I will summarize the statistics of Outgoing Cases by state as well as by receiving country. In Part III, I will provide an overview of a child's right to permanency. In Part IV, I will demonstrate that it is in the child's best interest to be adopted internationally rather than to remain in foster care. In Part V, I will apply Florida adoption law to the Hague Convention requirements to create a proposal for how international adoptions of children in foster care would function.

OUTGOING CASES VIEWED BY STATE AND RECEIVING COUNTRY

In 2008, the first year that the Hague Convention was in effect, there were a total of twenty-five Outgoing Cases, from six states, to the following countries: Canada, Germany, Great Britain and The Netherlands.¹⁹ From 2009 through 2011 the number of Outgoing Cases continued to grow by leaps and bounds every year.²⁰ Figure 1.1 below provides a visual demonstration of this rapid growth by highlighting the

¹⁷ *Success Beyond 18 Campaign*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, available at <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=149&articleID=3974&keywords=foster%20care%20jail> (last visited May 9, 2013).

¹⁸ *Child Abuse and Neglect Stats*, FIRST STAR INC., available at <https://www.firststar.org/whats-at-stake/facts/> (on file with the CHILD & FAM. L.J.).

¹⁹ *Office of Children's Issues*, U.S. Department of State, Bureau of Consular Affairs, FY 2009 Annual Report on Intercountry Adoption at 17, http://travel.state.gov/content/dam/aa/pdfs/fy2009_annual_report.pdf. (Florida, California, Indiana, New York, and Pennsylvania – all had two except Florida had 17).

²⁰ *Id.*; See also *Office of Children's Issues*, U.S. Department of State, Bureau of Consular Affairs, FY 2008 Annual Report on Intercountry Adoption at 19, available at http://travel.state.gov/content/dam/aa/pdfs/Adoption_Report_v9_SM.pdf; *Office of Children's Issues*, U.S. Department of State, Bureau of Consular Affairs, FY 2011 Annual Report on Intercountry Adoption. http://travel.state.gov/content/dam/aa/pdfs/fy2011_annual_report.pdf.

data from Florida and combing all other states. Figure 1.1 was made using the Annual Reports on International Adoptions published by the United States State Department for the years 2008 through 2012.²¹ Unfortunately, it is impossible to analyze the data on Outgoing Cases prior to 2008, as that was the first year that the United States State Department published the Annual Report. However, by analyzing the last four years of reports, several trends are revealed.

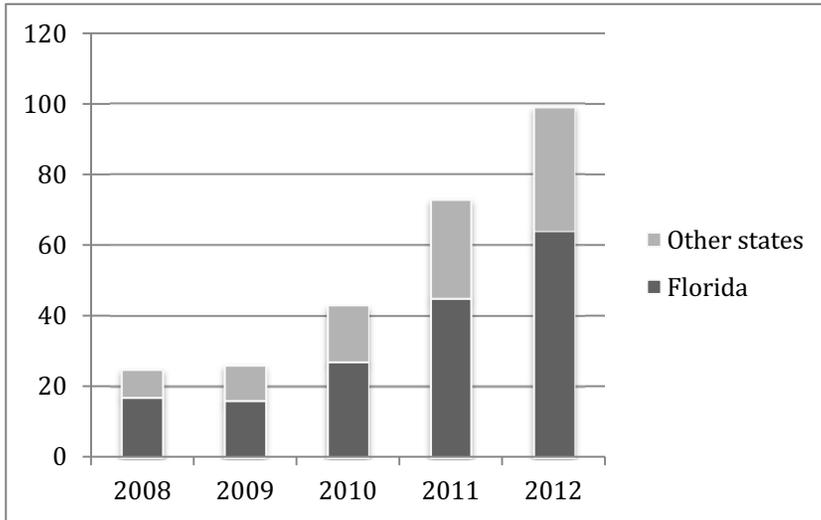


Figure 1.1

Figure 1.1 above shows the rapid increase in the number of adoptions from 2008 to 2012. In 2012, the number of Outgoing Cases was almost four times greater than it was in 2008. In the 2012 Annual Report, there were a total of ninety-nine Outgoing Cases.²² There were a total of seven receiving countries: Austria, Canada, Ireland, Mexico, Netherlands, Switzerland and the United Kingdom.²³ The Outgoing Cases came from a total of eighteen states.²⁴

²¹ *Office of Children's Issues*, U.S. Department of State, Bureau of Consular Affairs, Intercountry Adoption. <http://travel.state.gov/content/adoptionsabroad/en/about-us/publications.html>.

²² *Office of Children's Issues*, U.S. Department of State, Bureau of Consular Affairs, FY 2012 Annual Report on Intercountry Adoption. http://travel.state.gov/content/dam/aa/pdfs/fy2012_annual_report.pdf.

²³ *Id.*

²⁴ *Id.* (Alabama, Arkansas, California, Colorado, Florida, Hawaii, Kansas, Illinois, Louisiana, Maine, Missouri, Nevada, New Jersey, New York, Ohio, Pennsylvania, South Carolina, and Texas).

The numbers of Outgoing Cases from Florida are significantly higher than every other state.²⁵ There were a total of sixty-four Outgoing Cases from Florida in 2012.²⁶ The receiving countries that are adopting the highest percentages of children from Florida are: Canada at twenty-eight, the Netherlands at seventeen, and Ireland at fourteen.²⁷ The next highest state for Outgoing Cases, South Carolina, had a total of seven adoptions, however, all seven went to Canada.²⁸ California had a total of six Outgoing Cases; the receiving countries included Austria, Canada, Mexico, and Switzerland.²⁹ As figure 1.1 demonstrates for every year that the United States Department of State has published an Annual Report, *Florida accounts for at least half of the total number of Outgoing Cases*.³⁰

From 2008 to 2012, the countries that have consistently adopted from the United States in the highest numbers are the Netherlands, Ireland, and Canada.³¹ An article written in an Irish Newspaper on May 2012 discussed Ireland's sudden spike in adopting children from Florida.³² This article provided several reasons for Florida's significantly high number of Outgoing Cases.³³ In the article, a spokeswoman for the IAA opined as to why Florida was so popular among the Irish; "[t]here are many reasons for this but primarily because other families have effected legal and transparent adoptions from this state and the children are very young when placed for adoption."³⁴ Another reason is

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Office of Children's Issues*, *supra* note 20.

²⁹ *Id.*

³⁰ *Office of Children's Issues*, U.S. Department of State, Bureau of Consular Affairs, FY 2009 Annual Report on Intercountry Adoption. http://travel.state.gov/content/dam/aa/pdfs/fy2009_annual_report.pdf. See also *Office of Children's Issues*, U.S. Department of State, Bureau of Consular Affairs, FY 2008 Annual Report on Intercountry Adoption, http://travel.state.gov/content/dam/aa/pdfs/Adoption_report_v9_SM.pdf; *Office of Children's Issues*, U.S. Department of State, Bureau of Consular Affairs, FY 2010 Annual Report on Intercountry Adoption, http://travel.state.gov/content/dam/aa/pdfs/fy2010_annual_report.pdf; *Office of Children's Issues*, U.S. Department of State, Bureau of Consular Affairs, FY 2011 Annual Report on Intercountry Adoption. http://travel.state.gov/content/dam/aa/pdfs/fy2011_annual_report.pdf; *Office of Children's Issues*, U.S. Department of State, Bureau of Consular Affairs, FY 2012 Annual Report on Intercountry Adoption. http://travel.state.gov/content/dam/aa/pdfs/fy2012_annual_report.pdf.

³¹ *Annual Reports: 2008-2012*.

³² Patrick Counihan, *Irish flock to Florida for child adoption opportunities*, May 27, 2012, <http://www.irishcentral.com/news/Irish-flock-to-Florida-for-child-adoption-opportunities154729305.html#ixzz2RFNv4snI> (last visited December 29, 2015).

³³ *Id.*

³⁴ *Id.*

practicality; as Florida is on the east coast, it is easier for Europeans to travel back and forth than from the west coast.³⁵

Interestingly, the article also mentioned a study done by Ireland's Minister for Children Frances that reveals "that more children were adopted from the United States by Irish residents in 2011 than during the nine years from 2000 to 2008."³⁶ The United States Department of State did not publish statistics pre-2008, but it appears that adopting children from the United States is a recent phenomenon in Ireland; this is probably true of other countries as well. This leads to the conclusion that the desire for children from the United States, and particularly Florida is on the increase.

If the rate of increase from 2008 to 2012 remains the same, then by the next few years the number of Outgoing Cases could be in the hundreds, and by the next decade, in the thousands. Florida is by far the leading state in Outgoing Cases.³⁷ Florida's example should be followed by other states and utilized to find foster children safe and permanent homes. The need for permanent homes is of paramount importance to the thousands of United States children waiting in the foster care system.

AN OVERVIEW OF THE CURRENT STATUS OF A CHILD'S RIGHTS TO PERMANENCY

The Right to Permanency based on Florida Law

Under Florida law, "adoption is not a right; it is a statutory privilege and unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state."³⁸ However, Florida has adopted the best interest of the child standard when seeking adoptive placement for children.³⁹

In the first code section dealing with adoptions there is a section stating the legislative intent.⁴⁰ That section provides that:

(2) It is the intent of the Legislature that in every adoption, the best interest of the child should govern and be of foremost concern in the court's determination. The court shall make a specific finding as to the best interests of the child in accordance

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *Office of Children's Issues*, *supra* note 20, FY 2008, 2009, 2010, and 2011 Annual Report on Intercountry Adoption (2008 – 25, 2009 – 26, 2010 – 43, and 2011 -73).

³⁸ *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 809 (11th Cir. 2004).

³⁹ *Id.*

⁴⁰ FLA. STAT. § 63.022 (2012).

with the provisions of this chapter. (3) It is the intent of the Legislature to protect and promote the well being of persons being adopted and their birth and adoptive parents and to provide to all children who can benefit by it a permanent family life. . .⁴¹

This section demonstrates that the best interest of the child standard is tied to the child's need for a permanent family.

This same code section goes on to state that “[t]he Legislature finds that: (a) The state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, . . .”⁴² However, the code section does provide for the situation where no home can be found as follows:

[i]f a minor is surrendered to an adoption entity for subsequent adoption and a suitable prospective adoptive home is not available pursuant to s. 63.092 at the time the minor is surrendered to the adoption entity, the minor must be placed in a licensed foster care home, with a person or family that has received a favorable preliminary home study pursuant to subsection (2), or with a relative until a suitable prospective adoptive home is available.⁴³

In summary, under Florida law, it is in the child's best interest to find a permanent home in a prompt manner, and it is only when a home cannot be found that the child would be placed in foster care. Therefore, it follows that if a child has an opportunity to find a permanent and safe home that the state should allow facilitation it even if the home is in another country. While there is not an express right to permanency, or even to adoption under Florida law, the child's need for permanency is paramount to a child's best interest, which is controlling standard in Florida, as well as many other states.

The Right to permanency based on International Law

There is no express right to permanency for a legally abandoned child in international law.⁴⁴ However, there are proponents who argue “that the right to permanent family care can be inferred from other express rights outlined in the Convention on the Rights of the Child (CRC). Additionally, there are provisions in the Hague Convention that provide support for a child's right to permanent family care.”⁴⁵

⁴¹ *Id.*

⁴² *Id.*

⁴³ FLA. STAT. § 63.052 (2012).

⁴⁴ Shapiro, *supra* note 14, at 205.

⁴⁵ *Id.* at 206.

Both the CRC and the Hague Convention direct “that a child should be placed for adoption in the child’s country of origin, rather than abroad, when domestic placement is possible.”⁴⁶ The CRC, as well as many opponents of international adoption, places an emphasis on a child’s right to grow up in the context of his or her family and culture.⁴⁷ This right is based on the fundamental truth that growing up in the context of one’s family and culture can be crucial to the basic dignity, survival, and development of the child.⁴⁸

However, the CRC provides that in determining whether intercountry adoption is in the child’s best interest is the paramount consideration, and that the state shall “[r]equire that intercountry adoption may be considered as an alternative means of the child’s care, if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the country of origin.”⁴⁹ In sum, the international standard is the child first has a right to be raised in his or her own culture, but if no domestic placement can be found, then the child’s right to permanency trumps any other interest.⁵⁰ This standard is similar to that under Florida law, discussed above; *i.e.* if no home domestically can be found, then international adoption is the preferred alternative to other situations such as long-term foster care.⁵¹

INTERNATIONAL FOSTER TO ADOPT SHOULD BE ALLOWED BECAUSE IT IS
IN THE CHILD’S BEST INTEREST AND CHILDREN
HAVE A RIGHT TO PERMANENCY

International Foster-to-adopt programs can provide children permanency sooner than if they remained in foster care.

It is in the child’s best interest to avoid the harms associated with long-term foster care. The increase in Outgoing Cases in the past few years leads to the conclusion that we should look to the international community to find safe and permanent homes for the thousands of youth stuck in domestic, long term foster care. Currently, there are an estimated 14,000 children in foster care in Florida.⁵² About 750 of the children waiting for permanent placement are without identified families.⁵³

⁴⁶ D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349, 395 (2005).

⁴⁷ *Id.* at 396.

⁴⁸ *Id.*

⁴⁹ *Id.* at 363.

⁵⁰ *Id.* at 396.

⁵¹ See FLA. STAT. § 63.052 (2012).

⁵² Florida Foster Care and Adoption Guidelines, Adopt US Kids, <http://www.adoptuskids>

The unstable environment of temporary family care can have severe negative effects on a child's development.⁵⁴ Including growth delays because of psychological stress, or behavioral and emotional disorders because of the instability of temporary family care.⁵⁵ Profoundly, when a child is placed with a permanent family, many of these delays and disabilities begin to disappear.⁵⁶ The more time that a child spends in institutional and temporary families, the more likely it is that the child will be harmed.⁵⁷ It follows that, "[p]rolonging the amount of time that a legally abandoned child must wait prior to permanent family placement also negatively affects the child's well-being and development."⁵⁸

The harms associated with the temporary family placement do not stop when a child reaches adulthood; it follows the child for the rest of his or her life.⁵⁹ Children who age-out of foster care have an increased risk of being in jail, being homeless, incurring substance abuse problems, and becoming pregnant as a teenager.⁶⁰ The evidence overwhelming shows that long-term foster care is not in the child's best interest and should be avoided at all cost.⁶¹

Intercountry adoption can provide an alternative to United States children remaining in foster care when they are freed for adoption. Some critics of "intercountry adoption argue that children adopted internationally will have difficulties adjusting to their new languages and cultures, or that the child will develop identity problems due to being raised by parents of a different race, ethnicity, or nationality."⁶² The value of language, culture, and nationality pales in comparison to the need for a permanent loving home. Granted, children who are older in age should be given a voice to say whether they want to be adopted internationally.⁶³ Many of these concerns disappear for younger children because they can adapt much more easily.⁶⁴ The critics of intercountry adoption may very well have some valid points; however, a child gains

.org/for-families/state-adoption-and-foster-care-information/florida (last visited May 9, 2013).

⁵³ *Id.*

⁵⁴ Shapiro, *supra* note 14.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Success Beyond 18 Campaign*, *supra* note 17.

⁶⁰ *Id.*

⁶¹ See Shapiro, *supra* note 14, at 204-05.

⁶² Shani King, *Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT'L L. 413, 461 (2008-2009).

⁶³ See Shapiro, *supra* note 14.

⁶⁴ *Id.*

much more by intercountry adoption than what they are losing in leaving their birth culture: they are gaining a permanent family, which is essential to their long-term wellbeing.⁶⁵ Thus, the evidence demonstrates that it is in the child's best interest to find a permanent home, regardless of whether that home is in the United States or another country.

African American Children are at the highest risk of remaining in foster care and intercountry adoption provides the best alternative to long-term foster care.

African American children constitute seventeen percent of children in the United States, but they make up forty-two percent of children in foster care.⁶⁶ Shockingly, in some large cities African American children make up more than seventy percent, and sometimes upwards of ninety-five percent of the number of children in foster care.⁶⁷

"African American families are the most likely of any racial or ethnic group to be disrupted by child protection authorities, and African American children are the most likely to enter the child welfare system after being removed from their homes."⁶⁸ Unfortunately, these children also have the smallest chance of being reunited with their parents, and once they enter the foster care system, "they remain there longer, are moved more often, and receive less desirable placement than white children."⁶⁹ Yet, given the amount of children waiting to be adopted in foster care, United States citizens continue to adopt children from abroad in large numbers.⁷⁰

One scholar argues and summarizes the seemingly inconsistent positions of the United States adoption of international children and there being a surplus of adoptable children in foster care.

A critical racial dimension to this supply and demand scheme explains why the United States sends children abroad for adoption while it remains the world's largest receiving country. Most prospective adoptive parents in the United States are white and prefer to adopt healthy white infants. In fact, many involved in the adoption industry openly acknowledge the "adoption

⁶⁵ Shapiro, *supra* note 14, at 196.

⁶⁶ Avitan, *supra* note 2, at 497.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Office of Children's Issues, *supra* note 20, Annual Report 2012, available at http://travel.state.gov/content/dam/aa/pdfs/fy2012_annual_report.pdf.

hierarchy” where “[b]lond, blue-eyed girls are at the top and African American boys are at the bottom.”⁷¹

Around forty percent of children in foster care are African-Americans and half of all the children in foster care are children of color.⁷² In order to eliminate this disparity, African Americans would have to adopt at many times the rate of Caucasians to provide permanent homes for all of the African American children currently waiting.⁷³

The foster care population is enormous, with over 400,000 children in the system. There are some who are now advocating for the building of orphanages even though they know orphanages have failed miserably in the past, “they see no other way to house the overwhelming numbers of children whose birth parents cannot care for them.”⁷⁴ However, Elizabeth Bartholet, an expert in Adoption law, argues that:

[O]rphanages seem necessary only to the degree we buy into the necessity for maintaining current barriers to transracial adoption. Foster care population numbers are overwhelming to a significant degree because of our refusal to place children for adoption whom we easily could place. We must do something to bring people to their senses.⁷⁵

Even though there are laws that are designed to facilitate the adoption of African American children, regardless of the race of either the parent or child, the reality is that white parents who adopt African American children continue to face obstacles like social stigma.⁷⁶ Something needs to be done to resolve the problem of these children staying in foster care awaiting a permanent home.⁷⁷

Foreign parents are adopting African American children, who are the hardest to place domestically.⁷⁸ In a CBS News article discussing the phenomenon of black babies being adopted by Canadians, Walter Gilbert, CEO of The Open Door, stated that he views “these adoptions as a ‘win-win’ situation for the children, and he has strong opinions about why.”⁷⁹ He believes Canadians are colorblind and he tells his birth mothers that there has been less prejudice in Canada than in the United

⁷¹ *Id.*

⁷² Elizabeth Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 DUKE J. GENDER L. & POL’Y 99, 101 (1995).

⁷³ *Id.*

⁷⁴ *Id.* at 104.

⁷⁵ *Id.*

⁷⁶ Avitan, *supra* note 2, at 495.

⁷⁷ Bartholet, *supra* note 73.

⁷⁸ Avitan, *supra* note 2, at 495.

⁷⁹ Rebecca Leung, *Born In USA; Adopted In Canada*, CBS News, February 11, 2009, http://www.cbsnews.com/8301-18560_162-673597.html (last visited May 9, 2012).

States.⁸⁰ Whether or not it is true that Canadians and Europeans really are colorblind is irrelevant for the purpose of this comment. The important fact is that they are willing to adopt African American children from the United States. If the children remain in the United States foster care system, they will still face racism, but will have the added trauma and negative effects of being in foster care.⁸¹

African American children already face great odds against finding permanent families, and adoption is their only solution.⁸² Even though I do not advocate for the sending off of all of the African American children, so that the United States does not have to deal with the very real issues of racism, I choose to look at it from the perspective of the child's best interest, which is the controlling standard. It is in the child's best interest to find a permanent safe home. While societal factors such as race, nationality, culture, and language are important, they are not nearly as important as a permanent home for children in foster care. Therefore, the most immediate and effective solution for African American children who are not being adopted by United States parents is to provide a means for them to be adopted by people willing to give them permanent homes, even if these homes are outside of the United States.

PROPOSAL FOR INTERNATIONAL - FOSTER TO ADOPT PROGRAMS

The United States State Department has finalized regulations according to the Hague Convention specifications for Outgoing Cases.⁸³ One of the criticisms of the State Department is that the "regulations that subject all Outgoing Cases to increased costs, uncertainty, and prolonged delay."⁸⁴ Some scholars argue that these regulations "reflect an extreme form of the subsidiarity principle that penalizes American children for the failures of others."⁸⁵ In addition, it is argued that, "these regulations are particularly harmful for African American children who are already in a precarious position in the United States, where, despite these children's good health and young age, many prospective adoptive parents have overlooked their availability for adoption."⁸⁶

As discussed above, Florida is seeing a significant number of Outgoing Cases each year, and while the number is small compared to

⁸⁰ *Id.*

⁸¹ Shapiro, *supra* note 14, at 205.

⁸² Avitan, *supra* note 2, at 519.

⁸³ The Guide, *supra* note 3.

⁸⁴ Avitan, *supra* note 2, at 519.

⁸⁵ *Id.*

⁸⁶ *Id.*

the number of incoming adoptions, it is on a definite upward trajectory.⁸⁷ As Florida has shown, the criticism that the State Department delays adoptions can be overcome by individual states. Finally, the regulations undermine the objectives of several federal statutes that aim to facilitate permanent placement for all American children, and in particular for those children who are likely to end up in the foster care system.”⁸⁸

In order to create a proposal for how intercountry adoptions from the United States foster care system would function, I will use Florida as the model because they are already the leader for Outgoing Cases, which makes it the most likely candidate to start an international-foster-to-adopt program. In Florida’s statute outlining the procedures for adoptions, the legislature once again took the opportunity to underscore the importance of the child’s best interest by providing that in “all matters coming before the court under this chapter, the court shall enter such orders as it deems necessary and suitable to promote and protect the best interests of the person to be adopted.”⁸⁹ This standard is the foundation upon which my proposal is based.

Under the proposed system, there must first be a child in need of placement which is determined by a United States authorized entity such as the state or local child protective services agency; an agency that is accredited, or approved; or, a supervised provider.⁹⁰ Under Florida Law, a child is free to be adopted when “the required persons consent to the adoption” (meaning the parents) “or the parent-child relationship is terminated by judgment of the court.”⁹¹ After parental rights have been terminated, “the parents are not entitled to notice of any subsequent adoption proceeding and “are not entitled to knowledge at any time after the order terminating parental rights is entered of the whereabouts of the child or of the identity or location of any person having the custody of or having adopted the child.”⁹² Therefore, under Florida law, international adoptive parents would not have to worry about the birth parents contesting the adoption because under Florida law they are not even entitled to know of the proceeding.

Under the IAA the next step is that a United States authorized entity prepares a child placement study.⁹³ The background study must include

⁸⁷ *Office of Children’s Issues, supra* note 20, Annual Report 2012.

⁸⁸ *Id.*

⁸⁹ FLA. STAT. § 63.022(4)(k) (2012).

⁹⁰ 22 C.F.R. §§ 97.1 (2006), 97.2 (2006), 97.3(b) (2006).

⁹¹ FLA. STAT. § 63.022(4)(b) (2012). For a detailed account of the requirements for termination of parental rights pending adoption, *see* FLA. STAT. § 63.087 (2012), FLA. STAT. § 63.089 (2012).

⁹² FLA. STAT. § 39.812(2) (2012).

⁹³ 22 C.F.R. §§ 97.3(a) (2006), 96.53(a) (2014).

information regarding the child's social environment, family history, and medical history.⁹⁴ Florida has similar requirements regarding the medical history of the child, but this is done at the same time as the prospective adoptive parent's home study.⁹⁵

The IAA next provides that "[r]easonable efforts must be made to actively recruit and make a diligent search for prospective adoptive parents in the United States before an Outgoing Cases of a child can be approved."⁹⁶ The agency must prove to a state court that it made reasonable efforts and be able to provide documentation of these efforts.⁹⁷

22 CFR 96.54 (a-b) provides that reasonable efforts include:

- (1) Disseminating information on the child and his or her availability for adoption through print, media, and internet resources designed to communicate with potential prospective adoptive parents in the United States;
- (2) Listing information about the child on a national or State adoption exchange or registry for at least sixty calendar days after the birth of the child;
- (3) Responding to inquiries about adoption of the child; and
- (4) Providing a copy of the child background study to potential U.S. prospective adoptive parents.⁹⁸

However, the reasonable efforts requirement does not apply if the parents of the child find adoptive parents internationally as long as the adoption service provider does not help them.⁹⁹ The parent's choice standard reflects the rule that reasonable efforts in some situations can mean no efforts at all when it is in the best interest of the child.¹⁰⁰

Next, a home study is done on the prospective adoptive parent.¹⁰¹ Once a foreign person decides to adopt a United States child, the prospective adoptive parent has a home study prepared that meets the requirements of the county he or she resides in and the United States with jurisdiction over the adoption.¹⁰² After the home study is prepared, the foreign entity will send the home study to the United States

⁹⁴ *Id.*

⁹⁵ See FLA. STAT. § 63.082 (2013).

⁹⁶ Adoptions from the U.S., INTERCOUNTRY ADOPTION, http://adoption.state.gov/hague_convention/outgoing.php (last visited May 9, 2013). See 22 C.F.R. § 96.54(a) (2014). See also Avitan, *supra* note 2, at 505.

⁹⁷ Avitan, *supra* note 2, at 505.

⁹⁸ 22 C.F.R. § 96.54(a)(1)-(4) (2014).

⁹⁹ Adoptions from the U.S., INTERCOUNTRY ADOPTION, http://adoption.state.gov/hague_convention/outgoing.php (last visited May 9, 2013).

¹⁰⁰ 22 C.F.R. § 96.54(b) (2014).

¹⁰¹ 22 C.F.R. § 97.3(d)(1)-(3) (2006).

¹⁰² *Id.*

authorized entity.¹⁰³ The home study must provide information regarding:

the prospective adoptive parent[‘s] identity, eligibility, suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, and characteristics of the children for whom they would be qualified to care; Confirmation that a competent authority has determined that the prospective adoptive parent is eligible and suited to adopt and has ensured that the prospective adoptive parent has been counseled as necessary; and The results of a criminal background check.¹⁰⁴

Florida law also requires a social study to be completed, which is taken into consideration by the court prior to judgment on adoption petitions.¹⁰⁵ Under Florida law, after the “social and medical information concerning the minor and the parents is furnished by the parent”, it is filed with the court.¹⁰⁶ The court then conducts a final hearing on the petition to terminate parental rights pending adoption.¹⁰⁷

The home study looks into details of the prospective- parents’ life.¹⁰⁸ Florida law allows the following people to adopt, “a husband and wife jointly,” “an unmarried adult, a married person without the other spouse” if certain conditions are met, but “no person eligible to adopt under this statute may adopt if that person is a homosexual.”¹⁰⁹ This excludes any homosexual international prospective parent from adopting from Florida.

However, the most important aspect of Florida’s law is that it does not require the parent to be a resident of the state.¹¹⁰ The statute requiring the prospective adoptive parent to be a resident was repealed in 2003.¹¹¹ This is crucial because international adoptive parents would not be able to meet a state’s residency requirement.¹¹² Repealing this statute could very well be one of the key factors of why Florida is the leading state in Outgoing Cases. In order for Outgoing Cases to be a viable solution to the growing foster care system, other states need to take Florida’s lead

¹⁰³ 22 C.F.R. § 97.3(d) (2006).

¹⁰⁴ 22 C.F.R. § 97.3(d)(1)-(3) (2006).

¹⁰⁵ FLA. STAT. § 63.022(4)(c) (2014).

¹⁰⁶ FLA. STAT. § 63.022(4)(f) (2014).

¹⁰⁷ *Id.*

¹⁰⁸ FLA. STAT. § 63.092(3)(a)-(h) (2012).

¹⁰⁹ FLA. STAT. § 63.042(2)(a)-(c) (2015).

¹¹⁰ FLA. STAT. § 63.185 (2015) (Repealed by Law 2003, c 2003-58, § 33, eff. May 30, 2003).

¹¹¹ *Id.*

¹¹² *See id.*

and repeal any law-requiring residency in the United States. When the United States adopts from other countries systems similar to our foster care, there is no residency requirement imposed; so to require an additional burden on international parents that is not imposed on prospective United States adoptive parents would be paternalistic and hypocritical. Therefore, there should be no residency requirement before a parent is approved to adopt in Outgoing Cases.

Once the prospective adoptive parent has applied to and been approved by the foreign authorized entity, the approval, the home study and the criminal background check are sent the United States authorized entity.¹¹³ Then the United States authorized entity sends the foreign authorized entity for approval the child background study, proof that necessary consents have been obtained, and a proposed placement, along with the reason for its determination that child background study and giving her ethnic, religious, and cultural background.¹¹⁴ Finally, if the Foreign authorized entity approves the match, the United States authorized entity can give the proposal to the prospective adoptive parents for their approval.¹¹⁵

After the parents have received the adoption proposal, they must petition the U.S. State adoption court that has jurisdiction over the case to adopt the child and must present all supporting evidence required by state law.¹¹⁶ If the state law allows it, the state adoption court may conduct a “preliminarily review of the proposed adoption to determine whether initial guardianship to the prospective adoptive parent may be granted, so that the child can travel with the parent to the receiving country prior to the issuing of a final adoption order.”¹¹⁷ If the court grants the guardianship, then the prospective adoptive parents will return to the U.S. state adoption court for the final adoption if required to do so.¹¹⁸

Under Florida law, after the home studies are complete, the state does allow the child to go home to live with the prospective parent for a sufficient period of time.¹¹⁹ However, this is done under the guidance of the adoption entity.¹²⁰ In an international-adoption from foster care the child could go home with the prospective adoptive parent.¹²¹ While

¹¹³ See 22 C.F.R. § 97.3(a)-(d) (2015).

¹¹⁴ 22 C.F.R. § 97.3(b), (g)-(i) (2015).

¹¹⁵ 22 C.F.R. § 97.3(f), (i)(1)-(2) (2015).

¹¹⁶ *Id.*

¹¹⁷ The Guide, *supra* note 3, at 11.

¹¹⁸ See 22 C.F.R. § 97.3(e)-(i) (2015).

¹¹⁹ FLA. STAT. ANN. § 63.022 (4)(d) (West 2014).

¹²⁰ *Id.*

¹²¹ See 22 C.F.R. § 97.3(e-i) (2015).

guidance from the adoption entity could be difficult to arrange, there are many ways it could be done. For example, the United States could establish procedures for having an agency personally visit the home a few times or the United States could try to partner with the foreign agency to supervise the situation. This would allow a test trial to see if the placement is in the child's best interest.

Another requirement under Florida law is that the "the birth parent, the prospective adoptive parent, and the minor receive, at a minimum, the safeguards, guidance, counseling, and supervision required in this chapter."¹²² This is a good way to provide support to both the child and the prospective adoptive parent to help ease the transition into becoming a family. In the international context, it may provide additional difficulties to institute the guidance and counseling because the adoptive parent is not in the country, but as stated above the United States could work with international providers or while the prospective adoptive parent is in the United States for the court proceedings they could receive counseling and support.

Under the IAA, after the foreign authorized entity provides entry authorization for the child, the U.S. state adoption court conducts a final review of the proposed adoption.¹²³ Section 303(b) of the IAA imposes conditions on U.S. state court orders in Outgoing Cases: (1) the U.S. State adoption court must have determined the above mentioned procedures have been met, (2) determined that the adoptive place is in the best interests of the child, and (3) verified satisfactory evidence that Articles 4 and 15 through 21 of the Convention have been met.¹²⁴

In addition, if the parent or any authorized entity is seeking a Hague Adoption Certificate (HAC) or Hague Custody Declaration (HCD), then the following U.S. State adoption court findings are needed: the evidence supported a finding that adoption was in the best interest of the child,¹²⁵ a determination that the child is eligible for adoption, the court's grant of adoption or custody for purposes of adoption; and the court's verification that substantive regulatory requirements set forth in 22 CFR 97.3 (a-k), which are addressed above, have been met.¹²⁶

After an U.S. state court grants a final adoption or custody for the purpose of adoption, any party can apply to the United States Department of State for an HAC or HCD to help to ensure that the adoption or grant

¹²² FLA. STAT. ANN. § 63.022 (4)(j) (West 2014).

¹²³ 22 CFR § 97.3(f), (i)(1)-(2)(2006).

¹²⁴ 22 CFR § 97.3(b)(2006).

¹²⁵ 22 CFR § 97.2(b)(2)(2006).

¹²⁶ 22 CFR § 97.3(a)-(k)(2006).

of custody will be recognized by the receiving country.¹²⁷ The Secretary of State issues HACs, and HCDs.¹²⁸ An HAC certifies that the outgoing adoption has been done following the requirements of the Convention and the IAA.¹²⁹ An HCD declares that custody of a child for the purpose of adoption has been granted in the United States.¹³⁰ Depending on the immigration laws of the receiving country, an HCD may be helpful in getting the child into the receiving country for the purpose of permanent residence and citizenship depending on the immigration laws of the receiving country.¹³¹

Emigration of the child to the receiving country is the last and final step in the adoption process. However, “[p]ost placement monitoring is performed, if required.”¹³² As discussed above, the monitoring may be difficult to achieve in the international context, but through cooperation with foreign adoption agencies it is possible to have post placement monitoring if it is required.

Under Florida law, any action or proceeding of any kind to vacate, set aside, or otherwise nullify a judgment of adoption or an underlying judgment terminating parental rights on any ground may not be filed more than one year after entry of the judgment terminating parental rights.”¹³³ This is important for the peace of mind of prospective adoptive parents because they can be secure that after one year they never have to worry about someone trying to undo the adoption.

International adoption from the United States foster care system presents several challenges to international prospective adoptive parents; however, these challenges can be overcome. The above analysis of the matching of the IAA and Florida statutory law shows that the two systems are compatible. The most important requirement is that the state does not have a residency requirement before adopting. If that requirement has been removed, then the process can proceed. Even though there are challenges in the monitoring, counseling, and guidance that normally accompanies domestic adoptions, it is possible to overcome these challenges through cooperation with foreign adoptive agencies.

Furthermore, when United States adoptive parents adopt internationally, they are often adopting from state institutions that are the

¹²⁷ U.S. CITIZENSHIP AND IMMIGRATION SERVICES, PROCESS SUMMARY, 2009 WL 156570 (Oct. 16 2009).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ FLA. STAT. § 63.182 (2006).

equivalent of United States foster care systems. It would be hypocritical and paternalistic for the United States to have no problem adopting from international foster care systems and yet refuse to allow international prospective adoptive parents do the same. Therefore, the United States should implement a system from which international parents can adopt from the foster system.

CONCLUSION

Even the opponents of intercountry adoption cannot deny the numbers; 104,236 children in foster care waiting for adoption.¹³⁴ As demonstrated by the United States State Departments Annual Reports, there are increasing numbers of foreign individuals willing to adopt United States children.¹³⁵ This is a problem that needs to be fixed.

The effects of being left in foster care for long periods of time are undisputedly harmful to children's growth and development.¹³⁶ However, when the child is adopted and is part of a permanent family, many of these delays and disabilities begin to disappear.¹³⁷ The more time that a child spends in institutional and temporary families the chances of him not being harmed lessens.¹³⁸ Children who age out of foster care rarely catch up to their peers.¹³⁹ In fact, they are more likely to be homeless, in jail, having substance abuse problems and becoming pregnant as a teenager.¹⁴⁰ Therefore, it becomes imperative to find children homes as fast as possible. There is no time for them to wait years for a United States citizen to want to adopt them when there are Europeans and Canadians ready and willing to adopt them.

Intercountry can provide a fast, safe, solution to the United States' large numbers of children waiting to be adopted. Children of color are the most at risk of not being adopted by United States citizens;¹⁴¹ it is unfair to place the burden of the United States' racism on their small shoulders while denying them a permanent home, when it is in their best interest to be adopted as soon as possible.

¹³⁴ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, Preliminary FY 2011 Estimates as of July 2012, No. 19, available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf>.

¹³⁵ See *Office of Children's Issues*, *supra* note 21.

¹³⁶ Shapiro, *supra* note 14.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *Success Beyond 18 Campaign*, *supra* note 17.

¹⁴⁰ *Id.*

¹⁴¹ Avitan, *supra* note 2, at 495.

The procedures of intercountry adoption from the United States foster care system present several challenges to international prospective adoptive parents, however, with the cooperation of each state these challenges can be overcome. Florida is currently providing an example of the way a state can facilitate intercountry adoption. These same procedures can be applied to adoptions from foster care. As discussed above, the IAA regulations and state law can be welded together to create a viable framework for how an intercountry adoption from United States foster care can work. However, in order for it to work it is imperative that the state has no residency requirement for adopting parents. If a state has a residency requirement, then the possibility of intercountry adoption as a solution to children waiting to be adopted in foster care can never be utilized. There are also difficulties in the monitoring, counseling, and guidance that normally goes along with domestic adoptions, but these challenges can be overcome through cooperation with foreign adoptive agencies.

When all of the challenges to intercountry adoption are stripped away, all that is left is a child, who is alone in the world, with no family, no permanent home and who is dependent on the government to do what is in his or her best interest. The evidence clearly shows that remaining in foster care is not in the best interest of the child; the more time a child spends on foster care, the more harm is done.¹⁴² More states need to follow Florida's example and start exploring the possibility of intercountry adoption as a solution to the problem of over 100,000 children waiting to be adopted.

¹⁴² Shapiro, *supra* note 14.