

Recommendations to the State Department & Acton Burnell re:  
Implementation of the Intercountry Adoption Act of 2000

**Evan B. Donaldson Adoption Institute**

Cindy Freidmutter, Esq., Executive Director

May 24, 2001

The Evan B. Donaldson Adoption Institute appreciates the opportunity to submit comments concerning the promulgation of regulations under the Intercountry Adoption Act (IAA). Established in 1996, the Adoption Institute is a not-for-profit organization that provides a fact-based perspective on adoption issues by disseminating reliable information, conducting empirical research, and educating practitioners and policymakers on how to improve adoption policy and practice. The Institute does not provide adoption services.

In crafting standards for international adoption, all participants should be cognizant of the overarching objectives that the regulations and the oversight entity(ies) must achieve. Of primary concern are the hundreds of thousands of children wait in orphanages throughout the world with no hope of adoption within their own countries. United States (U.S.) families are the major source of permanent homes for these children. The younger these children are adopted, the better chance they have of a healthy, happy future. Positive public perception of the international adoption process will encourage larger numbers of U.S. families to consider international adoption. *Regulation and oversight must facilitate and improve, but not complicate and delay, the process for international adoption by U.S. prospective adoptive parents.*

We also must recognize that international adoption has evolved into a potentially lucrative and largely unregulated business. Since 1990, the number of international adoptions by Americans has increased by 161% from 7,093 to 18,539 in 2000. Accurate information is not currently compiled by any reliable source about the aggregate fees charged for international adoption services. One can reasonably estimate, however, that U.S. adoptive parents minimally were close to \$200 million in the year 2000 for international adoption services.<sup>1</sup> As the number of children being adopted internationally has grown, there has also been a sharp escalation in the number of individuals and agencies, here and abroad, that are involved in facilitating the adoption process. In 1989, a handful of adoptions took place in Russia and China. In 2000, these two countries accounted for 52 percent of all international adoptions by Americans. By the end of the 1990s, there were 80 U.S. agencies active in Russia and 150 active in China.<sup>2</sup>

The market forces inherent in international adoption pose a potential threat to the welfare of children being considered for adoption, as well as their birth parents and prospective adoptive parents. Some Americans desperate for young healthy children

---

<sup>1</sup> The estimate conservatively assumes an average of \$10,000 per finalized adoption for services provided domestically and overseas (not including orphanage "contributions", travel costs and home studies) for 18,539 adoptions in 2000.

<sup>2</sup> Freundlich, M, *Adoption and Ethics, The Market Forces in Adoption*, An Evan B. Donaldson Adoption Institute Report published by CWLA Press (2000), 43.

will pay substantial fees to adopt infants and toddlers. Speakers at Acton Burnell's April 2 public meeting described unethical and even shocking practices they experienced or observed during international adoption. Some of these practices are not directly addressed by any laws; others continue through poor enforcement and oversight systems. Even small numbers of bad experiences will disproportionately influence public perception about international adoption and reduce the numbers of potential adoptive parents in the U.S.

While the majority of agencies and professionals act ethically, charge reasonable fees and utilize appropriate practice standards, profiteers have seen the economic potential and entered the field of international adoption. The result: illegal action and unethical behavior with respect to obtaining children for the purpose of adoption that have been recently documented in the United States and many other countries, including Guatemala, India, Peru, Vietnam and Honduras.<sup>3</sup> This unethical behavior, which is believed to be exhibited by a very small number of adoption providers, is driven mainly by the perceived money making opportunities in international adoption.

The Adoption Institute's recent book, *Adoption and Ethics: The Market Forces in Adoption*, clearly describes the increasingly commercialized environment in which international adoption occurs and the pressing need for practice standards. Written by Madelyn Freundlich, the former executive director of the Adoption Institute and published in cooperation with the Child Welfare League of America, this book was based on extensive research and consultations with a broad range of organizations, professionals and triad members. The book highlights many of the serious issues that the State Department must address in developing the regulations for the IAA. The chapter on international adoption is attached for your review and consideration.

Until the IAA, there was no federal law governing the activities of agencies and individuals in the United States providing assistance with international adoption. State laws are generally weak in curbing potential abuses. One commentator noted that "It is a more heinous crime in North Carolina to throw a piece of trash on a highway (punishable by a \$1,000 fine) than to place a child illegally or in an unsuitable home in 41 states."<sup>4</sup> While a number of U.S. adoption agencies have participated in voluntary accreditation, passage of the IAA has opened the door for the first time to a formal governmental process for setting national standards for all providers of international adoption services.

It is absolutely essential that the international adoption practice standards promulgated by the State Department establish clear, uniform parameters for adoption practice for all agencies, practitioners and their contractors and agents. These standards must place the highest priority on the rights and needs of children. The standards should create a framework for adoption service providers that promotes respectful and honest interaction with birth parents and prospective adoptive families. It is also critical that the State Department use this initial regulatory process to provide for appropriate enforcement of the standards. Children adopted from other countries should never have to question the practices that led to their adoption.

The State Department is center stage at a unique and historic moment in the history of adoption in the U.S. If the key issues in international adoption are appropriately addressed, the regulations may positively affect the lives of hundreds of thousands of birth parents, adopted children and adoptive families in the first decade of the

---

<sup>3</sup> *The Market Forces in Adoption*, P. 46-7.

<sup>4</sup> *The Market Forces in Adoption*, P. 61.

millennium. In order to ensure that the regulations do address all of the critical issues, it is essential that all concerned stakeholders -- especially the people who have experienced the process first hand -- have an opportunity to participate in the standards development and review process. The triad survey posted on the Acton Burnell website is not adequate. It will not reach a broad cross-section of triad members, so the responses will not produce a balanced and comprehensive picture of recent experiences with international adoption.

Although serious abuses in the international adoption process have been reported in a number of forums, the process of regulation development would best be served if we had more extensive information about the overall quality of practices in international adoption. Acton Burnell could significantly advance the regulation drafting process by engaging in a systematic survey of agency practices and consumer experiences (in addition to asking for public input) in order to better understand the issues. By clarifying the scope and prevalence of practice issues that need to be addressed, such a survey would ensure that the U.S. neither over-regulates nor under-regulates the international adoption industry.

Given the limitations of what is known and the many aspects of international adoption that are under consideration, the Institute urges the State Department to address the following six critical issues in promulgating regulations:

### **1. Adoption Service Fees**

The Institute urges that standards be established with respect to adoption service fees in order to systemically eliminate excessive fees and unethical financial incentives for U.S. accredited agencies and approved persons (and their contractors and agents). Those involved in arranging international adoption are certainly entitled to be reasonably compensated for services rendered. Standards and enforcement mechanisms should be established to identify and sanction what are likely to be the small numbers of practitioners charging excessive fees that bear no relation to the market rates for comparable services and costs. Given the reporting requirements for fees in the IAA, the State Department and/or the accrediting entity(ies) should have capability for identifying excessive fees in an efficient manner.

Excessive fees that go beyond reasonable compensation to adoption service providers have the potential to hurt all members of the adoption triad. Birth parents, often uneducated and living in dire poverty, are sometimes pressured, paid or coerced into relinquishing their children. Prospective adoptive parents who can provide a nurturing home but can't pay high fees may be closed out of the adoption process. Most important, children may be hurt in many ways by excessive charges. Some may lose their childhoods languishing in orphanages because potential adoptive families are economically unable to pursue adoption. Others may be hurt in adulthood by the perception that they were "purchased" in what looks objectively like commercial transactions. Most frightening, children may be unnecessarily separated from their birth families by unscrupulous individuals whose "customers" will pay high "fees" for young healthy children.

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Treaty") clearly addresses this issue. Article 32 says:

- 1. No one shall derive improper financial or other gain from an activity related to an intercountry adoption.*

2. *Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.*

The IAA specifically addresses fees in *Section 203 (b)(1)(A)(iv) & (v)* and *Section 104 (b)(7)* by requiring the following:

- ❑ Accurate fee information must be provided to adoptive families,
- ❑ Contingency payments to staff and independent contractors are prohibited, and
- ❑ Annual reports on the range of and median adoption fees charged are required.

The Institute urges that the issue of excessive adoption fees be directly addressed in the implementing regulations. The State Department has authority to address this issue under the IAA and the Treaty. The State Department should start by incorporating the Hague Convention Treaty language, cited above, in the proposed regulations. By limiting fees to costs, expenses and reasonable professional fees as the Treaty requires, and by prohibiting contingency payments to staff and independent contractors as the IAA requires, the regulations will effectively address the financial motive that underlies so many of the reported unethical practices.

In order to meet the IAA requirement for disclosure of fee information to prospective adoptive families, the regulations should establish a uniform reporting format that allows realistic comparison of costs from agency to agency. To make such comparison possible, it is essential that agencies be required to report the specific services that are provided for a particular fee. For example, an agency that charges \$3,000 more than another provider, but provides comprehensive counseling and education, may actually offer more value than the “cheaper” provider.

But mandating disclosure is not sufficient. The oversight entity must monitor accredited agencies and approved persons to insure that prospective adoptive families are, in fact, charged for services, not children. Mechanisms such as periodic audits of agencies and surveys of adoptive families must be in place to provide basic assurances that the information reported is accurate, that families are not being charged more than the stated fees and that fees are not excessive.

Current practices in setting international adoption fees must be reviewed to evaluate compliance with the Hague Treaty. Some agencies charge sliding scale fees to enable people with a range of incomes to adopt. These differential fees serve a valid purpose, and do not appear to violate the Treaty. But it is also a prevalent practice to charge varying fees depending on the age, health and in some instances race of the child. While many providers may have instituted this practice for non-economic reasons, the Institute is concerned that this pricing structure may violate the Treaty and may need to be addressed in the current regulatory process.

## **2. Access to Health and Other Family Information**

It is critical throughout the life of an adopted person to have access to comprehensive genetic and health information about their biological family. Access to information about adoptees' origins is essential, since scientific advances have made genetic information and health history a prerequisite to receiving optimal medical care. From a psychosocial perspective, many adopted people want to know about their origins. Not knowing about their origins and being denied available information has led to unnecessary psychological pain and unresolved identity issues for adoptees. It can be expected,

therefore, that significant numbers of people adopted through intercountry adoption will seek information about and/or contact with their biological families for a variety of reasons important to them.

The IAA addresses access to health and other information in two ways. First, it requires accredited agencies and approved persons to provide prospective adoptive parents with a copy of the medical records of the child, translated if practicable, in a timely manner (*Section 203(b)(1)(A)(i)*). Second, it provides access to Convention records maintained by the Immigration and Naturalization Service as permitted by applicable federal law (*Section 401(b)(1)*). The laudable consequence of these provisions is to improve access to information for adoptive parents and their children.

In crafting monitoring and oversight mechanisms for the health information disclosure provisions, the State Department should be concerned about the influence of money. Market force incentives *may be* motivating what are believed to be small numbers of unscrupulous adoption agencies and individuals to withhold known information or to gather minimal information in order to attract adopters willing to pay high fees for “healthy” children. Without uniform standards, even adoption providers who unquestionably provide quality services may be reluctant to press orphanage staff and government bureaucrats for more information when they are dependent on these sources for referral of children.

To effectively implement these provisions, the Institute recommends that the State Department make it a priority to improve the quality of the information available at the time of adoption from the sending countries in the following ways:

The best time to gather baseline health information is at the time of the relinquishment of the child for adoption. Depending on the country and type of relinquishment, this information may not be available, accurate or complete. In many countries, health personnel are not familiar with modern medical advances and/or health practices are different. Some orphanages do not have regular access to medical personnel. With available personnel and diagnostic methods, it may not be possible to identify complete medical histories or diagnose all current and future medical problems. But action must be taken by the United States to require accredited agencies/approved persons and encourage sending countries to improve their reporting of health and genetic information about children available for adoption.

The United States should set uniform requirements for all accredited agencies and approved persons concerning the type of, and process for gathering health information. The State Department should provide adoption and orphanage officials in other countries, as well as U.S. accredited agencies and approved persons, with a bilingual medical history questionnaire for gathering essential family health information from relinquishing birth parents and orphanage staff. The questionnaire should be prepared in consultation with expert organizations, such as the American Academy of Pediatrics and the National Institutes of Health, and other Treaty countries. It should be completed and signed by medical personnel, if possible, or by orphanage officials at the institution where the child resides. General information about health issues in the birth country also should be provided in writing to prospective adoptive parents as part of the pre-adoption training/education curriculum. The statement submitted by the American Academy of Pediatrics on medical evaluation of internationally adopted children comprehensively addressed the prevalent health issues among this population.

But health information disclosure cannot be handled simply through regulations prescribing appropriate practices by accredited agencies and approved individuals. The

State Department should broadly educate adoption officials in the predominant sending countries about the U.S. health information standards and the reasons for establishing them.

Moreover, it is predictable that all relevant genetic health information will not be available or even known at the time of relinquishment. In some cases, adoptees' lives may literally hinge on their ability to establish contact. For example, organ and bone marrow transplants from biological family members sometimes are essential in life threatening situations and will likely become more commonplace in the future. In addition, all available information about adoptees' origins may not be in the Convention records, but may be in the records of the sending country. There is justifiable concern that information in sending countries regarding international adoptees' origins will be lost unless the State Department addresses this issue in a proactive manner. The Institute recommends that the State Department strongly encourage sending countries to retain records in an accessible manner, consistent with Article 30 of the Treaty, which directly addresses this issue:

- 1) *The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.*
- 2) *They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.*

U.S. citizens adopted from other countries should, at a minimum, have all available information about their origins preserved in the sending countries so that contact with their biological families is possible.

### **3. Consumer Protections & Education**

As in other industries that provide services to vulnerable people, adoption providers should receive clear direction about the minimum safeguards that must be in place to protect their direct "customers"--adoptive families--from unethical and illegal behavior. Each year, tens of thousands of American families "purchase" services to help them adopt a child with less consumer protection and education than is provided to buyers of cigarettes and used cars. Too often, adoptive families are asked to sign contracts that require full payment and waive all agency/practitioner liability, without regard to whether services are actually delivered or meet minimum quality standards. This practice must be addressed in the regulatory process. Although there are issues unique to adoption, models from other industries will likely be informative.

The IAA provides legislative authority to take the following initial steps:

- The responsibilities and non-waivable liabilities of accredited agencies and approved persons should be specified in the regulations, and mandated to be included in plain language in adoption contracts between accredited agencies/approved persons and prospective adoptive parents.
- Accredited agencies and approved persons should be required to have sufficient financial reserves, or alternatively agree to put in escrow a specified portion of their fees from pending adoptions, to insure that families receive all contracted-for services.

In order to implement the accreditation process, the State Department or its designee should conduct an educational campaign to inform potential adoptive parents about the U.S. standards for international adoption services, including client rights and provider responsibilities. Consumers can neither make informed decisions about where to get adoption services, nor can they realistically evaluate the services received, unless they know what is required by law. Currently, adoptive families are forced to rely mostly on word of mouth and provider advertisements to select a service provider.

As a key component of the education campaign, the State Department or its designee should develop a consumer report card on accredited agencies and approved persons. Relevant information should be displayed in a standardized format that allows comparison of providers. The information should include accreditation/approval status, fees charged, services provided, number of finalized and disrupted adoptions by sending country<sup>5</sup>, demographic profile of adopted children, the average time required for completion of finalized adoptions by sending country, and other relevant information. Consumer report cards for medical providers have been available for years, and have resulted in more informed consumer choice and consequently improved consumer satisfaction.

The State Department should create, or delegate to the accrediting entity(ies) to create, an independent ombudsman to assist families receiving international adoption services with problems and complaints. In many regulated industries comparable to adoption, independent ombudsmen are key to improving consumer satisfaction and identifying and resolving systemic problems.

While consumer education, consumer report cards and ombudsman services will improve the adoption experience for prospective adoptive parents, these measures will also protect children who are, most appropriately, the major concern of the Hague Treaty. By encouraging prospective adoptive parents to select accredited agencies/approved individuals who engage in best practices, report cards, educational campaign and the ombudsman will discourage unscrupulous providers who use unethical methods to “procure” children for adoption and ineffective practitioners who don’t reliably provide services from continuing in the business.

Finally, by mandating that adoption service providers carry “adequate liability insurance for professional negligence and any other insurance that the Secretary considers appropriate” (*Section 203(b)(1)(E)*), the IAA contemplates that providers will be liable for negligence and misrepresentation of information. Through actuarial research, the State Department and Acton Burnell should determine the appropriate amount of malpractice and other coverage that will be minimally required to insure that accredited agencies and approved persons are adequately insured to reimburse families for malpractice, breach of contract, and other acts of negligence and fraud. Insurance carriers will undoubtedly place requirements on providers to act with due care, as they do in other industries. While litigation may to some degree raise the overall cost of adoption (as it has the cost of health care) due to rising insurance costs, the health care industry’s concern about liability and litigation has also had a positive impact in improving the quality of health care services. As with the consumer education mechanisms discussed above, legal recourse for adoptive families who have experienced gross negligence or fraud also protects children and birth parents in other countries by creating economic disincentives for unscrupulous and/or poor quality providers to continue providing adoption services.

---

<sup>5</sup> These rates need to be appropriately risk adjusted so that agencies placing older and other higher risk children are not unfairly portrayed.

#### **4. Preadoption Training/Education & Post Adoption Services**

The IAA requires that preadoption education be provided to prospective adoptive families (*Section 203 (b)(1)(A)(iii)*). This mandate goes to the heart of how the regulatory process can improve the adoption experience. In a 1999 Institute survey of adult Korean adoptees, the participants strongly expressed the need for better parent preparation for transracial adoption, and wished their families had been better prepared to effectively help them with issues related to loss, identity, race and culture. We should use this knowledge to help the next generation of adoptees and their families.

Standards for the content of such training should be developed with the goal of fully informing preadoptive families about issues related to adoption in general and international adoption in particular. Families considering international adoption should be educated about specific health, emotional and behavioral issues that have been documented among internationally adopted children generally, as well as those issues specific to the country of origin. This training should include information, where relevant, about current knowledge of the short, and sometimes long-term, impact of institutional environments on children, and available post-adoptive services that can be accessed to provide health care, rehabilitation and support.

In addition, preadoption education/training should prepare prospective adoptive parents to understand:

- ❑ the child's cultural, religious, ethnic and/or linguistic background and how to nurture these ties;
- ❑ the grief and loss of leaving their birth family and country of origin, as appropriate to the age of the child;
- ❑ issues related to knowledge about and contact with birth families;
- ❑ issues related to children's bonding with adoptive families;
- ❑ development and life cycle phases;
- ❑ post-traumatic stress disorder; and
- ❑ identity formation.

Adoptive families who have realistic expectations and appropriate information on how to deal with potential problems and challenges will be better equipped to parent their children. With accurate and comprehensive information, they can also make informed choices about the characteristics of the children for whom they would be qualified to parent.

#### **5. Adoptions of Children Emigrating from the United States**

The IAA creates a national policy with respect to emigration of U.S. resident children for adoption in other countries by requiring that accredited agencies/approved persons make "reasonable efforts to actively recruit and make a diligent search for prospective adoptive parents to adopt the child in the United States." (*Section 303(a)(1)(B)(i)*). This requirement applies to all U.S. resident children potentially being placed for adoption in other countries. It also requires the search to be "timely" recognizing that children can be irrevocably harmed by delays in placement with a permanent family. Currently, there is no reliable source of information about the numbers of and reasons why U.S. children are placed for adoption in other countries.

The regulations should address the search mandate in the following manner:

- ❑ Specifically define "reasonable effort", "actively recruit" and "diligent search" to require a minimum and meaningful time period in which the accredited entity or

- approved person utilizes media venues, publicly-funded adoption registries/websites, and/or community outreach in an effective manner to identify an adoptive family in the U.S. Efforts should be child-specific.
- Require the accredited entity or approved person to file a report on each child it seeks to place for adoption in another country describing U.S. placement efforts. If recruitment efforts are futile, such as for children with significant special needs, the provider must document the reasons and can request a waiver of all or part of the search period.
  - Permit adoptive placement in another country only after the report is reviewed and approved by the State Department or its designee. Review and approval should be mandated to take no longer than 10 business days. Since this approval is an oversight function, it would defeat the purpose for the designee to be the accredited agency or approved person.

The National Council for Adoption (NCFA) has proposed that the IAA recruitment and search requirements should be addressed in the regulations by requiring one annual advertisement in a newspaper with national circulation stating that the provider “expects to regularly have children who may be the subject of intercountry adoption and that any prospective adoptive parents are invited to submit applications to adopt said children.” NCFA further proposes that a “timely” search should be 3 days after birth for a newborn or one week for other children. The Institute strongly opposes NCFA’s position. The Institute believes that our national public policy, as reflected in the IAA, should place a high priority on facilitating domestic adoptions for children residing in the U.S. whenever possible, so long as there is no undue delay in adoptive placements.

## **6. Accreditation, Oversight & Enforcement**

The international adoption industry would benefit from an oversight approach that focused less on paper intensive peer review accreditation activities and more on identifying the relatively small number of poor quality and/or unscrupulous agencies and individuals. Investigating individual complaints is not sufficient. Oversight also should include pro-active and systematic efforts to identify patterns of poor quality, unethical and/or illegal activities. Serious violators should be subject to swift and severe sanctions, including government enforcement action and loss of accreditation.

The accrediting entity(ies) is granted broad authority in the IAA (*Section 202(b)*) to accredit and approve providers, as well as provide oversight and enforcement of the regulatory standards governing adoption practice. This structure is somewhat unorthodox. Oversight and enforcement of other comparable regulated activities have historically been retained by governmental bodies. For example, accrediting organizations for health care providers are not called on to provide primary enforcement of, or to oversee compliance with, health care regulations. While accreditation activities may uncover non-compliance with governmental health care standards, it is the role of government health departments to oversee and enforce compliance with practice requirements. Delegating such broad authority under the IAA poses some risks and challenges, since an organization with accreditation or credentialing expertise may, in fact, have no experience with or capacity for oversight and enforcement.

In developing the Request for Proposal for the accrediting entity(ies), the State Department must address the need for a strong, proactive oversight and enforcement capacity. This would include having the capability not only to investigate complaints, but also to conduct routine surveys of individuals who adopt and tried to adopt internationally and to monitor the industry’s delivery of services to identify problematic patterns and

practices. If the contractor(s) with accreditation experience do not have expertise with respect to oversight and enforcement, serious consideration should be given to dividing the responsibilities among several entities working as partners or as contractor and sub-contractor. Membership “trade associations” should not be considered as primary enforcement or oversight bodies for adoption practitioners due to the obvious conflict of interest.

In conclusion, the Institute is concerned that the focus of regulation drafting to date has been primarily on accreditation, which from our perspective is not the most critical element of the regulations. First, it is essential to adopt specific and practical quality standards that are based on thoughtful input from providers, as well as triad members, and experts who have no financial interest in international adoption. Effective implementation of standards depends on creating appropriate accreditation and enforcement mechanisms. After the standards are promulgated, an accreditation, oversight, and enforcement plan should be developed that will insure that U.S. accredited agencies and approved persons provide optimal quality services.

Toward this end, the Institute urges the State Department to rethink its plan to complete this task in just a few months and to recognize that extensive consultation and information gathering on the issues raised by the Institute and other commentators is necessary to ensure the development of appropriate, effective regulations.

The ultimate goals of these regulations should be straightforward and clear: to elevate the interests of vulnerable children above the financial interests of small numbers of adoption profiteers, and to create national requirements for ethical and reliable international adoption practice.

Legitimate intercountry adoption, based on the best interests of the child, should be recognized as beneficial for the adoptable children of sending countries as well as for the adopting parents of the receiving ones. If all of these ...efforts do succeed in eliminating the abuses, fear and mistrust that surround international adoption, then this practice will be perceived not as an abominable traffic in human flesh but instead as what it should be--an act of love.<sup>6</sup>

---

<sup>6</sup> Carro, J.L. Regulation of Intercountry Adoption: Can the Abuses Come to an End?, *American Journal of Family Law* 9,148 (1995).