

CRACKS IN THE COST STRUCTURE OF AGENCY ADOPTION

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I. INTRODUCTION

It is no longer a secret. Domestic adoption is big business.¹ “Baby selling” has long been vilified and remains unlawful.² However, a close examination of the cash that changes hands in the garden-variety domestic adoption would make it difficult for most people to tell the difference.³ Prospective adoptive parents pay agencies and lawyers exceptional sums to identify and locate birth parents that are willing to relinquish their parental rights.⁴ Hospital and delivery charges, often not covered by private

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¹ Sandra Patton-Imani, *Redefining the Ethics of Adoption, Race, Gender, and Class*, 36 LAW & SOC’Y REV., 813, 827 (2002).

² See Tamar Lewin, *At Core of Adoption Dispute Is Crazy Quilt of State Laws*, N.Y. TIMES, Jan. 19, 2001, at A14; *U.S. Embassy Report Faults Vietnam’s Oversight of Adoptions*, N.Y. TIMES, Apr. 26, 2008, at A7; see also *In re Adoption of Stephen*, 645 N.Y.S.2d 1012, 1014 (N.Y. Fam. Ct. 1996); *Sale of Children in Interstate and Foreign Commerce: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary H. of Reps.*, 95th Cong. (1977), available at <http://poundpuplegacy.org/files/4e.pdf> [hereinafter *Hearings*].

³ See generally Douglas H. Reiniger, *Ethical Considerations in Representing Birth Parents: Regulation of Adoption Expenses*, in ADOPTION LAW INSTITUTE 2007, at 183 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. C-211, 2007); Commentary, *End Baby Commerce*, GAMBIT WEEKLY, June 10, 1999, at 7.

⁴ See Laura Mansnerus, *Market Puts Price Tags on the Priceless: In Search of a Child: The Baby Bazaar*, N.Y. TIMES, Oct. 26, 1998, at A1 (explaining that adoption costs can range from \$5,000 to \$100,000). State laws generally permit agencies to charge service fees for each adoption they facilitate. See ALA. CODE § 26-10-4.1(a) (LexisNexis 2009); DEL. CODE ANN. tit. 13, § 928(b) (2009); D.C. CODE § 4-1410 (2008); 720 ILL. COMP. STAT. ANN. 525/1 (West 2010); KAN. STAT. ANN. § 59-2121(a)(1) (2005); KY. REV. STAT. ANN. § 199.590(2) (West 2006); LA. CHILD. CODE ANN. art. 1200(B) (2004); MD. CODE ANN., FAM. LAW § 5-362(b)(2) (LexisNexis 2006); NEV. REV. STAT. ANN. § 127.275(1) (LexisNexis 2010); N.H. REV. STAT. ANN. § 170-B:13(1) (LexisNexis 2010); N.J. STAT. ANN. § 9:3-39.1(e) (West 2002); N.M. STAT. ANN. § 32A-5-34(B) (2003); N.Y. SOC. SERV.

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insurance or Medicaid, are borne by families seeking to adopt.⁵ Prospective adoptive parents almost always cover fees for mental health counseling to birth mothers.⁶ Travel and incidental costs frequently amount to thousands of dollars.⁷ Legal representation for both the adoptive and birth parents to finalize the placement costs a substantial sum.⁸ In short, the expense of a domestic agency adoption can decimate a family budget.⁹

Moreover, parents desiring to build their families through adoption are almost assured a long haul. Healthy, white infants are adopted so frequently that parents seeking such a child often wait years before finally becoming parents through an agency adoption.¹⁰ Still, there is no overage

LAW § 374(6) (McKinney 2010); N.C. GEN. STAT. ANN. § 48-10-103(e) (2009); OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2010); OKLA. STAT. ANN. tit. 10, § 7505-3.2 (West 2009); 23 PA. CONS. STAT. ANN. § 2533(d) (West 2010); S.C. CODE ANN. § 63-9-310(F) (2010); VT. STAT. ANN. tit. 15A, § 7-104 (2002); VA. CODE ANN. § 63.2-1218 (2007); W. VA. CODE ANN. § 48-22-803(e) (LexisNexis 2009). An attorney may be paid additional fees by the adoptive family for services in connection with an adoption. See ARIZ. REV. STAT. ANN. § 8-114(D) (2007); COLO. REV. STAT. § 19-5-213(1)(a) (2010); FLA. STAT. ANN. § 63.097(2)(f)(1) (West 2005); LA. CH. CODE ANN. art. 1200(B)(8) (2004); MISS. CODE ANN. § 43-15-23(4) (2009); N.H. REV. STAT. ANN. § 170-B:13(1) (LexisNexis 2010); N.C. GEN. STAT. ANN. § 48-10-103(a) (West 2009); N.D. CENT. CODE § 14-15-10(1) (2009); OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2010); 23 PA. CONS. STAT. ANN. § 2533(d) (West 2010); S.C. CODE ANN. § 63-9-310(F) (2010); TENN. CODE ANN. § 36-1-109(a)(1)(B)(i) (2010); UTAH CODE ANN. § 76-7-203(1)(a) (LexisNexis 2008); W. VA. CODE ANN. § 48-22-803(e) (LexisNexis 2009); WIS. STAT. ANN. § 48.913(1) (West 2008 & Supp. 2010).

⁵ 2 AM. JUR. 2D *Adoption* § 57 (2004); UNIF. ADOPTION ACT § 7-103(a)(3), 9 U.L.A. 126 (1999).

⁶ See UNIF. ADOPTION ACT § 7-103(a)(4), 9 U.L.A. 126; see also *Adoption of Stephen*, 645 N.Y.S.2d at 1015 (finding that payment of counseling expenses was proper and reasonable).

⁷ See, e.g., *Adoption of Stephen*, 645 N.Y.S.2d at 1014.

⁸ Reiniger, *supra* note 3, at 188; see also Katy Ruth Klinke, Note, *The Baby M Controversy: A Class Distinction*, 18 OKLA. CITY U. L. REV. 113, 148 (1993) (discussing a lawyer who received \$184,000 for arranging surrogacy contracts in 1983).

⁹ Fronting tens of thousands of dollars in costs for an adoption can be difficult or impossible, even for families who can reasonably support an adopted child. See Klinke, *supra* note 8, at 148; Lewin, *supra* note 2, at A14. The cost of raising a child is borne over a lengthy period. Adoption expenses, however, often rival an average American family's annual income. See Klinke, *supra* note 8, at 148; Lewin, *supra* note 2, at A14.

¹⁰ Mansnerus, *supra* note 4, at A1.

of infants available for adoption in this country.¹¹ Infants do not typically wait to find suitable adoptive parents.¹² Quite the contrary. This state of affairs is deceptive because it creates an inappropriate level of societal comfort with America's private adoption system. If parents wanting to adopt will pay whatever is required, and most babies in need of adoption find adoptive homes, then what is the problem? Does the cost structure of the domestic adoption scheme need to be modified at all?

This article argues that private adoption, viewed purely from an economic standpoint, is broken. A near free market has taken hold.¹³ And that free market substantially prejudices prospective adoptive parents.¹⁴ Children are being adopted, but adoption needs to be less costly. Legislatures should act to cap adoption expenses, provide remedies for prospective adoptive parents in failed adoptions, and offer better tax incentives to prospective adoptive parents. A more active regulation of the agency-adoption market would aid prospective adoptive parents, likely spur more Americans to adopt, and thereby, increase the likelihood of a positive adoption outcome for adoptees.

II. CAPPING ADOPTION EXPENSES

The purchase and sale of children today remains, as it has for many years, unlawful in every American state.¹⁵ Many states regulate the sale of

¹¹ *Id.* at A16.

¹² *Id.*

¹³ See Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324 (1978) (arguing, controversially, that an experimental move toward a free market in adoption would serve to rectify the supply and demand mismatch plaguing the system); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 71 (1987) (arguing, nearly ten years after the "Baby Shortage" piece, that legal schemes allowing the payment of substantial sums to birth mothers are really sales in disguise).

¹⁴ See Landes & Posner, *supra* note 13, at 71.

¹⁵ See WILLIAM MEEZAN, SANFORD KATZ & EVA MANOFF RUSSO, ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS 182 (1978); Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 473 (2004). Criminal statutes punish the practice in thirty-three states. See ALA. CODE § 26-10A-34 (LexisNexis 2009); CAL. PENAL CODE § 273(a) (West 2008); COLO. REV. STAT. § 19-5-213(1)-(2) (2010); FLA. STAT. ANN. § 63.212(1)(c) (West 2005 & Supp. 2010); GA. CODE ANN. § 19-8-24 (2010); IDAHO CODE ANN. § 18-1511 (2004); IND. CODE ANN. § 35-46-1-9(a) (West 2004); IOWA CODE ANN. § 600.9(1)(c) (West 2001 & Supp. 2010); KY. REV. STAT. ANN. § 199.493 (West 2006); LA. REV. STAT. ANN. (continued)

§ 14:286 (2004); MD. CODE ANN., CRIM. LAW § 3-603 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 210, § 11A (West 2007 & Supp. 2010); MICH. COMP. LAWS ANN. § 710.54(1) (West 2002); MINN. STAT. ANN. § 259.55 (West 2007); MISS. CODE ANN. § 43-15-23 (2009); MO. ANN. STAT. § 568.175(1) (West 1999); MONT. CODE ANN. § 42-7-105(3) (2009); NEV. REV. STAT. ANN. §§ 127.287–288 (LexisNexis 2010); N.J. STAT. ANN. § 9:3-39.1(d) (West 2002); N.Y. SOC. SERV. LAW §§ 374(6), 389(2) (McKinney 2010); N.C. GEN. STAT. ANN. § 48-10-102 (2009); N.D. CENT. CODE § 12.1-31-05 (1997 & Supp. 2009); OKLA. STAT. ANN. tit. 21, § 866 (West 2002); 18 PA. CONS. STAT. ANN. § 4305 (West 1983); S.C. CODE ANN. § 16-3-1060 (2003); S.D. CODIFIED LAWS §§ 25-6-4.1–4.2 (2004); TENN. CODE ANN. § 36-1-109 (2010); TEX. PENAL CODE ANN. § 25.08 (West 2003 & Supp. 2010); UTAH CODE ANN. § 76-7-203(2) (LexisNexis 2008); VA. CODE ANN. § 63.2-1218 (2007); WASH. REV. CODE ANN. § 9A.64.030 (West 2010); W. VA. CODE ANN. § 48-22-803 (LexisNexis 2009); WIS. STAT. ANN. § 948.24 (West 2005). Additionally, fourteen states denounce the practice through case law. *See* *People v. Daniel*, 241 Cal. Rptr. 3d 3, 5–6 (Cal. Ct. App. 1987) (convicting the defendant of “attempted sale of a person” for demanding \$90,000 in exchange for consent to the adoption of his seventeen-month-old daughter); *Adoption House, Inc. v. P.M.*, No. 02-12-07TN, 00-37796, 2003 WL 23354141, at *7–10 (Del. Fam. Ct. Oct. 9, 2003) (holding that a fee paid to a biological parent or a fee charged by an adoption agency for more than the reasonable costs associated with an adoption constitutes “unjustifiable conduct” depriving a court of jurisdiction to terminate parental rights); *Douglas v. State*, 438 S.E.2d 361, 361 (Ga. 1994) (offering an automobile in exchange for the biological mother’s consent to adoption violated a statute making it unlawful to induce parents to part with their children); *In re Kindgren*, 540 N.E.2d 485, 488–49 (Ill. App. Ct. 1989) (holding that consent was fraudulently obtained where adoptive parents paid the birth mother \$10,000 to cover medical expenses without being aware of what the expenses were); *In re Adoption of Baby Boy M.*, 18 P.3d 304, 305 (Kan. Ct. App. 2001) (holding that a trial court erred in ordering adoptive parents to reimburse Medicaid for payments for birth mother’s expenses where no law required them to do so); *State v. Roberts*, 471 So. 2d 900, 901–02 (La. Ct. App. 1985) (holding that the biological mother violated the statute by selling her child to a police officer in Louisiana for \$3,000); *State v. Runkles*, 605 A.2d 111, 120 (Md. 1992) (finding that a mother who was persuaded by her boyfriend to relinquish her child to the boyfriend’s father for \$4,000 did not violate the statute because she did not know of the payment); *Doe v. Kelly*, 307 N.W.2d 438, 440–41 (Mich. Ct. App. 1981) (holding that the defendant violated the statute by offering to relinquish her child for \$5,000); *Balouch v. State*, 938 So. 2d 253, 258 (Miss. 2006) (holding that the defendant violated the statute by offering to give up her child for \$5,000); *State v. Daugherty*, 744 S.W.2d 849, 850 (Mo. Ct. App. 1988) (holding that the defendant was guilty of trafficking of children for offering to pay \$1,000 for the adoption of a child); *Gray v. Maxwell*, 293 N.W.2d 90, 95 (Neb. 1980) (finding relinquishment of a child done in consideration of promise to pay a sum of money in excess of legitimate expenses against public policy); *In re Adoption of Baby Boy P.*, 700 N.Y.S.2d 792, 798 (N.Y. Fam. Ct. 1999) (reducing excessive agency fees and disallowing both attorney fees for services

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children by criminalizing the transfer of “anything of value” in connection with an adoptive placement.¹⁶ Still, the cost of agency adoption is staggering—frequently in excess of \$40,000¹⁷—with nearly all states excepting from their baby-selling prohibitions agency fees,¹⁸ medical

provided to the natural father and car maintenance expenses); *In re* Adoption of Stephen, 645 N.Y.S.2d 1012, 1014–15 (N.Y. Fam. Ct. 1996) (holding that living expenses paid to a birth mother and rent by adoption agency violated statute); *In re* Adoption of Alyssa, L.B., 501 N.Y.S.2d 595, 596–97 (N.Y. Sur. Ct. 1986) (holding that expenses are limited to those “incidental to the birth or care of the adoptive child, the pregnancy or care of the adoptive child’s mother, or the placement or adoption of the child” but cannot include an automobile for the birth mother); *In re* Adoption of P.E.P., 407 S.E.2d 505, 510 (N.C. 1991) (finding payment of fees including travel expenses, medical expenses of the parent, six month lease of an apartment, weekly stipend for three months, and attorney fees violated the statute); *In re* Baby Girl D., 517 A.2d 925, 927–28 (Pa. 1986) (allowing adoptive parents to pay only expenses related to the care of the child); *DeJesus v. State*, 889 S.W.2d 373, 375–77 (Tex. App. 1994) (upholding the defendant’s conviction for the sale of a child because over \$10,000 in payments were made outside of the confines of the statute); *Thacker v. State*, 889 S.W.2d 380, 384–86 (Tex. App. 1994) (finding that a mother and an attorney violated the statute when the attorney paid the mother a total of \$12,000 for her five children).

¹⁶ See, e.g., ARIZ. REV. STAT. ANN. § 8-114(C) (2007) (prohibiting compensation for consenting to place a child for adoption). But see *id.* § 8-114(A) (allowing a court to approve any reasonable and necessary expenses incurred in connection with the adoption, including “costs for medical and hospital care and examinations for the mother and child, counseling fees, legal fees, agency fees, living expenses, and any other costs the court finds reasonable and necessary”). See also IND. CODE ANN. § 35-46-1-9(a) (West 2004) (establishing the transfer of property for consent to adoption as a Class D felony). But see *id.* § 35-46-1-9(b) (allowing payment for attorney’s fees, hospital and medical expenses, agency fees, birth parent counseling, costs of housing, utilities, phone service, or any additional itemized necessary living expense for birth mother during the second or third trimester of pregnancy and not more than six weeks after birth, maternity clothing, travel expenses that relate to the pregnancy or adoption, and actual wages lost).

¹⁷ *Costs of Adoption*, CHILD WELFARE INFORMATION GATEWAY FACTSHEETS FOR FAMILIES (Dep’t of Health & Human Servs., Washington, D.C.), June 2004, at 2, available at http://www.childwelfare.gov/pubs/s_cost/s_costs.pdf. It is not at all uncommon for complicated domestic adoptions to approach \$100,000. Mansnerus, *supra* note 4, at A1.

¹⁸ See, e.g., DEL. CODE ANN. tit. 13, § 928(b) (2009) (stating a service fee may be charged by an adoption agency “for each adoption in an amount not exceeding the cost of services rendered, to be paid by the adopting parent or parents”); KAN. STAT. ANN. § 59-2121(a) (2005) (“Except as otherwise authorized by law, no person shall request, receive, give or offer to give any consideration in connection with an adoption, or a placement for adoption, other than: (1) reasonable fees for legal and other professional services rendered in connection with the placement or adoption not to exceed customary fees for similar

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expenses,¹⁹ counseling expenses,²⁰ birth-mother-living expenses,²¹ and legal fees.²² States allow these payments in connection with an adoptive

services by professionals of equivalent experience and reputation where the services are performed . . . (2) reasonable fees in the state of Kansas of a licensed child-placing agency . . .”).

¹⁹ See ALA. CODE § 26-10A-34 (LexisNexis 2009); ARIZ. REV. STAT. ANN. § 8-114(A) (2007); ARK. CODE ANN. § 9-9-206(c) (2009); CAL. FAM. CODE § 8610(a) (West 2004); FLA. STAT. ANN. § 63.097(2)(b) (West 2005); GA. CODE ANN. § 19-8-13(c) (2010); IDAHO CODE ANN. § 18-1511 (2009); 720 ILL. COMP. STAT. ANN. 525/4 (West 2010); IND. CODE ANN. § 35-46-1-9(b) (West 2004); KAN. STAT. ANN. § 59-2121(a)(4) (2005); LA. CHILD. CODE ANN. art. 1200(B)(1) (2004); ME. REV. STAT. ANN. tit. 18, § 9-306(a)(3) (1998); MD. CODE ANN., FAM. LAW § 5-362(b)(2)(i) (LexisNexis 2006); MICH. COMP. LAWS ANN. § 710.54(3)(b) (West 2002); MINN. STAT. ANN. § 259.55(1) (West 2007); MISS. CODE ANN. § 43-15-23(4) (2009); MO. ANN. STAT. § 453.075(1)(1) (West 2003); MONT. CODE ANN. § 42-7-101(1) (2009); NEV. REV. STAT. ANN. § 127.287(3) (LexisNexis 2010); N.H. REV. STAT. ANN. § 170-B:13(I)(a) (LexisNexis 2010); N.J. STAT. ANN. § 9:3-39.1(e) (West 2002); N.M. STAT. ANN. § 32A-5-34(B)(2) (2003); N.Y. SOC. SERV. LAW § 374(6) (McKinney 2010); N.C. GEN. STAT. ANN. § 48-10-103(e) (2009); N.D. CENT. CODE § 14-15-10(1)(c) (2009); OHIO REV. CODE ANN. § 3107.055(C)(1)–(2) (West 2005 & Supp. 2010); OKLA. STAT. ANN. tit. 10, § 7505-3.2(B)(1)(b) (West 2009); OR. REV. STAT. § 109.311(1) (2009); 23 PA. CONS. STAT. ANN. § 2533(d)(1) (West 2010); S.C. CODE ANN. § 63-9-310(F)(1) (2010); TENN. CODE ANN. § 36-1-109(B)(i) (2010); TEX. PENAL CODE ANN. § 25.08(b)(2) (West 2003 & Supp. 2010); UTAH CODE ANN. § 76-7-203(1)(a)(iii)(A)(III) (LexisNexis 2008); VT. STAT. ANN. tit. 15A, § 7-103(a)(2) (2002); VA. CODE ANN. § 63.2-1218 (2007); WASH. REV. CODE ANN. § 9A.64.030(2)(f) (West 2010); W. VA. CODE ANN. § 48-22-803(e)(2) (LexisNexis 2009); WIS. STAT. ANN. § 48.913(1)(f)–(g) (West 2008 & Supp. 2010).

²⁰ See ARIZ. REV. STAT. ANN. § 8-114(A) (2007); CONN. GEN. STAT. ANN. § 45a-728 (West 2004); IND. CODE ANN. § 35-46-1-9(b)(4) (West 2004); LA. CH. CODE ANN. art. 1200(B)(5) (2004); ME. REV. STAT. ANN. tit. 18-A, § 9-306(a)(2) (1998); MICH. COMP. LAWS ANN. § 710.54(5) (West 2002); MINN. STAT. ANN. § 259.55(1) (West 2007); MISS. CODE ANN. § 43-15-117(4) (2009); MO. ANN. STAT. § 453.075(1)(2) (West 2003); MONT. CODE ANN. § 42-7-101(1)(g) (2009); N.H. REV. STAT. ANN. § 170-B:13(I)(a) (LexisNexis 2010); N.J. STAT. ANN. § 9:3-39.1(e) (West 2002); N.M. STAT. ANN. § 32A-5-34(B)(3) (West 2003); N.C. GEN. STAT. ANN. § 48-10-103(e) (2009); OKLA. STAT. ANN. tit. 10, § 7505-3.2(B)(1)(c) (West 2009); 23 PA. CONS. STAT. ANN. § 2533(d)(3) (West 2010); TENN. CODE ANN. § 36-1-109(a)(1)(B)(i) (2010); TEX. PENAL CODE ANN. § 25.08(b)(2) (West 2003 & Supp. 2010); UTAH CODE ANN. § 76-7-203(1)(a)(iii)(A)(V) (LexisNexis 2008); VT. STAT. ANN. tit. 15A, § 7-103(a)(3) (2002); VA. CODE ANN. § 63.2-1218 (2007); WIS. STAT. ANN. § 48.913(1)(a)–(b) (West 2008 & Supp. 2010).

²¹ See ALA. CODE § 26-10A-34 (LexisNexis 2009); ARIZ. REV. STAT. ANN. § 8-114(A) (2007); CAL. FAM. CODE § 8610(a) (West 2004); CONN. GEN. STAT. ANN. § 45a-728(c) (continued)

placement to facilitate adoption.²³ The theory is that adoption will remain a viable alternative for women facing unplanned pregnancies so long as it

(West 2004); FLA. STAT. ANN. § 63.097(2)(a) (West 2005); IDAHO CODE ANN. § 16-1515(1) (2009); 720 ILL. COMP. STAT. ANN. 525/4.1(a) (West 2010); IND. CODE ANN. § 35-46-1-9(b)(5) (West 2004); IOWA CODE ANN. § 600.9(2)(d) (West 2001 & Supp. 2010); KAN. STAT. ANN. § 59-2121(a)(6) (2005); LA. CHILD. CODE ANN. art. 1200(B)(7) (2004); ME. REV. STAT. ANN. tit. 18-A, § 9-306(a)(6) (1998); MICH. COMP. LAWS ANN. § 710.54(3)(d) (West 2002); MINN. STAT. ANN. § 259.55(4) (West 2007); MISS. CODE ANN. § 43-15-117(4) (2009); MO. ANN. STAT. § 453.075(1)(5) (West 2003); MONT. CODE ANN. § 42-7-101(1)(h) (2009); NEV. REV. STAT. ANN. § 127.287(3) (LexisNexis 2010); N.H. REV. STAT. ANN. § 170-B:13(I)(d) (LexisNexis 2010); N.J. STAT. ANN. § 9:3-39.1(e) (West 2002); N.M. STAT. ANN. § 32A-5-34(B)(4) (2003); N.Y. SOC. SERV. LAW § 374(6) (McKinney 2010); N.C. GEN. STAT. ANN. § 48-10-103(a)(4) (2009); N.D. CENT. CODE § 14-15-10(1)(e) (2009); OHIO REV. CODE ANN. § 3107.055(C)(9) (West 2005 & Supp. 2010); OKLA. STAT. ANN. tit. 10, § 7505-3.2(B)(1)(e) (West 2009); S.C. CODE ANN. § 63-9-310(F)(1) (2010); TENN. CODE ANN. § 36-1-109(a)(1)(B) (2010); UTAH CODE ANN. § 76-7-203(1)(a)(iii)(A)(VI) (LexisNexis 2008); VT. STAT. ANN. tit. 15A, § 7-103(a)(4) (2002); VA. CODE ANN. § 63.2-1218 (2007); WIS. STAT. ANN. § 48.913(1)(i) (West 2008 & Supp. 2010).

²² See ALA. CODE § 26-10A-34(b) (LexisNexis 2009); ARIZ. REV. STAT. ANN. § 8-114(A) (2007); ARK. CODE ANN. § 9-9-221(c) (2009); COLO. REV. STAT. § 19-5-213(1)(a) (2010); DEL. CODE ANN. tit. 13, § 928(b) (2009); FLA. STAT. ANN. § 63.097(2)(d) (West 2005); IDAHO CODE ANN. § 16-1515(1) (2009); 720 ILL. COMP. STAT. ANN. 525/4.1(g) (West 2010); KAN. STAT. ANN. § 59-2121(a)(1) (2005); KY. REV. STAT. ANN. § 199.590(6)(a) (West 2006); LA. CHILD CODE ANN. art. 1200(B)(8) (2004); ME. REV. STAT. ANN. tit. 18-A, § 9-306(a)(1) (1998); MD. CODE ANN., FAM. LAW § 5-362(b)(2)(i) (LexisNexis 2006); MICH. COMP. LAWS ANN. § 710.54(3)(f) (West 2002); MINN. STAT. ANN. § 259.55(1) (West 2007); MISS. CODE ANN. § 43-15-117(4) (2009); MO. ANN. STAT. § 453.075(1)(4) (West 2003); MONT. CODE ANN. § 42-7-101(1)(i) (2009); N.H. REV. STAT. ANN. § 170-B:13(I)(a) (LexisNexis 2010); N.J. STAT. ANN. § 9:3-39.1(e)(3) (West 2002); N.M. STAT. ANN. § 32A-5-34(B)(6) (2003); N.Y. SOC. SERV. LAW § 374(6) (McKinney 2010); N.C. GEN. STAT. ANN. § 48-10-103(a)(6) (West 2009); N.D. CENT. CODE § 14-15-10(1)(b) (2009); OHIO REV. CODE ANN. § 3107.055(C)(3) (West 2005 & Supp. 2010); OKLA. STAT. ANN. tit. 10, § 7505-3.2(B)(1)(a) (West 2009); 23 PA. CONS. STAT. ANN. § 2533(d)(4) (West 2010); S.C. CODE ANN. § 63-9-310(F)(5) (2010); TENN. CODE ANN. § 36-1-109(a)(1)(B) (2010); TEX. PENAL CODE ANN. § 25.08(b)(2) (West 2003 & Supp. 2010); UTAH CODE ANN. § 76-7-203(1)(a)(iii)(A)(I) (LexisNexis 2008); VT. STAT. ANN. tit. 15A, § 7-103(a)(6) (2002); VA. CODE ANN. § 63.2-1218 (2007); WASH. REV. CODE ANN. § 9A.64.030(2)(f) (West 2010); W. VA. CODE ANN. § 48-22-803(e)(2) (LexisNexis 2009); WIS. STAT. ANN. § 48.913(1)(h) (West 2008 & Supp. 2010).

²³ See Reiniger, *supra* note 3, at 188 (arguing that the purpose of “expense statutes” is to make adoption “a financially neutral option for the birth mother”).

remains a financially neutral transaction for them.²⁴ Not all allowable expenses serve that purpose, however. Indeed, some state laws provide a rather generous possibility of profit for birth mothers choosing adoption.²⁵

The harms of a private-adoption scheme, which are startlingly close to sanctioning a free market in infants, have been chronicled elsewhere and are relatively well accepted.²⁶ This piece focuses solely on the need to reduce exorbitant expenses for prospective adoptive parents. The first step in so doing is a small and simple one to take: expense caps on fees paid in connection with agency adoptions should be expanded dramatically.

A number of states already cap *living* expenses paid to birth mothers in connection with an adoption to small sums ranging from \$1,500 to \$5,000.²⁷ But states still have much further to go.²⁸ The vast majority of

²⁴ See *FAQ's About Birth Mother Expenses*, ACADEMY OF CALIFORNIA ADOPTION LAWYERS, <http://www.acal.org/birth.htm> (last visited Feb. 22, 2010). The Academy of California Adoption Lawyers describes payments from adoptive parents to birth parents as for the purpose of making adoption a “financially neutral option for the birth mother” rather than a money-making opportunity. *Id.*; see also *Hearings, supra* note 2, at 17–18 (testimony of William Acosta, Deputy Comm’r, Div. of Servs., N.Y. Dep’t of Soc. Servs.); Candice M. Zierdt, *Compensation for Birth Mothers: A Challenge to the Adoption Laws*, 23 LOY. U. CHI. L. J. 25, 62 (1991); Jennifer L. Watson, Comment, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers Be Compensated for Their Services?*, 6 WHITTIER J. CHILD. & FAM. ADVOC. 529, 539 (2007).

²⁵ See Andrea B. Carroll, *Re-Regulating the Baby Market: A Call for a Ban on Payment of Birth Mother Living Expenses*, 59 KAN. L. REV. 285, 290–95 (2011).

²⁶ See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (describing multiple harms to personhood and society flowing from the commodification of infants, including the exacerbation of existing class, race, and gender divisions); see also Barbara K. Rothman, *Reproductive Technology and the Commodification of Life*, in EMBRYOS, ETHICS AND WOMEN’S RIGHTS: EXPLORING THE NEW REPRODUCTIVE TECHNOLOGIES 95, 96–97 (Elaine H. Baruch et al. eds., 1988) (arguing that commodification in the surrogacy context affects women’s self-respect and self-worth).

²⁷ Three states provide specific dollar caps. See CONN. GEN. STAT. ANN. § 45a-728c (West 2004) (\$1,500 cap); OHIO REV. CODE ANN. § 3107.055(C)(9) (West 2005 & Supp. 2010) (\$3,000 cap); WIS. STAT. ANN. § 48.913(1)(i) (West 2008 & Supp. 2010) (\$5,000 cap). More than twenty others limit expenses to those adjudged “reasonable” or “necessary.” See ALA. CODE § 26-10A-34 (LexisNexis 2009); ARIZ. REV. STAT. ANN. § 8-114(A) (2007); CAL. PENAL CODE § 273(b) (West 2008); FLA. STAT. ANN. § 63.097(2) (West 2005); IDAHO CODE ANN. § 16-1515(1) (2009); 720 ILL. COMP. STAT. ANN. 525/4.1(a) (West 2010); IND. CODE ANN. § 35-46-1-9(b) (West 2004); KAN. STAT. ANN. § 59-2121(a) (2005); MICH. COMP. LAWS ANN. § 710.54(3) (West 2002); MINN. STAT. ANN. § 259.55 (West 2007); MISS. CODE ANN. § 43-15-117(4) (2009); MONT. CODE ANN. § 42-7-101(1) (2009);

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states do not place any specific dollar limitations on birth mother living expenses.²⁹ Moreover, prospective adoptive parents under this “living expenses” umbrella often shoulder expenses tangentially related to the birth and adoptive placement.³⁰ In Massachusetts for instance, prospective adoptive parents may legally pay a birth mother up to \$980 per month in rent, utilities, food, and clothing and an additional \$500 monthly for “educational, vocational, recreational, or religious services.”³¹ The allowance for such a breadth of payments demonstrates an adoption scheme run amuck. The effect of such loose regulation of birth mother living expenses is predictable and real: birth mothers flock to states that liberally sanction the payment of living expenses and provide the opportunity to gain financially through an adoptive placement.³² Capping the payment of living expenses to very small sums closely related to the

NEV. REV. STAT. ANN. § 127.287(3) (LexisNexis 2010); N.H. REV. STAT. ANN. § 170-B:13(I) (LexisNexis 2010); N.M. STAT. ANN. § 32A-5-34(B) (2003); OKLA. STAT. ANN. tit. 10, § 7505-3.2 (West 2009); S.C. CODE ANN. § 63-9-310(F) (2010); TENN. CODE ANN. § 36-1-109 (2010); UTAH CODE ANN. § 76-7-203 (LexisNexis 2008); VT. STAT. ANN. tit. 15A, § 7-103(a) (2002); VA. CODE ANN. § 63.2-1218 (2007).

²⁸ See generally Carroll, *supra* note 25 (arguing for a nationwide ban on payment of birth mother living expenses).

²⁹ See *Regulation of Private Adoption Expenses: Summary of State Laws*, CHILD WELFARE INFORMATION GATEWAY STATE STATUTES (Dep’t of Health & Human Servs., Washington, D.C.), Mar. 2010, at 3, available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/expensesall.pdf (explaining that only a small number of states place actual dollar figures on expense caps).

³⁰ See Carroll, *supra* note 25, at 28–29 (describing the manner in which allowing the payment of birth mother living expenses results in arguments for covering cars, massages, and health club expenses).

³¹ Adoptive Families Magazine, *Adoption Laws by State*, THE ADOPTION GUIDE (2008), <http://www.adoptivefamilies.com/adoptionlaws>.

³² See, e.g., *Adoption House, Inc. v. P.M.*, No. 02-12-07TN, 00-37796, 2003 WL 23354141 (Del. Fam. Ct. Oct. 9, 2003). In *Adoption House*, a birth mother refused to agree to adoption in Pennsylvania because at that time Pennsylvania law did not permit the payment of birth mother living expenses. See *id.* at *3. She decided instead on a couple from New York, a state that allowed living expenses. See *id.* Two years later, when the same birth mother sought an adopting couple for another child, she decided first on a couple from Louisiana, who later changed their minds at the hospital after learning the child was biracial. *Id.* at *4. The birth mother finally decided on a Delaware couple because Delaware state law permitted the payment of living expenses. See *id.* at *5; see also Zierdt, *supra* note 24, at 31–32.

birth and placement of a child, like Connecticut, Wisconsin, and Ohio have done,³³ is a step all states should pursue.

However, caps on expenses paid to a birth mother in connection with an adoption are but one piece of the puzzle of reducing the cost of domestic adoption. Limiting the fees charged by adoption agencies is another important step. These fees are far less regulated under state law, and vary quite substantially.³⁴ Most agencies charge around \$15,000 for their fees alone in brokering an adoption, with no guarantee to prospective adoptive parents that a placement will take place after the payment is made and no duty on the agency's part to recompense the fee if a placement is not made.³⁵

Certainly, any suggestion that private agencies should be hamstrung by fee caps is a controversial one, particularly to free market devotees.³⁶ However, while some fear that the adoption market is moving more towards a free one, it is not there yet.³⁷ The fact that adoption is such big business³⁸ demonstrates the problem precisely. Even non-profit players in adoption post huge revenues and salaries for their top employees.³⁹ A 2004 *Forbes* report, for instance, reported that Catholic Charities USA—a non-profit agency heavily involved in domestic adoption—brought in non-profit earnings after expenses of nearly \$3 billion, with the top earner

³³ See CONN. GEN. STAT. ANN. § 45a-728c (West 2004); OHIO REV. CODE ANN. § 3107.055(C)(9) (West 2005 & Supp. 2010); WIS. STAT. ANN. § 48.913(1)(i) (West 2008 & Supp. 2010).

³⁴ Lois Gilman & Susan Freivalds, *Adopting Smart: How Adoption Works and How Much It Costs*, ADOPTIVE FAMILIES, <http://www.adoptivefamilies.com/adoption.php> (last visited Oct. 28, 2010) (detailing variation in costs of a domestic agency adoption).

³⁵ See, e.g., *Domestic Adoption Costs*, ADOPTIONSERVICES.ORG, http://www.adoptionervices.org/adoption/adoption_costs_domestic.htm (last visited Oct. 28, 2010) (describing typical fees associated with domestic adoption).

³⁶ See generally Posner, *supra* note 13 (discussing a free market in babies).

³⁷ See Pamela Laufer-Ukeles, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 VT. L. REV. 407, 418 (2002). The wealth of baby-selling statutes make it clear that Landes and Posner's 1978 free market proposal has not been wholly embraced by American states. Compare Landes & Posner, *supra* note 13 (presenting the 1978 free market proposal), with sources cited *supra* note 15 (detailing state statutes prohibiting baby selling).

³⁸ See source cited *supra* note 1 and accompanying text.

³⁹ William P. Barrett, *America's Most (and Least) Efficient Charities*, FORBES.COM (Nov. 24, 2004, 2:00 PM), <http://www.forbes.com/finance/lists/14/2004/LIR.jhtml?passListId=14&passYear=2004&passListType=Misc&datatype=Misc&uniqueId=CH003>.

making \$116,362 annually.⁴⁰ Much of those adoption agency earnings come, of course, from agency fees prospective adoptive parents pay for the brokerage of an adoptive match.⁴¹ In addition, many of the reasons for limiting expenses prospective adoptive parents may pay a birth mother in connection with an adoption—reducing the infringement on a birth mother’s voluntariness and more strongly encouraging quality parents to consider adoption⁴²—cry out for state interference in regulating agency fees as well. As long as state law prohibits baby selling and a free market of infant sale is not the norm, states should pursue fee limitations and other reasonable means of modifying the cost structure of the adoption scheme in a manner that actually serves to foster adoption.

III. PROVIDING GREATER REMEDIES FOR FAILED ADOPTIONS

The financial risk of a domestic agency adoption is sobering. Adoptive parents can expect that a successful agency adoption will carry a hefty price tag.⁴³ And there is no doubt adoptive parents would willingly pay that price, and more, for the guarantee of a child.⁴⁴ Of course, agency adoption provides no such guarantee.⁴⁵ In fact, domestic-agency-adoption-failure rates are rather alarming.⁴⁶ No official or governmental statistics track failure rates with precision,⁴⁷ but adoption insiders estimate that as many as half of prospective adoptive families experience at least one failed match before finalizing an adoption.⁴⁸ In eighty percent of the cases in

⁴⁰ *Id.*

⁴¹ See *Domestic Adoption Costs*, *supra* note 35 (noting that the agency service fee is typically the largest fee a potential adopter will pay).

⁴² See Carroll, *supra* note 25, at 31–34.

⁴³ See sources cited *supra* note 17 and accompanying text.

⁴⁴ LAURA BEAUVAIS-GODWIN & RAYMOND GODWIN, *THE COMPLETE ADOPTION BOOK: EVERYTHING YOU NEED TO KNOW TO ADOPT A CHILD* 16 (3d ed. 2005).

⁴⁵ See *id.* at xi.

⁴⁶ See Susan Scherreik, *Adoption: Now There’s the Cyber-Stork*, *BUSINESSWEEK*, Aug. 14, 2000, at 134E2.

⁴⁷ See Katherine Q. Seelye, *Specialists Report Rise in Adoptions that Fail*, *N.Y. TIMES*, Mar. 24, 1998, at A14 (stating that there are no exact national statistics available on failed adoptions).

⁴⁸ See Scherreik, *supra* note 46, at 134E2 (estimating a failure rate of between twenty-five and fifty percent); Dan Gearino, *Money, Hope Lost in Failed Adoptions*, *QUAD-CITY TIMES* (Feb. 21, 2006, 12:00 AM), http://www.qctimes.com/news/local/article_4fd32e38-7947-5759-9d40-8c6f2948e2cc.html (reporting that a survey conducted by *Adopted Families* magazine found that twenty-nine percent of readers had a failed adoption).

which birth mothers create adoption plans with prospective adoptive families or agencies, birth mothers ultimately choose to parent their children themselves.⁴⁹ Emotionally distraught adoptive parents often find themselves financially devastated also⁵⁰ because state law provides few remedies for prospective adoptive parents who become parties to a failed adoption.⁵¹

A. Allowing Recoupment from Birth Mothers

The problem stems largely from the fact that adoptive parents generally have no one from whom to recoup expenses paid in connection with a failed adoption.⁵² Agency-drafted adoption contracts nearly always provide that all fees prospective adoptive parents pay their agencies in connection with an adoption are wholly non-refundable.⁵³ Moreover, agencies often arrange for prospective adoptive parents to directly pay

⁴⁹ See Mansnerus, *supra* note 4, at A16; see also Steven Pressman, *The Baby Brokers*, CAL. LAW., July 1991, at 30, 34, 105.

⁵⁰ See, e.g., *Juman v. Louise Wise Servs.*, 663 N.Y.S.2d 483, 489 (Sup. Ct. 1997) (prohibiting a cause of action allowing adoptive parents to recover for emotional distress); see also Pressman, *supra* note 49, at 34 (describing a couple that spent \$4,000 on a birth mother's expenses before finding out that she agreed to place the child with another family).

⁵¹ See, e.g., *Engstrom v. State*, 461 N.W.2d 309, 316–19 (Iowa 1990) (holding that pre-adoptive parents have no implied cause of action under government statutes, no actionable malpractice claim, and no deprivation of property claim).

⁵² Because birth mothers may not terminate parental rights in advance of the child's birth, see, e.g., DEL. CODE ANN. tit. 13, § 1106(c) (2009); NEV. REV. STAT. ANN. § 127.070(1) (LexisNexis 2010), the vast majority of expenses are paid by prospective adoptive parents before the birth. See ARIZ. REV. STAT. ANN. § 8-114(B) (2007); CAL. FAM. CODE § 8610(a) (West 2004); FLA. STAT. ANN. § 63.132 (1) (West 2005); IDAHO CODE ANN. § 16-1515 (2009); MICH. COMP. LAWS ANN. § 710.54(7)(a) (West 2002); MO. ANN. STAT. § 453.075(1) (West 2003); N.H. REV. STAT. ANN. § 170-B:19(V) (LexisNexis 2010); N.M. STAT. ANN. § 32A-5-34(A) (2003); OKLA. STAT. ANN. tit. 10, § 7505-3.2(A) (West 2009); S.C. CODE ANN. § 63-9-740(A) (2010); TENN. CODE ANN. § 36-1-116(b)(16)(B) (2010); UTAH CODE ANN. § 78B-6-140(2) (LexisNexis 2008); VT. STAT. ANN. tit. 15A, § 3-702(1) (2002) (describing the process for reporting expenses, most of which are paid before the birth of the child).

⁵³ See, e.g., *Agency Policies*, ADOPTION ASSOCIATES, INC., http://www.adoptassoc.com/about/agency_policies/ (last visited Feb. 25, 2010); see also Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL'Y & ETHICS 131, 135–36 (2003).

certain fees to third party service providers such as doctors or hospitals.⁵⁴ Such an arrangement insulates agencies from reimbursing expenses that never passed through their hands.⁵⁵ Likewise, third party service providers who have provided the service for which they are paid owe no duty to reimburse adoptive parents once an adoption fails.⁵⁶ Prospective adoptive parents are therefore highly unlikely to recover any monies paid in connection with an adoption from either their own agency or any person who provided a service related to the adoption.

If anyone owes a duty of reimbursement to prospective adoptive parents, it should be the birth mother who received housing, medical, and other benefits and chose not to complete her adoption plan. Still, state law generally refuses to restore the parties to their original positions by requiring birth mothers to reimburse prospective adoptive parents for expenses they paid in the wake of a failed adoption.⁵⁷ For most jurisdictions, it is simply a matter of public policy.⁵⁸ Absent evidence of some fraud perpetrated by the birth mother,⁵⁹ reimbursement orders are

⁵⁴ See, e.g., GA. CODE ANN. § 19-8-13(c) (2010); IOWA CODE ANN. § 600.9(2) (West 2001 & Supp. 2010); MINN. STAT. ANN. § 259.55 (West 2007); N.H. REV. STAT. ANN. § 170-B:13(I) (LexisNexis 2010); N.D. CENT. CODE § 14-15-10(1) (2009); OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2010); OKLA. STAT. ANN. tit. 10, § 7505-3.2(B) (West 2009); 23 PA. CONS. STAT. ANN. § 2533(d) (West 2010) (providing statutorily approved payments to third party service providers that must be reported to the court); see also Zierdt, *supra* note 24, at 34.

⁵⁵ 18 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 52:38 (4th ed. 2001).

⁵⁶ *Id.*

⁵⁷ See, e.g., A.L. v. P.A., 517 A.2d 494, 498 (N.J. Super. Ct. App. Div. 1986) (holding that adoptive parents cannot recover any out-of-pocket expenses spent on the adoptive child while in the adoptive parents' custody if the birth parents breach the adoption contract and regain control of the child).

⁵⁸ See *id.*; see also Commentary, *supra* note 3, at 7 (noting that even in successful agency adoptions, states scrutinize payments, but exercise "very little oversight in determining what is 'reasonable'"); Gabriel Escobar, *Lawyer's Kidnap Case Spotlights Louisiana Adoption Laws*, WASH. POST, Nov. 16, 1998, at C1 ("[J]ust how carefully expenses are scrutinized [by state district judges] is an open question.").

⁵⁹ Where it is clear that a birth mother has perpetrated a fraud on prospective adoptive parents, state law protects the aggrieved parties rather well. See, e.g., CAL. PENAL CODE § 273(c) (West 2008) (making it a misdemeanor for any parent to obtain financial benefit with the intent either not to complete the adoption or to consent to the adoption); 720 ILL. COMP. STAT. ANN. 525/4.1 (West 2010) (allowing reimbursement when a natural parent either knew she was not pregnant or accepted payments from more than one adoptive

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considered too much of a burden to impose on a likely poor woman in desperate circumstances.⁶⁰ As a result, prospective adoptive parents are almost certain not to recover any monies they pay birth parents in connection with a planned adoption that fails.

However, not all states have chosen such insulation for birth mothers who receive money from prospective adoptive parents and fail to follow through with an adoption plan. Idaho law statutorily requires that a court order a birth parent withdrawing from an adoption to

reimburse the adoptive or prospective adoptive parents for all adoption expenses including, but not limited to, all medical fees and costs and all legal fees and costs, and all other reasonable costs and expenses including, but not limited to, expenses for food and clothing incurred by the adoptive or prospective adoptive parents in connection with the care and maintenance of the child while the child was living with the adoptive or prospective adoptive parents.⁶¹

Other states should consider Idaho's solution. It appropriately balances the risk of a failed adoption between prospective adoptive parents and birth parents. More importantly, the result of the Idaho rule—repayment to

family); IND. CODE ANN. § 35-46-1-9.5 (West 2004) (stating a birth mother commits adoption deception if she knowingly or intentionally benefits from expenses when she knows or should know she is not pregnant, when the first adoptive parent is not aware that another adoptive parent is also paying expenses in an effort to adopt the same child, or when the mother does not intend to make an adoptive placement); NEV. REV. STAT. ANN. § 127.287(2) (LexisNexis 2010) (making it unlawful for any person to receive payment for medical and other necessary expenses related to the birth of a child from a prospective adoptive parent with the intent of not consenting to or completing the adoption of the child); N.C. GEN. STAT. ANN. § 48-10-03(d) (2009) (noting a prospective adoptive parent may seek to recover a payment if the parent or other person receives or accepts payment with the fraudulent intent to prevent the proposed adoption from being completed).

Of course, the difficulty of proving fraud in connection with a planned placement of the child means that these state remedies are not typically useful to prospective adoptive parents. See generally John R. Maley, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709 (1987) (proving and recovering even in cases of fraud is unlikely).

⁶⁰ See, e.g., *In re Baby M.*, 537 A.2d 1227, 1238–49 (N.J. 1988).

⁶¹ IDAHO CODE ANN. § 16-1515(2) (2009) (allowing prospective parents to failed adoptions to sue for expense reimbursement and damages).

prospective adoptive parents in a failed adoption—provides laudable incentives to adopt. Under such a rule, prospective adoptive parents may have the financial resources to try again after a failed adoption, and families considering agency adoption are more likely to try to adopt with such a risk-mitigating statute.

B. Encouraging a Private Insurance System

Without many state laws to protect their investment, prospective adoptive parents often emerge from a failed match financially devastated and without the resources to pursue adoption again.⁶² However, that poor outcome was not always as likely as it is today. In the late 1990s, “adoption cancellation insurance” was available—an alternative that greatly diminished the financial risk to prospective adoptive parents of a failed adoption without necessitating heavy state involvement in the murky policies raised by state reimbursement schemes.⁶³ Adoption cancellation insurance is no longer underwritten by any American carrier,⁶⁴ but states should take steps to encourage the return of this form of coverage as a simple and reasonable alternative to capping adoption expenses or enacting reimbursement schemes.

Adoption cancellation insurance became available in the United States in 1990 but became more commonplace in 1997 when Kemper Insurance Agency (a subsidiary of MBO Insurance Brokers) began underwriting policies.⁶⁵ The goal of the underwriters offering the policies was simple—to provide, for a fee, coverage to prospective adoptive parents for what they paid in connection with a planned adoption in the event a birth parent changed her mind and prospective adoptive parents made adoption-related expenditures without a successful placement.⁶⁶ Kemper’s policies typically covered expenses paid to a social worker or adoption agency to have an adoptive home study conducted, any fees paid to the birth mother, legal expenses, and even travel expenses incurred in connection with the planned adoption.⁶⁷ Yet, the company advertised that the policy could also

⁶² See *supra* Part III.A.

⁶³ See CHRISTINE ADAMEC & WILLIAM L. PIERCE, *THE ENCYCLOPEDIA OF ADOPTION* 19 (2d ed. 2000).

⁶⁴ See Scherreik, *supra* note 46, at 134E2.

⁶⁵ See ADAMEC & PIERCE, *supra* note 63, at 19; see also *Adoption Cancellation Insurance*, ADOPTING.ORG, <http://www.adopting.org/mbo.html.bak> (last visited Nov. 6, 2010).

⁶⁶ ADAMEC & PIERCE, *supra* note 63, at 19.

⁶⁷ See *Adoption Cancellation Insurance*, *supra* note 65.

cover other adoption-related expenses so long as “credible statistics [could] be collected to predict the size and frequency of future losses.”⁶⁸ Kemper issued policies to cover expenditures ranging from \$5,000 to \$30,000 with premiums ranging from \$750 to \$1,900.⁶⁹

The coverage Kemper provided was popular. The company purported to receive in excess of 100 inquiries per month about its adoption cancellation plans and sold roughly 500 policies in 1997 alone.⁷⁰ By 2000, however, Kemper—the only insurer still underwriting adoption cancellation insurance—discontinued the line, announcing that providing the coverage had proved “unprofitable.”⁷¹

States can, and should, do more to encourage the provision of adoption cancellation insurance by qualified insurers. State encouragement and support of insurance coverage through private carriers already takes place under circumstances in which insurance carriers struggle with profit-making, and thus, lean toward withdrawing from a particular line of business.⁷² Coverage for hurricane-related losses is one such well-known area.⁷³ Louisiana, for instance, has created the Insure Louisiana Incentive Program, which is designed to address the “crisis in availability and affordability of insurance” in the wake of devastating hurricane loss claims.⁷⁴ This legislative program creates public-private partnerships and grants matching capital funds in an effort to guarantee adequate insurance coverage in a difficult market.⁷⁵ Moreover, even in the murky family and parenting arena, many state legislatures have stepped in to require insurance companies to provide certain coverage they otherwise are

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ ADAMEC & PIERCE, *supra* note 63, at 19.

⁷¹ Scherreik, *supra* note 46, at 134E2. Such a result is not surprising given the high failure rate of domestic agency adoptions. *See id.*

⁷² *See, e.g.*, LA. REV. STAT. ANN. § 22:2362 (2004); *see also* CONG. BUDGET OFFICE, FEDERAL REINSURANCE FOR DISASTERS 35 (2002), *available at* <http://www.cbo.gov/ftpdocs/37xx/doc3787/09-20-FederalReinsurance.pdf> (explaining that some states, like Florida and California, offer state-sponsored natural disaster insurance programs at low prices).

⁷³ *See, e.g.*, LA. REV. STAT. ANN. § 22:2362.

⁷⁴ *Id.*

⁷⁵ *Id.*

reticent to provide. Fourteen states, for instance, statutorily require that health insurance policies include infertility coverage.⁷⁶

In short, on occasion states do incentivize insurers to provide coverage that benefits their citizens. With the welfare of such an important group at stake—children in need of permanent, stable, and loving homes through adoption—states should act to incentivize private insurers to provide adoption cancellation insurance as well.

IV. INCREASING TAX INCENTIVES TO ADOPT

Even adoption agencies themselves recognize that the cost of an agency adoption can overwhelm families and may even prove too great for some families to bear.⁷⁷ One popular adoption resource encourages prospective adoptive parents to take “cash advances from credit cards, second mortgages, home equity loans and special adoption loans,” to “borrow from a life insurance policy, 401(k) or pension plan,” and even to “tap friends and relatives” to manage the cost of adopting a child.⁷⁸ There is no doubt that many prospective adoptive parents will be forced to resort to drastic measures to make adoption affordable no matter how much it costs.⁷⁹ However, the state and federal governments should provide more assistance in an effort to reduce the number of prospective adoptive parents for whom adoption is simply not financially feasible. The federal government does aid prospective adoptive parents through an adoption tax credit.⁸⁰ Additionally, a few states provide a similar, smaller credit.⁸¹

⁷⁶ ARK. CODE ANN. §§ 23-85-137(a), 23-86-118(a) (2004); CAL. HEALTH & SAFETY CODE § 1374.55(a) (West 2008); CONN. GEN. STAT. §§ 38a-509, 38a-536 (West 2007); HAW. REV. STAT. §§ 431:10A-116.5, 432.1-604 (West 2008); 215 ILL. COMP. STAT. 5/356m (West 2008); MD. CODE ANN., INS. § 15-810 (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 175, § 47H (West 1998); MASS. GEN. LAWS ANN. ch. 176A, § 8K, ch. 176B, § 4J, ch. 176G, § 4, 211 (2007); MASS. CODE REGS. 37.11 (2007); MONT. CODE ANN. § 33-22-1521(3)(xii) (2009); N.J. STAT. ANN. §§ 17:48-6x(a), 17:48A-7w(a), 17:48E-35.22(a), 17B:27-46.1x(a) (West 2008); N.Y. INS. LAW §§ 3216(13)(A), 3221(6)(A) (McKinney 2006); N.Y. INS. LAW § 4303(s)(1) (McKinney 2007 & Supp. 2010); OHIO REV. CODE ANN. § 1751.01(A)(7) (West 2009 & Supp. 2010); R.I. GEN. LAWS §§ 27-18-30(a), 27-19-23(a), 27-20-20(a), 27-41-33(a) (2008); TEX. INS. CODE ANN. §§ 1366.001, 1366.03 (West 2009); W. VA. CODE § 33-25A-2(1) (LexisNexis 2006).

⁷⁷ See Gilman & Freivalds, *supra* note 34.

⁷⁸ *Id.*

⁷⁹ See *id.*

⁸⁰ I.R.C. § 23(a) (2006).

Nevertheless, the credit, even though regularly updated, is outdated and often does not function as it should in the situation in which adoptive parents are most needy—in failed adoptions.⁸²

For the 2009 tax year, the Internal Revenue Code provided adoptive parents a tax credit of \$12,150.⁸³ The adoption tax credit allows parents of a child adopted in the tax year to claim a credit for adoption-related expenditures, including payments made for agency fees, attorney fees, travel, court costs, and the like.⁸⁴ The fact that the federal government provides *some* recognition of the financial burden borne by adoptive parents and attempts to incentivize adoption in light of that recognition is commendable. Still, the adoption tax credit is not generous enough.

The amount of the credit—currently at an all-time high⁸⁵—still pales in comparison with the cost of an agency adoption, which frequently costs parents in excess of \$40,000.⁸⁶ In addition, the credit carries income phase-out limitations.⁸⁷ In short, the adoption tax credit provides too small a benefit to too few families.

Moreover, the credit focuses on providing a method of recouping expenses to families whose adoption attempts have been successful. The Internal Revenue Service only recently modified their instructions on the adoption tax credit to clarify that the credit is available for an “unsuccessful” adoption.⁸⁸ Even now, the instructions assume that an unsuccessful adoption attempt is followed by a successful one and require parents to combine expenses for purposes of the \$12,150 limitation.⁸⁹ For

⁸¹ See, e.g., KS. STAT. ANN. § 79-32,202 (Supp. 2009); MISS. CODE ANN. § 27-7-22.32 (2010).

⁸² See I.R.C. § 23(b) (2006).

⁸³ See I.R.C. § 23(h). For adoptions taking place after January 1, 2010, the credit will increase to \$13,170. William Perez, *Adoption Tax Credit*, ABOUT.COM, <http://taxes.about.com/od/deductionscredits/qt/adoptioncredit.htm> (last visited Nov. 6, 2010).

⁸⁴ Perez, *supra* note 83. The adoptive parent may claim the credit in the year the expenses are paid if the adoption becomes final that year or in the following year if the adoption is finalized by then. I.R.C. § 23(a)(2).

⁸⁵ See Perez, *supra* note 83.

⁸⁶ See *supra* note 17 and accompanying text.

⁸⁷ I.R.C. § 23(b)(2). The credit begins to phase out for married taxpayers with a modified adjusted gross income in excess of \$182,520 and is completely phased out at a modified adjusted gross income of \$222,520. Perez, *supra* note 83.

⁸⁸ Internal Revenue Service, *Instructions for Form 8839*, at 2 (2009), available at <http://www.irs.gov/pub/irs-pdf/i8839.pdf>.

⁸⁹ *Id.* at 2–3.

instance, if adoptive parents spend \$30,000 in agency fees and birth mother expenses in 2008 for a failed adoption and then another \$20,000 in 2009 on a successful adoptive placement, they are limited to claiming *one* credit of a maximum of \$12,150.⁹⁰ This required collation does precisely the opposite of what the adoption tax credit is designed to do.⁹¹ The collation serves to remove tax incentives for trying again after a failed adoption⁹²—precisely when prospective adoptive parents need the most incentive to push forward.⁹³

Finally, the adoption tax credit, warts and all, is set to become even less useful to adoptive parents after December 31, 2011.⁹⁴ The credit sunsets that year, and unless Congress intervenes, the credit will provide assistance only for a woefully inadequate \$5,000 in adoption expenses.⁹⁵

Congress should act to make the adoption tax credit permanent and to make it more closely represent the realities facing domestic adoption. The credit should be more closely aligned with the actual expenses of an agency adoption today. Additionally, it should take into account the frequency with which adoptions fail and the need to provide more equitable tax incentives to pursue adoption when those failures arise.

V. A CALL TO REFORM

The stakes of insuring a smoothly functioning agency adoption system are quite high. Birth mothers considering adoption deserve protection, particularly geared at safeguarding the voluntariness of their placement

⁹⁰ See *id.* at 3.

⁹¹ See Joe Kroll, *The Adoption Tax Credit: An Ethical Dilemma*, NACAC.ORG, <http://www.nacac.org/adoptalk/adoptiontaxcredit.html> (last visited Nov. 6, 2010) (citing S. Rep. No. 104-279 (1996) (noting the purpose of the credit was to encourage adoption)).

⁹² See Liz Pulliam Weston, *The Basics: \$10,000 Adoption Credit Has Many Strings*, MSN MONEY, <http://moneycentral.msn.com/content/CollegeandFamily/Raisekids/P37251.asp> (last visited Nov. 6, 2010) (“[I]f more than one adoption attempt doesn’t succeed, or if you succeed after failing one or more times, your credit for all attempts is limited . . .”).

⁹³ See Angela Krueger, *The Effects of Adoption Disruption on the Family: How Adoptees and Adoptive Families Cope with a Failed Adoption*, SUITE101.COM (Oct. 14, 2009), <http://www.suite101.com/content/the-effects-of-adoption-disruption-on-the-family-a158861>.

⁹⁴ See Perez, *supra* note 83.

⁹⁵ *Id.*

decisions.⁹⁶ Prospective adoptive parents deserve protection so they are not taken advantage of or financially devastated after failed, or even successful, adoption attempts. Above all, the children that are the subject of adoption deserve protection and the full focus of state legislators to create the best possible opportunities for successful and permanent adoptive placements.⁹⁷

State law can do a better job of striking a balance among all these parties by increasing regulation of adoption-related expenditures in agency adoptions. Capping adoption expenses,⁹⁸ providing reimbursement and insurance remedies in failed adoptions,⁹⁹ and increasing tax incentives for adoption¹⁰⁰ are small steps towards achieving the balance. Each of these reforms would benefit prospective adoptive parents and would also increase public confidence in a system that must remain distinct from a free market, thereby, benefiting all players involved in agency adoption.

⁹⁶ See generally *Safeguarding the Rights and Well-Being of Birthparents in the Adoption Process*, 2007 EVAN B. DONALDSON ADOPTION INST. 27–42, available at http://www.adoptioninstitute.org/publications/2006_11_Birthparent_Study_All.pdf.

⁹⁷ See Sanford N. Katz, *Rewriting the Adoption Story*, 5 FAM. ADVOC. 9, 10 (1982).

⁹⁸ See *supra* Part II.

⁹⁹ See *supra* Part III. A–B.

¹⁰⁰ See *supra* Part IV.