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Getting to Stay: Clarifying Legal Treatment of Improper Adoptions

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I. INTRODUCTION

A. Legal and Procedural Irregularities in Intercountry Adoptions

Intercountry adoption cases often encounter legal and procedural irregularities. While some irregularities are intentional violations of intercountry adoption policies and national laws, many are unintentional mistakes arising from inaccuracies or inconsistencies common when working with international—and especially developing world—governments and adoption agencies.¹ In fact, the legal framework addressing international adoptions is cumbersome and complex. An international adoption, to be successful, must comply with a myriad of requirements, some of which may be in conflict with one another, such as: (1) foreign country laws,² (2) international conventions, (3) U.S. enabling statutes and regulations for international conventions, (4) U.S. immigration laws and regulations, and (5) U.S. state laws and regulations.³

Any improprieties in the adoption process may have an effect on a child's legal status with regard to his or her adoption, citizenship, or immigration status in the destination country. Although the *Annual Report on Intercountry Adoptions* for both 2008 and 2009 state that no cases of disrupted adoptions had been reported to the U.S. Department of State,⁴ many U.S. adoptive parents are concerned about the possibility of unreported cases and the lack of guidance on disruptions and dissolutions from U.S. authorities.⁵ This is especially disconcerting for parents who may have turned to international adoption to avoid the traditionally greater risk of pre- and

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1. See *infra* notes 93–95, 121–24 and accompanying text (providing examples of various improprieties occurring in intercountry adoption).
 2. Laws governing adoption in foreign countries, which are the first hurdle to any international adoption, vary greatly by continent, participation in the Hague Convention (or other international treaties), and cultural tradition. As a result, foreign country laws are outside of the scope of this paper.
 3. U.S. state law and regulations are outside the scope of this paper. However, the following articles describe the various relevant legal regimes, as well the complex interrelationships between them: Jordana P. Simov, *The Effects of Intercountry Adoptions on Biological Parents' Rights*, 22 LOY. L.A. INT'L & COMP. L. REV. 251, 254–65 (1999); Johanna Oreskovic & Trish Maskew, *Red Thread or Slender Reed: Deconstructing Prof. Bartholet's Mythology of International Adoption*, 14 BUFF. HUM. RTS. L. REV. 71, 88–104 (2008); Jennifer M. Lippold, *Transnational Adoption from an American Perspective: The Need for Universal Uniformity*, 27 CASE W. RES. J. INT'L L. 465, 480–486 (1995).
 4. U.S. DEP'T OF STATE, FY 2009 ANNUAL REPORT ON INTERCOUNTRY ADOPTIONS (2009) [hereinafter 2009 ANNUAL REPORT], available at http://www.adoption.state.gov/pdf/fy2009_annual_report.pdf; U.S. DEP'T OF STATE, FY 2008 ANNUAL REPORT ON INTERCOUNTRY ADOPTIONS (2008) [hereinafter 2008 ANNUAL REPORT], available at http://www.adoption.state.gov/pdf/Adoption%20Report_v9_SM.pdf. As of January 3, 2011, the U.S. Department of State has not published a report on intercountry adoption for 2010.
 5. Parents who face other non-legal challenges with children often turn to rehabilitation centers or retreats, where children remain, sometimes indefinitely. Kirk Johnson, *Russian Adoptees Get a Respite on the Range*, N.Y. TIMES, Apr. 27, 2010, at A1. In situations where a disruption does take place, the child often remains in the care of such organizations without an official termination of his or her adoption status. *Id.* As the aforementioned article demonstrates, there are many children in such arrangements in the United States, yet there is no official reporting to or acknowledgement by U.S. authorities. See *id.*

post-adoption interference from birth parents that is commonplace in U.S. adoptions.⁶ As a result, concerns about intercountry adoption have also inspired multiple reform efforts both on a country level and internationally.⁷ In fact, adopted children who have found procedural or legal irregularities in their adoption proceedings have become prominent advocates of these reforms.⁸

B. Lack of Attention and Clarity in Treatment of Legal and Procedural Irregularities in Intercountry Adoptions

Notwithstanding the frequency of legal or procedural irregularities in intercountry adoptions, international policy and U.S. law do not provide clear guidance on what effect a violation—whether intentional or not—would have on the placement of the child after its discovery. Although it appears that the child most likely remains with the adoptive parents in the destination country, there is no clear guidance on child placement in the event of procedural irregularities during the adoption process, and what guidance exists is not consistent. For these reasons, it is critical for appropriate regulators and agencies to step into the void and provide clear guidance to ensure that adoptive parents and children have certainty about the placement in the event that any irregularities are discovered after the adoption takes place.⁹

The following discussion will address the main legal regimes governing the adoption, immigration, and citizenship status of the child if any procedural or legal improprieties are discovered after the adoption takes place: (1) international conventions, including the U.N. Convention on the Rights of the Child (CRC), the Convention on the Civil Aspects of International Child Abduction (“Abduction Convention”), and the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (“Intercountry Adoption Convention”); (2) U.S.

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6. Gabriela Marquez, *Transnational Adoption: The Creation and Ill Effects of an International Black Market Baby Trade*, 21 J. JUV. L. 25, 28 (2000); Stephanie Zeppa, “Let Me In, Immigration Man”: *An Overview of Intercountry Adoption and the Role of the Immigration and Nationality Act*, 22 HASTINGS INT’L & COMP. L. REV. 161, 165–66 (1998) (describing the “Baby Richard” and “Baby Jessica” cases, where U.S. birth mothers successfully retained or reclaimed their children and terminated a planned adoption).
 7. Kristin Sawada, *Marshallese, Hawaii Join to Control Adoptions*, PAC. BUS. NEWS, Feb. 23, 2004, <http://www.bizjournals.com/pacific/stories/2004/02/23/story2.html> (summarizing Hawaii’s efforts to combat illegal adoption practices from the Marshall Islands).
 8. See Limb Jae-un, *A Generation Fights to Reform Adoption Laws*, JOONGANG DAILY, Nov. 11, 2009, <http://joongangdaily.joins.com/article/view.asp?aid=2912372> (stating that adopted children have advocated for more stringent adoption regulation and enhanced disclosure because they found birth parents that previously “didn’t exist,” falsified consent forms, fictional orphan identities, and other evidence of record manipulation at Korean adoption agencies).
 9. Although the 2010 report has not been released, it will be important to review the 2010 report disruption statistics because the U.S. Department of State had to deal with a very public disruption when Ms. Torry Hansen from Tennessee sent her adopted son, Artyom Savelyev, back to Russia by putting him on a plane with a note to Russian adoption authorities. See, e.g., Clifford J. Levy, *Russia Calls for Halt on U.S. Adoptions*, N.Y. TIMES, Apr. 9, 2010, at A1. If the report does not reflect this disruption—or others that have been brought to light since the Tennessee incident—it will confirm that the U.S. State Department reports do not provide an accurate picture of the frequency of disruptions in intercountry adoptions.

enabling statutes and regulations, including the U.S. Intercountry Adoption Act (IAA) of 2000 and IAA Regulations; and (3) U.S. immigration laws and regulations, including the U.S. Immigration and Nationality Act (INA) and INA Regulations.

Although all of these legal regimes address the adoption, immigration, or citizenship status of internationally adopted children, they do not reach the same conclusion on any of those issues. Generally, an improper adoption under the CRC and the Abduction Convention would require the return of the child to the origin country if any legal or procedural irregularities are discovered after the adoption takes place. Under the CRC, if the improper adoption is deemed to compromise the child's identity (i.e., a so-called "illicit transfer") and the return is in the best interests of the child,¹⁰ the CRC would require the return of the child to his or her origin country. Similarly, under the Abduction Convention, if the adoption is considered a wrongful retention or removal because it violated the custody rights of the parents or legal guardians in the origin country, whether the child will be returned depends on the length of the completed adoption and whether any exceptional circumstances would allow the destination country to retain the child.

On the other hand, the Intercountry Adoption Convention, the IAA, the IAA Regulations, the INA, and the INA Regulations would allow the child to remain with the adoptive parents in the destination country. The Intercountry Adoption Convention provides a general preference for retaining the child in the destination country as long as improper adoptions are treated similarly to disrupted placements.¹¹ The IAA also appears to assume that the child will remain with his or her adoptive parents.¹² Similarly, under the IAA and the IAA Regulations—no matter whether improprieties are discovered before or after the official adoption takes place—the child is likely to remain in the destination country as long as there are no exceptional circumstances that would require obtaining the approval of the Central Authority of

10. The phrase "best interests of the child" is used extensively through the international convention discussed in this article. However, it is a subjective phrase that is not explicitly defined anywhere. Principle 6 of the 1959 Declaration of the U.N. Convention on the Rights of the Child is widely cited to demonstrate that this phrase encompasses tangible and intangible needs. *See* Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, princ. 6 (Nov. 20, 1959) ("The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of state and other assistance is desirable."). Further, Article 5 of the 1986 U.N. Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, includes "the [child's] need for affection and right to security and continuing care" when discussing the "best interests of the child" standard. G.A. Res. 41/85, U.N. GAOR, 41st Sess., U.N. Doc. A/RES/41/85, art. 5 (Dec. 3, 1986).

11. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *concluded* May 29, 1993, 1870 U.N.T.S. 167 (entered into force May 1, 1995) [hereinafter IAC].

12. Intercountry Adoption Act (IAA) of 2000, 42 U.S.C. §§ 14901-14954 (2006).

the state of origin¹³ and the U.S. Secretary of State, and it is in the best interests of the child. The policies behind the INA and the INA Regulations are less consistent in terms of addressing the placement of the child if any improprieties in the adoption process are discovered after the adoption, but in many instances they protect the child's location in the destination country.¹⁴ Whether U.S. immigration officials may revoke the child's U.S. citizenship or permanent resident status depends on a number of factors, including the type of visa the child used to enter the United States, whether the child entered the United States with or without U.S. citizenship, and the nature of the improprieties in the adoption process.¹⁵ However, unless the immigration violations are severe, such as evidence of "child-buying," waivers and status adjustments are available at the discretion of the U.S. Attorney General.¹⁶

As mentioned above, Part II of this paper will discuss the relevant legal regimes using a hypothetical example to illustrate the placement effect on the child. Part III will provide a brief summary and comparison of the legal regimes. Although this paper does not advocate for a specific solution to these problems, it seeks to highlight the need for resolution through coordination and cooperation among U.S. and international lawmakers, U.S. intercountry adoption community stakeholders, and applicable U.S. federal agencies.

II. RELEVANT LEGAL REGIMES AND THEIR EFFECT ON THE CHILD

This Part provides a summary of the main legal regimes governing intercountry adoption into the United States and discusses the conflicts between them. The differences between legal regimes are demonstrated by using a hypothetical example that includes many features and themes common to adoption cases with unclear legal or procedural improprieties—Son *X*. The following discussion shows that, depending on which laws and regulations apply, Son *X* ends up with a different family, in a different country, or perhaps without a family at all. Whereas the uncertainty felt by parents should be an important concern for the United States, the long-term welfare

13. The Central Authority in each country is designated by that country, and the U.S. Central Authority is the U.S. Department of State. 42 U.S.C. § 14911. Article 6 of the Intercountry Adoption Convention states:

(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities. (2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

IAC, *supra* note 11, art. 6.

14. *See, e.g.*, 8 U.S.C. § 1227(a)(3)(D)(ii) (2006 & Supp. II 2008).

15. *See* 8 C.F.R. §§ 204.3(h)(14), 205.1(a) (2010). *See generally id.* § 204.2(d)–(e) (2010) (detailing regulations for international adoption).

16. *See, e.g.*, 8 U.S.C. § 1227 (detailing grounds for the deportation of aliens).

of the child should be the top priority. That goal is not well-served by unclear regulations that jeopardize the stability of the child's family bonds and home life.

A. Example: Son X

Son *X* was born in Country *Y* to a single young mother ("Mother *X*") living on the streets. After being approached by an adoption agency representative, Mother *X* agreed to put her son ("Son *X*") up for adoption because she could not support him. In fact, she had been thinking about adoption, but did not know how to begin the process. When she met with the adoption agency, Mother *X* did not sign any paperwork, but gave them her son and received a fee. Although Mother *X* became upset after handing over Son *X*, the adoption agency told her the arrangement was final. According to the agency, the fee was to cover her expenses. The fee allowed Mother *X* to pay one month's rent on a room and use that address to obtain a job.

Son *X* was adopted by U.S. citizens two years ago and is living in the United States. Recently, investigators uncovered several violations by the agency, including payment for relinquishment of children and not maintaining proper consent authorization forms for adoptions. Son *X*'s U.S. adoptive parents are concerned about Son *X*'s adoption, citizenship, and residency status in the United States.

B. U.N. Convention on the Rights of the Child (CRC)

1. Background

The CRC was first introduced as a draft by Poland in 1978 in anticipation of the International Year of the Child, but it took another ten years to draft the Convention and another eight years to ratify it on a global level.¹⁷ On November 20, 1989, the U.N. General Assembly approved the treaty, which remains one of the most expansive international protocols addressing children's rights.¹⁸ Although it has played an important role in addressing intercountry adoption issues, it does not address adoption specifically. The CRC has been signed and ratified by 193 nations; however, the United States has signed but not ratified the CRC.¹⁹ As a result, it is unlikely that the CRC would be used to determine the placement of a child in the event that any procedural irregularities are discovered in the United States. That being said, it is important to discuss the implications of the CRC because it would be applicable if

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17. Some of the reasons for the delay include the meeting schedule of the Commission on Human Rights Open Working Party, the number of proposals and counterproposals, the number of participants, the number of legal and cultural traditions involved, and some language issues. Linda J. Olsen, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 PENN. ST. INT'L L. REV. 483, 507-08 n.178 (2004). Further, the delay may be attributed, in part, to the fact that this was the first significant convention addressing many of these children's issues.
18. See Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].
19. See Kurtis A. Kemper, Annotation, *Construction and Application of the United Nations Convention on the Rights of the Child*, 28 I.L.M. 1448 (1989)—*Global Cases and Administrative Decisions*, 20 A.L.R. FED. 2d 95 (2007).

irregularities are discovered in other countries that have ratified the CRC. Further, the CRC is widely regarded as the basis for the Intercountry Adoption Convention, which the United States has ratified.²⁰

2. *Relevant Provisions Addressing Legal or Procedural Irregularities in Intercountry Adoption*

There is no direct guidance on child placement in the event of procedural irregularities during the adoption process under the CRC. Read broadly, however, the CRC establishes a preference for returning the child to his or her country of origin.²¹ Article 8 requires parties to the CRC to “respect the right of the child to preserve his or her identity” and “provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.”²² A child’s identity could also be compromised if an adoption is illegal (especially if his or her nationality, name, or other identifying information was fraudulently altered), in which case Article 8 requires the re-establishment of that identity and the return of the child to his or her natural parents and/or origin country. In addition, Article 11 requires parties to the CRC to “take measures to combat the illicit transfer and non-return of children abroad” through the use of “bilateral or multilateral agreements or accession to existing agreements.”²³ An improper adoption may also be considered an “illicit transfer,” in which case Article 11 would require parties to the CRC to “combat the illicit transfer and non-return of children abroad” and return the child to his or her natural parents and/or origin country.²⁴ Further, Article 9 requires that parties to the CRC “ensure that a child shall not be separated from his or her parents against their will except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”²⁵ However, an illegal adoption may constitute

20. See 2 AM. JUR. 2D *Adoption* § 46 (2010).

21. See CRC, *supra* note 18.

22. *Id.* art. 8. Article 8 states:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

Id.

23. *Id.* art. 11. Article 11 states: “1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad. 2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.” *Id.*

24. See *id.*

25. *Id.* art. 9. Article 9 states:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a

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unauthorized separation from the child's natural parents, so Article 9 requires parties to the CRC to return the child to his or her parents. Article 21 also requires that a party's "system of adoption" ensure the best interests of the child are met, and be authorized by both proper authorities and "informed consent" of the parents, highlighting that intercountry adoption is available only if alternative means of care are not available in the "country of origin" and there is no "improper financial gain" to those involved in the adoption.²⁶ As a result, Article 21 confirms the CRC's preference for returning the child to his or her origin country because intercountry adoption is available only if alternative means of care are not available.²⁷ Notwithstanding the above, the return would take place only if it is also in the best interests of the child. If the return would not be in the best interests of the child, the child would remain with the adoptive parents under the CRC.²⁸ The views of the child also may be considered under the CRC in determining "best interests."²⁹

particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known. 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Id.

26. *Id.* art. 21. Article 21 states:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary; (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it; (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Id.

27. *See id.*

28. *See id.*

29. *See id.* art. 12

3. *Effect on Son X*

It is unlikely that the CRC would be used to determine the placement of Son *X* because Son *X* was adopted in the United States, which has not ratified the CRC. However, the CRC may require Son *X* to return to Country *Y* in two situations. First, if the lack of official, informed consent from Mother *X* is considered to have compromised his identity under Article 8, he may be required to return to Country *Y*. Second, if the payment Mother *X* received made the adoption either an “illicit transfer” under Article 11 or an unauthorized separation from his natural parents under Article 9, he may also have to return to Country *Y*. Article 21 confirms the CRC’s preference for returning the child to his origin country because it states that intercountry adoption is available only if alternative means of care are not available. It may be possible to conclude that alternative means of care are available because Mother *X* has not passed away and the orphanage is able to take care of Son *X*. As a result, under the CRC, it is likely that Son *X* would return to Country *Y* as long it is also in his best interests to do so.

C. *Convention on the Civil Aspects of International Child Abduction (Abduction Convention)*

1. *Background*

The Abduction Convention began at the Hague Conference on Private International Law in 1976, but was not drafted until 1980.³⁰ Created with the purpose of helping countries resolve international abduction and custody issues, it has been signed and ratified by eighty-one nations.³¹ On July 1, 1988, it came into force in the United States.³² Although the Abduction Convention does not generally address intercountry adoption issues, it may be used to determine the placement of the child in the event any procedural irregularities would classify the adoption as an abduction or “wrongful removal or retention.”³³ Article 3 of the Abduction Convention defines

30. See Tai Vivatvaraphol, *Back to Basics: Determining a Child’s Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 *FORDHAM L. REV.* 3325, 3333–34 (2009).

31. See *id.* at 3334.

32. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [hereinafter *Abduction Convention*].

33. *Id.* art. 3. Article 3 states:

The removal or the retention of a child is to be considered wrongful where—(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Id.

removal or retention as wrongful if it is “in the breach of rights of custody” of the child’s parents and those rights were actually being exercised or capable of being exercised.³⁴ As a result, the Abduction Convention applies only if a child is taken out of his or her origin country without the consent of his or her parents or the legal guardians, because those are the only two situations in which custody rights are violated under that Convention. The Abduction Convention would not apply in the case of other non-custody-related procedural irregularities.

2. Relevant Provisions Addressing Legal or Procedural Irregularities in Intercountry Adoption

If the irregularities in the adoption process involve the custody rights of the natural parents or legal guardians in the origin country, the adoption may be considered a wrongful removal or retention and subject to the Abduction Convention.³⁵ In these cases, the Abduction Convention has a general preference for returning the child to his or her origin country. Article 1 requires parties to the Convention to “secure the prompt return of children” abducted from their origin country and to ensure that custody rights of parents in the origin country are respected in the destination country.³⁶ Similarly, Article 7 requires parties to the Convention to “secure the prompt return of children.”³⁷

34. *Id.*

35. *See id.*

36. *Id.* art. 1. Article 1 states: “The objects of the present Convention are—(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and or access under the law or one Contracting State are effectively respected in the other Contracting States.” *Id.*

37. *Id.* art. 7. Article 7 states:

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through any intermediary, they shall take all appropriate measures – a) to discover the whereabouts of a child who has been wrongfully removed or retained; b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures; c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues; d) to exchange, where desirable, information relating to the social background of the child; e) to provide information of a general character as to the law of their State in connection with the application of the Convention; f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access; g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers; h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child; i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

Id.

That said, whether the child will be returned depends on the length of the adoption and whether any exceptional circumstances would allow the destination country to retain the child. Article 12 requires the Abduction Convention parties' judicial or administrative authorities to return an abducted child to his or her origin country if the child has been gone for less than one year.³⁸ If the child has been gone for more than one year, authorities must return the child "unless it is demonstrated that the child is now settled in [his or her] new environment."³⁹ As a result, the Abduction Convention generally requires that parties return the child to his or her origin country if the adoption occurred within the last year.⁴⁰ However, if the adoption occurred more than one year ago, Article 12 allows parties to consider retaining the child in the destination country if the child is "settled in [his or her] new environment."⁴¹

No matter the length of time that has passed since the abduction, the destination country must retain the child in five situations set out in Article 13: (1) if custody rights were not being exercised, (2) if there is subsequent consent to the removal or retention, (3) if there is a "grave risk that his or her return would expose the child to physical or psychological harm," (4) if the return would "otherwise place the child in an intolerable situation," or (5) if the child "objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of [his or her] views."⁴² In order to accomplish the goals of the Abduction Convention, Article 7 requires parties to the Convention to "co-operate with each other" to "bring about an amicable resolution of the issues."⁴³ That said, the destination country's award of custody to the adoptive parents cannot be used as grounds for "refusing to return a child" under Article 17, but the destination country can "take account of the reasons" for their custody award when considering the return of the child.⁴⁴

38. *Id.* art. 12.

39. *Id.* Article 12 states:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Id.

40. *Id.*

41. *Id.*

42. *Id.* art. 13.

43. *Id.* art. 7.

44. *Id.* art. 17.

3. *Effect on Son X*

The Abduction Convention applies to Son *X* only if his U.S. adoption could be considered an “abduction” under Article 3. It is possible that the adoption would meet this standard because Son *X* was adopted without official consent from Mother *X*; thus it may be “in the breach of rights of custody” because Mother *X* may have been capable of exercising her custody rights. That said, other facts demonstrate that Mother *X* did consider giving up her child for adoption before being approached by the adoption agency, so there are some indicators that consent was given even though it is not documented. If those indicators are enough to suggest that consent was given, the adoption would not be in violation of Mother *X*’s custody rights and thus would not be considered an abduction.

But even if Son *X*’s adoption is considered an abduction, and the Abduction Convention applies, he may not have to return to Country *Y* because of the length of his adoption. Because Son *X* was adopted over a year ago, Article 12 may allow Son *X* to remain in the United States if he is “settled in [his] new environment,” although it generally requires his return to Country *Y*.

Further, regardless of whether Son *X* has been adopted for over one year and well-settled in the destination country, the Abduction Convention will require Son *X* to stay in the United States if he falls into one of the five special categories set out in Article 13.⁴⁵ First, Son *X* must remain in the United States if Mother *Y* was not “exercising” her custody rights. It is not clear whether Mother *X* was exercising her custody rights due to the concerns relating to her official consent. However, if her actions are accepted to be voluntary, it is possible to conclude that she was not exercising those rights by placing Son *X* into an adoption agency. Second, Son *X* must remain in the United States if Mother *X* subsequently consented to the removal or retention. In the facts of our case, there is no indication that Mother *X* consented to Son *X*’s adoption in the United States; but she did not attempt to reclaim him from the adoption agency, which may provide some evidence of her approval. Third, Son *X* must remain in the United States if there is a “grave risk” that he would be exposed to “physical or psychological harm” if returned to Country *Y*. There is no evidence to suggest that Son *X* would be exposed to any harm if he returns to Country *Y*. In fact, because the payment from the adoption agency enabled Mother *X* to get a job, it is possible that his life would be relatively better than it would have been otherwise. Fourth, Son *X* must remain in the United States if his return would place him “in an intolerable situation.” There is no evidence to suggest that he would be in a uniquely difficult situation if he returned to Country *Y*. Fifth, Son *X* must remain in the United States if the child “objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of [his] views.” Because Son *X* is only two years old, it would be inappropriate to take account of his views and perspectives. This provision is typically used for older children who have a developed memory of their experiences in their native country and are able to compare those experiences to what they have experienced in their adopted country in order to make

45. *Id.* art. 13.

a qualified judgment about their preference.⁴⁶ Article 13 requires a detailed facts-and-circumstances analysis, and it is unlikely that Son *X* would be allowed to remain in the United States under this provision. Thus, although the Abduction Convention has a general preference to return Son *X* to Country *Y*, it may allow Son *X* to remain in the United States, depending on how his situation is interpreted.

D. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (“Intercountry Adoption Convention”)

1. Background

The Intercountry Adoption Convention was introduced at the May 1993 Netherlands meeting of the Hague Convention.⁴⁷ Notably, this is the first convention that was created with the explicit goal of addressing international adoption, and it has been successful on a global scale. The Intercountry Adoption Convention has been signed and ratified by eighty-three nations, including the United States.⁴⁸ As a result, it is likely that the Intercountry Adoption Convention would be used to determine the placement of a child adopted from a country that has also ratified the Intercountry Adoption Convention.⁴⁹ The enabling legislation of the Intercountry Adoption Convention in the United States are the IAA and the IAA Regulations, which provide the most relevant source of authority for any adoption irregularities discovered in the United States.

2. Relevant Provisions Addressing Legal or Procedural Irregularities in Intercountry Adoption

Under the Intercountry Adoption Convention, if an adoption encounters legal or procedural irregularities or improprieties, the child may not be “adoptable” under

46. Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, in 3 ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 426, 433 (1982), available at <http://hcch.e-vision.nl/upload/expl28.pdf>.

47. IAC, *supra* note 11.

48. *Convention Countries*, U.S. DEP’T OF STATE, OFFICE OF CHILDREN’S ISSUES, <http://www.adoption.state.gov/hague/overview/countries.html> (last visited Jan. 8, 2011). Although the Russian Federation has not ratified the Intercountry Adoption Convention, in the future all adoptions from Russia to the United States will likely be required to be processed through adoption agencies that are accredited and compliant with the requirements of the Intercountry Adoption Convention. *See, e.g.*, Richard Boudreaux, *U.S., Russia Near Adoption Agreement*, WALL ST. J., May 14, 2010, <http://online.wsj.com/article/SB10001424052748703950804575242620932318554.html>; Maxim Tkachenko, *Official: U.S.-Russia Adoption Agreement to be Finalized by Friday*, CNN.COM, May 12, 2010, <http://www.cnn.com/2010/WORLD/europe/05/12/russia.us.adoptions/index.html>. This bilateral agreement was the result of an international adoption scandal, where an American woman from Tennessee “returned” her adopted son to Russia on a one-way ticket to Moscow with a note to Russian adoption authorities. Boudreaux, *supra*. As of May 14, 2010, an official agreement had not been reached, but talks were scheduled to continue in hopes of reaching an agreement soon after. *Id.*

49. *Overview*, U.S. DEP’T OF STATE, OFFICE OF CHILDREN’S ISSUES, <http://www.adoption.state.gov/hague/overview.html> (last visited Jan. 8, 2011).

Articles 1 and 4.⁵⁰ If a child is not “adoptable,” there is no direct guidance on child placement after an improper adoption.⁵¹ The goals of the Intercountry Adoption Convention are to require parties to the Convention to both “ensure that intercountry adoptions take place in the best interests of the child” and “prevent the abduction, the sale of, or traffic in children.”⁵² Further, Article 4 limits the population of children who can be adopted by requiring parties to process intercountry adoptions for children only if: (1) the children are “adoptable,” (2) there is freely given consent from parents and/or legal guardians, and (3) there is no improper payment or compensation.⁵³ But even if the child is “adoptable,”⁵⁴ the adoption may still be improper for other reasons under Article 4, such as lack of freely given consent from parents and/or legal guardians or improper payment or compensation.⁵⁵ In that situation, there is similarly no direct guidance on child placement after an improper adoption, unless the improper adoption is treated like a “disrupted placement.”⁵⁶

If improper adoptions are treated similarly to “disrupted placements,” the Intercountry Adoption Convention reflects a general preference for retaining the child in the destination country.⁵⁷ If an adoption occurs after a placement,⁵⁸ it is possible to treat an improper adoption in a manner similar to that of a disrupted placement in the context of Article 21. If the placement is no longer in the best interests of the child, Article 21 requires parties to the Convention to remove the child from his or her prospective adoptive parents and arrange temporary care, new placement, or alternative long-term care, or, “as a last resort,” to return the child to the origin country.⁵⁹ As a result, an improper adoption allows the child to remain in

50. See IAC, *supra* note 11, arts. 1, 4.

51. Whether a child is “adoptable” is determined by the origin country. However, many countries do not offer direct guidance on this issue, and it varies significantly across countries that are parties to the convention. Typically, an “adoptable” child is: (1) a child with terminally or mentally ill parents, (2) an orphan, (3) an abandoned child, or (4) a child in a risky environment. Benyam D. Mezmur, *From Angelina (to Madonna) to Zoe’s Ark: What are the ‘A–Z’ Lessons for Intercountry Adoptions in Africa?*, 23 INT’L J.L. POL’Y & FAM. 145, 154–55 (2009).

52. See IAC, *supra* note 11.

53. See *id.* art. 4.

54. Mezmur, *supra* note 51.

55. See IAC, *supra* note 11, art. 4.

56. See *id.*

57. See *id.*

58. See 22 C.F.R. § 96.2 (2010) (providing a definition of “adoption” and “post-placement” in the context of the Intercountry Adoption Act of 2000).

59. IAC, *supra* note 11, art. 21. Article 21 states:

(1) Where the adoption is to take place after the transfer of the child to the receiving State and it appears to the Central Authority of that State that the continued placement of the child with the prospective adoptive parents is not in the child’s best interests, such Central Authority shall take the measures necessary to protect the child, in particular—
a) to cause the child to be withdrawn from the prospective adoptive parents and to arrange temporary care; b) in consultation with the Central Authority of the State of

the destination country because returning the child to the origin country is a measure of “last resort.”⁶⁰ Further, the child should remain in the destination country because the Intercountry Adoption Convention *Guide to Good Practice* no. 1, paragraph 609, states that “[r]eturning the child to the State of origin should only be done in rare cases, and only after ‘all measures to find alternative care in the receiving State having been exhausted and any prolonged stay of the child in that State no longer being for his or her welfare or interests.’”⁶¹ Similarly, the *Guide to Good Practice* no. 1, paragraph 610 requires that the adoptive child, “being fully integrated into the adoptive family, will be protected in the same way as any other child in the receiving country.”⁶² In addition, the *Guide to Good Practice* also supports retaining the child in the destination country and provides the only relevant guidance on “breakdowns” of completed adoptions.⁶³ That said, the destination country may refuse to recognize an improper adoption “if the adoption is manifestly contrary to [the destination country’s] public policy, taking into account the best interests of the child” under Article 24.⁶⁴ In that case, the child must be placed in a proper adoption, if possible, or be returned to his or her origin country.⁶⁵ Finally, Article 33 requires a party to ensure that “appropriate measures are taken” if it or any other party to the Convention does not respect, or if there is a “serious risk” that it or another party may not respect, any provision of the Intercountry Adoption Convention.⁶⁶ In fact, the *Guide to Good Practice* no. 1,

origin, to arrange without delay a new placement of the child with a view to adoption or, if this is not appropriate, to arrange alternative long-term care; an adoption shall not take place until the Central Authority of the State of origin has been duly informed concerning the new prospective adoptive parents; c) as a last resort, to arrange the return of the child, if his or her interests so require. (2) Having regard in particular to the age and degree of maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken under this Article.

Id.

60. *Id.*

61. HAGUE CONFERENCE ON PRIVATE INT’L LAW, IMPLEMENTATION AND OPERATION OF THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION: GUIDE TO GOOD PRACTICE 130, ¶ 609 [hereinafter GUIDE TO GOOD PRACTICE], available at http://hcch.e-vision.nl/upload/adoguide_e.pdf.

62. *Id.* ¶ 610. (“The Convention does not expressly provide procedures for the breakdown of completed adoptions. The child, being fully integrated into the adoptive family, will be protected in the same way as any other child in the receiving country. This means that the child will have the benefit of the measures of care and protection available to all children generally in the country where he/she now has his/her habitual residence.”).

63. *Id.* (requiring that the adoptive child “being fully integrated into the adoptive family, will be protected in the same way as any other child in the receiving country”); *id.* ¶ 611 (stating that “the protection of the child after an adoption has taken place is not the responsibility of the State of origin, but rather of the receiving State, which must be trusted to carry out this duty”). Paragraph 611 also emphasizes that “the adoption, at the point of breakdown, will . . . become a matter for child protective services [in the destination country], and the Central Authority may no longer be involved with or informed of such developments.” *Id.*

64. *Id.* ¶ 529.

65. *Id.* ¶¶ 609, 610.

66. IAC, *supra* note 11, art. 33.

paragraph 611 confirms that “the protection of the child after an adoption has taken place is not the responsibility of the State of origin, but rather of the receiving State, which must be trusted to carry out this duty.”⁶⁷

3. *Effect on Son X*

The Intercountry Adoption Convention applies if Son *X* comes from a country that has ratified the Convention or, potentially, from Russia.⁶⁸ Son *X* is most likely “adoptable” under Article 1 because (1) he was “abandoned” by Mother *X* when she gave him up for adoption and (2) he was living in a “risky environment” because Mother *X* was homeless. If adoption is improper under Article 4 because Son *X* is not “adoptable” because Mother *X* did not provide her freely given consent, or because the orphanage fee constitutes improper payment or compensation, it may be treated like a “disrupted placement.” In that situation, Son *X* would remain in the United States because returning a child to his destination country is considered a “last resort” under Article 21. However, the United States may refuse to recognize Son *X*’s adoption if it is “manifestly contrary to [the United States’] public policy, taking into account the best interests of the child” under Article 24. Although Mother *X* did receive a payment, which calls into question the voluntariness of her consent to the adoption, there is nothing to suggest that there were egregious violations that would require the United States to refuse the adoption. As a result, the Intercountry Adoption Convention would likely allow Son *X* to remain in the United States.

E. *Intercountry Adoption Act (IAA) of 2000 and IAA Regulations*

1. *Background*

The IAA, the enabling legislation for the Intercountry Adoption Convention, was signed into law in the United States on October 6, 2000.⁶⁹ The IAA provides that the U.S. State Department will serve as the U.S. authority to establish, oversee, and manage the process of accreditation and approval of U.S. adoption service providers, the case registry for incoming and outgoing adoptions, and other intercountry adoption issues.⁷⁰ The IAA is the most relevant source of authority for any adoption irregularities discovered in the United States.

2. *Relevant Provisions Addressing Legal or Procedural Irregularities in Intercountry Adoption*

(a) *IAA*

67. GUIDE TO GOOD PRACTICE, *supra* note 61, ¶ 611.

68. *See supra* note 48 and accompanying text.

69. 42 U.S.C. § 14901 (2006). President Clinton transmitted the Intercountry Adoption Convention to the Senate on June 11, 1998, and the Senate provided advice and consent to ratification of the Convention on September 20, 2000. *Id.*

70. *Id.* § 14912.

There are five provisions that provide very limited guidance on the treatment of a child with an improper adoption under the IAA. IAA section 301 requires federal and state agencies, courts, and other public and private persons to treat intercountry adoption certificates as “conclusive evidence of the facts certified therein,” and adoptions as “final valid adoption[s].”⁷¹ Given that the IAA explicitly addresses the validity of the intercountry adoption certificate and the consequences of any substantive violations of the adoption process, but does not provide for the placement of the child in those situations, it is possible to conclude that it assumes the child will remain with his or her adoptive parents.

Although the IAA contains no other substantive discussion of adoptions, it does discuss violations of its provisions in some detail. Section 404(a)(2) provides civil penalties for “any person” who “makes a false or fraudulent statement, or misrepresentation, with respect to a material fact, or offers, gives, solicits, or accepts inducement by way of compensation” that is intended to influence any accreditation, custody, consent, adoption, or other decision of the United States or any foreign country.⁷² In addition, section 404(b) allows the U.S. Attorney General to bring a civil enforcement action for any of the conduct set out in sections 404(a) and 404(c), and provides criminal penalties for anyone who “knowingly and willfully violates” section 404(a).⁷³ However, there is no private right of action under the IAA.⁷⁴

(b) *IAA Regulations*

Although the IAA provides only very limited guidance on the treatment of a child with an improper adoption, the IAA Regulations are quite comprehensive in their discussion of this issue. The IAA Regulations define adoption as “the judicial or administrative act that establishes a permanent legal parent-child relationship between a minor and an adult who is not already the minor’s legal parent and terminates the legal parent-child relationship between the adoptive child and any former parent(s).”⁷⁵

Under the IAA Regulations, the child is likely to remain in the destination country as long as there are no extreme circumstances that would require obtaining the approval of the Central Authority and the U.S. Secretary of State and remaining in the destination country is in the best interests of the child.⁷⁶ Further, it allows a child to be returned to his or her origin country only if the “Central Authority of the

71. *Id.* § 14931(a)(2)(b). The reference to section 301 of the IAA in the text corresponds directly to 42 U.S.C. § 14931. Hereinafter, any reference to an IAA section will cite to the corresponding U.S. Code section.

72. *Id.* § 14944(a)(2).

73. *Id.* § 14944(b)(1), (c).

74. *Id.* § 14954.

75. Accreditation of Agencies and Approval of Persons Under the Intercountry Adoption Act of 2000, 22 C.F.R. § 96.2 (2010).

76. *Id.* § 96.50(e)(2).

country of origin and the Secretary [of State] have approved the return in writing.”⁷⁷ This suggests that returning a child to his or her origin country is done only in extreme circumstances. Even if the adoption is dissolved, the IAA Regulations require that the parties to the Convention “do not return from the United States an adopted child whose adoption has been dissolved unless the Central Authority of the country of origin and the Secretary [of State] have approved the return in writing.”⁷⁸

The IAA Regulations differentiate between the treatment of children with improper adoptions before and after the adoption takes place.⁷⁹ Any improprieties that occur in the adoption process would result in a “disruption” during the post-placement period or a “dissolution” after the adoption takes place.⁸⁰ “Disruption” is defined as “the termination of a placement for adoption during the post-placement period,” and dissolution is defined as “the termination of the adoptive parent(s)’ parental rights after an adoption.”⁸¹ If there are improprieties that lead to a disruption, the IAA Regulations requires that the child be: (1) removed from the placement if it is no longer in the child’s best interests, (2) put into temporary care, and (3) provided with a new adoptive placement in the destination country with consideration for the views and consent of the child.⁸²

In addition, the IAA Regulations provide an additional source of guidance that may determine the child’s status after any irregularities are uncovered: the adoption services contract between the adoptive parents and the adoption agency.⁸³ The contract must describe “the agency’s or person’s responsibilities if a placement for adoption is disrupted,” including “if the disruption takes place after the child has arrived in the United States, under what circumstances the child will, as a last resort, be returned to the child’s country of origin, if that is determined to be in the child’s best interests.”⁸⁴ Adoption contracts typically state that adoption is “permanent” and

77. *Id.*

78. *Id.* § 96.51(d).

79. *Id.* § 96.2.

80. *See id.*

81. *See id.*

82. *Id.* §§ 96.50(d), (e).

83. *Id.* § 96.50(f). This section details the adoption services contract, which provides for:

(1) Who will have legal and financial responsibility for transfer of custody in an emergency or in the case of impending disruption and for the care of the child; (2) If the disruption takes place after the child has arrived in the United States, under what circumstances the child will, as a last resort, be returned to the child’s country of origin, if that is determined to be in the child’s best interests; (3) How the child’s wishes, age, length of time in the United States, and other pertinent factors will be taken into account; and (4) How the Central Authority of the child’s country of origin and the Secretary will be notified.

Id.

84. Disruption and dissolution plans will address: “[W]ho will have legal and financial responsibility for the transfer of custody or the child in an emergency; who will assume care of the child; how the adoption service provider will take into consideration the child’s wishes, the child’s age, and the length of time

agencies will work in the “best interests of the child” at all times, including during a disruption or dissolution.⁸⁵ Some adoption contracts also state that returning the child to the country of origin will be done only “as a last resort, only after exerting best efforts to establish a new placement with other adoptive parents, and only if this foreign country government and relevant accrediting agency have provided prior approval in writing for such return.”⁸⁶ Some agreements also highlight that the agency will consider “[t]he child’s wishes, age, [and] length of time in the U.S.” when determining the placement of the child after a disruption or dissolution.⁸⁷ In almost all of the contracts, the adoptive family remained financially responsible for all services rendered after the disruption, including the new placement of the child.⁸⁸

Although most contracts provide that the agency “will attempt to assist the family in arranging for supportive services to the child and family, and in those cases where it is in the best interest of the minor child, [the agency] will assist in locating and arranging for a new adoptive placement when possible,”⁸⁹ there are some contracts that do not require the agency to support the adoptive parents in this process. Instead, some state that the adoption agency “is not qualified to assist with the services associated with disruption/dissolution” and the agency “is not legally, financially or otherwise responsible for disruption/dissolution,” so it will not provide any “services associated with disruption/dissolution.”⁹⁰ In addition, some agreements state that, where the agency retains custody of the child before the official adoption, the agency

the child has been in the United States; how the Central Authority of the child’s country of origin and the U.S. Central Authority will be notified; and under what circumstances might it be in the best interest(s) of the child to return him or her to the country of origin.” U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION: A GUIDE FOR PROSPECTIVE ADOPTIVE PARENTS 14 (2006), available at http://adoption.state.gov/pdf/PAP_Guide-1.pdf. Further, if the agency provides services in the event of dissolution or disruption, it “must provide a plan describing its responsibilities” in those situations. *Id.*

85. See, e.g., Model International Adoption Service Agreement, The Open Door Adoption Agency, Inc. 9, 15, http://www.opendooradoption.org/uploads/documents/international_adoption_service_agreement.pdf [hereinafter Open Door Model Agreement]; Model International Adoption Agreement, A Helping Hand Adoption Agency, *International Adoption Agreement* 5, <http://worldadoptions.org/downloads/PDF/IAA%20sample.pdf> [hereinafter Helping Hand Model Agreement].
86. See, e.g., Helping Hand Model Agreement, *supra* note 85, at 10; HIC Model Adoption Services Agreement, Hawaii Int’l Child 2 (2006), http://www.h-i-c.org/Forms/Adoption_Services_Application.pdf [hereinafter HIC Model Agreement].
87. See, e.g., HIC Model Agreement, *supra* note 86.
88. See, e.g., Open Door Model Agreement, *supra* note 85, at 15–16; HIC Model Agreement, *supra* note 86, at 6; Model Adoption Services Agreement, The Adoption Ctr. of Wash., <http://www.adoptioncenter.com/AboutACW/AdoptionServicesAgreement.pdf> [hereinafter Adoption Ctr. of Wash. Model Agreement].
89. See, e.g., Open Door Model Agreement, *supra* note 85, at 15–16; HIC Model Adoption Services Agreement, *supra* note 86 (stating that parents “agree to notify HIC and allow HIC to assist with temporary foster care if appropriate and possible, while identifying another adoptive family, if appropriate and possible); Adoption Ctr. of Wash. Model Agreement, *supra* note 88, at 6.
90. See, e.g., Model Adoption Services Agreement, Adoption Ark 10, http://www.adoptionark.org/upload/sampleadoptionagreement_30167.pdf.

“will have full authority over the child to remove, place[,] or return the child to their previous orphanage.”⁹¹ However, where the adoption is finalized, the agency will assist the family but will not take physical or legal custody of the child, and “future placement will remain the primary responsibility of the family, exactly as it would if this were a biological child.”⁹²

When the IAA and the IAA Regulations laws have been applied to situations where improprieties have been discovered in the adoption process following an adoption, the children have typically remained in the United States. For example, when the United States issued a moratorium on inbound adoption from Cambodia due to widespread child trafficking, the adoptions that were in an intermediate stage were officially completed, even though the legal status of the adoption process had already been officially called into question by the moratorium and resulting investigations.⁹³ Further, the conspirators in Cambodia were indicted on charges of visa fraud, conspiracy to launder money, and other financial crimes.⁹⁴ However, all of the adoption cases, including those still in the middle of the Cambodian process—cases which would have progressed to completion if not for the moratorium—and a smaller group who had filed applications to adopt but had not yet been matched with a child, were all processed and resulted in legally binding adoptions of Cambodian children. These children remained in the United States with their adoptive parents.⁹⁵

3. *Effect on Son X*

Assuming Son *X*'s adoptive parents have a valid intercountry adoption certificate, he will likely remain in the United States. The discovered improprieties in Son *X*'s adoption will not be treated like a disruption because he has already been legally adopted. However, if the improprieties are treated like dissolution, Son *X* would be allowed to remain in the United States because returning Son *X* to Country *Y* requires authorization by the U.S. Secretary of State.⁹⁶ Further, the IAA generally retains the Intercountry Adoption Convention's preference for children to remain in their adopted countries with their adoptive parents. Finally, if Son *X*'s adoption services contract is similar to those traditionally used by adoption agencies, it would allow Son *X* to remain in the United States. If the contract allows for consideration of the child's wishes, it is unlikely that this would apply in Son *X*'s situation given his relatively young age. However, if the contract allows for consideration of the length

91. See, e.g., Open Door Model Agreement, *supra* note 85, at 15–16.

92. *Id.*

93. See Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 CUMB. L. REV. 619, 623–24 (2005).

94. *Id.* at 624.

95. See *id.* at 623–24; see also Oreskovic & Maskew, *supra* note 3, at 110–16.

96. Accreditation of Agencies and Approval of Persons Under the Intercountry Adoption Act of 2000, 22 C.F.R. § 96.2 (2010). Section 96.51(d) requires that the parties to the Convention “[do] not return from the United States an adopted child whose adoption has been dissolved unless the Central Authority of the country of origin and the Secretary have approved the return in writing.” 22 C.F.R. § 96.51(d).

of Son X's adoption, remaining with his U.S. adoptive family for over two years should provide further support for him remaining in the United States if other provisions addressing legal or procedural improprieties, or disruptions and dissolutions, are included in the contract.

F. Immigration and Nationality Act (INA) and INA Regulations

1. Background

The INA is the major body of immigration law in the United States. Prior to its enactment, immigration law was governed by a number of separate federal statutes and regulations. In 1952, the INA became the first comprehensive body of rules governing immigration into the United States, and has been amended several times since then. Although a number of INA provisions relevant to intercountry adoption are discussed below, the most notable recent amendment is the Child Citizenship Act of 2000, which provides immediate U.S. citizenship to foreign-born adopted children entering the United States from a country that has ratified the Intercountry Adoption Convention.

2. Relevant Provisions Addressing Legal or Procedural Irregularities in Intercountry Adoption

(a) INA

The INA's guidance for the status of children with potentially improper adoptions depends on the type of immigration process used by the child. The process by which an adopted child obtains U.S. citizenship depends, in turn, on the child's visa.⁹⁷ The

97. *Before Your Child Immigrates to the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d72e18a1f8b73210VgnVCM100000082ca60aRCRD&vgnnextchannel=d72e18a1f8b73210VgnVCM100000082ca60aRCRD> (last updated Sept. 2, 2009). The first type of visa available to adopted children is the IH-3, which is issued for children with full and final adoptions from a Hague Convention country. With an IH-3 visa, a child automatically acquires U.S. citizenship if the child enters the United States before his or her eighteenth birthday and resides with his or her adoptive parents in the United States (or overseas if parents are U.S. government or military personnel assigned abroad). *Id.*

The second type of visa for adopted children is the IH-4, which is issued for children coming to the United States from a Hague Convention country. With an IH-4 visa, a child does not automatically acquire U.S. citizenship upon entry to the United States, but becomes a permanent resident (green card holder) and automatically acquires citizenship on the date of his or her adoption in the United States, as long as the adoption occurs before the child's eighteenth birthday. *Id.*

The third type of visa is the IR-3, which is issued when a full and final adoption is completed abroad and requires that the parents physically see the child prior to or during the adoption proceedings. With an IR-3 visa, a child automatically acquires U.S. citizenship if the child enters the United States before his or her eighteenth birthday and resides with his or her adoptive parents in the United States (or overseas if parents are U.S. government or military personnel assigned abroad). *Id.*

The fourth type of visa is the IR-4, which is issued to a child who is coming to the United States to be adopted after being adopted abroad by only one parent, if married, and was not seen by the parents prior to or during the adoption. With an IR-4 visa, a child does not automatically acquire U.S. citizenship upon entry to the United States, but becomes a permanent resident (green card holder) and

GETTING TO STAY: CLARIFYING LEGAL TREATMENT OF IMPROPER ADOPTIONS

U.S. Department of State advises parents that if the “adoption doesn’t meet these requirements . . . acquiring citizenship for [the] child will require an additional process and additional fees,” and if they “postpone or forget to file for [the] child’s naturalization,” the child may lose claims to benefits and “might actually be subject to possible deportation.”⁹⁸ In fact, § 1201(i) of the INA allows the consular officer or the Secretary of State to revoke a visa or any documentation after it has been issued “at any time, in his discretion.”⁹⁹ In addition, § 1504(a) allows the U.S. Secretary of State to cancel any U.S. passport or Consular Report of Birth if “it appears that such document was illegally, fraudulently, or erroneously obtained from, or was created through illegality or fraud.”¹⁰⁰ However, this cancellation “shall affect only the document and not the citizenship status of the person in whose name the document was issued.”¹⁰¹

If the child received U.S. citizenship immediately after entering the United States, it will be more difficult for U.S. authorities to revoke that citizenship and remove the child to his or her country of origin if any irregularities in the adoption process are uncovered. If the citizenship and/or certificate of naturalization were “illegally procured or were procured by concealment of a material fact or by willful misrepresentation,” the U.S. attorney for each district may institute proceedings in any U.S. district court to revoke and set aside the citizenship and/or the certificate of naturalization under § 1451(a), as long as they provide an affidavit showing “good cause.”¹⁰² However, it can be difficult to show “good cause” under the guidance in Interpretation 340.1.¹⁰³ This guidance clarifies that “good cause” is shown only where “some substantial results are achieved thereby in the way of betterment of the citizenship of the country” because revocation is “remedial rather than penal in its

automatically acquires citizenship on the date of his or her adoption in the United States, as long as the adoption occurs before the child’s eighteenth birthday. *Id.*

The fifth type of visa is the IR-2, which is issued to a child adopted by a U.S. citizen if the child immigrates to the United States while unmarried and before his or her twenty-first birthday, or after his or her twenty-first birthday only if he or she is treated under the Child Status Protection Act as if he or she were still less than twenty-one years old. With an IR-2 visa, a child automatically acquires U.S. citizenship upon entry to the United States if he or she is under eighteen years old and resides with adoptive parents in the United States (or overseas if parents are U.S. government or military personnel assigned abroad). Children over eighteen years old become permanent residents (green card holders) and can apply for naturalization when they are eligible. *Id.*; see also Child Citizenship Act of 2000, 8 U.S.C. § 1431 (2006).

98. U.S. DEP’T OF STATE, OFFICE OF CHILDREN’S ISSUES, INTERCOUNTRY ADOPTION FROM A TO Z 31 (2008), available at <http://adoption.state.gov/pdf/Intercountry%20Adoption%20From%20A-Z.pdf>.

99. 8 U.S.C. § 1201(i).

100. *Id.* § 1504(a).

101. *Id.*

102. *Id.* § 1451(a).

103. U.S. CITIZENSHIP & IMMIGRATION SERVS., INTERPRETATIONS OF IMMIGRATION STATUTES & REGULATIONS, § 340.1(f), available at <http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-45104/0-0-0-50234.html>.

nature.”¹⁰⁴ Given that the revocation of citizenship would punish the child, who did not have a hand in any improprieties leading to his or her adoption and who did not commit “willful and deliberate fraud,” which would indicate a “lack of moral qualifications necessary for citizenship,”¹⁰⁵ it is unlikely that the U.S. Attorney General would be able to show “clear, unequivocal, and convincing evidence” that revocation of his or her citizenship would be remedial.¹⁰⁶ Even if the child retains his or her U.S. citizenship, the U.S. Secretary of State may cancel the child’s U.S. passport under § 1504(a) if “it appears that such document was illegally, fraudulently, or erroneously obtained from, or was created through illegality or fraud.”¹⁰⁷ This cancellation would not affect the citizenship or placement of the child, though, because the cancellation of the passport “shall affect only the document and not the citizenship status of the person in whose name the document was issued.”¹⁰⁸ However, if the U.S. Attorney is successful in showing “good cause” for the revocation of U.S. citizenship, the revocation will be effective as of the original date of the citizenship and certificate of naturalization.¹⁰⁹

That said, there are three other situations that are analogous to an irregular adoption in which U.S. immigration laws may require that the child’s citizenship and/or permanent resident status be revoked as a result of his or her parent’s actions, even though the child is not responsible for the improprieties leading to the revocation of the parent’s U.S. citizenship and/or permanent resident status. First, where a parent’s U.S. citizenship or naturalization is “illegally, fraudulently, or erroneously obtained from, or was created through illegality or fraud” under § 1504(a), the child will simultaneously lose his or her citizenship under § 1451(d) unless the child is living in the United States at the time of revocation of the parent’s U.S. citizenship.¹¹⁰ Second, where a parent’s U.S. citizenship or naturalization was “illegally procured or was procured by concealment of a material fact or by willful misrepresentation” under § 1451(a), the child will simultaneously lose his or her citizenship under § 1451(d).¹¹¹ Third, a child whose permanent resident status is conditional on his or her parent’s marriage to a U.S. citizen will simultaneously lose his or her permanent resident status if the marriage is deemed invalid and conditional permanent resident status is revoked.¹¹² That said, § 1186a(c)(4) allows the Attorney General to remove the conditional basis of the conditional permanent resident status of both the spouse and

104. *Id.*

105. *Id.*

106. *Id.* § 340.2(b)(ii), (f).

107. 8 U.S.C. § 1504(a).

108. *Id.*

109. *See supra* text accompanying note 102.

110. 8 U.S.C. § 1451(d).

111. *Id.*

112. *Id.*

children if they can show that “extreme hardship” would result if they were removed.¹¹³

If the U.S. government challenges the child’s U.S. citizenship successfully and the child is not eligible to remain the United States, there are three situations in which the U.S. Attorney General may cancel removal proceedings and/or adjust the child’s status to allow the child to remain in the United States with his or her adoptive parents. First, § 1229b(a) allows the Attorney General to cancel removal proceedings for an alien who is inadmissible to or deportable from the United States if the alien meets certain requirements.¹¹⁴ Second, § 1229b(b) allows the Attorney General to cancel removal proceedings and make an adjustment to the permanent residence status of a child who is inadmissible to or deportable from the United States if the child meets specified requirements.¹¹⁵ Third, § 1229b(b)(2) allows the Attorney General to cancel removal proceedings and make an adjustment to the permanent resident status of a child who is inadmissible to or deportable from the United States if the child meets certain requirements.¹¹⁶

3. *INA Regulations*

If irregularities in the adoption process, such as any evidence of “child-buying,” are discovered before the adoption takes place, U.S. immigration officials may “automatically [revoke]” any petition for adoption if there are any reasons the adoption would have been denied “at the time of adjudication.”¹¹⁷ The INA Regulations explicitly identify “child-buying” as a ground for denial and thus automatic revocation if the “child-buying” was concealed during the immigration process.¹¹⁸ The INA

113. *Id.* § 1186a(c)(4)(A).

114. *Id.* § 1229b(a)(1)–(3). The three requirements include: “the alien (1) has been . . . lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.” *Id.*

115. *Id.* § 1229b(b)(1)(A)–(D). The requirements include:

[T]he alien (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application, (B) has been a person of good moral character during such period, (C) has not been convicted of [any of the listed offenses], and (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien’s . . . parent . . . who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Id.

116. *Id.* § 1229b(b)(2). The Attorney General may cancel removal of an alien child who: (1) has been “battered or subject to extreme cruelty by a . . . parent who is or was a United States citizen . . . or lawful permanent resident”; (2) has been present in the United States for “a continuous period of not less than 3 years immediately preceding the date of such application”; (3) has been “a person of good moral character during such period”; (4) is not inadmissible under certain sections of this title, is not deportable under certain sections of this title, and has not been convicted of an aggravated felony; and (5) establishes that the removal would “result in extreme hardship to the alien . . . or the alien’s parent.” *Id.*

117. 8 C.F.R. § 204.3(h)(14) (2010).

118. *Id.* § 204.3(i).

Regulations define “child-buying” as any situation where “prospective adoptive parents or adoptive parent(s), or a person or entity working on their behalf, have given or will give [sic] money or other consideration either directly or indirectly to the child’s parent(s), agent(s), other individual(s), or entity as payment for the child or as an inducement to release the child.”¹¹⁹ However, “reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings” is allowed.¹²⁰ But the case law suggests that “child-buying” is difficult to establish because natural parents are not interested in admitting their involvement with the practice¹²¹ and also because of the significant amount of acceptable fees that are often required for international adoptions.¹²²

In addition, the INA Regulations allow an immigration officer to revoke a petition “on any ground other than those specified” if there is a “necessity for the revocation.”¹²³ As a result, immigration laws that allow revocation of visa for entry into the United States may require a child with an improper adoption to return to his or her origin country.

When U.S. immigration laws have been applied to situations in which improprieties have been discovered in the adoption process following an adoption, the children have typically remained in the United States. For example, there have been many situations where women from the Marshall Islands gave up their children for adoption without understanding the legal consequences of the procedure and the children have been allowed to remain with their U.S. adoptive parents.¹²⁴ In addition, several Jamaican children who were fraudulently adopted were also allowed to remain with their U.S. adoptive parents even though adoption procedure violations were uncovered.¹²⁵ Finally, in one instance, a U.S. adoptive family was able to retain its adopted Vietnamese child even though the child was adopted after a prior adoption in Vietnam was revoked, and the adoption was based on consent provided by a fraudulent birth mother.¹²⁶ Although there are numerous anecdotal discussions of legal and procedural improprieties with regard to adoptions in the immigration context, it is often difficult to ascertain the current status of the child. As a result, these examples are important in that they demonstrate that, no matter the complexity of the U.S. immigration laws or their stringent penalties for violations, they also often allow children to remain with their U.S. adoptive parents.

119. *See id.*

120. *Id.*

121. Maskew, *supra* note 93, at 625–32.

122. Hague Convention on Intercountry Adoption, 71 Fed. Reg. 8064, 8093 (Feb 15, 2006) (codified at 22 C.F.R. pt. 96) (providing comments and responses regarding the use of adoption service fees as a form of child-buying).

123. 8 C.F.R. § 205.2(a) (2010).

124. Jini L. Roby, *Understanding Sending Country’s Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J.L. & FAM. STUD. 303, 303–11, 321 (2004).

125. Request for a Legal Opinion, Genco Op. No. 93-43, 1993 WL 1503990 (INS).

126. *In re Anonymous*, 80 No. 21 Interpreter Releases 749 (Admin. App. Office 2003) (on file with author).

G. Effect on Son X

Son *X* is likely to remain in the United States, unless the fee that Mother *X* received would constitute “child-buying.” Her small fee is certainly “money” that may be considered “payment for the child or . . . an inducement to release the child,” but the amount and Mother *X*’s use of the money to provide basic housing and services for herself would suggest that it is more likely to be considered a “reasonable payment for necessary activities related to the adoption proceedings.”¹²⁷ As a result, it is possible that Mother *X* would not be considered to be engaged in “child-buying,” which would allow Son *X* to retain his U.S. immigration status.

If Son *X* has already obtained his U.S. citizenship, revocation of his U.S. citizenship is unlikely. However, revocation may be possible if: (1) Son *X* entered the United States on either an IH-4 or IR-4 visa and has not obtained U.S. citizenship; and (2) any of Son *X*’s documents were “illegally, fraudulently, or erroneously obtained from, or [were] created through illegality or fraud.”¹²⁸ The second prong of this analysis requires a closer examination of the documentation—if any—available from Son *X*’s adoption agency; the adoption agency may retain fraudulent consent forms because they did not have a valid consent form from Mother *X*. In that case, depending on whether the fraud is severe, it would call into question the validity of any subsequent documents filed with the U.S. Citizenship and Immigration Service, including any verification of his legal status in the country and any applications for U.S. citizenship. That said, if the violations are minor, the U.S. Citizenship and Immigration Service—as well as any other authorities—would retain discretion as to whether they would pursue any action against the adoptive parents or Son *X*. Because the factual scenario suggests that the violations are unlikely to be egregious, it is likely that Son *X* would be able to retain any U.S. immigration status he has already attained.

III. CONCLUSION

Notwithstanding the frequency of legal or procedural irregularities in intercountry adoptions and the complex and conflicting legal regimes governing these situations, international policy and U.S. law do not provide clear guidance on what legal regime would govern the placement of the child, or whether the child would be allowed to remain with his or her adoptive parents, if any irregularities are discovered after an adoption takes place. This paper discussed the main legal regimes governing the adoption, immigration, and citizenship status of the child if any procedural or legal improprieties are discovered after the adoption takes place: (1) international conventions, including the CRC, the Abduction Convention, and the Intercountry Adoption Convention; (2) U.S. enabling statutes and regulations, including the IAA and the IAA Regulations; and (3) U.S. immigration laws and regulations, including the INA and the INA Regulations.

127. 22 C.F.R. § 96.36(a) (2010).

128. 8 U.S.C. § 1504(a) (2006).

The differences between these legal regimes were demonstrated by using a hypothetical example, Son *X*, which includes many features and themes common to adoption cases with unclear legal or procedural improprieties. In fact, depending on which laws and regulations apply to Son *X*, the child ends up with a different family, in a different country, or perhaps without a family at all. Generally speaking, an improper adoption under the CRC and the Abduction Convention requires the return of Son *X* to the origin country. Under the CRC, if the improper adoption is deemed to compromise the child's identity (i.e., a so-called "illicit transfer") and the return is in the best interests of the child, the CRC requires the return of the child to his or her origin country. Similarly, if Son *X*'s adoption is considered a wrongful retention or removal, the Abduction Convention has a general preference to return Son *X* to his origin country, but it may allow Son *X* to remain in the United States, depending on how his situation is interpreted.

On the other hand, the Intercountry Adoption Convention, the IAA, the IAA Regulations, the INA, and the INA Regulations would allow Son *X* to remain with the adoptive parents in the United States. The Intercountry Adoption Convention provides a general preference for retaining Son *X* in the destination country. The IAA also appears to assume Son *X* will be able to remain with his adoptive parents. Similarly, under the IAA and the IAA Regulations, no matter whether improprieties are discovered before or after the official adoption takes place, Son *X* is likely to remain in the destination country as long as there are no extreme circumstances that would require obtaining approval from the Central Authority of the state of origin and the U.S. Secretary of State, and it is in his best interests. The policy behind the INA and the INA Regulations are less consistent in terms of addressing the placement of the child if any improprieties in the adoption process are discovered after the adoption, but in many instances it protects the child's location in the destination country. Whether U.S. immigration officials may revoke the child's U.S. citizenship or permanent resident status depends on a number of factors. However, unless the immigration violations are severe, such as evidence of "child-buying," waivers and status adjustments at the discretion of the U.S. Attorney General are available. Further, because the factual scenario suggests that the violations are unlikely to be egregious, it is likely that Son *X* would be able to retain any U.S. immigration status he has already attained.

Although all of these legal regimes address the adoption, immigration, or citizenship status of internationally adopted children, the simple hypothetical case of Son *X* demonstrates that they do not come to the same conclusion on any of those issues. As discussed above, an improper adoption under the CRC and the Abduction Convention would require the return of Son *X* to the origin country. On the other hand, the Intercountry Adoption Convention, the IAA, the IAA Regulations, the INA, and the INA Regulations would allow Son *X* to remain with the adoptive parents in the United States. For this reason, it is important for lawmakers and relevant regulators and agencies to provide clear guidance regarding the application of this patchwork body of laws and regulations.