Addendum to Adoption: Adjusting the Adoption Statutes in South Carolina

Jennie Rischbieter

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ADDENDUM TO ADOPTION: ADJUSTING THE ADOPTION STATUTES IN SOUTH CAROLINA

Jennie Rischbieter

I. INTRODUCTION ................................................................. 841

II. BACKGROUND ............................................................... 843
    A. South Carolina Safeguard Statutes .................................. 843
    B. South Carolina Cases .................................................. 844

III. ANALYSIS OF DURESS AND McCANN V. DOE ......................... 847
    A. McCann v. Doe ....................................................... 847
    B. Duress ................................................................. 851

IV. OVERVIEW OF OTHER STATES AND THE UNIFORM ACT .............. 852
    A. Withdrawal Periods in Different States .......................... 852

V. WHY SOUTH CAROLINA SHOULD REVISE ITS ADOPTION LAWS ......... 854

VI. CONCLUSION ................................................................. 858

I. INTRODUCTION

Currently in South Carolina, there is no period of time during which a birth parent may withdraw consent after signing a consent form giving a child up for adoption, absent a showing that there was an element of duress or coercion present at the time the form was signed. Nor is there a waiting period after the birth of the child before a parent may sign a consent form giving a child up for adoption. North Carolina and Georgia also allow withdrawal of consent, but unlike South Carolina, the first few days of their withdrawal periods do not require a showing of duress or coercion in order for the birth parents to withdraw consent.

In light of the duress standard set forth in McCann v. Doe, South Carolina should adopt statutory measures to give a birth parent a period of time to withdraw consent for adoption without proving duress or coercion. Furthermore, South Carolina law currently provides waiting periods for other important family planning decisions, which allow individuals to take time to review the life changing and potentially permanent consequences of these

3. GA. CODE ANN. § 19-8-9(b) (2010); N.C. GEN. STAT. § 48-3-706(a) (2013).
decisions. For example, before two people can get married they must submit a written application and then wait twenty-four hours before the license is issued.\(^5\) As another example, before a woman can have an abortion performed, she must make an appointment to receive written information about the procedure, sign a form indicating that she has received this information, and then wait at least twenty-four hours before undergoing the procedure.\(^6\) Presumably, these waiting periods are designed to give people the opportunity to review these kinds of decisions so that they may enter into them fully informed and fully committed, and hopefully not regret their ultimate decision.\(^7\) The court in McCann v. Doe notes that although biological parents must wait forty-eight hours after receiving a brochure from the Department of Social Services to place their child with the Department for adoption, and that biological parents are given time to decide if they are going to use the Department or a private agency, “there is no similar provision giving parents time to reflect on the more important decision of relinquishment.”\(^8\) Although there is a waiting period for parents when choosing the adoption agency, there is no similar period after a birth parent signs the consent form giving a child up for adoption during which the parent can withdraw that consent without a statutorily defined reason. Currently, it appears that this withdrawal period is looked upon favorably by the judiciary of South Carolina.\(^9\) A short period of at least twenty-four hours, and perhaps no more than three days, during which consent may be withdrawn absent a showing of duress or coercion would not place an undue burden on the adoption system, would help ensure the finality of a birth parent’s decision to place a child for adoption, and would help further the ultimate goal of adoption laws—to make sure that serving the best interests of the child is at the forefront of adoption decisions.\(^10\)

This Note discusses the current statutory and case law regarding consent for adoption and withdrawal of that consent in South Carolina, with a specific look at the evolution of the definition of duress, and draws upon current examples of other states and the Uniform Adoption Act of 1994 to provide suggestions for the legislature. Part II examines the current South Carolina statutes and provisions related to the signing and withdrawal of consent. The first section discusses the elements needed to sign the consent form relinquishing a child for


\(^{7}\) See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) (“In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”).

\(^{8}\) McCann, 377 S.C. at 384 n.6, 600 S.E.2d at 506 n.6.

\(^{9}\) See id.

\(^{10}\) Id. at 389, 660 S.E.2d at 509 (quoting Dunn v. Dunn, 298 S.C. 365, 367, 380 S.E.2d 836, 837 (1989)) (“The best interest of the child remains, always, the paramount consideration in every adoption.”).
adoption, as well as what is required for the birth parent to withdraw such consent. The second section examines several important cases that have shaped the current standards for withdrawing consent. Part III details the standard of duress that a birth parent currently must overcome in order to withdraw consent, and analyzes McCann v. Doe, a recent South Carolina case that hinged on the court’s finding of duress and the definition of duress that it set forth. Part IV includes an overview of other states’ provisions and cases that allow for a withdrawal period, an examination of North Carolina and Georgia’s statutory provisions and case law, and an analysis of section 2-408 of the proposed Uniform Adoption Act of 1994, to provide guidance on how South Carolina might structure its own withdrawal period. Part V discusses why a withdrawal period would be beneficial to South Carolina and makes recommendations for the South Carolina legislature.

II. BACKGROUND

A. South Carolina Safeguard Statutes

Under South Carolina law, in order to withdraw consent for adoption, a birth mother must give notice to the court that she wishes to withdraw consent and file the reason that she is withdrawing consent, and all parties involved must have the chance to speak on their behalf.11 In order to successfully revoke consent, a birth parent must satisfy a two-prong test.12 First, the birth parent must prove that she signed the consent form under duress or coercion, or that the decision was involuntary.13 Second, the birth parent must demonstrate that the court’s decision to revoke the consent and place the child back with the birth mother is in the child’s best interest.14 However, as noted in South Carolina Code section 63-9-350 and confirmed in Hagy v. Pruitt, a birth parent’s consent is irrevocable once the final decree for adoption has been entered,15 unless such consent has been procured by fraud.16

There are current statutory safeguards in place to protect the birth parent from signing a consent form involuntarily or while under duress or coercion. Three steps must be taken in order to produce a valid consent form in South Carolina.17 First, two witnesses must be present when the birth parent signs the consent form.18 There are three possible types of witnesses: a family court judge from South Carolina, an attorney who is licensed in South Carolina and who is

12. Id.
13. Id.
14. Id.
15. Id.
18. Id. § 63-9-340(A).
not a representative of the potential adoptive parents, or a person who is certified by the State Department of Social Services. Second, each witness must sign a document stating that before the consent form was signed, the birth parent was fully informed about the provisions in the statute and attach the document to the consent form. By signing and attaching that document, each witness is asserting that he or she believes that the consent was completely voluntary and was not given under duress or coercion. Finally, the birth parent giving consent for adoption must receive a copy of these documents.

Recently, in Brown v. Harper, the South Carolina Court of Appeals strictly construed these protective statutory requirements, stating that the requirements must be fulfilled in order for the consent to be valid. The court held that the witnesses must be present, they must sign the affidavit, and there must be a thorough discussion about the consent form before the form is signed. In Brown, the attorney that was one of the witnesses was not present when the birth mother signed the consent form, and the attorney did not discuss the consent form with the birth mother before she signed it; therefore, the consent for adoption was invalid. Thus, even though a birth parent may proceed with actions pursuant to giving up a child for adoption, if the witness requirements are not strictly followed, the adoption will be invalid. Although these requirements should help prevent duress and involuntary consent, it is important to note that an attorney does not have to be present when the birth parent signs the consent form as long as the other two witness types are present, and the absence of an attorney does not necessarily mean there will be a finding of duress or coercion.

B. South Carolina Cases

Four cases have been instrumental in shaping the duress and consent principles for adoption proceedings in South Carolina. A brief overview of these cases shows that while the standard of duress has been instrumental as a

19. Id.
20. Id. § 63-9-340(B).
21. Id.
22. Id. § 63-9-340(C).
24. Id. at 472–74, 761 S.E.2d at 779–80 (citations omitted).
25. Id. at 473, 761 S.E.2d at 780 (quoting S.C. CODE ANN. § 63-9-340 (2010)).
26. Id.
27. See id.
safeguard for the best interest of the child in adoption cases, it is a murky and difficult standard for birth parents to understand and overcome.

Driggers v. Jolley was an early case that set the tone for future adoption cases in South Carolina. In Driggers, the Supreme Court of South Carolina held that the adoptive parents should continue to have custody of the child. The case involved the prospective adoption of a child where the birth parents, the Jolleys, gave full custody of the child to the prospective adopting parents, the Driggers. Subsequently, the Driggers filed for adoption of the child, and the Jolleys filed a petition giving their consent for the adoption. However, three months later, the Jolleys wanted to leave South Carolina and take the child with them, so they sought to regain custody. The court acknowledged that an early trend in the state permitted birth parents to freely withdraw consent before the adoption was finalized. However, the court decided to align itself with an emerging trend and held that when the birth parents gave consent “freely and knowingly,” such consent “could not be arbitrarily withdrawn.” This was especially true, according to the court, when the adopting parents relied on consent that was voluntarily given and “bonds of affection” had formed between the child and the adopting parents. Thus, this case established the baseline for future adoption cases.

Phillips v. Baker, a case that was decided more than thirty years after Driggers, examined both the “best interest of the child” prong—the undercurrent present in all adoption litigation—and whether consent is voluntary in order to determine if withdrawal of consent was proper. The court referred to a 1939 case about a contract claim that defined duress as “a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition.” The court noted that because the consent form was signed in the presence of the birth mother’s parents, her attorney, and a hospital social worker, there was no duress and consent was voluntarily given. Although the court found that there was no duress present here, namely that there were no external pressures, this is at least somewhat suspect, as the birth mother was sixteen and

31. Id. at 39, 64 S.E.2d at 23.
32. Id. at 33, 64 S.E.2d at 20.
33. Id.
34. Id. at 33–34, 64 S.E.2d at 20.
35. Id. at 37, 64 S.E.2d at 22.
36. Id.
37. Id.
39. See id. at 135–37, 325 S.E.2d at 534–35 (citations omitted).
40. Id. at 137, 325 S.E.2d at 535 (quoting Cherry v. Shelby Mut. Plate Glass and Cas. Co., 191 S.C. 177, 183, 4 S.E.2d 123, 126 (1939)).
41. See id. at 137, 325 S.E.2d at 535.
unwed at the time of the baby’s birth. Furthermore, the birth mother’s father “demonstrated a marked hostility towards her,” making disparaging remarks about the baby’s bastardy and informing the birth mother that her baby “would not be welcome in his home.”

Thus, the fact that the birth mother’s father was present while she was signing the adoption consent form is perhaps a subtle form of coercion. Nevertheless, the court chose to ignore this possibility, demonstrating the limitations of the duress standard.

In Johnson v. Horry County Department of Social Services, the South Carolina Supreme Court again concluded that the birth parent signed the consent form for adoption without any signs of duress or coercion, and listed several factors that contributed to this finding. Paramount to the court’s decision was the fact that the birth mother “had an eleventh grade education and was able to understand the documents she was signing.” Furthermore, “[s]he was not under the influence of incapacitating drugs at the time of consent nor was she in any unusual emotional state.” The court also noted that the birth mother signed the provisions in the document speaking to the voluntariness of consent.

Notwithstanding those definitions of duress, the court made it quite clear in Gardner v. Baby Edward that unless a birth parent specifically petitions the court for withdrawal of consent and alleges duress or coercion, there will be a presumption that the consent was voluntarily given, and the judge will not inquire into the voluntariness of the consent during an adoption proceeding. Indeed, the court asserted that the trial judge does not have any “authority which permits the trial judge to make this inquiry prior to entering an adoption decree.” Therefore, the burden is on the birth parent to petition the court and show that the decision to give consent for adoption was made either under duress or coercion, or that the decision was involuntary in some way.

Although these cases provided an important foundational framework for judges to look to when determining if the consent for adoption was given voluntarily, duress remained a malleable concept open to judicial interpretation. It was not until McCann v. Doe that the South Carolina Supreme Court provided

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42. See id. at 135, 325 S.E.2d at 534.
43. Id. at 136, 325 S.E.2d at 534.
44. See id. at 137, 325 S.E.2d at 535 (stating that both parents were present at the signing of the consent form).
46. Id. at 356, 380 S.E.2d at 831.
47. Id.
48. Id.
49. Id.
51. See id. at 334, 342 S.E.2d at 603 (citing S.C. CODE ANN. § 20-7-1720 (1976); Phillips v. Baker, 284 S.C. 134, 325 S.E.2d 533 (1985)).
52. Id.
an example of what external pressures may provide a sufficient basis to constitute duress.

III. ANALYSIS OF DURESS AND McCANN v. DOE

A. McCann v. Doe

A finding of duress is critical for a birth parent in adoption cases, but it is notoriously difficult to prove. In many states, judges often apply a high standard of proof when examining the facts to determine if a birth parent signed the consent form under duress. Since there is no clearly demarcated list of circumstances or factors that constitute duress, a finding of duress in a certain set of facts for one judge may not result in a similar finding under another judge.54

McCann v. Doe is the most recent South Carolina case that has examined the definition of duress and what situations can give rise to a finding of duress. Looking at the totality of the circumstances and the best interests of the child, the court concluded that the family court correctly held that the birth mother was “incapable of giving a voluntary consent,” and that the baby should be returned to her.55

In this case, Laura McCann, the birth mother, drove herself to the hospital to give birth to her child in July of 2006.56 At the time she gave birth, she was experiencing what the court described as “emotional stressors” in her life, including the fact that her boyfriend had died in a car accident in 2004, her father had died from cancer in 2005, her pregnancy was the result of a rape, she hid the pregnancy from almost everyone in her life because she was ashamed and scared, and she had lost her job while pregnant when the restaurant that she managed shut down.57 Another major concern was that McCann was Catholic, and in the Catholic Church, having children outside of marriage is viewed unfavorably.58 When she gave birth to a baby girl, McCann did not respond to the child and one of the nurses was concerned about the lack of response, at which point the obstetrician called for a social work consultation.59 McCann was evaluated by several professionals, including Dr. Gorman, an obstetrician

54. See, e.g., id. at 385–86, 660 S.E.2d at 507 (demonstrating South Carolina’s approach of favoring a totality of the circumstances approach over a demarcated list of factors in assessing duress).
55. Id. at 390–91, 660 S.E.2d at 509–10.
56. Id. at 376, 660 S.E.2d at 502.
57. Id. at 376–77, 660 S.E.2d at 502.
who dealt with post-natal care; Judy Hewes, a social worker; and Dr. Srivastava, who performed a psychological evaluation.\footnote{60} Dr. Srivastava diagnosed McCann at an emotional level between anxiety and depression, and found that she had a “functioning level, or GAF score of 50, which meant partial insight.”\footnote{61}

After meeting with those professionals, McCann contacted Helen Duschinski, the director of a private adoption agency, who agreed to meet with her at the hospital the following morning.\footnote{62} After this exchange, McCann asked to see her baby and “appeared to bond with her baby.”\footnote{63}

The next morning, Duschinski met with McCann to discuss the adoption, and, apparently, McCann “believed Duschinski worked with the Department of Social Services and would explain the process.”\footnote{64} McCann filled out paperwork that included a document on counseling, and after filling this paperwork with McCann, Duschinski left.\footnote{65} Rock Corley, attorney for the adopting Does, and Hector Esquivel, the attorney in charge of presenting McCann with the consent form, entered the room.\footnote{66} Although Corley left while Esquivel went over the consent form, Nurse Hewes stayed in the room as a witness, as part of the statutory requirement for signing a consent form.\footnote{67} Esquivel apparently went over the consent form “line by line, trying to ensure that McCann understood the form and that her consent was voluntary,” and he explained that the only way to revoke her consent would be to “go to court and explain the decision was made under duress.”\footnote{68} However, Nurse Hewes testified that Esquivel told McCann that she could “go to court to prove she was the better parent in order to ‘undo it.’”\footnote{69}

The Does filed for adoption on July 26, 2006, and McCann filed for reversal of consent on the following day.\footnote{70} The court called an emergency meeting and appointed a guardian ad litem for the baby.\footnote{71} After McCann amended her complaint, the court called another temporary hearing, during which the court granted McCann “limited, supervised visitation with the baby.”\footnote{72} The family court bifurcated the trial to decide first the issue of whether the consent was voluntary, and then to decide whether revocation of the consent would be within

\begin{footnotes}
\item 60. \textit{Id.} at 377\textendash78, 660 S.E.2d at 502\textendash03.
\item 62. \textit{McCann}, 377 S.C. at 378\textendash79, 660 S.E.2d at 503.
\item 63. \textit{Id.} at 379, 660 S.E.2d at 503.
\item 64. \textit{Id.}
\item 65. \textit{Id.} at 379, 660 S.E.2d at 503\textendash04.
\item 66. \textit{Id.} at 379\textendash80, 660 S.E.2d at 504.
\item 67. \textit{Id.} at 380, 660 S.E.2d at 504.
\item 68. \textit{Id.}
\item 69. \textit{Id.} at 381, 660 S.E.2d at 504.
\item 70. \textit{Id.}
\item 71. \textit{Id.}
\item 72. \textit{Id.}
\end{footnotes}
the best interest of the baby. As to whether the consent was voluntary, the family court found that McCann’s emotional distress meant that “she could not have voluntarily given her consent” because she was in an “unusual emotional state” while at the hospital, “the guidance she received during her hospital stay was not objective and reflective of a realistic approach,” and the unclear language in the forms together with the conversation between the nurse and the attorney combined to leave McCann with the impression that she would be able to revoke her consent. The family court found that these facts “created such pressure or had such influence upon Plaintiff that her signing of the document could not have been done voluntarily and that her signing was obtained under duress or through coercion.”

These circumstances left her with the view that she had no reasonable alternative to signing the Consent and Relinquishment and practically destroyed her free will and caused her to do an act not of her own volition and that her act was not the result of rational judgment on her part.

Following the court’s holding that McCann’s consent was not voluntary, the family court determined that it was in the best interest of the baby for the court to revoke McCann’s consent and return the baby to her.

The adoptive family appealed, and both the South Carolina Court of Appeals and the South Carolina Supreme Court affirmed the family court’s ruling. In doing so, the South Carolina Supreme Court looked at whether the “totality of the circumstances, including emotional stressors from four significant events and McCann’s confusion over the significance of the documents she signed, amounts to signing the consent for adoption involuntarily or pursuant to duress or coercion.” The court applied the definition of duress set forth in Phillips. In addition, the court said that duress is “viewed with a subjective test, looking at the individual characteristics of the person allegedly influenced, and duress does not occur if the person has a reasonable alternative to succumbing and fails to avail themselves of the alternative.” The court further noted that duress “is

73. Id.
74. Id. at 381, 660 S.E.2d at 504–05.
75. Id. at 381, 660 S.E.2d at 505.
76. Id. at 381, 660 S.E.2d at 505.
77. Id.
78. Id. at 382, 390–91, 660 S.E.2d at 505, 509–10.
79. Id. at 383, 660 S.E.2d at 505.
80. “Duress is defined as ‘a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition.’” Id. at 385, 660 S.E.2d at 506–07 (quoting Phillips v. Baker, 284 S.C. 134, 137, 325 S.E.2d 533, 535 (1985)) (internal quotation marks omitted).
81. Id. at 385, 660 S.E.2d at 507 (citing Blejski v. Blejski, 325 S.C. 491, 498, 480 S.E.2d 462, 466 (Ct. App. 1997)).
only one consideration,” and that there are other factors the court may look at, “including the totality of the circumstances,” to make the voluntariness determination.82 The court acknowledged that in this case, it gave “great deference to the family court’s credibility determinations of the conflicting evidence,” and further stated that there was “abundant evidence that McCann’s emotional stressors and suffering caused impaired functioning.”83 Particularly, the court pointed to the testimony of hospital staff, who were concerned about McCann’s safety and stated that her behavior prompted a psychological consultation to make sure she could take care of herself in order to be released from the hospital; the fact that her GAF score was only one point away from “requiring further hospitalization”; and that the two professionals who evaluated her ability to give consent for adoption testified that McCann was not capable of “giving her voluntary consent for adoption at the time she was in the hospital.”84 The court also noted that there were several circumstances that made McCann believe she had time to change her mind about giving consent, and, thus, the totality of the circumstances showed that McCann’s consent was involuntary.85 All of these circumstances show that McCann certainly would have benefited from either a forty-eight hour waiting period to sign the consent form or a period to withdraw consent without having to prove duress or coercion. Had either of these options been available to her, this litigation might not have been necessary.

Furthermore, the court agreed with the family court’s view that placing the child back with McCann was in the child’s best interest.86 Although it noted that both sets of parents would be able to raise the child well, the court ultimately decided that placing the child with her birth mother would be in the child’s best interest.87

Although McCann is a very involved and fact-specific case, the precedent it creates for duress determinations indicates that it is very difficult to withdraw consent under the current case law and statutes. This case is also critical because one of the most notable aspects of the opinion, besides the definition of duress that the court uses, is the section where the court discussed the possibility of a “reflection period, during which biological parents could closely examine their decision,” as a measure that “would assure adoptive parents that the adoption would likely be completed.”88 The court looked at both Georgia and North Carolina’s statutory law that provides for revocation of consent within a certain amount of time without having to prove duress or coercion,89 and highlighted that “this relinquishment period allows a biological parent, usually the birth

82. Id. at 385–86, 660 S.E.2d at 507.
83. Id. at 388, 660 S.E.2d at 508.
84. Id.
85. Id. at 388–89, 660 S.E.2d at 508.
86. Id. at 390, 660 S.E.2d at 509.
87. Id.
88. Id. at 384, 660 S.E.2d at 506.
89. Id. at 383, 660 S.E.2d at 505.
mother, to contemplate her decision away from the physical and emotional effects of giving birth.” 90 The court said that this “reflection period” would be beneficial because “the likelihood of a challenge to the consent after reflecting during a revocation period would be substantially reduced.” 91 The court also mentioned that while prohibiting revocation of consent absent a showing of duress or coercion is beneficial to adoptive parents, it does not “reduce the heartbreak from prolonged litigation when a biological parent later changes his or her mind.” 92 Although the court then goes on to apply South Carolina law, 93 the fact that it deliberately chose to include this section in the opinion indicates that the court would not, at least in theory, be opposed to a statute in South Carolina providing for a period of revocation for birth parents.

Under these extraordinary facts, the court had little trouble finding that there was indeed duress. 94 Although this case is helpful in that it gives an example of a situation in which the court would find that there is duress, it is unhelpful insofar as it shows the high end of the spectrum, yet fails to give any guidance as to what the minimum requirements would be for a showing of duress.

B. Duress

Finding duress is critical in many cases in which a birth parent wishes to revoke consent for adoption. Therefore, it is important to understand how courts decide what circumstances and facts are sufficient to constitute duress. In South Carolina, as in many other states, finding duress is a fact-intensive inquiry, and the standard that must be overcome for such finding is fairly high. 95 It is a “subjective” test, 96 and statutes often provide little to no guidance on what constitutes duress. Instead, it is up to judges to interpret the standard. For example, in Georgia, duress must be something other than emotional or financial instability; it must amount to pressure and coercion from others. 97 In

90. Id.
91. Id. at 384, 660 S.E.2d at 506.
92. Id.
93. Id.
94. Justice Waller, the lone dissenting justice, would have held otherwise because he thought that there was no evidence of external pressure, only internal stressors that were not enough to justify revoking consent, and said that although McCann’s decision to give up her baby for adoption was supported by the people to whom she talked at the hospital, this support was not enough for the court to find that her decision was involuntary. Justice Waller also pointed out that the consent form fully complied with the statutory requirements, and since under the statute there is no waiting period before such consent becomes effective, there was no other way for McCann to revoke her consent other than by showing duress, which Justice Waller did not think was evidenced here. Id. at 391–95, 660 S.E.2d at 510–12 (Waller, J., dissenting) (citations omitted).
96. McCann, 377 S.C. at 385, 660 S.E.2d at 507.
Washington, a “lack of full understanding of the consequences, coupled with inexperience, emotional stress, uncertainty and indecisiveness are insufficient findings to allow repudiation of the surrender.”

In a Mississippi case, the court did not find that there was duress even though, in the dissent, some of the judges emphasized that an unmarried who gives birth to a child and then moves in to the home of the prospective adoptive couple is subject to strong emotional pressure to give up the child, especially in light of the fact that she was promised significant contact with the child after the adoption, was not represented by independent legal counsel, and did not recognize the enormity of the decision she made when she signed the consent form and relinquished her parental rights.

What is the purpose of such a high standard for finding duress in adoption consent signings? One reason for having a high standard difficult to overcome is that courts generally want there to be finality and stability in adoptions, particularly when adoptive parents have relied on the birth parent’s consent and have formed a bond with the child. Additionally, it is important that courts always look to the best interest of the child when making decisions in adoption cases. Courts want the child to be in a settled home, and having a high standard of duress helps ensure that the child settles into a suitable home, instead of being bounced around among families. Therefore, a high standard of duress that makes it difficult for a birth parent to revoke consent seems to ensure that both finality and the best interests of the child are served. However, duress is a subjective test, and although it is the current standard, a better option would be to have a short revocation period to withdraw consent or a waiting period before signing consent, so that the duress standard would be a last resort instead of the only option for birth parents.

IV. OVERVIEW OF OTHER STATES AND THE UNIFORM ACT

A. Withdrawal Periods in Different States

Currently, other states have statutory withdrawal periods. Some states structure this withdrawal period according to a set amount of days. These states include Alaska and Georgia with ten days, California and Maryland with thirty days, and North Carolina with seven days. Some states, instead of prescribing a set amount of days for a birth parent to withdraw consent, measure the revocation period by other means. Missouri simply provides that consent

99. In re Adoption of D.N.T., 843 So.2d 690, 711–12 (Miss. 2003).
100. ALASKA STAT. § 25.23.070(b) (2012).
102. N.C. GEN. STAT. § 48-3-608(a) (2013).
may be withdrawn up until the adoption has been approved by a judge.\footnote{See Mo. Ann. Stat. § 453.030(6) (2014). The statute further provides that consent for adoption may not be given until the child is forty-eight hours old. Id. § 453.030(5). There is currently a bill in the Missouri legislature to change the forty-eight hours to twenty-four hours. H.B. 546, 98th Gen. Assem., First Reg. Sess. (Mo. 2015).}

Texas’s statute very boldly states that “[a]t any time before an order granting the adoption of the child is rendered, a consent required by Section 162.010 may be revoked by filing a signed revocation.”\footnote{Tex. Fam. Code Ann. § 162.011 (West 2013).}

Other states, instead of having a statutorily explicit policy on withdrawal of consent, rely on case law and a judicial creation of a withdrawal period. One such example is Oregon, a state that invokes a series of cases dealing with the revocation of consent to complement its adoption statutes.\footnote{See Stubbs v. Weathersby, 892 P.2d 991, 999 (Or. 1995) (citing In re Adoption of Lauless, 338 P.2d 660, 662 (Or. 1959); Adoption of Capparelli, 175 P.2d 153, 154–55 (Or. 1946)).}

In Adoption of Camarilla, the Supreme Court of Oregon, for the first time, established that a birth parent may withdraw consent.\footnote{Capparelli, 175 P.2d at 154–55.}

More than a decade later, the manner in which a birth parent in Oregon may withdraw consent was clarified by the court in In re Adoption of Lauless, where the court noted that the right of a birth parent was not absolute,\footnote{Lauless, 338 P.2d at 664 (citing Driggers v. Jolley, 219 S.C. 31, 37, 64 S.E.2d 19, 22 (1951); Note, Parental Right to Withdraw Consent in Adoption Proceedings, 30 St. John’s L. Rev. 75, 79 (1955)).}

Pennsylvania has a similar line of case law, under which it is now well settled that “consent to adoption by the natural parent may be withdrawn at any time before entry of the final decree of adoption.”\footnote{Id. at 665.}

A look at South Carolina’s neighboring states, North Carolina and Georgia, can provide some insight into a possible period of withdrawal that our legislature should consider. Having provisions that are similar to surrounding states would help in situations involving interstate adoptions.

North Carolina General Statutes section 48-3-608 (a) provides that a birth parent may withdraw consent after signing the consent form relinquishing rights to an unborn child or a minor child within seven days by providing written notice to the person specified in the consent form.\footnote{K. N. v. Cades, 432 A.2d 1010, 1014–15 (Pa. Super. Ct. 1981) (quoting In re Adoption of R. W. B., 401 A.2d 347, 349 n.2 (Pa. 1979)).}

In addition, the birth parent does not have to show duress in order for the revocation to be effective,\footnote{Id. at 1014.}

although section 48-3-609 does provide that consent for adoption will be void if the birth parent can prove that the consent was obtained through fraud or duress,\footnote{N.C. Gen. Stat. § 48-3-608(a) (2013).} a slightly different standard than in South Carolina.
Similarly, Georgia’s statute provides a period of ten days during which consent may be withdrawn without having to show duress or coercion.\textsuperscript{115}

As a point of comparison to the myriad state laws on revocation of consent for adoption, the Uniform Law Commission promulgated the Uniform Adoption Act of 1994.\textsuperscript{114} Among other provisions, the Commission, in section 2-408, listed three specific criteria for birth parents to revoke consent.\textsuperscript{115} In addition to proving that the consent was procured under duress or coercion,\textsuperscript{116} the Act also provided that consent could be revoked if the birth parent and the adoptive parents both agreed to the revocation.\textsuperscript{117} Perhaps most importantly, the Act provided for a period of 192 hours (8 days) after the birth of the child and after consent was given during which the birth parent could withdraw consent, as long as the birth parent notified the adoptive parents or the adoptive parents’ lawyer in writing.\textsuperscript{118} Although this Act has only been adopted in Vermont,\textsuperscript{119} it is still noteworthy that the Commission would include such a withdrawal provision in an Act that is meant to synthesize and promote ideal adoption laws across the states.

V. WHY SOUTH CAROLINA SHOULD REVISE ITS ADOPTION LAWS

Although the duress standard is currently South Carolina’s method of ensuring the finality of adoptions and the protection of children in the adoption process, it is, at best, an imperfect method. In light of the high standard of duress that birth parents must overcome in order to revoke consent, the large number of cases where birth parents wish to withdraw their consent, and the fact that many states approve of a limited time during which a birth parent may revoke consent without a showing of duress or involuntariness, a period of revocation of twenty-four hours would be a beneficial change to South Carolina’s statutory law. In addition, a law that provides that a birth parent could not give consent until a certain amount of time after giving birth, perhaps twenty-four to forty-eight hours, would help ensure the finality of a birth parent’s decision and further the goals of protecting the child’s best interest. Finally, requiring that the birth parent speak with an attorney about the implications of giving consent to make sure that the birth parent understands exactly what rights he or she is giving up would also be beneficial.

\begin{enumerate}
\item See GA. CODE ANN. § 19-8-9(b) (2010).
\item UNIF. ADOPTION ACT (1994).
\item Id. § 2-408.
\item Id. § 2-408(b)(1).
\item Id. § 2-408(a)(2).
\item Id. § 2-408(a)(1).
\end{enumerate}
A statutory revocation period would be beneficial to the adoption process because many birth parents suffer from feelings of regret after signing the consent forms giving up a child for adoption, especially if done very soon after giving birth. In her article *Reproduction and Regret*, Professor Susan Appleton draws parallels between adoption and abortions, saying that giving a child up for adoption can lead to feelings of regret similar to those that come with having an abortion. A period during which consent may be withdrawn might help reduce the feelings of regret that birth parents often experience, and would help further the adoption system’s goal of finality by ensuring that birth parents have time to fully settle their minds on whether or not they want to give up their child for adoption. Furthermore, the focus of the courts on the birth mother’s behavior, particularly if the birth mother is young or unmarried, which is often the case in adoption cases, represents a sometimes unnecessary injection of a judge’s personal and subjective opinion that may represent a critique of the birth mother’s lifestyle or choice and not necessarily the best interests of the child. Having a statutory withdrawal period would help keep those kinds of opinions out of the determination of whether or not withdrawal of consent is proper under the circumstances.

In her article, Elizabeth Samuels, citing numerous adoption cases, studies in the United Kingdom, and advice from the Concerned United Birthparents’ (CUB) advocate group, theorizes that birth parents should not sign consent forms too soon after giving birth to their children. She notes that CUB advises birth parents not to sign consent forms while they are still in the hospital; rather, they should wait until they are in a more formal legal setting so that they understand their rights and do not make hasty decisions. The article also notes two studies conducted in the United Kingdom that indicated that birth parents felt a longer time to withdraw consent would be beneficial. Furthermore, in an extensive analysis of a wide variety of adoption cases, Samuels concludes that when birth parents consented to give their children up for adoption in the hours or days after giving birth, such adoptions “were not conducted in ways that facilitated deliberate and firm decisions.” "In most of the cases, the mothers

120. See Appleton, supra note 95, at 278–86 (citations omitted).
121. Id. at 278 (citing ANN FESSLER, THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE ROE V. WADE 53 (2006)).
122. See id. at 282 (citing FESSLER, supra note 121, at 182–85; RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES 69–70 (2001)).
123. Id.
126. Id. at 540 (quoting JOHN TRISELIOITIS ET. AL., ADOPTION: THEORY, POLICY AND PRACTICE 98 (1997)).
received no counseling, and in almost all of them, they did not have legal representation.” 127 Those decisions were “soon regretted.” 128

As long as it is short, a statutory withdrawal period would not overly burden the current adoption system. In fact, it could even potentially reduce the current burden on the system because having a statutory withdrawal period could help reduce litigation involving attempts to withdraw consent, as birth parents would have a period of time to withdraw consent without going to court to prove that there was duress or coercion present at the time they signed the consent forms.

As long as the withdrawal period remained short—following the trend of the other states with this type of revocation period—the child and the adoptive parents would not have had a lengthy time to bond. A court action to withdraw consent due to duress or coercion could prolong the placement of the child in a home of any kind, as the court noted in McCann when it stated that “protections need to be in place for both biological and adoptive parents to ensure the decision to give a child for adoption is a thoughtful and certain one and not likely to be challenged in a long, arduous, and emotionally-wrenching legal process.” 129 Furthermore, in her article, Samuels says that “no research or historical experience suggests that a period of a few days to a few weeks in foster care damages newborn babies who then return to their birth families or move into secure adoptive placements” 130 because babies do not begin to display attachment behavior until the age of approximately six months. 131 So, their development would not be negatively influenced. 132

By adopting a twenty-four hour withdrawal period, courts may be less likely to run into problems concerning adoptive parents’ reliance on consent, a concern that is often at the forefront of adoption cases. 133 Although there may be some concern that adoptive parents may be reluctant to adopt if there is a revocation period—a concern particularly worrisome to pro-adoption states like South Carolina—as long as the new revocation period is short, it would not be substantially different from current adoption law and would be unlikely to deter most adoptive parents.

A revocation period would also not conflict with current statutory language prohibiting the withdrawal of consent after the final adoption decree because, presumably, a final adoption decree would not be filed twenty-four hours after consent was given in a normal adoption proceeding, such as in McCann when the adoption petition was not filed until five days after the consent form was signed. 134 As long as the birth parent filed for revocation of consent before the

127. Id. at 549.
128. Id.
130. Samuels, supra note 124, at 540.
131. See id. (citing 1 JOHN BOWLBY, ATTACHMENT AND LOSS 200–01 (2d ed. 1982)).
132. See id. (citing 1 JOHN BOWLBY, ATTACHMENT AND LOSS 200–01 (2d ed. 1982)).

https://scholarcommons.sc.edu/sclr/vol66/iss4/7
final adoption decree was entered, the revocation period would still comply with the current statutory requirements.135

Ultimately, providing a time period during which a birth parent can revoke consent for adoption without proving duress, coercion, or involuntariness would further the goal of providing the child with the most stable home, and thus would fit squarely with the requirement that any outcome in an adoption proceeding would be in the best interest of the child. There is a presumption in South Carolina that "it is the best interest for the child to be placed with a biological parent over a third party,"136 and allowing a birth parent the opportunity to revoke consent for adoption and take the child back would be in line with that presumption.

In addition to a revocation period, a statutory requirement prohibiting birth parents from consenting to adoption until a certain amount of time has passed since the birth of the child would also be beneficial. Even if they do not have a revocation period, many states impose a waiting period after the birth of a child before a birth parent can sign a consent form for adoption. For example, in West Virginia, a birth parent must wait at least seventy-two hours after giving birth to sign a consent form.137 In a case discussing this waiting period, the West Virginia Supreme Court recognized that "the legislative policy behind the seventy-two hour period was to provide the natural parent some protection against a too hurried decision to relinquish her child at a time when the physical and/or emotional stress of childbirth might limit or impair the parent’s normal reasoning ability."138 Pennsylvania, which allows birth parents to withdraw consent before a final adoption decree has been entered, also requires birth parents to wait at least seventy-two hours after the birth of a child before signing a consent form for adoption.139 Combining a waiting period before consent can even be given with a period in which a parent may revoke consent without having to prove duress, coercion, or involuntariness would further assure that birth parents are fully committed to giving their child up for adoption. There would be less potential for regret on the birth parents’ part on one hand as well as less potential for disappointment of the prospective adopting parents if the adoption does not go through on the other.

Finally, requiring that birth parents have access to independent legal counsel—counsel solely representing them and not representing the adoptive parents—would be beneficial because it would reduce the confusion that birth parents sometimes have when it comes to understanding what exactly they are giving up, as far as their legal parental rights toward the child are concerned—namely, that they are giving up all parental rights—as well as help them

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138. Id. at 842.
139. 23 PA. STAT ANN. § 2711(c) (West 2010).
understand all provisions of the consent form as fully as possible.\textsuperscript{140} Additionally, having an advocate to solely represent the interests of the birth parent and not the adoptive parent will hopefully reduce duress and coercion and keep birth parents from succumbing to undue pressure from outside sources. There is support for separate legal counsel among attorneys in the field, and those supporters “emphasize the important nature of the adoption proceeding, the typical imbalance of power between birth parents and adoptive parents, the possibility of conflicts of interest, and the fact that many birth mothers change their minds after the birth.”\textsuperscript{141}

VI. CONCLUSION

Although McCann gives some guidance to birth parents, adoptive parents, attorneys, and judges in South Carolina as to what circumstances will constitute a finding of duress, it is still a murky concept. A better solution would be to give all parties involved bright-line rules that would help cut down on litigation to begin with. To provide such bright-line rules and strengthen the protections afforded to birth parents and adoptive parents alike, the South Carolina legislature should enact legislation that (1) gives biological parents time to revoke consent without proving duress, coercion, or involuntariness; (2) makes biological parents wait for a certain amount of time before signing the consent form; and (3) requires a biological parent to receive advice from a lawyer unaffiliated with the prospective adoptive parents prior to signing any consent form.

A withdrawal period during which a parent can revoke consent for adoption without having to show that duress or coercion would be beneficial to the adoption process in South Carolina because it would be in line with similar provisions in neighboring states, cutting down on confusion and litigation difficulties when children are adopted across state borders. There is judicial support for this provision, as evidenced in McCann.\textsuperscript{142} Furthermore, a revocation period would help ensure finality in adoption cases by providing parents with a concrete, bright-line rule for a short period of time to withdraw consent. In addition, since twenty-four hours is a short time, there would not really be a chance for reliance and bonding by the adoptive parents, and it would help reduce the burden on courts by reducing the need to go to court and get judicial consent for withdrawal. Finally, a statute of this nature would still be consistent with the goal of providing a stable home in the best interests of the child.

A similar line of reasoning supports requiring birth parents to wait for a certain amount of time—perhaps twenty-four to forty-eight hours—before

\textsuperscript{140} See Samuels, supra note 124, at 537–38.
\textsuperscript{141} Id.
signing the consent form, as it would give birth parents time to bond with the child and see if adoption still is the route they wish to pursue.

Finally, requiring that birth parents discuss the consent form and the adoption process with independent legal counsel not affiliated with the prospective adoptive parents would help ensure that birth parents are fully cognizant of the ramifications of signing the consent form, the time at which such consent becomes completely irrevocable, and the exact rights they are giving up when they relinquish their child for adoption. In short, these statutory provisions will go a long way towards fixing the confusing and uncertain adoption system currently in place in South Carolina.