Adoption News and Views

March 2008

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This is the first 2008 edition of *Adoption News and Views* a newsletter which aims to provide information about adoption of children and about any legal and policy developments affecting adoptees, birth parents or adopters. It will also provide progress reports on efforts by individuals and groups pressing the government to give a higher priority to enacting new legislation to replace the out of date Adoption Act 1955. Newsletters will be sent out at three monthly intervals or more frequently if important issues arise. Back issues will be sent by email on request.

The main purpose of the newsletter is to provide up to date and accurate information changes for people with an interest in adoption on actual and proposed law and policy. It is hoped that it will also provide a forum for people to discuss adoption issues. Reviews of books and other publications touching on adoption are invited.

***Adoption News and Views* is sent to you because you are known to be a person interested in adoption. If you do not want to receive further issues you should reply to this email indicating this. If you know of others who would like to receive future issues or you or others would like to send in information or views for inclusion in the next newsletter you can reply to this email or ask interested others to do so.**

While the aim of this newsletter is to provide an open forum for people interested in adoption issues the editors reserve the right to decline or abridge any contributions offered.

Growing concern of judiciary at delay in adoption reform

In a recent Family Court decision Judge Fraser commented that the Adoption Act 1955 is well overdue for reform: *Re Adoption of HT* 19/9/07, Palmerston North Family Court. Two months later Judge Walsh in *Re Adoption of* C*M* 5/11/07, Christchurch Family Court observed: "The Adoption Act 1955 is widely regarded as outdated and in need of reform. Professor Mark Henaghan recently called it 'an embarrassment'. It is one of the oldest statutes in New Zealand to still be applied on a relatively regular basis. Despite ongoing calls for reform by commentators and Judges alike, this has not happened".

A student's views on Adoption Act 1955

In a university paper on adoption reform submitted in 2007 Catherine Moody wrote:

> "The Adoption Act is archaic. It is based on parental rights and fails to address the rights, needs or wants of children. Although adoption is a life-changing experience for all concerned, the Act does not address the repercussions it can have on children or indeed

> on their birth or adoptive parents … We have moved from the society of 1955. The Act, however, remains unchanged in substance and still represents the social stigmas of our society in the mid-twentieth century.”

Catherine Moody added that:

> “It is clear that the legislation governing adoption in New Zealand is in grave need of reform. The Act must move forward from the policy of the 1950s to the practice and research of the present day. At the forefront of this reform must be the rights of children. It is essential that children’s rights and well being are elevated and no longer capable of being so easily overridden by parental rights. Children must have a voice within the legislation, an opportunity to express this and a means of doing so. An important aspect of this is giving children who are deemed capable, an opportunity to consent or refuse to consent to their adoption.”

The waning popularity of adoption

There was no rush to make use of legal adoption when it was first introduced in New Zealand in 1881. From 1881-1897 adoptions did not exceed 100 each year. In 1921, adoptions exceeded 500 for the first time. After a decline during the depression-hit 1930s, the Second World War brought a sharp rise in adoptions and in 1946 1,373 adoption orders were made. This increase can be partly explained by an increase in ex-nuptial births resulting from the upheavals of the war: *New Zealand Official Year Book*, Wellington, Department of Statistics, 1956, at p 74.

In the early 1950s the adoption rate stabilised at approximately 1,400 a year. The numbers increased during the 1960s and peaked at 3,976 in 1971. Since then there has been a sustained decline. In 1985, 1,438 adoption orders were made and by 1991 the number of adoptions had dropped to 807. In 1995 there were only 640 adoption orders. Since then, the number of domestic adoption orders made each year has reduced to a low of 213 in 2007 being:

Adoption by non-relative	60
Adoption by parent and step-parent	69
Adoption by relative	70
Adoption by foster parent	3
Type not recorded	11

In 2007 a further 53 adoption orders were made under the Adoption Act in respect of foreign children and there were 352 overseas adoptions were recognised as having the same force and effect as a New Zealand adoption order. Many of these would have been intercountry adoptions where New Zealanders had adopted children resident in overseas and brought them to New Zealand. While domestic adoption continues to decline, intercountry adoption has continued to flourish although the numbers of intercountry adoption is affected by the policies of overseas countries that make children available for overseas adoption.

LEGAL AND POLICY ISSUES

Can unmarried partners adopt a child?

When an Act becomes so out of touch with contemporary attitudes as to become an embarrassment and to create injustice there is a natural tendency for judges to go beyond the clear wording of the statute and attempt to mitigate its effect.

Section 3(2) Adoption Act 1955 states that "An adoption order can be made on the application of 2 spouses jointly". This is reinforced by s 4(3) which provides that an order shall not be made for the adoption of a child by more than one person except as provided in s3(2). The term "spouse" is not defined in the Adoption Act: no doubt in 1955 it was considered that the meaning of "spouse" was so plain and obvious that definition was unnecessary. The Marriage Act 1955 passed in the same year as the Adoption Act, sets out the procedures necessary for a man and a woman to marry and uses the word "spouse" to refer to people who are married. The Adoption Regulations passed four years later (which remain in force) require that joint applicants for an adoption order annexe to their affidavit a copy of their marriage certificate: r8(2)(b) Adoption Regulations 1959. This adds weight to the view that the intention of the Adoption Act was that joint applications for adoption could only be made by married couples.

In 1955, when the Adoption Act was passed, marriage was seen as the natural and proper legal framework for a man and a woman who chose to live together in a couple-relationship. Unmarried couples were sometimes described as "living in sin" and, although unmarried cohabitation was not uncommon, it was not socially acceptable. Children of such a relationship carried the stigma (and the legal disadvantages) of illegitimacy until the Status of Children Act 1969.

Family Court Judges have from time to time granted adoption orders in favour of unmarried couples on the basis that the term "2 spouses" should be interpreted to include unmarried couples because unmarried couples are today, for most legal purposes, treated in the same way as married couples. Indeed, the Human Rights Act 1993 and the NZ Bill of Rights Act 1990 make discrimination on the grounds of marital status unlawful. Most Family Court judges have taken a more cautious approach holding that on a reading of the Adoption Act as a whole it is clearly intended that only married couples could adopt a child. This view was accepted by Child, Youth and Family and unmarried couples are not considered as joint applicants for adoption.

The issue was revisited in late 2007 by Judge Walsh sitting in the Christchurch Family Court where an unmarried couple sought to adopt the child commissioned by them under a surrogacy agreement. While the child was conceived using the egg of the commissioning mother and the sperm of the commissioning father neither applicant was, under New Zealand law, a legal parent of the child. The Judge made an adoption order, taking the view that the term "2 spouses" must be interpreted according to current social attitudes. His decision was based on a number of factors:

- The discriminatory nature of the requirement that only married couples can jointly adopt a child. Reference was made to the Human Rights Act, the New Zealand Bill of Rights Act and the UN Convention on the Rights of the Child;
- Recent legislative developments give explicit recognition to de facto relationships such as Property (Relationships) Act as amended in 2002; Care of Children Act 2004, Civil Union Act 2004, and Relationships (Statutory References) Act 2005.
- Since 1979 there have been at least six reviews of adoption law and yet the 1955 Act has not been updated. The Law Commission in its report *Adoption and its Alternatives* recommended allowing unmarried and same-sex couples to make a joint application for an adoption order.: *Adoption of CM* 5/11/07, Judge Walsh. Christchurch Family Court

It remains to be seen whether other Family Court judges will follow this decision and whether Child, Youth and Family will change its policy in relation to joint adoptions by unmarried applicants. The problem is that if the view of the law taken by Judge Walsh is later held by a higher court to be wrong any adoption orders made in favour of unmarried couples may well be void as having been made without jurisdiction. This could have devastating effects for the adoptive parents, the birth parents and the child.

Adoption by same-sex couples – international review

Certain jurisdictions prohibit homosexual couples from adopting children, or have a policy of considering applications made by heterosexual couples before those of homosexual couples. The issue of adoption by non-heterosexual couples is tied in with the debate on homosexuality. Preference to heterosexual couples may be given in the belief that heterosexuals who adopt often have fertility problems and therefore must be given preference on medical grounds. Opponents say this system is untenable in a free society and can leave needy children with limited access to a family structure.

Adoption by same-sex civil unions or marriages are allowed in Australia (Western Australia, Tasmania, ACT), the United Kingdom, Canada, the Netherlands, Belgium, Iceland, Sweden, Spain and in some of the USA. As adoptions are mostly handled by local courts in the United States, some judges and clerks accept or deny petitions to adopt on criteria that vary from other judges and clerks in the same state.

Only stepchild adoptions within same-sex couples, *i.e.* where one of the partners in the relationship has children of his or her own, are allowed in Denmark, Norway, France and Germany.

Ireland (which does not recognize same-sex unions) does not allow joint applications to adopt from same-sex couples, but does permit applications from one of the partners. According to the adoption laws in India, same-sex couples are not allowed to adopt.

In January 2008, the European Court of Human Rights ruled that homosexual persons have the right to adopt a child.[

Extracted from http://en.wikipedia.org/wiki/Adoption 31 March 2008

Adoption order granted in favour of gay male applicant

A sole male applicant who was openly gay (although not currently in a relationship) has been granted an adoption order in respect of his two year old nephew. The boy had been in his care since birth: *Re Adoption of HT* 19/9/07, Judge Fraser, Palmerston North Family Court. Judge Fraser recognised that his decision was "hugely significant" in that it appeared to be the first New Zealand application by a gay single male to adopt a child. He referred to the difficulties in the need to accommodate the social ethos of 2007 within an Act that was passed in 1955. He noted that in 1955 it would have been beyond contemplation that a gay male would publicly acknowledge his sexuality (sodomy then being a criminal offence carrying heavy penalties) and even less conceivable that he would contemplate adopting a child. The applicant was Maori and a fluent Maori speaker and had the support of his whanau. Judge Fraser commented that, even if an adoption order was refused, the child would be likely to remain in the applicant's care. He found that adoption would provide the child with security of care, stability of attachment and would be in line with some elements of traditional Maori adoption.

Adoption and the UN Convention on the Rights of the Child

In other family legislation the courts must treat the welfare/best interests of the child as the first and paramount consideration: see s5 Care of Children Act 2004, s6 Children, Young Persons, and Their Families Act 1989. Before making an adoption order the judge must be satisfied on three maters, one of which is that the adoption will promote the welfare and interests of the child. The child's welfare/interests while a consideration are not *the paramount* consideration. In this respect, New Zealand law is in breach of Art 21 UN Convention on the Rights of the Child (UNCROC). While the Adoption Act states that the judge must give due consideration to the wishes of the child to be adopted it contains no provision for a lawyer to be appointed for the child and the only information about the child's views on the proposed adoption will be in the report provided to the court by a Child, Youth and Family social worker .There is no legal requirement that that the social worker interview the child and record his or her wishes.

It is hardly surprising that an Act passed in 1955 does not meet the requirements of UNCROC which was ratified by New Zealand some 38 years later. What is surprising is that 15 years after ratification New Zealand has taken no steps to amend or replace the Adoption Act to bring it into line with its UN Committee on the Rights of the Child in October 2003 advised the Committee that the New Zealand government intended to reform its adoption legislation and the Committee welcomed this assurance. The following year adoption reform was taken off the Ministry of Justice work programme and was only restored in July 2007 after a delegation of professionals interested in adoption had met with the then Minister, Mark Burton. Adoption reform must still be receiving a low priority because there have been no indications that new legislation is being drafted.

Delay in adoption reform impeding NZs ratification of Optional Protocol on Child Trafficking

New Zealand ratified the Convention on the Rights of the Child in 1993 and signed the optional protocol on the Sale of Children, Child Prostitution and Child Pornography in 2000. It was intended that the Optional Protocol would be ratified soon afterwards but this has not happened.

A report by ECPAT International on the New Zealand situation states that ratification by New Zealand' has been delayed because the necessary amendments have not yet been made to the Adoption Act 1955 to enable the Act's extraterritorial application to inter-country adoptions::*Status of Action Against Commercial Sexual Exploitation of Children – New Zealand* ECPAT International 2006. p16 available from www.ecpat.net

The concern raised appears to be that under s17 Adoption Act overseas adoptions are recognised as having the same force and effect as New Zealand adoptions and, where the child's country of residence is not a party to the Hague Convention on international adoption, there is no scrutiny whether the child's birth parents gave a genuine and informed consent to the adoption and whether money changed hands to facilitate the adoption. It would be easy for a child to be brought to New Zealand from a non-Hague country where the intention of the parties was that the child be forced into child labour or prostitution in this country.

Lawyer suspended over adoption negligence

Radio New Zealand reports that Christchurch lawyer Susan Barbara Lewis has been suspended from practising for the maximum period of three years after admitting a charge of incompetence and negligence in an adoption case. The New Zealand Law Society says Lewis admitted the negligence calling into doubt her fitness to practise and that her actions brought the profession into disrepute.

The Law Practitioners Disciplinary Tribunal found Lewis failed to give adequate advice over guardianship, the Care of Children Act and the Hague Convention on Civil Aspects of International Child Adoption. The tribunal also found she accepted instructions to act when she had no adequate understanding of such rights or duties: **Radio New Zealand 19 March 2008**

Children's views and step-parent adoption

In *Re Application by Y [adoption]* 13/2/07, Judge Brown, Hamilton Family Court the strongly held views of three children aged 12 and 13 were overridden. A mother and her husband had applied to adopt the three children of the mother's first marriage. The Judge found that the children's father had failed to exercise the normal duty and care of parenthood and turned to consider whether, in the exercise of his discretion, he should dispense with the father's consent. The children had had no contact with their father for 11 years and were strongly

opposed to any future contact. They wanted to be adopted by their step-father. The father who had remarried and had three children by his later marriage had indicated that he would agree to the step-father being appointed additional guardian of the three children and to a parenting order being made in his favour but he opposed an adoption order. Judge Brown observed that little would change in the children's lives by the making of an adoption order and that such an order might confirm the children's view that their father was a bad man. He concluded that:

> "Refusal [to dispense with the father's consent] may, and I accept it is only a possibility, operate at some point in the children's lives to indicate that the situation has more complexity that they realise and particularly that, to put it at its lowest, their father may have changed. By the slenderest of margins I think that there is sufficient advantage to them in that to justify refusing their immediate wish for adoption."

The wishes of a father who had had no involvement in the care and upbringing of his three children for more than a decade were given greater weight than the wishes of the children and those who had been closely involved in their care. This decision is perhaps indicative of the apparent distaste for adoption felt by some judges who believe that child care arrangements are better formalised by guardianship and day-to-day care orders rather than by adoption order. If the Adoption Act was amended as recommended by the Law Commission this quandary would be largely resolved.

Are step parents using administrative guardianship rather than adoption?

It is now open to step-parents to become a guardian of their spouse or partner's child by administrative appointment under s23 Care of Children Act 2004. This does not require a court order and there need be no cost involved. It was anticipated that step-parents would use this speedy and inexpensive procedure rather than apply for an adoption order but official statistics show that there has been no significant drop in the number of step-parent adoptions over the last three years.

New Surrogacy Guidelines

The Advisory Committee on Assisted Reproductive Technology (ACART) has released guidelines for fertility service providers whose assistance is sought in relation to a proposed surrogacy arrangement. The fertility service must obtain ACART approval before services can be provided for commissioning parents. Approval will be given only where at least one of the commissioning parents will be a genetic parent of the child. ACART must also be satisfied that "there has been discussion, understanding and declared intentions between the parties about day-to-day care, guardianship and adoption of any resulting child, and ongoing contact".

Fertility services may be asked to provide services to implement a surrogacy agreement where it is intended that the child be conceived:

- by artificial insemination using the surrogate's eggs and the sperm of the commissioning father or of a donor;

- by in vitro fertilisation of the commissioning mother's eggs and the commissioning father's sperm with the resulting embryo being transferred to the womb of the surrogate mother.

It would appear that ACART will not require that the commissioning parents make a commitment to adopt the child gestated by the surrogate mother but will insist that the commissioning parents make a commitment to secure a legal status in relation to the child either by way of guardianship or adoption.

Persons and organisations who had made submissions in response to an earlier discussion paper had expressed concerns about adoption of children born to a surrogate mother. Some submitters had proposed that there be a separate procedure where a commissioning parent applies to adopt his or her own genetic child,

Maori Perspective on Adoption

A Maori perspective on adoption was given in *Puao-te-ata-tu (day break)* Ministerial Advisory Committee on q Maori Perspective for Department of Social Welfare Sept 1998:

> "Group rights are without recognition in other areas of law pertinent to Maori group identity and traditional structures. …Those causing particular anguish relate to the placement of children, be it in adoption, following marriage breakdown, after death, following neglect or abuse or resulting from an appearance of a young person in court.
>
> The placement of children was once the means whereby kin group or whanau structures were strengthened. The child is not the child of the birth parents, but of the family and the family was not a nuclear unit in space but an integral part of a tribal whole, bound by reciprocal obligations to all whose future was prescribed by the past fact of common descent. Children were best placed with those in the hapu or community best able to provide, usually older persons relieved from the exigencies of daily demands, but related in blood so contact was not denied. Whakapapa (recited genealogies) were maintained to affirm birth lines, but placements were arranged to secure lasting bonds, commitments among relatives, the benefit of children for the childless, or those whose children had been weaned from the home, and relief for those under stress. Placements were not permanent. There is no property in children. Maori children know many homes, but still, one whanau. 'Adopted' children knew birth parents and adoptive parents alike and had recourse to many in times of need. But it follows too that the children had not so much rights, as duties to their elders and community. The community had obligations to train and control its children. It was a community responsibility. Discipline might be imposed on a child by a distant relative, and it was a strange parent who took umbrage.
>
> Into this remarkably fluid arrangement, Western adoption laws were introduced. It was a totally alien concept, contrary to the laws of nature in Maori eyes, for it assumed that the reality of lineage could be expunged, and birth and parental rights irrevocably traded. At first Maori adoption placements were recognised in law but then equated with adoptions."

FROM THE MEDIA

Pass the parcel

A Korean girl given up by a Dutch diplomat and his wife in Hong Kong seven years after adopting her has sparked outrage among social workers and expatriate Koreans who are struggling to find a new home for her. A South Korean consular official in Hong Kong said the couple, who adopted the child when she was four months old, had handed her over last May into the care of Hong Kong authorities. The South China Morning Post reported that the couple had adopted the girl while they were based in South Korea, believing they could not have children. The wife later gave birth to two children, the report said. "The diplomat gave no explanation for his decision except to say 'the adoption had gone wrong'," the paper reported.

Hong Kong's Social Welfare Department said foster parents were now caring for the girl, but declined further comment. **Reuters 13 December 2007 (abridged)**

NZ Documentary about adoption of Sudanese twins by New York performance artist

A documentary directed by New Zealander Pietra Brettkelly was in January this year the first documentary to be accepted by the Sundance Film Festival. *The Art Star and the Sudanese Twins* tells the story of a New York performance artist, Vanessa Beecroft, who, after reading a story about the war in Sudan, left her husband in charge of their two young children and travelled to that country. Vanessa who had been breast feeding her youngest child agreed to breast feed twins whose mother had just died and were being cared for in a Sudanese orphanage. She later decided to adopt the twins. She has used images of her breastfeeding the twins as part of her art. The documentary does not take a position for or against intercountry adoption but inevitably raises a number of issues. It is to be shown at the International Film Festival in July this year. www.nzff.co.nz

Review of Australian film *Gone to a Good Home*

A film tells the tragedy of postwar women whose babies were taken away.

A 17-year-old woman has been taken into custody for the crime of being pregnant but not married. During a night-time raid, Queensland police officers removed the woman from the home she shared with her partner and placed her in a prison holding cell. She was then transferred to the Holy Cross Catholic girl's home, to work without pay in the laundry until she gives birth. It is expected that a married couple will adopt the baby.

IF THIS appeared in today's *Age* the reaction would be one of shock and disbelief. Surely the officers should be charged with kidnapping, the Catholic institution investigated for slavery and the woman counselled and compensated.

But when it happened to Lily Arthur in 1967, Australia was a very different place. Single mothers were at the mercy of a postwar system that supported the illegal removal of

illegitimate children from their mothers. The practice claimed the babies of more than 150,000 women.

Gone to a Good Home, a Storyline Australia documentary, focuses on Arthur and her landmark case against the Queensland government. Arthur's story is no less heartbreaking than the others told in the film but her tragedy seems compounded by several factors. She wasn't under the age of consent and she wasn't a single mother-to-be. Her de facto partner Steve arrived at the hospital to propose and take his new family home. Lily, sedated and forbidden to see or hold her baby, was tricked into signing an adoption paper.

"It was all about morals and morality," says producer Karen Berkman. "She had done the wrong thing by the standards of the day and she had to be punished and the child taken out of her care so it could be raised by 'good people', which is very sad."

Lily Arthur, now in her 50s, works to reunite members of the Aboriginal stolen generation. She slow-burns with a terrible anger and a drive for justice.

"The systems that we have in place in our society can't be trusted because there is evil when it comes to the authorities forcing their will on to you," she says. "I'd like to set the record straight on the way that we've been portrayed, as women who gave away their children."

Arthur took the law into her own hands nine years ago, contacting her son, Tim, despite a veto from the adoption agency. The two recently returned from an adoption conference in New York and Tim has also met Steve. In the film, Steve and Lily look through childhood photographs of their son. "

Film by Storyline Australia produced by Karen Berkman

Review by Bridget McManus Melbourne Age 2 November 2006

A DVD of *Gone to a Good Home* is available on loan from Susan Marks at Susan.Marks@parliament.govt.nz

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