

ISSUE PAPER 13

Power to discharge or vary an adoption order

The Adoption Act 1955 provides for discharge or variation of an order (see below). There are also detailed provisions dealing with other orders that can be made by the Court on the discharge of an adoption order: s 20(6). However, there are very few reported cases where an adoption order has been discharged or varied.

Because an adoption order currently has the effect of legally replacing the adopted person's parents and relatives with a new set of parents and relatives, the discharge of an order is bound to have far-reaching consequences. A discharge without further orders may leave the adopted person without any legal parents or family/whanau members. This is a persuasive reason for law reform to ensure that an adoption order no longer extinguishes birth family relationships – see Issue Paper 4.

On an application for discharge or variation of an adoption order, there is no requirement that the Court give consideration to the welfare or best interests of the child, let alone that the child's best interests be a primary or the paramount consideration. This is in breach of New Zealand's obligations under Article 21 of the UN Convention on the Rights of the Child.

It is difficult for the birth parent(s), the adopted person or any other person to seek to discharge the adoption order, even if the adoptive parents abuse, neglect or abandon their child. In a 2019 decision, an adoption order was discharged on the grounds that the adoptive father had abused the child: *Edwards v Houghton* [2018] NZFC 2716.

Where a person who has no biological links with an adopted person, but has been deemed by s 16(2)(c) to be a relative of that person, seeks to marry or enter a civil union with that adopted person, doing so would breach the laws as to forbidden marriages or incest. The Adoption Act 1955 does not enable discharge in these circumstances. In at least five such situations, a private Act of Parliament has been passed to discharge an adoption order – see below, and also detailed discussion in Issue Paper 15.

This difficulty would be overcome if the Act were changed so that, on the making of an adoption order, the relationship of the adopted person with the birth parents and all relatives traced through them was not extinguished by the order. See Issue Paper 4 and the provisions of the Adoption Act 2000 New South Wales in this respect.

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DISCHARGE OF AN ADOPTION ORDER

Adoption Act 1955

An adoption order can be discharged only if:

- (i) the application for discharge has received the prior approval of the Attorney-General, and
- (ii) the adoption order was made by mistake as to a material fact, or in consequence of a material representation made to the court or to any person concerned: s 20(1) & (3).

The Act sets no criteria on which such an application for leave may be granted. Arguably the prerequisite breaches s 27(5) of the New Zealand Bill of Rights Act 1990, under which “Every person has the right to bring civil proceedings... and to have those proceedings heard according to the law”.

In practice, it is known that any application for approval is referred by the Attorney-General to the Crown Law Office, resulting in further delays and uncertainty. The Act gives no right of appeal against refusal of leave; refusal might be challenged on an application for judicial review, but there is no reported case on this point.

Care of Children Act 2004

A person’s guardianship rights may be terminated by the court if he or she is found to be unwilling to exercise the duties and responsibilities of a guardian or is, for some grave reason, unfit to be the child’s guardian, and further, that removal as a guardian will serve the child’s welfare and best interests: s 56(1) and s 4(1). Day-to-day care and contact orders can be varied or discharged if there is a change of circumstances that affects the welfare and best interests of the child. This flexibility is in sharp contrast to the rigidity of the Adoption Act provisions for the variation and discharge of orders.

Law Commission Report 2000

The Commission recommended that the Family Court should have a discretion to discharge an adoption order in special circumstances, which might include: (i) the adoptive parents having neglected or abused the child; (ii) the adoptee is an adult and there has been an irretrievable breakdown in the relationship between the adopted person and the adoptive parents; (iii) the consent of a birth parent to the adoption has been obtained by fraud or duress. The Commission proposed that the consent of the Attorney-General requirement should be removed.

Ministry of Justice Cabinet Paper 2007

The Ministry supported the Law Commission’s recommendations. It considered that any decision as to discharge should be made by the Family Court. It proposed that an adult adopted person aged 18 years or older should be able to apply for discharge of the adoption on the grounds of “special circumstances”. It also observed that the discharge of an adoption order would affect the adopted person’s entitlement to inherit under the laws of succession. The Ministry proposed that the Court should have the power to

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make orders as to who would be the child's parents after discharge of the adoption order, or that the Court could, in some cases, leave the child without any legal parents. It recommended that the Court be able to make other ancillary orders about the adopted person's names, guardianship, and domicile. The Cabinet paper opposed any time limit on an application for discharge on the grounds of fraud or duress.

Kevin Hague Bill 2016

Comprehensive provisions as to variation and discharge of adoption orders are in a proposed new s 182:

182 Discharging or varying an adoption order

(1) The court may vary an adoption order on an application by a birth parent or parents, adopted child or adopted person, or adoptive parent or parents, and the order may be made subject to such terms and conditions as the court thinks reasonable.

(2) The court may discharge an adoption order upon an application by a birth parent or parents, adopted child or adopted person, or adoptive parent or parents where—

(a) the order was made as a result of a mistake as to a material fact or by a material representation to the court or to any other person involved; or

(b) the relationship between adoptive parents or the relationship between an adoptive parent and the child has undergone a significant and irretrievable breakdown; or

(c) the consent of any birth parent or guardian was obtained by—

(i) fraud, duress, or undue influence; or (ii) material misrepresentation.

(3) An application to discharge an adoption order pursuant to s182 (2)(c) may only be brought within 2 years after the adoption order was made, and the court must have regard to whether, and the extent to which, an adoptive parent was aware of or participated in the fraud, duress, or undue influence.

(4) The court may discharge an adoption order made in any place outside New Zealand only if (a) the adopted child or adopted person is living and is domiciled in New Zealand; and (b) every living adoptive parent is domiciled in New Zealand.

(5) On the discharge of an adoption order the court may direct—

(a) that any adoptive parent is no longer a legal parent of the child:

(b) that the child will from the date of discharge again become the legal child of the birth parent or parents as if the adoption had not occurred, provided that such a direction will only be made in respect of a deceased birth parent where that parent's next of kin or members of his or her whānau or family support the order.

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(6) Before making an order varying an adoption or order under subsection (1) or discharging an adoption order under subsection (2) in respect of an adult adopted person, the court must have regard to the views of the adopted person and the effect that any variation or discharge will have on his or her interests and wellbeing.

(7) The domicile of a former adoptive child or adoptive person is not changed by the discharge of an adoption order unless the child is under the age of 18 years and the birth parent or parents have resumed the exercise of the role of providing day-to-day care of the child.

(8) The Registrar of the court must notify the Registrar-General of Births, Deaths, Marriages and Relationships of the discharge of an adoption order and of any ancillary orders made at the time of discharge.

Adoption Act 2000 New South Wales

Section 93 provides that:

(4) The Court may make a discharge order if it is satisfied that:

(a) the adoption order, or any consent to adoption, was obtained by fraud, duress or other improper means, or

(b) there is some other exceptional reason why the adoption order should be discharged.

(5) The Court must not make a discharge order if it appears to the Court that:

(a) the making of the order would be prejudicial to the best interests of the child, or

(b) if the application for the order is made by the child--the application is motivated by emotional or other considerations that do not affect the welfare of the child arising out of a relationship formed because of the child's access to information or contact with a person under Chapter 8 (Adoption information).

(6) If the Court makes a discharge order respecting a general consent, that consent remains effective for the purpose of a further application for an adoption order in relation to the same child, unless the Court orders otherwise.

(7) If the Court makes a discharge order, it may, at the same time or subsequently, make such consequential or ancillary orders as it thinks necessary in the interests of justice or to promote the best interests of the child, including orders relating to the following:

(a) the name of the child, (b) the ownership of property, (c) the parental responsibility for the child, (d) the domicile of the child.

(8) On the making of a discharge order, but subject to any order made under subsection (6) and to section 95 (4), the rights, privileges, duties, liabilities and relationships under the law of New South Wales of the child and of all other persons are to be the same as if the adoption order had

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not been made, but without prejudice to: (a) anything lawfully done, or (b) the consequences of anything unlawfully done, or (c) any proprietary right or interest that became vested in any person, while the adoption order was in force.

Adoption Act 2009 Queensland

Section 219(1) provides that:

An adoption order can be discharged on the grounds that the order was made or something was done for the purpose of making the order because of:

- (a) (i) a false or misleading document or misrepresentation, or (ii) a person acted fraudulently or used undue influence (defined in s 219(2)) (iii) a person acted in some other improper way;
- (b) a required consent was not given freely and voluntarily by a party who had the capacity to consent;
- (c) there are other exceptional circumstances to warrant the discharge.

Case Law on discharge of adoption orders

This issue is discussed in detail in Thomson Reuters Brookers *Child Law III* at PA.2.02A.

Discharge of Hague Convention intercountry adoptions

There is no reference to discharge of adoption orders in the *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption* (the Hague Convention). The New Zealand Family Court would have no jurisdiction to discharge an order made under the Convention in another Hague Country.

Where the adoption order has been made in New Zealand, s 20(1) of the Adoption Act would apply and a discharge could be ordered if the strict pre-conditions there set out could be met.

Section 20(2) of the Adoption Act gives the Family Court the power to discharge an adoption order made “in any place outside New Zealand” if the adoptive parent(s) and the adoptee are all living in and domiciled in New Zealand.

This provision is unusual, in that the country where the adoption order was made is not bound by a New Zealand court order. There are no reported cases of an overseas adoption order being discharged in New Zealand.

Discharge of adoption orders where the 1955 Act prohibits parties from entering a marriage or civil union

As noted above, the limited grounds in s 20 on which an adoption order can be discharged do not include situations where two people seeking to marry or enter a civil union find that their marriage or civil union would be within the prohibited degrees of relationship set out in the Marriage Act 1955 or the Civil Union

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Act 2004 as a result of s 16(2)(a) to (c) of the Adoption Act. The only remedy available to them is to seek to have the adoption discharged by Act of Parliament. Examples where a discharge has been achieved in this way are: Thomson Adoption Discharge Act 1958, Thomas Adoption Discharge Act 1961, Liddle Adoption Discharge Act 1963, Papa Adoption Discharge Act 1982. Clearly, it is unacceptable that couples in such situations must obtain an Act of Parliament. This topic is discussed in detail in Issue Paper 15.

Variation of an adoption order

Adoption Act 1955

An adoption order can be varied under s 29(1) on any terms and conditions that the Court thinks fit. None of the stringent restrictions that apply to an application for discharge of an adoption order apply to an application to vary. This is undoubtedly because there are limited elements of an adoption order that are capable of variation, e.g. names conferred on child, religious conditions imposed on adoptive parents.

Case law on variation of adoption orders

There are few reported cases on variation of adoption orders. In one case, an adoption order was varied to correct an error in the name of the adopted person. An adoption order cannot include supplementary orders giving members of the adopted child's birth family contact with the child, so it is not possible to achieve this end by applying for a variation of the adoption order: see *Re T* (1996) 1 NZLR 368. Application for a contact order can be made by a birth parent or relative under s 47(1)(d) or (e) Care of Children Act 2004, but only if the applicant has first obtained the leave of the Family Court to apply.