NEW ZEALAND ADOPTION RESOURCE

ADOPTION OPTIONS

VOL 4

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STEPPARENT ADOPTION

INTERCOUNTRY ADOPTION

Adoption as part of a spectrum of child care options

Adoption and other legal categories available to substitute carers A.9.01

Trapski— The New Zealand Law Commission has reminded us that "adoption cannot be viewed in isolation from the wider issue of placement of children needing alternative care. Rather, it represents one end of a spectrum of available options": *Adoption and Its Alternatives: A Different Approach and a New Framework,* NZLC R65, September 2000, para 7.

Adoption differs from other care options because it does not merely confer on an adult carer certain rights and responsibilities in relation to a child. Adoption severs the child's relationship with the biological parents and creates a new legal and family relationship with the adoptive parents. Adoption changes the child's legal and family status and identity. Unlike other care options, adoption is virtually irreversible. An adoption order cannot be revoked even if the adoption can be shown to be contrary to the child's welfare or an adoptee expresses a strong and understandable desire to revoke the adoption order.

Other care options under New Zealand law include:

(1) Foster and family placements

"Foster care" or "out-of-home care" describes a care arrangement rather than a legal status. These terms are used to describe an arrangement where strangers to a child provide for that child's day-to-day care. The term "family care" is often used to describe a situation where members of the child's family other than biological parents provide for the child's care.

"Long-term foster care" refers to a placement that is intended to be permanent or long term. While in practical terms, long-term foster care is virtually indistinguishable from adoption, the carers may have no legal status in relation to the child. The child may be placed informally with a friend or relative and the guardianship and custody rights remain with the parent(s). Alternatively, the carer may have a legal status as custodian or guardian under ss 78, 101, 102, 110 Children, Young Persons and their Families Act 1989 or ss 6, 6A, 7, 8 Guardianship Act 1968. Where a child is a ward of the Court under ss 10A to 10E Guardianship Act a person may be appointed an agent of the Court to have custody and day, today care of the child.

The research evidence as to the advantages of adoption over a permanent planned fostering arrangement is equivocal. One view is that the child's sense of security derives from the quality of the personal relationship between child and parent including the love, nurturing, and sense of belonging and that the legal status has no real bearing on the quality of the relationship. A different view is that the legal status is important as a formal recognition of the carer's role and provides an environment in which a long term or permanent commitment can grow, thus enhancing the sense of emotional security of both carer and child. It also has symbolic importance as a public manifestation of the carer's commitment to the child. For an extended discussion of these issues and a reference to relevant research literature see *Application by P (adoption)* [2001] NZFLR 673.

There is no doubt that many long-term foster placements arranged by the Child, Youth and Family Service have broken down and there is a lack of research as to the reason for such breakdowns. A series of failed placements is particularly destructive to children.

(2) Placement by CYFS pursuant to agreement with parent

A child may be placed with foster carers by Child Youth and Family Service pursuant to an agreement between a parent and the service: this may be an extended care agreement (more than 28 days) under s 140 CYPF Act 1989 or a temporary care agreement under s 139 (less than 28 days).

(3) Custody

Under s 3 Guardianship Act 1968 "custody" connotes "the right to possession and care of a child", which is the definition of custody in s 2 Children, Young Persons, and Their Families Act 1989. Custody is awarded to the parent or other person primarily responsible for the day-to-day care and nurture of the child.

(4) Guardianship

Section 3 Guardianship Act 1968 defines "guardianship" as the "right of control over the upbringing of a child" and all rights, powers, and duties in connection with the person and upbringing of a child prescribed by law. Guardianship gives the guardian the right to custody of the child, except where there is a custody order in force in favour of some other person or persons: s3. An equivalent definition appears in s 2 Children, Young Persons, and Their Families Act 1989. The guardian of a child is entitled to make, in consultation with the child's other guardian(s), important decisions in relation to the child's upbringing, including the child's health and education.

(5) Wardship

The Court can be appointed the child's legal guardian. On the making of an order in wardship, the Court acquires the common law rights and powers over the ward's person and property: ss 10A to 10E Guardianship Act 1968. See *Trapski s Family Law* Vol IV, ch 2. Wardship proceedings can be brought in the Family Court or High Court and, on the making of an order, the Court has the rights and powers over the person and property of the child that a guardian would have: s 10E Guardianship Act. Under that section the Court can give custody of the child to any person or can authorise any person to have care and control of the child.

(6) Enduring guardianship

The Law Commission has proposed, in *Adoption and Its Alternatives: A Different Approach and a New Framework,* NZLC R65, September 2000, paras 117 to 125, a new care status of enduring guardian which it sees as being particularly appropriate where care of the child is assumed by a step-parent or relative. Enduring guardianship would establish a lifetime parent-child relationship, but would not sever the child's legal links with the biological parents.

Proposal for a comprehensive Care of Children Act A.9.02

The Law Commission has proposed a Care of Children Act setting out a range of care options for children and replacing the specific provisions of the Guardianship Act 1968, the Adoption Act 1955, and the Children, Young Persons, and Their Families Act 1989. This would allow child placement issues to be dealt with in a coherent and principled manner so that the needs of an individual child could be matched with the appropriate legal status.

The Commission was attracted to the notion of shifting the emphasis from parental rights towards parental responsibilities and defining quite specifically what those parental responsibilities are: *Adoption and Its Alternatives: A Different Approach and a New Framework,* NZLC R65, September 2000, ch 5.

Proposed reformulation of the legal effects of adoption A.9.03

The Law Commission proposed a reformulation of the legal consequences of an adoption order. The majority of those making submissions to the Commission agreed that adoption should not continue as presently constituted, and many found it repugnant that the child should be deemed to be a child of the adoptive family.

The Law Commission proposal was that an adoption order would have the effect of permanently transferring full parental responsibilities from the birth parents to the adoptive parents. The adoptive parents would be regarded as the child's legal parents, but the elements of legal fiction and denial of the child's biological heritage would be removed.

In its earlier discussion paper the Law Commission proposed renaming adoption "legal parenthood". However, in its report the Commission opted to keep the term "adoption" because it was well understood, because the public would be likely to continue to use the term adoption, and because the community might see "legal parenthood" as something less than adoption: see *Adoption and Its Alternatives: A Different Approach and a New Framework,* NZLC R65, September 2000, paras 91 to 98.

Source *Trapski's Family Law* Vol.5. 'Adoption' A.9.01- A.9.03 . 24/10/2003 Brooker's.

The Adoption Option

Gary Coles— "The beginning of wisdom is to call things by their right names" Chinese proverb and "Sweet are the uses of adversity" - William Shakespeare

The word 'adoption'

is derived from the two Latin words *ad* and *optare*, meaning 'to choose'. It is a bitter irony, that adoptions, as practised in Western societies, are the very antithesis of choice. An adopted person does not choose to be severed from his or her family of origin. That decision was and is made for them, ostensibly in their best interests. Historically, birth parents often felt they were marginalised in decisions about the future of their child, because of the undue influence exercised by parents and social workers and the prevailing community attitudes, manifested in a disapproval of single motherhood. Most adopting parents were not in a position to influence choosing which child was theirs, although later they may have told the child, "we chose you because, of all the babies, you were the special one" or, "you are special, because we chose you." Typically, unwed mothers did not choose to get pregnant. Adoptive parents who were infertile did not choose to be so. It seems that it was only the social workers, working for adoption placement agencies, who were in a position to exercise choice, for it was their role to match relinquished children with prospective adoptive parents, to choose a new family for the child. Post adoption, when adopted persons and birth parents decide to search for each other, they discover there are many 4legal barriers to surmount. Again, the ability to choose one's actions is compromised.

Adoption a destruct of family relationships

Another irony is the historical conjunction between 'adoption' and 'family'. For adoption does not create families. It destroys them, and the consequences are loss and grief. That an adoption occurs in the first instance means that there has been a family breakdown. A child has had to leave their family of birth and be transferred, using a legal fabrication, to a family with whom they share no consanguinity.

Attempts to obliterate origins

This severance of heritage has a dramatic impact on the relinquishing parent(s) and the child. This may not be totally apparent at the time, for the wound festers. The adoption order assigns a new and false identity to the child. The roles the birth parents played in conceiving and giving birth to the child are denied and obliterated by issuing the adopted person with a new birth certificate, complete with the names of permanent replacement parents. The child's entire genealogical heritage is devalued, not only their descent from the birth parents, but also connections to grandparents, uncles, aunts, cousins and siblings.

Genetic links can never be destroyed

Although the legal rights and responsibilities are transferred from one set of parents to another, the actual relationships between the birth parents and the child do not alter. The father of the child will always be the father of the child; the mother will always be the mother. Neither may play a role in the raising of the child, but they never lose the right to be called the mother and the father of the child. By raising the child, the adoptive parents earn the right to be called a mother and a father, but they are not the sole mother and father of the adopted child. The adopted person inherits both the natural genetic characteristics passed on by the birth parents and an acquired social fabrication that they are as if born to their adoptive parents.

This often results in confusion for the adopted person, affects their sense of identity and may cause distress. For birth parents, the issuing of their child with a new identity is compounded by that identity being withheld from them. They are asked the impossible - to deny that their child exists and to forget about him or her, forever.

It is little wonder then that birth parents and adopted persons alike acknowledge that adoption has caused them considerable emotional damage. Some consider that they have been the victims of an unfortunate social experiment, driven by legislation intent on treating the child as a gift, a commodity passed from apparently willing donors to grateful receivers. Adoptive parent Colleen Buckner (2001) puts the notion of the adopted child as a gift into perspective:

"I always cringe when I hear an adoptive parent describe their adopted son or daughter as a 'gift' from the birth mother. A 'gift' usually means something given freely and without reservation. The majority of adopted babies were 'entrusted' to us - they were not a gift. We are entrusted to care for and love this child that the birth mother was not able to keep because of family and social pressure and stigma" (p6).

Partiality of open adoption

Today, proponents of adoption claim that the era of non-disclosure has passed. Adoption now, they say, is 'open'. Communication between the birth parents, the adopted person and the adoptive parents is allowed, but at the discretion of the adoptive parents. They may terminate contact between the child and the birth parents whenever they wish. Under this arrangement, the fundamentals have not changed. The official identity of the adopted person continues to be vested in the adoptive family, through the perpetuation of a fiction in which the birth parents are legally disposed of by an adoption order. In New Zealand, there has been discussion about an alternative to adoption, called "enduring guardianship", whereby the parental responsibilities are transferred, but the child's original legal identity is retained and there is unhindered access to the records by the parties involved in the arrangement. The possibility of replacing various Acts, including the Adoption Act, and introducing a Care of Children Act has been part of the discussion.

Dramatic fall in Australian adoption

Thankfully, in Australia, the number of adoptions has fallen, from a peak of almost 10,000 in 1971-72, to 178 local 'placement'* adoptions in 1997-98 (Kelly, 2000, p109). This trend has continued, with 127, 106 and 88 in the succeeding statistical periods. There are various reasons for this dramatic drop. Contraception is more readily available, attitudes to single parenthood have shifted dramatically over the past thirty years and the financial hardship of bringing up a child without a supporting income was relieved somewhat by the introduction of a single

parent benefit by the Federal Government in 1973. In Australia, early in the twenty-first century, adoption is beginning to be accepted as one of the least desirable options for placing children from dysfunctional or broken families. Today, the courts prefer the permanent care option, which maintains legal relationships with the family.

Such is not the case in other jurisdictions. Robinson reports that, in the United Kingdom, for example, it is a common practice for adoptions to take place without consent, under the authority of a court order. The child is compulsorily removed from parents who are deemed to be unsuitable by social welfare officials, and placed within another family that is considered to be acceptable (2003, p198). I am concerned that, in these circumstances, adoption is considered to be at the same time a punishment for and the solution to a family's difficulties. In my view, it is neither. An adoption is synonymous with the breakup of a family, and that is a tragedy.

Seeking less destructive alternatives

Surely, given the plethora of painful experiences and damaged lives that adoption has left in its wake, there have to be less destructive alternatives. Providing birth parents with what they lack, whether it be parenting skills or short term financial relief, is certainly a more humane solution than guaranteeing another family misfortune created by adoption. South Australia adheres to this 'root cause' approach. Intent on preserving families, their focus is on identifying and resolving the core issue that is threatening to split the family. The child is not seen as the problem. Adoption is seen as compounding family difficulties, rather than resolving them. As a result, the state of South Australia, with a population of 2 million people, had only three local 'stranger' adoptions in 1999-2000, three in 2000-2001 and one in 2001-2002 (Lucas, 2003). If the 2001-2002 figure for South Australia were to be translated on the same per capita basis to the United States of America, that country would record about 150 local 'stranger'** adoptions per annum. Instead, the annual figure for the USA is actually approximately 50,000 'stranger' adoptions (excluding inter-country placements)! According to Reuben Pannor (personal communication, 2003), increasingly adoption is seen in his country as a solution to poverty. Poor parents, unable to support an additional mouth to feed in a family already blessed with children, receive a payment from an adoption broker in exchange for their relinquished child. Patently, America has not got the message that adoption causes distress.

Adoption a last alternative

The preservation of birth families must be the prime objective. Only when all possibilities of achieving this have been exhausted, should separating parent and a child be considered, preferably on a temporary basis. If separation becomes necessary, the child should retain their name, for this is their identity and an essence of their security. This preservation both honours the child's heritage and enhances their sense of self. Further, it encourages honesty about their parentage. Communication between the birth parents and their separated child should be open and frequent, for secrecy destroys relationships.

Adoption not a tidy solution

Adoption has been touted as the tidy solution to illegitimacy and infertility, with the adopted person the beneficiary of adult misfortunes. O'Shaughnessy (1994) puts it another way, commenting that typically adoption is seen as "a service for parentless children, childless parents and child-burdened natal mothers" (p22). He then quotes a myopic view, attributed to Professor Rita Dukette in 1984: "Over the years, adoption has been tremendously advantageous for children, enriching for adoptive parents, and liberating for biological parents" (ibid). For all concerned, adoption is not the option of choice. Without interference, the birth mother and the birth father would choose to live in a society that allows them to keep their child. Adoptive parents would prefer to conceive their own children. Adopted persons would be in a position to remain with their birth parents. For adoption equates with loss, and 'loss', taking it back to its Old English roots, means `destruction'.

A future without adoption?

Robert Ludbrook (1997) is one who is in favour of a future without adoption. Presenting a paper entitled 'Closing the Wound' to the 'Adoption and Healing' conference in Wellington, New Zealand, he had this to say: "I believe that adoption no longer serves any overriding social purpose which outweighs its negative aspects. I believe much of the pain and hurt generated by adoption could be avoided. While this may not provide solace for the wounded it might reduce the casualty rate for further generations" (p57).

I look forward to the day when a book such as mine will not be necessary as an account of recent and current practices, but will be valued as a record of an anachronistic experiment.

** Where a child does not know its adoptive parents, versus 'known child' adoptions, which are typically the province of step and foster parents. The exact terminology differs between jurisdictions. Local 'placement' and local 'stranger' are equivalent terms. Local means intracountry, not intercountry.

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INSTITUTIONAL ADOPTION
1881-1925

Benevolent Institutional Adoption 1881-1925
The future was often bleak for a deserted child left in an Institution. It was difficult to find placements for abandoned or illegitimate children. Often only Charitable Institutions, usually church based, would provide the required care. Provisions were made in our legislation for children to be adopted by an approved Institution—

1 The Institution adopting the child assumed full parental responsibility.
2 Only a deserted or abandoned child could be adopted by an Institution.
3 For some children it was their only hope of entering a substitute family; the adoption gave them legal, social, and economic security. Adoption by Institutions was a genuine attempt to meet the needs of deserted children. These Institutions are not to be confused with work houses or industrial schools. Institutional adoption was abolished in 1925.

Adoption not popular
There were (a) Strong prejudices against illegitimate children. (b) A belief they would bring bad blood into a family. (c) Harsh financial times. (d) Government gave no financial help. (e) Deserted children were totally dependent on public charity. Hence the great importance of benevolent and religious institutions of the day, often they alone would pick up the responsibility. For some, the institution was the only home they would know.

Religious conditions attached
The children were adopted by the actual Institution. The Institution became in effect the adoptive parents. All adoptions by religious Institutions had a religious condition attached the child must be of the same denomination as the Institution. The Judge must be satisfied: "That such child is deserted, and of the same religious denomination as that of the institution whose manager makes the application." This religious condition was included to safeguard the religious upbringing of the children and avoid proselytising of children by Institutions. The provisions for Institutional adoption were repealed by the Child Welfare Act 1925 s38(3).

Statutes
1881 Adoption of Children Act "s8.
"Adoption- in connection with benevolent and other institutions: Upon the application of the manager for the time being of any benevolent or other institution established in connection with any religious denomination, and not maintained by Government subsidy, who is desirous of adopting any deserted child in connection with such institution, the District Judge of the district wherein such institution is situated, on being satisfied-

(1) That such child is deserted, and of the same religious denomination as that of the institution whose manager makes the application; and

(2) That such institution is properly conducted, and is capable of properly bringing up such child, may make an order authorizing the manager for the time being to adopt such child in connection with such institution, such child retaining his or her own name, and in no manner inheriting or succeeding to any property, real or personal, or otherwise howsoever, of such manager or institution.

s9 Sections four, five, and six shall in no way apply to the case of any child adopted as in section eight of this Act, except as to the determination on such order of all rights of natural parents, and as to the rights of such child to take property, as respectively stated in section six of this Act: Provided such child shall be entitled to the support, maintenance, education, and advancement afforded by such institution, and all such other rights, benefits, privileges, and advantages appertaining thereto, and which it shall be the duty of the person or body managing or controlling the said institution to provide.

s10 Name of adopted child
The order of adoption, except that made under section eight, shall confer the name of the adopting parent on the adopted child, in addition to the proper name of the latter." [Repealed Adoption of Children Act 1895]

1895 Adoption of Children Act
"**s10** Adoption in connection with benevolent or other institutions: Upon application in writing of the manager for the time being of any benevolent or other institution, established in connection with any religious denomination, and not maintained by Government subsidy, who is desirous of adopting any deserted child in connection with such institution, the Judge usually exercising jurisdiction in the district wherein such institution is situated, on being satisfied-

(1) That such child is deserted,

(2) That such child is of the same religious denomination as that of the institution whose manager makes the application, and

(3) That such institution is properly conducted, and is capable of properly bringing up such child,- may make an order authorising the manager for the time being of such institution to adopt such child in connection with such institution, such child retaining his or her own name, and in no manner inheriting or succeeding to any property, real or personal, or otherwise howsoever, of such manager or institution.

s11. Sections 6,7, and 8 not to apply thereto: Sections six, seven, and eight hereof shall not apply to the case of any child adopted as provided in section ten hereof, except as to the determination of all rights of the child's natural parents, and as to the rights of the child to take property, as respectively stated in section eight of this Act: Provided always that such child shall be entitled to the support, maintenance, and advancements afforded by such institution, and all other such rights, benefits, privileges, and advantages appertaining thereto all which it shall be the duty of the person or body managing or controlling the said institution to provide.

s12 Name of adopted child

The order of adoption, except when the same is made under section ten hereof, shall confer the name of the adopting parent on the adopted child, in addition to the proper name of the child." [Consolidated in Infants Act 1908 Part 3 s24]

Infants Act 1908 "s24

(1) "Adoption in connection with benevolent or other institutions: On the application in writing of the manager for the time being of any benevolent or other institution established in connection with any religious denomination, and not maintained by Government subsidy, who is desirous of adopting any deserted child in connection with such institution, the Judge usually exercising jurisdiction in the district wherein such institution is situated, on being satisfied- (a) That such child is deserted; (b) That such child is of the same religious denomination as that of the institution whose manager makes the application; and (c) That such institution is properly conducted, and is capable of properly bringing up such child,- may make an order authorising the manager for the time being of such institution to adopt such child in connection with such institution, such child retaining his or her own name, and in no manner inheriting or succeeding to any property, real or personal, or otherwise howsoever, of such manager or institution.

(2) Sections nineteen and twenty one hereof shall not apply to the case of any child adopted under this section, except as to the determination of all rights of the child's natural parents, and as to the rights of the child to take property, as respectively stated in section twenty-one hereof: Provided that such child shall be entitled to the support, maintenance, and advancements afforded by such institution, and in all other such rights, benefits, privileges, and advantages appertaining thereto, all which it shall be the duty of the person or body managing or controlling the said institution to provide." [Repealed by Child Welfare Act 1925 Third Schedule]

Child Welfare Act 1925
Institutional adoption ended

The provisions were repealed by the Child Welfare Act 1925 Third Schedule. Thus adoption by Institutions were provided for in New Zealand Statutes in the period 1881-1925. The Child Welfare division now took increased responsibility in caring for deserted children and there was no need for the provision of adoption by institutions.

1921 Practice of institutional adoption

"Adoption of deserted children by any benevolent institution or any other institution, established in connection with any religious denomination, and not maintained by Government subsidy (s24 of Infants Act 1908).

Deserted child is defined

In s15 as meaning any child who, in the opinion of the magistrate, is deserted, and has ceased to be cared for and maintained by its parents, or by such one of them as is living, or by the guardian of such child; or by the mother of such child, if the child is illegitimate. A deserted child may, of course, be adopted like any other child; but it is only a deserted child which may be adopted by the manager of a benevolent or religious institution.

Application

Is made in respect of any such child by the manager of the institution averring that he is desirous of adopting such child in connection with such institution.

Conditions

Proof must be given (a) that the child is deserted. (b) that the child is of the same religious denomination as of the institution whose manager makes the application, and (c) that such institution is properly conducted, and is capable of properly bringing up such child. On being satisfied of these matters, the magistrate may make an order, authorising the manager for the time being of the institution to adopt such child in connection with the institution.

Under such order *the child retains his or her own name, and in no manner inherits or succeeds to any property of the manager or of the institution.* The institution may receive a premium or reward in respect of the adoption without the consent of the judge. In practice, the institutions, which are mostly the orphanages and social service organisations established by the various religious denominations, trace the deserting parent, and oblige him or her (by legal process if necessary) to contribute to the support of such parent's child when adopted by the institution. S21 relating to status does not apply to such adoptions, except as to the determination of all rights of the child's natural parents, and except as to the right of the child to take property as heir or next of kin of his natural parents, directly of by right of representation.

Entitlement

Such, an adoption order entitles the child to the support, maintenance, and advancement afforded by such institution; and all such other rights, benefits and privileges and advantages appertaining thereto, all of which it is the duty of the person or body managing or controlling the institution to provide." D. Stanley Smith. 'Adoption of Children in New Zealand' Journal of Comparative Legislation and International Law. Third Series Vol.3. 1921 pp175-176

1909 Example

In 1909 the Manager of the Presbyterian Social Service Association, Dunedin, adopted 21 children. Child Welfare Annual Report 1910 E.4 *Appendix to Journals of the House of Representatives.*

1921 Institutional adoption premiums

"The institution may receive a premium or reward in respect of the adoption *without the consent of the judge.* In practice, the institutions, which are mostly the orphanages and social service organisations established by the various religious denominations, trace the deserting parent, and oblige him or her (by legal process if necessary) to contribute to the support of such parent's child when adopted by the institution." *D. Stanley Smith* p176 *Journal of Comparative Legislation. Vol.3.* 1921

Significance of Institutional adoptions

The total number of adoptions by Institutions are unknown but probably did not exceed a few hundred. For those adopted, they were all deserted children, and it would have been very significant. I experienced something similar when I was a 'house master' at the Wellington Boy's In-

stitute in the 1950s. We had several boys in the hostel who were orphans or had no family support. For these the Institute agreed to take full responsibility for their welfare. I saw some remarkable transformations. My guess is that deserted children adopted by Institutions probably had similar reactions, at last they had a security and a sense of belonging. KCG

CLOSED ADOPTION

Complete Break Adoption 1950-1980s

Two swings of the pendulum

Genetic determinism to environmentalism created major problems and damage within the institution of adoption.

Genetic determinism

The theory that behaviour and morality as well as physical characteristics are predominantly genetically determined. Dysfunctional or immoral behaviour in the parents, is conveyed genetically to the children. It's all in the blood. Most adopted children are illegitimate, they have sinful parents and their sin will be passed on to the child. It's all predetermined by genetic makeup. This theory dominated and blighted our early adoption history. Then we swung to the opposite extreme.

Environmentalism

The belief environment will overcome heredity. Place a child in the right environment and it will grow likewise. The adopted child, transplanted into an adoptive family, should turn out 'as if' born to them. This led to the denial of difference practice. Due to the overwhelming influence of environment, nurturing an adopted child should be no different from a natural child.

There is some truth in both theories. It was the extremes to which they were taken that caused the damage. For example, we now know that all our physical being is genetic, along with significant portions of our personality, but there is no evidence of morality being genetically fixed. Likewise, environment can have powerful affects, but can not alter our genetic structure, and behaviour modification can be limited by genetic personality. We inherit all our potential, but how we use and develop it is largely determined by our environment.

Natural relationship irrelevant and buried

"The whole scheme of the Adoption Act 1955 is to cut the ties between the natural child and its parents and to place it permanently and virtually irrevocably in the position of the adoptive parents' natural child...I cannot avoid the conclusion that Parliament's intention was to create a situation where the new parent-child relationship was to be accepted by all without question or further inquiry in the knowledge that the circumstances surrounding the adoption should not, in general be disclosed, and that the previous natural relationship was to be treated as irrelevant and buried." Judge Inglis QC Napier FC *Re an Application by P* FLN144(2d) N211 at 212 // (1984) 10NZRL 47

Origin of the complete break theory

The imposition of extreme secrecy from 1945 to 1980 resulted from interwoven social, legal and philosophical factors. Unravelling the mystery is like untangling a ball of cotton made of several strands. Some strands are-

1 Environmentalism

A growing belief that environment was more important than heredity, in determining the physical, mental and a class society, heredity is of great importance, being of right blood. In egalitarian society, heredity is less important, it is what you make of life that counts, environment is of greater importance. By the late 1940s the pendulum of debate had swung to the environmental extreme. Heredity was of little real importance and could be overcome by environment. The theory was then almost universally accepted, it become an ideology.

2 One real mother two unthinkable

The only way a child could have two mothers was if the first one died. Thus the birth mother of an adoptee was treated to all effects and purposes as dead. As the adoptee can only have one real mother the other mother must be unreal and disposed of for good. There was increasing stress on the modern woman's role as an individual relatively isolated wife and mother, bearing a heavy responsibility for her children's welfare. No one else could take her place. The idea of an adopted child having two mothers and two families was unthinkable. As for adoptees having a 'birth father', that was an affront to adoptive fathers. Even as late as 1980 in the Adult Adoption Information Bill debate a member of Parliament, Mr Mclean (Tarawera) an adoptive father, suggested "We need new words. The words sire and dam have been suggested, but I believe they have a pejorative sense; we need to look for words like begetter." NZPD Vo1.433. 5/9/1980 p3234

3 Unmarried women unfit to raise children

There was a very strong belief that children brought up in other than two-parent families must be deprived. A solo mother just could not compete with a two parent family. It cannot be in the best interests of the child to be deprived, therefore they should be adopted into a nuclear family. Birth mothers of adoptees had already proved themselves irresponsible by having an illegitimate child, and in doing so had shown contempt for marriage and the nuclear family. "An unmarried woman was unfit to bring up a child or even retain contact with it. Any desire on her part to retain contact was proof of her inability to understand what was best for the baby. She had to be banished from its life forever, as did its entire birth family. Babies available for adoption were frequently described as parentless."

4 Good adoptees' don't need origins

If the adoptive parents are really doing their parenting task, their careful nurturing of the child will ensure that the adoptee will have no need for origins, or any contact. Just as the birth mother has put her past behind her and started a new life, so will the good adoptee. "Just as birth mothers were supposed to forget and start a new life, so adopted people were not supposed to be interested in their origins. If they were, it was a sign that their adoptive parents had somehow failed to do their job properly. All that mattered was the ability to achieve as an individual and to create a new nuclear family of one's own. Pre-birth family history was seen as irrelevant to the present. When the state denied and concealed that history, it could claim to be acting in an adopted person's best interests. It could also claim to be protecting the birth mother."

5 Bonding theory

Relating to infant-to-parent attachment. Early theories suggested there was a period shortly after birth which

was optimal for the parent-child attachment. Later studies challenged this theory and argue that parent-child attachment does not depend on such contact occurring during the sensitive or critical period of short duration after the birth of a child. "Lorenze, Bowlby 1951, 1953 postulated that bonding between mother and child began shortly after birth, and that there was an optimum period soon after birth when a baby could bond to another person, not necessarily its birth mother. These ideas were used to promote baby adoptions which had previously not been so popular. The clean break theory provided maximum security for the adoptive parents so that bonding could take place." Kennard 1991 p14

6 Psychodynamic theory

From the beginning the law on adoption assumed birth parents were likely to cause trouble for the adoptive parents and the child. The Psychodynamic Theory supplied social workers with a pseudo psychological justification and rationale for maintaining a complete break. The theory portrayed unmarried mothers as immature and unstable, the baby as unwanted, conceived to fulfil her neurotic needs and fantasy. Therefore it was in the best interests of the adoptive parents and the child that they be permanently separated from the birth mother. It was also in the best interests of the birth mother that in order to heal her dysfunctional personality, she make a complete break from the past and a new life for herself. see "Psychodynamic Theory'

7 Theory became practice

In the post war 1940s we were building a new society. The theory that environment reigned supreme was translated into belief and action. It shaped both our education and adoption policy for the next 40 years. The changes reflected an important postwar shift in attitudes to origins, heredity, genealogy and family. In postwar child development theories, the emphasis moved away from heredity toward environment. This was part of the general shift toward regarding children as individuals and reducing the idea of 'family' to the nuclear family group. Detaching the baby from its origins allowed it to be safely adopted.

8 Complete break ideology

When the 1955 Adoption Act was drafted environmental supremacy had become an ideology. That is, the belief had reached the level of unquestioned acceptance demanding implementation. Because an adoptee's heredity was now considered largely irrelevant, it was in their best interests to be completely cut off from their origins. *A complete break would allow the adoptive environment full reign to take over and shape the adoptee's life into the mould of the adoptive family*. Therefore, an impenetrable wall of secrecy, between the adoptee and their origins, was the obvious and sensible thing. Thus, complete break secrecy provisions were inserted in the Adoption Act without any question or consultation with the parties directly concerned. With an ideology there was no need to consult because you know you are right.

9 Legal fiction became general fiction

The 'legal fiction' served a defined legal purpose, as a device to clarify the legal status of the adoptee and adoptive family relationships. The major difficulty arose when social workers and adoptive parents, ignoring the legal constraints and used 'legal fiction' as both a device and justification for turning fiction into fact. The transformation of legal fiction into a general fiction is a delusion that became adoption policy and practice. "The original adoption law introduced a simple legal fiction, in which the idea of an adopted person becoming 'as if born to' the adopters was a legal concept only. But gradually this turned into a general fiction, involving a web of pretence and denial." Else 1990 p181.

To make a lie stick you have to conceal truth or destroy the factual evidence.

Child Welfare view on complete break 1955

The Superintendent of Child Welfare, Mr C E Peek, in a letter of 23 January 1955 to the law drafting office, concerning the 1955 Adoption Bill, commented- "I think that if the natural parent is to have any influence once the order has been made, then the whole spirit and effect of adoption orders is being undermined, and the child is not being treated as though he were the natural child of his adoptive parents. I suppose it would be true enough to say that, as far as an adopted child is concerned, his natural parents are legally dead, and that the dead hand should not govern the upbringing of the child." GC pp5566-7

"Closed adoption brought about the permanent separation of mother and child, but that was seen either as a small necessary evil for the sake of the greater good, or as a positive benefit, because it freed each of them for ever, legally and socially, from the embarrassing presence of the other." Else 1991 p26

Adoption practice 1940-1960

"Adoption practice during the 1940's and 50's also followed the theories already outlined. If the child was not wanted for itself but was merely a symbol, then the logical conclusion was that the child was unwanted and would be better off adopted. The unmarried mother was counselled to place the baby for adoption as it would be best for the baby, and then when she did, was seen as abandoning her child. Many adoptive parents believed that they were `rescuing' an unwanted, abandoned baby. Because it was believed that raising adopted children was the same as raising natural children, information about birth parents was seen as unnecessary, unsettling, and a threat to the bond between adoptive parent and child. Social work records, therefore, contained little or no information about birth families. The legacy of these beliefs is still evident today amongst adopted people, their adoptive and birth families." Kennard 1991 p15

The focus of adoption was on the relationships which were created and the perceived advantages for members of the new family. There was no attention given to the relationships which were destroyed and their impact upon the children, or life long effects all parties concerned.

Demise of Complete Break 1970-1985

The complete break philosophy came under increasing pressure from ten sources.

1 Existentialism
2 New psychological theory and practice
3 Civil rights movement
4 Adoptees and birth mothers speaking out
5 Research
6 Formation of support groups
7 Adoption law change England 1975
8 Professional training of social workers
9 Adult Adoption Information Act 1985
10 UN and international conventions

While professionals continued to defend complete break practice, the foundations were already collapsing under them. "While adoption workers and legal advisors were putting in every effort to establish legislation and practices that would support the `clean break' theory and secrecy, the literature shows that others had started to challenge these practices." Iwanek 1991

See 1955 Challenge to adoption secrecy by Justice Sholl, full High Court, Victoria Australia..

1 Existentialism

Is a modern philosophical movement stressing the importance of personal experience and responsibility and the demands that they make on the individual, who is seen as a free agent in a deterministic and seemingly meaningless universe. It is empirical as opposed to theoretical; concrete as opposed to abstract.

"After World War II existentialism slowly emerged as a major philosophical perspective which challenged psychoanalytic theories of personality. These theories gave social workers and other professionals a different perspective about people in the world and their needs. Existentialism promotes notions such as the importance of knowing oneself, freedom of choice and responsibility for one's actions. It holds that personal truth is a matter of subjectivity and asserts that the individual alone finally decides the meaning of a new situation. The existential view of an adoption practice based on pretence, such as the `born to' notion, and suppression of personal information by others under the guise of protecting the adopted person from possible hurt and thus from reality, is not helpful to that person and frustrates personal growth...

2 New psychological theory and practice

— Erickson's work on identity formation gave new insights into why adopted people need know their origins.

— Difference v denial "David Kirk, a sociologist, was one of the first Canadian pioneers to undertake research into kinship. His findings show that adoptive parents who deny the difference between a child by birth and one by adoption are more likely to have dysfunctional family relationships based on secrecy, inability to communicate and general distancing between parents and their children. On the other hand, he found that where there was an acknowledgment of difference, a more open and creative relationship existed between children and their adoptive parents. Kirk's findings appear to be in direct conflict with the practice of adoption agencies and legal advisors, who very much operated on a 'rejection of difference' philosophy, and who promoted secrecy. Kirk's acknowledging the difference meant that adoption has to be regarded as a lifelong process whereby adoptive parents will discuss with their children issues relating to the adoption over the years. Agencies, on the contrary, rejected the notion of difference, and saw adoption not as a lifelong process, but as time limited. When children adopted in an environment which promoted the 'as if born to' philosophy, it also meant that once the transfer was legally completed the differences no longer existed." Iwanek 1991

3 Civil rights movement

Provided impetus to other groups in society to form and band together to promote their own particular issues. Public speaking and use of the media were enhanced and encouraged. The empowering of women also enabled many birth mothers to speak out publicly. Annual marches from New York to Washington, proclaiming the case for open records became an annual event. Many political activists learnt their skills from the civil rights movement and used them to promote adoption law reform.

4 Adoptees and birth mothers speak out

With acknowledgment of difference adoptees felt free to ask questions. They began to questions the authorities, rejecting assertions of professionals that adoptees searching for origins were pathologically dysfunctional and in need of counselling. "Kirk's writing implied that children who request information about their families of origin reflect the security they feel about their relationship with their adoptive parents because they acknowledge the difference. On the other hand, adoption agencies often promoted the idea that children who requested information were either disturbed, or that something had gone wrong in the parent-child relationship. Kirk states: "Because of their insistence that an adopted child was the same as if born to them, they sought the same therapeutic solution as for non-adopted children with their parents. The outcome has often been that therapy was often unsuccessful and relationships deteriorated rather than improved Kirk 1985." Iwanek 1991. The adoptee action encouraged birth mothers to come out and tell their story.

5 Research

"Practical research findings based on adult adopted people's experiences became available in the early 1950s. The first person to publicly speak out on the issue of secrecy in adoption was Jean Paton, a social worker and an adopted person, who at 40 embarked on a search and found her birth mother. She wrote a book called `The Adopted Break Silence'. Others like McWhinnie 1967, Triseliotis 1973, and Raynor 1980, wrote about the need for identifying information for an adopted person, which they based on research findings ...Paton's book was the beginning of the adoption reform movement starting with

her own organisation called Orphan Voyage. Others followed much later in the early 1970s and 1980s, led by such people as Florence Fisher and Betty Jean Lifton. In 1978 Sorosky, Baran and Pannor reported for the first time on the feelings and attitudes of birth parents years after they had relinquished their children for adoption. This was followed by publications- Sawyer 1979, Langridge 1982, and Vankeppel 1984. All these studies described the anguish felt by birth parents, years after they had relinquished their children for adoption, and the severe emotional trauma they had suffered. The studies show that adoption agencies' and lawyers' beliefs that birth parents want permanent anonymity and privacy and to be left alone for ever was a myth. In most cases the mothers had given up their children to ensure they would have permanency. There was a growing awareness that legally defined adoption legislation had its own consequences which had not been intended at the time of passing legislation. The underlying belief of our adoption legislation is that the birth ties can be severed; the child's true origins erased as if they never were, and that everyone affected by this process, the adopted child, the birth parents and the adoptive parents, are benefited by this step. Griffith, 1981-- Iwanek 1991

6 Formation of support groups

Jigsaw and Adoption support groups developed effective support, educational and activist reform movements.

7 English law change 1975

The Childrens Act 1975 s26 granted all adoptees aged 18 or over access to their original birth entry. This was a major boost to the reform movement in New Zealand.

8 Professional training of social workers

Since the 1970s professional training for social workers has been available. Graduates brought new insights, research, and critical assessment to adoption work.

9 Adult Adoption Information Act 1985

Milestone in opening up adoption an consolidating change.

10 UN and International conventions Non compliance of NZ legislation couldn't be ignored.

1970s Long road back from complete break

"From the 1960's onwards adoption practice has gradually changed as the clean break theory has been questioned and found wanting. Secrecy was fundamental to the theory and those involved in adoption slowly recognised that there was advantage to both adoptive parents and adopted children in having some knowledge about the birth families. Practise has gradually moved towards more information, no secrecy and open adoption. Adopted people began to be listened to when they talked of their needs and rights. It was slowly realised that arguments that might be used to justify severing all links between a baby and its birth parents, could not continue to be used once that baby was an adult." Kennard 1991 p16

During the complete break period both policy and practice was driven by ideology, rather than principles arrived at after careful thought, based upon research. *"Closed stranger adoption can now be seen for what it was a social experiment with unknown and un-investigated outcomes, conducted on a massive scale.* " Else 1991 p197

Adoption Act 1955 ideology

Some of it's short comings were due in no small measure to the makeup of the interdepartmental committee. I have had the opportunity of researching not only the debates and submissions, but also the minutes and correspondence of the Committees and Departments concerned. While there was strong legal, adoptive parent and adoption society input and representation, input from the 19,000 birth parents and 11,000 adult adoptees of 1955 was neither specifically sought nor obtained. There was a firm belief that this mixture of legal, adoptive parent and welfare officer expertise knew what was in the best interests of the birth parents and the adoptees. There was simply no need to consult, the imposition of the complete break theory was agreed to by the legal, adoptive parent, welfare officers and adoption societies expertise of the day. What was now required was the theory's full imposition, and those birth parents or adoptees that raised objection were regarded and treated as deviants of society and remained so up until the 1980s.

Complete break secrecy period

"Mothers also share an ignorance of each other's identity. Previously, the mother who relinquished her right to any further mothering after adoption was more likely to be known by name, and often other identifying information, than the woman who adopted the child. The adoptive parents saw documents which contained the mother's name, and sometimes the name of the child's father. Copies of these documents were issued to the adoptive parents. Since [1955] this has not officially occurred. This suppression of identity is the basis of much controversy and debate which has revealed a stubborn adherence to the initial values on which it appears to have been based. The most obvious implication is that mothers and children separated by adoption are a danger to each other. The adopted person was an infant at the time and not a party to the legally binding instruments of his of her change of identity. From this point onward, the person adopted was denied the right to consultation. The original parent seeking care of a child through adoption was not able to relinquish that child without also agreeing as an intrinsic part of consent, to becoming both anonymous and un-traceable... p10

The legal expunging of all available records of this tie is part of the process of extinguishing the relinquishing parent's rights. The paradox is that the broad bond of nature is sufficiently valued for all that concerns the child, except the actual birth, to be reconstructed socially. A new birth certificate is issued, naming the child as the child of its social parents. The original birth certificate is marked as 'superseded' and filed away. This is a legal fiction. There can be only one birth. It is never superseded. That birth unquestionably concerns a mother and child. They shared a momentous event with enormous cultural meaning which under ideal circumstances, would have resulted in continuing contact and knowledge of one another un-

til death. The culture, which has the mother as its most potent symbol of altruistic love and generational power, denies that they know one another. It holds, lawfully, that they are, to each other, no ones." Kate Inglis '*Living Mistakes'* 1979 pp10-11

Grief in closed v open adoption

"The chance to grieve. One of the most devastating consequences of closed adoptions was the way they limited opportunities for birth parents to grieve the loss of their child. We now know a good deal about the grieving process for example, in grief associated with bereavement, final resolution comes when people are able to take into themselves an image that represents all that the dead person meant to them. Birth parents speak of the loss of a child by adoption as a `living' death. It is a loss that can, never be resolved as a bereavement can, because the child lives on, and their memories and thoughts cannot be rounded off at some fixed point in time. In open adoption they live with the full knowledge that their baby is living, growing, changing, child, teenager, adult, a person about whom, in a closed adoption, they know nothing. Openness in adoption gives tangibility to the loss of a child in adoption, so that it can be grieved for and grief resolved." Rockel and Ryburn 1988 pp162-163.

OPEN ADOPTION

"In one sense, open adoption is a contradiction. Whereas an adoption severs the child's legal ties with the birth parents and family of origin, open adoption practice encourages an ongoing relationship with communication and contact. What adoption takes away, open adoption practice seeks to nurture and sustain." Ludbrook 1994.

Need for change

"One of the most significant changes to adoption practice over the past decade has been the introduction of 'open adoption'. The Philosophy of the 1955 Act was that adoption should represent a clean break with the past, the birth mother could hand over the child, forget about it and then get on with her life; the adoptive family could take the child as if the child was its own natural child and no contact with the child's biological past was necessary. The reality, which has been subsequently attested to by many people, is that the past cannot be wiped out in this way. For adopted people the lack of knowledge of their roots could prove to be a major barrier in self-identity. For birth mothers, there would often be the question of what had happened to their child and the sense of guilt at having lost contact. Open adoption practices developed in part in response to the feelings of people involved in old adoptions. The new process also was more sympathetic to Maori and Pacific Island attitudes to adoption, where openness is the norm." 1990 Report p39

Definitions

Open adoption The adoptive parents and birthparents remain in contact during the adopted child's growing up. *Closed adoption*- the adoptive parents and birth parents are unknown and remain unknown to each other.

Open records where information on the adoption records is available as of right when adoptee's reach a particular age. *Closed records*- adoption records are not available to anyone without a Court order.

With open adoption the birthparents relinquish legal and child-rearing rights to the adoptive parents. Both sets of parents have a right to contact and information. The frequency of contact is an individual arrangement, reviewed as the need arises. Contact may range from a simple exchange of information to full incorporation as an extended family with all siblings and relatives in open contact.

What is open adoption?

"Open adoption means different things to different people and can take different forms...At one end of the spectrum, it involves nothing more than an exchange of letters and photographs, sometimes through the mediation of the Department. At the other end of the spectrum, it can mean a degree of co-parenting between the birth and adoptive parents. In between, there is a wide range of different styles of contact, co-operation and mutual care. Open adoption may involve not just the parents, but also the families, and we have heard of moving experiences as families get to know each other and share their lives... Whatever the nature of open adoption for particular individuals, it is important to emphasise that everyone should enter upon the process with the right attitude an attitude of openness, respect and willingness to explore the options in the interest of the child." 1990 Review p39

History

Open adoption is neither new or innovative in New Zealand. When adoption was first introduced in 1881, the process was open, in that people knew each other's identities, there were no legal restrictions on contact or the passing of information between the child, the birth family and the adoptive family. Open adoption is an essential aspect of Maori adoption and has also quite commonly practised by pakeha since 1881. A birth mother often stayed with a family during confinement and they adopted her child, remaining friends. There have always been stepparent, relative and foster-parent adoptions. With the advent of complete break adoption ideology 1950-1970 most social workers actively discouraged open adoption. However, by 1977 the number of non-stranger adoptions surpassed stranger adoptions. One social worker reported, "All parties met face to face at the time of placement, before consent was signed, and discussed the way in which they wished to be contacted in the future. By the end of 1979 approximately 95% of placements made had at least this level of openness in the districts I worked in." Iwanek 1987 p7

Varieties of Open Adoption

Marcy Wineman-Axness— The broad characterisations of open adoption on the continuum of openness—

Closed

There is no contact, the parents never meet. There is no possibility for contact without doing a search. There are very few closed adoptions in NZ technically. What we do have more and more of, which fall in the category of closed are international adoptions where there is no chance to know the parents of the child or have knowledge of the specific background. [Also, where an open adoption is promissed on paper, but never delivered in reality. KCG]

Semi Open

There is contact before birth where the birth mother chooses the adoptive parents possibly from resumes. They're only on a first names basis and they can only correspond through the agency. There is an ability to have more information to give the child but it is still highly controlled and there is that paternalistic feeling of having to correspond through the agency

Quasi Open

Every body who does it calls it an open adoption and they think it truly is an open adoption. This is where the birth parents and the adoptive parents meet. They have a relationship. They may have gone shopping together had lunch together probably talked about names and they may even be in the delivery room together for the birth of the baby. But, the critical thing is that after the birth there is no more contact except maybe letters and pictures. Even more crucial than that is that the child is never let in on the fact that her birth mother is known to the adoptive

parents. This kind of open adoption is really more for the comfort and benefit of the adults involved. The birth mother has the small comfort of knowing where her child is going to grow up and the adoptive parents get to participate in that wonderful high around the birth of the baby but this kind of the adoption fails the number one litmus test in my estimation. Does it serve the child's need for connection and information and the answer to that would be no. Quasi open adoption may take another form- where the birth mother visits but the child does not know she is his birth mother.

Semi closed open

The child is let in on the fact that they know his birth mother and they may have a life book for the child. The child may receive letters and photos from the birth mother. But Geographic distance makes acontact practically vertually impossible...There is going to be more information which is good but there is no availability of that birth mother to the child. At the risk of sounding cynical, the geographic undesirability often contributes to the comfort level of the adults involved. A nice safe buffer zone. She won't come round and bother us...

Another feature of these adoptions may be "When you're older" attitude about having contact with your birth mother. As if knowing your birth mother is like drinking or driving. Then when you're eighteen you can know your birth mother and also "We don't want to confuse him with having, two mothers" explanation. He Has two mothers anyway to not acknowledge it that's what confusing.

Fully open

Adoption where there is everything from the previous- The life book the gifts and we add in the ongoing contact with the birth mother for the child and possibly other birth relatives and extended birth family and very often subsequent birth siblings. It is done in a way which is responsive to the needs and the cues of the child. It is not pressed on him and its not unavailable. The adoptive parents are responsive to the needs of the child picking up on the clues and what that child is wanting

So there is the spectrum of openness.

But there is something missing, they only describe are the mechanics of the adoption. How the adoption looks. They don't talk about how the adoption feels. How the people relate to one another, and most critically how the adoptive parents relate to their child. The big question is 'Is Yours Really an Open Adoption or is it only open on paper?'

Open adoptions that work

All of the these so called open adoptions can be just open on paper. Its gets a little harder to fake it when you get down here to the Fully Open aspect because you have a life book you have you have pictures of the birth mother. It becomes harder to circumvent a more honest dialogue with your child but I assure you it can be done. It can still be fully open while denying certain key aspects of the adoptees experience and feelings

So my question always wants to be, "Is your adoption really an open adoption or is it just open on paper." By really open I mean open of heart—

✱ Open of heart begins before the baby is born in the honest questions adoptive parents ask themselves

Why is it that we want to adopt ?

Do we want to cure our infertility...wrong.
Do we want to make up for the baby that we lost...wrong
Do we want to finish furnishing our perfect life...wrong
Do we want to provide a home for a child whose mother for what ever reason could not do thatfor him ?
Do we want to open ourselves to an adventure of a different kind of relationship than the one we always thought we would have ?
Do we want to nurture a child whoever he or she might turn out to be?
These are the kinds of questions that if they are answered yes lay a foundation for openness of heart.

Attitude towards the birth mother

Please like the birth mother who may be carrying, your child. It's amazing how many prospective adoptive parents who are able to accept a baby from a woman they wouldn't even want to have over for dinner.

—Questions for adoptive parents to ask themselves in the deepest part of their hearts about how they see the prospective birth mother of there child.
—Do they see this woman as someone to be respected or is she the vessel carrying the object of their desire.
—Do they think about ways that they might keep her from changing her mind about the adoption or do they really realise that this baby is hers till after the baby is born. Until after she has had the chance and the time to make a clear decision and that this decision has very little to do with them.
—Are they ready to witness close up the grief sadness and the loss. The grief that she is going to be suffering through after that baby becomes theirs or will they feel relief if she decides to fade away and not be in touch any more.

1 think this is one of the hardest ones to deal with. To keep facing it. To keep showing up for that. Especially if the birth mother does want to retreat. There is a very delicate balance for respecting her need to have time alone and not allowing a total separation to begin.

From point of view of the birth mother

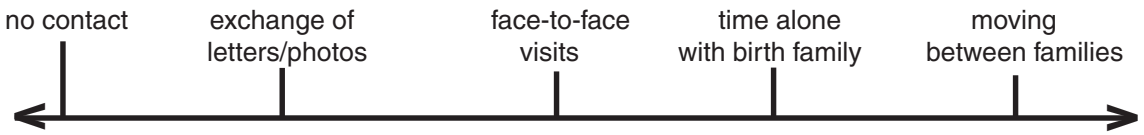
Open of heart has to do with her being able to have some contact with that child and the knowledge that whatever she can do in that regard in going to be of benefit to that child

Affirming the adopted persons reality

Now perhaps the most critical piece is affirming the adoptees reality. That is affirming. My child has another mother. The first real piece in affirming the child's reality is to really get that. My child has another mother and then all the things we talked about in the first session about adopting the child's reality.

Source Extracts from 'Varieties of open adoption' Plenary Address- Marcy Wineman-Axness *Adoption looking forward Conference* Lincoln University, Christchurch Feb14-15, 1998

OPEN ADOPTION CONTINUUM - RANGE OF OPTIONS



Megan J Fowler—

What is open adoption?

* where identifying information between adoptive and birth parents is exchanged
* where they have met at the time ofg or prior to placement
* where some form of ongoing contact with the birth parents after placement of the child is maintained

Challenges to children in open adoption

* uninvolved birth parents
* where contact is discontinued for some reason
* where there are different levels of involvement by birth parents when there is more than one child in a family
* where there are more than one child in a family
* if one sibling has a closed adoption, and one an open adoption
* when children have birth siblings living in other families
* when children have birth siblings remaining with hirthparent(s)

Possible benefits of open adoption for child

* children do not lose the connection between themselves and their birth family to gain permanent parents able to meet their needs in a consistent way

*children have access to up-to-date medical, social and historical information about their families of origin

*open adoption may contribute to adopted children's identity formation by their having access to important information. who they look like, what kinds of abilities might be genetically influenced, how birth relatives grew and developed, and help in integrating this information into their sense of self.

* children can learn about their racial or ethnic heritage from those who share it with them; they can learn about their ethnicity from within that heritage rather than apart from it.

* children may have a greater sense of control because they have access to information and therefore channel energy into other aspects of their personal development rather than their struggling for information as they grow

* children deal with reality, not fantasy, as the information they receive may be more credible because it comes directly from their birth parents

* adoptive parents may feel more secure in their parenting role and thus be better able to meet their children's emotional needs because they have had an opportunity to work through their feelings about their children's birth parents

* feelings of rejection may be decreased considerably or eliminated altogether through continuing contact and openness.

*secure adoptive relationships and an increased sense of belonging with their adoptive parents may be facilitated because the child knows that the birth parents chose them to parent him or her and that they can have both birth and adoptive parents in their lives and not have to choose between them.

Adoption of Children Act 1881

* did not impose any conditions of concealment on theparties involved
* birth certificates retained the original birth name of child and their birth parents

* adoptive and birth parents had access to each others identity

* child's birth name was retained and hyphenated to adoptive surname

Differences in adoptive parenting

* recognising the impact of the child's experience of separation from her birth parents, whether she actually knew them or not, and the permanent change in destiny, even if for the better, from the life the child would have had.,

* helping the child understand and come to terms with these issues and his feelings about them;

* learning how to deal with problematic or unhealthy manifestation of these issues;

* recognising and coming to terms with our own unresolved issues, especially those related to our childhood and fertility or infertility. and

* accepting the child's unique genetic endowment and the lack of a genetic connection to ourselves

Possible disadvantages of open adoption

* identity conflicts in the adopted child may be intensified and become unresolvable.

* contact and openness may interfere with the process of bonding between adoptive parents and child.

* birth parents may risk prolonged uncertainty and grief with open adoption

* can birth parents release and mourn a child to whom they are attached or, in other words, mourn a child that is not dead?

* can children attach themselves to psychological parents whilst they also maintain contact or links with a non-custodial birth parent or other relative?

* would the maintenance of such links confuse the child and impair his developing personal and social identity?

* can adoptive parents successfully parent a child and develop deep attachments to it without a feeling of 'entitlement' whilst there are continued visits or contacts by birth parents?

Source Megan J Fowler 'Open Adoption in New Zealand: Issues for Adoptive Parents' Thesis University of Auckland 1995.

Open adoption options

Russell– There are different definitions and agreements about how open an open adoption will actually be. Sometimes an open adoption means only that the birth parents choose the adoptive parents. Other times it means that communication will be maintained between the birth family and adoptive family over the course of the adoptee's life.

Sometimes the initial expectations of an open adoption arrangement are changed either by agreement or by default. It is a good idea to get social security numbers from the other triad members so you can always find them. In addition, a written agreement signed by the birth parents and the adoptive parents will clarify communication expectations.

Perhaps the most challenging aspect of open adoption is ongoing communication. Emotions are a very real aspect of adoption and will impact communication. The pain of adoption can be so great that a triad member may need to take a break from the relationship, with or without an explanation of his or her absence. Sometimes assumptions, fears, and sadness need to be discussed again to clarify expectations and feelings.

Perhaps the most important principle to keep in mind whether the adoption is open or closed is that adoption is for the child. The adults involved need to sometimes put their personal feelings aside to consider what is in the best interest of the adoptee.

Source Marlo Russell *Adoption Wisdom* 1996 p31-32 USA

Movement to open adoption

"As some of the negative features of closed adoption have emerged, informed opinion has swung towards opening up the adoption process. 'Open adoption' is now posited as an ideal for adoption legislation and social work practice. It is, perhaps, a slogan in search of a definition. There are significant legal and structural difficulties which impede a completely open adoption process. It has been suggested that the only way in which truly open care arrangements can be achieved is by abolishing the concept of adoption altogether. Those who advocate open adoption feel an adoption order meddles with genealogy and blood ties, and creates a series of legal fictions. Adoptive parents become fully and exclusively the child's parents, and the biological parents become, in law, strangers to the child. In these respects, adoption differs markedly from other care options such as custody, guardianship, or wardship." Trapski's Family Law Vol.5 Brooker's 1995 H3.01

Opposition to open adoption

Adoptive parents in closed adoptions may find open adoption quite threatening. The complete break ideology encouraged adoptive parents to treat the child 'as if born to them'. They were told to make a complete break with the past, cover up the origins and pretend the child was born to them. Open adoption means there can be no such pretence, the reality and truth of origins is all out in the open, there is simply no place for secrecy in open adoption, secrecy becomes irrelevant. Where adoption secrecy has been an obsessional preoccupation in social work, legal profession, statutes, Judiciary and adoptive parents for over 30 years, it becomes a major threat to be told that most secrecy is unnecessary. For persons brought up on the notion that secrecy is an essential foundation plank of adoption, to find a form of adoption where it is regarded as irrelevant is a shock, they may feel 'It just can't be *real* adoption'.

Openness v family secrets

Family therapy practice has clearly shown that family secrets have adverse effects on all family members. Communication becomes more difficult as the secret grows and becomes a conspiracy which requires increasing amounts of energy to maintain. On the other hand, ongoing open communication builds up basic trust.

Open adoption now standard practice

"Since the beginning of the 1980s, open adoption in New Zealand has become standard practice. New Zealand is the only country in the western world where adoptions of this kind occur as a matter of course through private and government agencies. However, openness in adoption at the time of placement is not yet written into the legal process in New Zealand but is instead a moral commitment that both adoptive and birth parents make at the time of the adoption. Because of this, openness and contact of any sort between birth parents, adoptee and adoptive parents after placement of the child is a matter of trust only, with the adoptive parents having the ultimate choice of whether or not contact is maintained, and the birth parents having no legal rights to contact at all." Fowler 1995 p1

Open Adoption Today- Rockel and Ryburn— Open adoption: what is it?

"Open adoptions are based on an agreement, reached at the time of a placement, that there will be some form of continuing contact between birth parents, adoptive parents and the adopted child. The nature of this contact varies. Most open adoptions begin with an initial meeting at the time of the placement. At this meeting, plans for future contact are discussed. Plans may include further meetings and the exchange of letters and photographs arranged through the agency, or direct contact between birth and adoptive parents. As in all relationships, the needs and circumstances of the people concerned in an adoption are likely to change over time. For this reason a voluntary, flexible agreement is likely to work better than a formal contract. Openness in adoption must always be the negotiated outcome of what all the parties want. This brings adoption into line with the rest of our lives where we take it for granted that things will change, and that when they do we will be able to make adjustments.

It is worth emphasising here that **there are no legal differences between open and closed adoptions.** Children who are part of an open adoption are in every legal sense the children of their adoptive parents, just as they are in a closed adoption. Open adoption is solely a voluntary agreement founded on good will between two sets of parents. Coercion has no place in it. The ultimate

goal is that the wishes of the adopted person should determine the nature of the contact between the parties. New Zealand has progressed further in accepting openness in adoption than most Western countries. Some form of continuing contact is now an accepted part of most agency adoptions and some private adoptions.

What open adoption means for birthparents

"Closed adoptions have caused more pain and difficulty for birth parents than for other members of the adoption triangle. Openness has strong advantages for them.

—*The chance to grieve.* One of the most devastating consequences of closed adoptions was the way they limited opportunities for birth parents to grieve the loss of their child. We now know a good deal about the grieving process for example, in grief associated with bereavement, final resolution comes when people are able to take into themselves an image that represents all that the dead person meant to them. Birth parents speak of the loss of a child by adoption as a 'living' death. It is a loss that can, never be resolved as a bereavement can, because the child lives on, and their memories and thoughts cannot be rounded off at some fixed point in time. In open adoption they live with the full knowledge that their baby is living, growing, changing, child, teenager, adult, a person about whom, in a closed adoption, they know nothing. Openness in adoption gives tangibility to the loss of a child in adoption, so that it can be grieved for and grief resolved.

—*Positive messages*. One of the most important tasks for adoptive parents is to give their children positive messages about their birth parents. It is also important for birth parents to feel that they will be positively portrayed to their child. Openness makes it much easier for all this to happen.

—*Having something to offer*. Openness means that birth parents can still feel they have something to offer their child. Most importantly, they can offer reassurance that adoption was not a rejection. They can help to answer their child's questions about origins.

—*The reassurance of knowing.* Birth parents who have no contact with their birth children don't forget them. Birthparents who have open contact have the reassurance of knowing what is happening.

Meaning for adoptive parents

—*Fears about open adoption.* Openness in adoption challenges traditional ideas about the need for secrecy, so it is not surprising it sometimes raises fears and anxieties—

—*What if the birth parents don't like us?* For most adoptive parents, their first direct exposure to what open adoption means is a meeting before the placement is finalised, with the birth parents of the child they hope to adopt. Such meetings can give rise to anxiety that the birth parents may not like them and decide against adoption, or wish to choose other parents. It is uncommon for birth parents to ask for a different couple after such a meeting. This is because a relationship has already begun, in a sense, before the meeting take place. Birth parents will have chosen a couple with whom, on the basis of detailed information, they believe they can identify. For this reason there is often familiarity between those involved in a meeting. Meetings before a placement are a mixture of joy and sadness, remembered by most adoptive parents as events of great importance. An important outcome of such meetings for adoptive parents is the feeling that birth parents have given them approval to become the parents of their child. Such a gain far outweighs any worry they may have had about being rejected.

—*Could we lose our child later?* Another common fear for adoptive parents is that they could 'lose' their child to his or her birth parents in later years. Sometimes parallels are drawn between open adoption and situations where parents have divorced and remarried, and children end up in a difficult 'tug of love'. These fears usually fade quickly once openness becomes a reality. There are several reasons for this.

—*The first* is that adoptive parents soon realise that no parents really 'own' their children but they do establish, through loving and nurturing, an unbreakable bond. So far as children are concerned, 'Mum and Dad' are the ones who have parented them— the ones who got them up, fed them, got them off to school, comforted them when they fell over, read them bedtime stories. This role is never diminished by contact with birth parents, who are no more likely than other friends or relatives to 'steal away' the affection of children from their parents. Love is not a limited commodity, and even if children develop a close relationship with their birth parents, this does not diminish their love for their adoptive parents.

—*Knowing birth parents as people is a second reason*, why adoptive parents lose their fear that they might seek to 'win back' their children. Learning how much the adoption decision cost in pain and suffering, and seeing how much their child's well-being matters to them, makes it clear that the birth parents would not lightly disrupt a life that is settled and secure.

—*A third reason* is that time changes relationships. As adopt-ed children grow, a distance is necessarily created between them and their birth parents. If there is open contact, a birth parent can see that he or she has ceased to be the same young child they placed for adoption, and this may make it easier to accept the reality of the situation.

—*Are children likely to run away?* Related to the fear of 'losing' children is the fear that having access to their birth parents may make children more likely to run away once they enter the storms of adolescence. The threat that adopted teenagers will run away to their 'real' parents has little cutting edge if there is open contact and everyone already knows the birth parents. Like adoptive parents, they are seen to be human, with faults as well as virtues, and as all teenagers know that adults usually join forces to 'make their lives miserable', what gain would there be in running to another set of adults?

—*Will contact be confusing for a child?* A worry for many people is that children will find it confusing to have two sets of parents in their lives. Adoptive parents we spoke to who have open adoptions did not see it as being at all likely that their children would be confused by contact with their birth parents.

Advantages for adoptive parents

Once anxieties are allayed by the experience of open adoption, adoptive parents soon become aware of the advantages for them too.

—*Answering questions* One of the most obvious advantages is that openness eases the difficulty of explaining to their children why they were adopted. As children, we expect our parents to have all the answers. This belief which tends to fade with time, creates a safe environment in which to test out relationships and explore the world. When adoptive parents are unable to satisfy their children's need to know about their history, it may threaten the trust on which child's sense of security is founded. This is not a problem where there is openness in adoption.

—*Having a yardstick*. Adoptive parents in closed adoptions are sometimes hampered in their parenting by a feeling that they are bringing up their child in limbo. Without knowledge of the birth family, they have none of the usual yardsticks for measuring progress and development, or clues to help them understand their child's personality. Where adoptive parents have contact with birth parents they're much less likely to have unrealistic expectations of their children.

—*Feeling legitimised*. Adoptive parents are often conscious that they are bringing up someone else's child. Most accept this as a fact of adoption. For some however, this can undermine their confidence as parents. Several adoptive parents in open adoptions found 'having contact some how seems to legitimise my role of being a parent'.

Coming to terms with infertility. Most couples who adopt are infertile. Closed adoptions have sometimes made it difficult for them to confront and come to terms with their infertility, because they believe they can substitute for their child's birthparents in every way. Without any real sense of the birth family, it is not always easy for adoptive parents to remember that their adopted child did not join the family by birth. Openness in adoption, on the other hand, makes it easier for adoptive parents to come to terms with the way their children joined their family.

What open adoption means for adopted persons

Our experience is that early contact between adopted children and their birth parents fosters a comfortable, easy acceptance of their relationships. Why I was adopted? can be directly answered.

—*Hearing birth parents' explanations.* For adopted children, the most burning question of all is 'Why didn't my first parents look after me themselves?' It is hard for adopted children not to view their adoption simply as a rejection which they feel they caused in some way. Closed adoptions give adopted people no chance to hear from their birth parents why they decided someone else should parent them. It is far more satisfying to be able to have this explanation direct from their birthparents than to rely on explanations from their adoptive parents, however much they love and trust them.

—*A strong sense of identity.* To develop a sense of identity, one of the things we must know and understand is our personal history and where we belong in relationship to everyone else. The practice in closed adoptions of severing all contact between children and their birth families has failed to appreciate the importance of this knowledge. Without it adopted people speak of feeling incomplete, rootless, never quite belonging. Some adopted people feel they cannot develop their full potential, because they do not know their inherited strengths and talents. In open adoptions, the origins of physical characteristics, and other special attributes and skills, are no longer a matter of conjecture or fantasy for adopted people and their parents.

Secure adoptive relationships. We have seen that young adopted adults who make contact with their birth parents can discover a new closeness in their relationships with their adoptive parents. Children growing up in open adoptions are not troubled by this feeling that their adoptive parents stand between them and their birth parents. Instead they have the security of knowing two sets of parents, both willing and able to answer their questions.

Assuming control. Many adopted people feel they are forever in a 'child' role—that adopted children are never allowed to grow up. Those of us who are not adopted expect, as we approach maturity, to be able to make our own decisions about our relationships with significant people in our lives. Adopted adults have, until recently, had no scope to renegotiate the decision to end the contact with their birth parents which was taken on their behalf, when they were children. Openness in adoption allows adopted people to make an easier transition into adulthood, since like the rest of us, they can take responsibility for managing the important relationships in their lives.

—*Celebrating milestones.* A final advantage of open adoption for adopted people is that they do not have to deal with the sadness that a closed adoption can bring at all major milestones. Where adoptions are open from the beginning adopted people can include their birthparents in the celebration of important life events.

Summing up. Openness in adoption is rapidly becoming established as the way adoption in New Zealand will develop in the future. Open adoptions serve the best interests of adopted people, birth parents and adoptive parents. They allow adopted people to understand and accept who they are and where they come from; they give birth parents a continuing place in their child's life; and they make it possible for adoptive parents, while accepting the differences between parenting by birth and parenting by adoption, to feel secure in their role as parents." Rockel and Ryburn *"Adoption Today Change and Choice in New Zealand"* 1988 extracts pp161-176

Balancing open adoption relationships

"Open adoption must exist for the benefit of the child. It's basis must lie in securing the best possible circumstances within which the child can develop as opposed to easing the anguish of the natural parent. However the best environment for the adoptive child may well be one in which the natural parent plays a part. But the degree of that parent's involvement must remain fluid, governed by the dictates of the growing psychological bond between the child and its adoptive parents. It follows that the balancing of relationships between the adoptive parents and the natu-

ral parents and the child is a delicate one. It must be based on agreement, cooperation and a mutual desire to serve the best interests of the child. Any attempt at enforcing an agreement could result in an intrusion into the child's developing psychological security...The child cannot form a primary attachment to, for example, two mothers: the primary and fundamental psychological attachment must focus on one mother and/or father figure. The intrusion of the natural mother into the adoptive child's life could provided a welcome secondary figure, but must not interfere with the primary attachment being formed and maintained." Bridge Perry & Bridge. 'Open Adoption: A multi-disciplinary view". Family Law Bulletin 1987 Vol.9 p135. Quoted with approval 1989 Heron J Wellington HC. *H v R and H* (1989) 5FRNZ 104 at 111 // *Hamlin v Rutherford.* (1989) 5NZFLR 426

CYPS open adoption

5.4 "...The first move to restrict access to the child's original birth records occurred in 1915. Subsequent moves towards closing the adoption process and sealing official records developed in the 1940s and 1950s and followed changes in social attitudes towards single parenthood and illegitimacy. Strict secrecy provisions were finally enacted in the Adoption Act 1955 and the 1959 Regulations. While it is true that the Adoption Act 1955, and the subsequent Adoption Regulations 1959, facilitate closed adoptions, there is nothing in the law that prevents birthparents and adoptive parents from agreeing to an open adoption, and having free access to information and contact. The underlying philosophy of the Adoption Act 1955 appears as being based on the assumptions that adoption should represent a complete break with the past, that birthparents could forget they had produced a child, that adoptive parents could pretend to be the biological parents of the child, and that the adopted persons need never know about their origins. The reality has proved to be quite different for many people. As some of the negative features of closed adoption gradually emerged there has been an evolutionary development towards a more open process of adoption. In recent years, there has been a trend in most western countries towards changes in legislation to allow access to records. There have also been developments in current adoption practice to encourage meetings and on-going contact between birth-parents and adoptive parents.

The concept of open adoption means different things to different people. Openness in adoption means that every one involved in the adoption process, whether adoptive or birthparents, are prepared to meet and communicate with one another, both prior and subsequent to placement. The degree of openness varies from case to case and it could range from limited written communication to frequent personal contact. Open adoptions, while considered by many, more positive for everybody than closed adoptions, do not change the fundamental fact that birthparents lose all of their legal rights to parent their children. Birthparents need to know that *open adoption is neither a joint custody nor a shared parenting agreement,* and that access cannot be enforced. Open adoption strives to voluntarily maintain family ties which have been legally severed by the Adoption Order. When counselling birthparents, social workers need to be mindful of the need to keep open adoption in perspective, in that it will still mean loss and grief for the birthparents and their families. Social workers, however, have a role, to educate adoptive parents and birthparents on the positive outcomes of openness in adoption. It has been well documented that although open adoption is not a panacea, or an option for everybody, it can reduce the worry and the hurting as well as some of the guilt and other problems associated with secrecy.

5.4.1. Legal enforcement of an open adoption agreement Adoptive and birthparents need to be aware that there is nothing in the Adoption Act 1955 dealing with this issue and therefore there is no protection in law for the enforcement of any contact previously agreed by the parties." Adoptions Local Placements Manual CYPS DSW 1995

Statute

There is at 1996 no statutory provision for "open adoption". There has never been in New Zealand adoption statutes any prohibition of open adoptions; they have always been and remain a matter of choice between the parties concerned. However, without legal provision an open adoption contract has no secure standing in law.

Legislative provision advantages

(a) Legislation would protect both sets of parents and ultimately the child, whose access to both families is thereby protected. (b) Relationships are more likely to work when the parties can feel they are regarded as equals. Lack of legislative provision puts birthparents in an unequal and powerless situation. (c) Open adoptions have become a chosen option by large numbers of people, and the law needs to address this reality.

Question of Court-imposed agreements

Some criticism has been raised at having open adoption agreements filed with the Court, with power to intervene. There are some issues where a review by a Family Court may be helpful. (a) Where the relationship between the adoptive parents and birthparents in an open adoption reaches an unresolved impasse. (b) Where the open adoption agreement is treated with contempt by either party. (d) Where birthparents' attempt to usurp or interfere with the adoptive parents primary nurturing role, at worst a takeover bid. (e) Where adoptive parents agree to open adoption, but once the birthparents sign the adoption consent renounce the agreement. Some birthparents have been duped into signing a conMsent by false promises.

1979 Review

In examining open adoption, Miss Webb concluded, "These changes seem to me very much to the good, but I do not think they call for any alterations in the legislation. It may be that in the long run radical changes in the legal framework will be needed, but meanwhile, despite the rigidity that is in some measure inseparable from the legal regulation of any institution, the new ideas can be, and are being, accommodated within that framework; and

any attempt to provide for them by statute is likely to hinder, rather than help, their satisfactory development. They should be allowed to develop naturally as far as possible." Webb 1979 p87

1987 Review

"At present, the parties to an adoption may agree that the natural parents will maintain some contact with the child. This may mean exchanging photographs, school reports or other information, or a visit by the natural parents to the home of the adoptive family. Whether this takes place is a matter of practice. There is nothing in the Act dealing with this. There is one New Zealand case in which an adoption order was made subject to access. In that case the natural father had obtained access following *habeas corpus* proceedings. When the mother and her husband subsequently adopted the children the adoption order was subject to the earlier access order. (*In re an Adoption: E v B* (1952) 47 MCD 25)." 1987 Review p39

Advantages of legislative provision

1 "It would reflect the trend towards 'open' adoptions. Moreover, if the legislation continued to be silent on this issue the position would be left unclear. Adoption practices have developed to the extent that they will not be hindered by a legislative provision. **2** It would introduce a greater degree of flexibility than is currently available. As the Victoria Committee stated: 'Planning for alternative forms of family care for a broad range of children demands flexible solutions designed to meet the needs of the particular child' (para 3.1.2.) Increasing the options may allow some children to be adopted who would not otherwise be placed. A natural parent who is unable to fulfil his or her parental tasks may consent to an adoption only if this will not end all links with the child. This is particularly relevant in view of the increasing numbers of older children being placed for adoption.. **3** Other jurisdictions make legislative provision for future contact. For example, section 12(6) of the Adoption Act 1976 (UK) provides that 'An adoption order may contain such terms and conditions as the court thinks fit.' The United States Model State Adoption Act contains a provision which allows the natural parents, adoptive parents and the child (if old enough)... 'to enter into a written agreement providing for the child's continuing contact with the birth parents.'" 1987 Review p39

Disadvantages

"Agreements would be every difficult to enforce. Further, attempts to enforce an agreement may create anxieties and bitterness which would be detrimental to the child and all others concerned. Legislation on this matter would represent an attempt to reflect good adoption practice. It may be questioned whether this is either feasible or desirable." 1987 Review p39

1987 Review draft law provision —

(1) "Subject to the provisions of this Act, an adoption order may make provision for contact between the child and one or more of the child's natural parents or other natural relatives following the making of the adoption order. Such contact may include, but is not limited to, the exchange of information between the child and the child's natural parents or natural relatives, and visits by the natural or other relatives to the home of the adoptive parents.

(2) Provision for contact in accordance with subsection (1) is to based on a written agreement signed by the prospective adoptive parents and the natural parents or natural relatives: Provided that the court shall not make an adoption order with provision for contact without considering a report from a social worker on the contents of the agreement.

(3) Any agreement for future contact shall include the parties' names and addresses and their relationship to the child, the form the contact is to take, and a provision to the effect that the enforcement of the agreement does not effect the validity of the adoption order. **(4)** If there is any dispute or any matter relating to an agreement for future contact, any of the parties to the agreement may apply to the court for directions. On such an application the court shall be empowered to issue directions as to the obligations of any one or more of the parties to the agreement or to vary any or all of the provisions of the agreement." 1987 Review pp39-40

New Zealand open adoption research

Limitation of USA research A major problem with USA based research is the lack of consistency in its definition of open adoption and the criteria used in each study of the levels of openness and contact. There are also major differences in adoption statutes between the two countries. In New Zealand since 1985 open adoption has become the normal practice, whereas in USA a battle still rages. The Adult Adoption Information Act 1985 had a major impact on the opening up adoption. By 1995 over half the adult adoptee population in New Zealand had applied for and received their original birth certificate. Openness in adoption has become the accepted norm of adoption practice, and widely accepted in the community. The three major New Zealand research studies on open adoption are Iwanek 1987, Dominick 1988 and Fowler 1995.

1987 Iwanek research open adoption

An in-depth study of 17 adoptive families and 14 birth parents in open adoptions. "Adoption in Western society over the last 50 years or so has been viewed by society, and by the social work and legal professions, as a closed, secretive process with the social worker in the role of intermediary, and protector of secrets, between the birthparents, adoptive parents and the adoptee." The study addressed two main issues. (1) Whether open adoption interfered with or enhanced adoptive parents' sense of entitlement to parent the child. (2) Did open adoption help or hinder birthparents grief and adjustment. The research substantiated that both entitlement and birthparent grief and adjustment were facilitated by open adoption. Iwanek 1987

Comments by adoptive parents—

—They appreciated knowing the birthfamily and having up to date information. It enabled them to answer ques-

tions immediately and honestly as they came up. This was particularly so where there was a closed and an open adoption in a family. With closed adoptions they felt parti-cularly frustrated with simple questions, 'Do you know where my birthmother is now?' or 'Do I have brothers or sisters?' They found it difficult to say we don't know.

— It was important to have ready access to health information for the doctor. Birth grandparents were a very good source of information and advice. When questions came up the child was encouraged to ask the birthmother next time she visited or they wrote. This naturally involved the birthfamily in a positive way, as the child became older.

— Adoptive parents encouraged the child to make contact as they got older. Some children were enthusiastic others intermittent. When the child asked questions and wanted to see their birthmother or grandparents, arrangements about contact became more flexible. Children enjoyed meeting and playing with their siblings.

— All agreed, all parties who have contact needed to be very clear about their roles so that children were not confused. There had to be clear understanding and agreement about what the children are to be told, at what stage and by whom, there must be no secrets. If the adults were clear in their thinking, children had few problems. Iwanek

Essential components for open adoption

Adoptive parents and birthparents agreed on essential components for a successful open adoption.

— Acceptance of the child's needs and right of access to both families are paramount.
— Basic trust in each other and belief that most differences can be worked out with patience and tolerance.
— Arrangements must be flexible and open to negotia tion, the child's needs, are the main reason for contact.
— Must be a clear understanding about each other's role.
— Compromises are necessary. A willingness to try things differently and see how they work.
— Sharing feelings can avoid misunderstandings and add positive qualities to the relationship.
— Use an independent or neutral person if stuck.
— Written contracts are helpful, especially at the start when most feel insecure and anxious.
— Each need their own support system as they experience deep emotions at opposite ends of the continuum. Adoptive parents experience a joy of bonding and entitlement, while the birthparents grieve for the child and perhaps the ending of a birthfather relationship. Iwanek

Adoptive parents believed

It is essential to come to terms with infertility. Adoption is a lifelong process. Adoption is a unique way of parenting and not "as if born to you". Adoptions should be open to a degree comfortable to all parties. Given right information and support most people can cope with open adoption. Contact and information are needed for positive self-image and identity. Iwanek

Birthparents believed

It is essential to be aware and accept that *open adoption is not co-parenting or shared decision making about the child's upbringing.* It needs acceptance that the adoptive parents will become the psychological and nurturing parents. The roles of the birth-family are complementary to this. Iwanek 1987 pp36-38.

Some findings of Iwanek—

— Both sets of parents experienced pressures from fr1iends and relations against open adoption.
— Adoptive parents were more able to acknowledge the differences between adoptive and birth parenting.
— Adoptive parents are capable of determining their own limits and decisions, given information and support.
— Open adoption is an ongoing process.
— Conflicts arise as in any relationship.
— Birth fathers have less contact but do have an important role if encouraged, are now becoming more active.
— Back-off. Just when adoptive parents are feeling quite at ease and want more contact, a birth parent may want to back off a bit to strengthen other relationships. This needs to be recognised. Iwanek 1987

Opposition to open adoption

This comes mainly from advocates of closed adoption. Refer to Kraft et al in Child and Adolescent Social Work USA, 1985 Vol.2 No3-4. Criticisms of open adoption, followed by New Zealand experience in small type:-

— Birth mothers want secrecy. Over 90% of birthmothers request to meet the adoptive parents before consent.
— Hinders formation of entitlement by adoptive parents.
— Open relationship aid the process of entitlement.
— Continued contact inhibits mourning. Contact of all parties assisted the grieving process.
— Birth mothers under 20 are too immature to make an open adoption decision. Adoption is bigger decision. Open adoption with teenage mothers is just as successful as with older birth mothers.
— Birth mothers need to be protected against intrusion of the child into their life. Over 80% of birthmothers choose non-strangers adoption they want openness not estrangement.

"Those who oppose open adoption suggest that the research is biased because samples are not randomly selected. Their stance against open adoptions appears to be based on theoretical considerations rather than practical experience with open adoptions...Open adoption is a subject which reveals deeply held but rarely expressed beliefs about the nature of parenthood, parental rights, ownership of children and sexual morality... Iwanek 1987

Effect on adoption numbers

23% of birthmothers in the study said they would have refused adoption unless it was open. 41% said they would have been uncertain.

Birthmothers experience pressures

-when discussing the possibility of open adoption with family and friends. "If you don't want the child yourself, why should you want to know where the child is?' 'Mothers who give up their babies don't deserve any contact.' 'Girls who get pregnant can't expect any rights.' 'It is not fair to adoptive parents, who want to have a baby of their own.' 'You're selfish, you should be grateful that someone else wants the child.' 'Why should they (the adoptive parents) have to put up with you?' 'The parents won't feel

the child belongs to them if you come to visit and therefore will not love it as much.' 'If you really loved the child, you should give it up completely.' 'If you keep in touch you will never get over it.' 'Give up the child and start a new life.' 'If you see the baby again you might want it back and then it will be too late. Better that you don't know, so even if you wanted it back, you could not do anything about it.' All found this hard to cope with and experienced feelings of anger, hurt, guilt and shame at different times. Many experienced feelings of being torn apart and being powerless to do much to resolve it. A number of birthmothers felt so upset about some of the comments that they thought it would perhaps be better to have a closed adoption, even though that was not what they personally wanted." Iwanek 1987 pp19-20

Adoptive parents pressured

"Many parents experienced similar pressures to birthparents from family and friends. 'Why give photos, she does not want the child?' 'If she sees the child she may want it back' 'She might 'snatch' the baby back if she knows where it is.' 'She won't get over it if she is being reminded all the time.' 'The child is yours. Why should you share it." Iwanek 1987 p29

Implications for theory and future research

In the past, research focused largely on analysing the birthmother's motive for relinquishment; that is, adoption was seen as acceptable practice with the 'Complete Break' as the theoretical base. This study shows that closed adoption is not in the long term interest of birth-mothers...Other studies have also shown that the 'Complete Break Theory' has adverse effects on adult adoptees and on the relationships between adopted children and adoptive parents...Open adoption is neither easy nor problem free. There is no way people can be guaranteed total protection in their lives as all living involves risk taking. It seems from the research that there is less risk of 'losing' the child in an open adoption based on honesty, than there is in the traditional secret adoption."
Iwanek 1987 pp40-1.

Recommendations

1 That the practice of secret adoption cease and be replaced by adoption that emphasises openness and honesty permitting healthier and psychologically sounder relationships. **2** That social workers dealing with adoption change their practice and do not provide a ready-made solution as is presently the case, but rather help people find the best solutions for themselves and actively support them in their decision. **3** That support be made available at different stages when required by either party. **4** That further research be carried out on the effects of open adoption. Extracts from M Iwanek 'A Study of Open Adoption Placements' 1987 p41

Dominick research 1988

A study of 78 couples who had adopted children, and 65 birth mothers who had given their children for adoption during the period 1980-1983. Subjects were a *random selection* from Social Welfare Files.

Results "Nearly all the birth mothers who met the adoptive parents of their child felt that this contact had helped them with their feelings of having the baby adopted and to their adjustment to the adoption. Contact with the adoptive families did not prevent the birth mothers from grieving their loss of their child and did no cause them more pain over time. In fact, the results indicated that contact facilitated this process, especially for those who were unsure about their decision prior to the adoption.
Nearly all adoptive parents (approximately 90%) who met the birth mother of their child were glad that they had done so and found the meeting a satisfying and positive experience. Nearly half of the adoptive parents who had met the birth parents felt that the meeting had helped them in the development of their relationship with the child. Not only this, but nearly two-thirds of the adoptive parents who had met the birth parents felt that meeting them had made them feel more sure of themselves as parents. Contact did not appear to 'delay or interfere with' the adoptive parents bonding with their child. Most adoptive parents had kept all the information and items that they had received from the birth parents so they could pass them on to the child if he or she asked for them. Those parents whose children had an open adoption found it easier to discuss the birth parent with their child, as in many instances these were people who were known to the adoptee..." above summary by Fowler 1995 p27
Clare Dominick 'Early Contact in Adoption: Contact between birth mothers and adoptive parents at the time of and after adoption.' Research Paper DSW Wellington 1988.

1990 Report
Open adoption- best interest of the child

"In our opinion, open adoption should be recognised in any future formulation of adoption law and practice. Open adoption appears to be in the best interests of the child for several reasons: (i) To develop socially, emotionally, physically and intellectually, the child should have a sense of personal identity. Knowledge of genetic inheritance, whakapapa and roots is a component of identity formation. Open adoption is one of several ways of preserving to varying degrees the child's cultural background. (ii) For a child to be accepted fully in the adoptive family, there is a need for the child's origins to be known and accepted by the whole family. (iii) There is research and inherited wisdom that children can maintain more than one relationship simultaneously and indeed may benefit from so doing, provided that there is no threat to the permanency of placement with the principal family." 1990 Report pp39-40

Law reform

"A recurrent concern is that there is no legal provision for open adoption. Open adoption has developed under a law which was drafted with closed adoption in mind, and though there is nothing in the law to prevent open adoption, there is ultimately no legal sanction for it either. We have received evidence from birth parents that adoptive parents have not kept to an arrangement about open adoption, and by the same token, we have heard evidence from adoptive parents who have been frustrated in their at-

tempts to get the birth mother to co-operate. Further, 'open adoption' reliant purely on goodwill could in essence be inflexible and virtually closed. We believe that some legislative reform in this area is urgent and should be given priority..." 1990 Report p41

Court registered open adoption plan

The 1990 Report, after wide consultation proposed as part of the adoption process a "negotiated adoption agreement", signed and witnessed, registered in Court, but not forming part of the adoption order. They suggested

(i) Before a final order is granted, an agreement between the birth mother (and in appropriate cases the birth father), or the whanau or other culturally recognised family group) and the adopting parents be submitted to the Family Court. The agreement would be known as a 'plan', similar to the plans developed by the Children, Young Persons, and Their Families Act 1989. If desired by the birth mother, a family meeting could be called to assist in preparing the plan.

(ii) The Court would have power to dispense with the requirement for a plan in exceptional cases. Examples would be where the birth parent(s) have died, have disappeared, are such that contact would place the child at risk or where there is a total unwillingness by the birth mother to enter into discussions about a plan.

(iii) A plan would be required in stepparent and relative/whanau adoptions, but its expected there may be more instances where the power to dispense would be used.

(iv) Where on granting an interim order the Court is not satisfied that the parties have been preparing a plan and receiving any assistance and counselling to do so, the Court should refer the parties to counselling. This would be organised through the Family Court Counselling Coordinator. The counselling referral need not be to DSW but could be to others in the community with the necessary skills and who are approved by the Court in a similar way to the approval of counsellors for matrimonial and domestic counselling. Where the child is a Maori, this should be an important factor in determining what counselling is appropriate. It is envisaged that the Court would routinely refer cases to counselling where the adoption has been privately arranged.

(v) The purposes of counselling are to ensure that the best interests of the child are considered, that access is flexible and able to be changed when necessary, that possible conflicts of interest and anxieties are addressed, and that all those who should be part of the preparation of the plan have had an opportunity to contribute.

(vi) The contents of the plan should be entirely flexible. In some instances a form of family group conference or whanau meeting could be the vehicle for reaching a satisfactory plan, but need not be so.

(vii) The Court should accept the plan, even if the parties have decided on no or minimal contact. The main role of the Court is to ensure that the parties have given some attention to the issue, but the Court should have a residual role to ensure that the best interests of the child are in no way jeopardised by terms in the plan.

(viii) The plan would be lodged with the Court, but would not formally be part of the order.

(ix) The plan would form the basis for the parties to return to the Court at some future date, eg when a party considers that the plan has not been actioned or when they desire to amend the plan. As under the Family Proceedings Act, there would be an immediate reference to counselling, where in most instances it is hoped that the matter can be sorted out. A simple procedure similar to section 9 of the Family Proceedings Act could be enough to allow for a referral by the Court. In other cases where counselling did not sort the matter out, a party should have the right to apply to the Court for directions, as suggested in the 1987 Report. A judge should give directions only after a mediation conference has first attempted to reach agreement.

(x) Recourse to Court counselling should not be limited merely to birth and adoptive parents. Other family or whanau members may be concerned about contact - eg grandparents, siblings." 1990 Report pp42-43

Ongoing support

"While the endorsement of open adoption is overwhelming, there are points of concern. Open adoption is sometimes presented as if it were the ideal answer and simple to carry through. The reality is that, even in the best of open adoption arrangements, there can be problems, unforeseen issues, tensions, changes of circumstances and changes of heart. These are perfectly natural, given that we are dealing with human beings. Sometimes they may stem from the different socio-economic backgrounds of the birth and adoptive parents. It must be recognised that open adoption needs working at, that the parties sometimes need assistance to make it work, and that each relationship is different. Under 'the new adoption', adoption is a process and not an event." 1990 Report p40

Birth certificates

"The process of open adoption draws attention to the need to revise the system of recording birth certificates. We suggest the issuing of only one birth certificate recording date of birth, date of adoption, names of both birth and adoptive parents and the child's name." p43. Recommendation 7. "In the context of open adoption. We suggest that birth certificates should disclose the fact of adoption, the names of both the birth parents and the adoptive parents. We believe that this proposal has merit in its own right and is not dependent upon the recommendation for an open adoption plan being included in amended legislation." 1990 Report p76

1995 Research by Megan J Fowler

Abstract

for above research "Open adoption is standard practice in New Zealand and adoptions of this kind occur as a matter of course through both private and government agencies. The main objective of the study was to explore the perceptions and beliefs of adoptive parents towards open adoption and provide a qualitative description of their experiences. Thirty-nine adoptive parents whose

children have experienced fully disclosed adoptions since placement were interviewed with a structured questionnaire. It was found that this group of adoptive parents were generally satisfied with the contact they experienced with their children's birth parents, particularly those who had the most contact. Contact between birth parents and adoptive family has changed since placement, with less direct declining contact occurring for those who initially began with little contact, and generally increasing contact, expanding to wider birth family members, for those who initially began with more contact. However, those adoptive parents who had a great deal of contact in the early period of the adoption found this initial contact very stressful. The perception of the adoptive parents of the advantages and disadvantages of open adoption corroborates, in general, that of previous research, but also identifies some that have not been mentioned in any depth in past research." Thesis 1995

"Open adoption and ultimately a newly drafted statute may in time overcome the perceived drawbacks of both guardianship and old style adoption." 1990 Report p61

Open Adoption Research
Megan J Fowler 1995

A study of 48 adopted children, divided into four subgroups

Contact Groups	%	Num=48
Group 1 limited contact	20.8%	10
Group 2 moderate contact	12.5%	6
Group 3 full contact	41.7%	20
Group 4 extended contact	25.0%	12

Adoptive parents initial contact with birthparents

Contact	Group 1 limited n=10	Group 2 mod n=6	Group 3 full n=20	Group 4 extended n=12
Letters/photos	2	1	5	2
Phone and/or letter	-	4	4	-
Face to face contact	3	-	10	5
Extended contact	-	-	1	4
No contact	5	1	-	1

Initial contact with birth parents

Letters / photo only	2	1	5	2
Phone and/or letter	-	4	4	-
Face to face contact	3	-	10	5
Extended contact	5	1	-	1
No contact	5	1	-	1

Current contact with birth parents

Letters/photo only	6	4	-	-
Phone and/or letter	-	2	1	-
Face to face contact	-	-	17	2
Extended contact	-	-	2	10
No contact	4	-	-	-

Who is involved in contact with adoptive family

Birth mother	1	2	5	-
BM and BF	2	-	-	-
Birth grandparents	1	1	-	-
BP + B grandparents	2	3	14	3
BP + extended family	-	-	1	9
No one	4	-	-	-

Frequency of contact with birth parents

Weekly	-	-	1	3
Monthly	-	-	8	4
3 monthly	1	3	5	5
6 monthly	3	2	6	-
Annually	2	1	-	-
No contact	4	-	-	-

Who is involved in contact with adoptive family

Birth mother	1	2	5	-
Birth mother + father	2	-	-	-
Birth grandparents	1	1	-	-
BPs and B Grandps	2	3	14	3
BPs and extended fam-		-	1	9
No-one	4	-	-	-

Satisfaction levels with contact by group

Very satisfied	10%	-	55%	75%
Mod satisfied	10%	50%	10%	-
Neither sat or dissat	10%	16.7%	-	16.7%
Mod dissatisfied	50%	33.3%	25%	8.3%
Very dissatisfied	20%	-	10%	-

Satisfaction levels with contact by type of adoption

	DSW n=33	Private n=15
Very satisfied	45.5%	46.7%
Mod satisfied	6.1%	26.7%
Neither sat or dissat	21.1%	13.3%
Mod dissatisfied	24.2%	13.3%
Very dissatisfied	12.1%	-

Desired changes to present contact

No changes	30.8%	12
Meet BF and extended family	20.5%	8
Some new contact were currently none	12.8%	5
More predictable and consistent contact	5.1%	2
Similar contact were more 1 child in AF	5.1	2

Expectation for future contact

Remain the same	51.3%	20
Hopefully increase and become closer	17.9%	10
Contact diminish to nothing	17.9%	10
Up to child to decide	10.2%	4
Some new contacts established	7.7%	3
Contact extended to wider family memb	7.7.%	3

Satisfaction with preparation for open adoption

	Group 1 limited n=10	Group 2 mod n=6	Group 3 full n=20	Group 4 extended n=12
Very satisfied	2	1	10	3
Mod satisfied	4	3	2	2
Neither sat or dissat	-	-	3	4
Mod dissatisfied	4	-	3	2
Very dissatisfied	-	2	2	1

Satisfaction preparation for open adoption by type

	DSW n=33	Private n=15
Very satisfied	36.3%	53.3%
Moderately satisfied	18.2%	20.0%
Neither satisfied or dissatisfied	15.2%	6.7%
Moderately dissatisfied	18.2%	20.0%
Very dissatisfied	12.1%	-

AP perception of role of birth parents

Special friend, godparent	43.6%	17
Extended family	41.0%	16
Available for information	28.2%	11
Provide emotional support	10.3%	4
Provide genetic link	7.7%	3

Effect of contact on parenting

Initial newborn period very stressful	38.5%	15
Extra responsibility in parenting	25.6%	10
Parenting easier with genetic knowledge	23.1%	9
No effect at all	15.4%	6

Advantages of open adoption

Knowledge of social information	51.3%	20
Knowledge of genetic information	15.4%	6

BPs able to answer child's questions	15.4%	6
Develop relationship with BPs	12.8%	5
Broader life experience	7.7%	3
Disadvantages of open adoption for children		
None	33.3%	13
Not in their situation	25.6%	10
Possibly in later life	12.8%	5
If BP don's want or discontinue contact	15.4%	6
Differing contact- more than 1 AP child	7.7%	3
Advantages open adoption for adoptive parents		
Knowing child's background information	69.2%	27
Able to answer child's questions	20.5%	8
Disadvantages of open adoption for adoptive parents		
None	53.8%	21
Possible interference	15.4%	6
Having to accom extra people in lives	10.2%	4
Threatens feeling of entitlement	5.1%	2
Stressful early period when child a baby	5.1%	2
Advantages of open adoption for birth parents		
Peace of mind	89.7%	35
Facilitates grief process	23.1%	9
Develop special relationship with child	5.1%	2
Disadvantages of open adoption for birth parents		
None	25.6%	10
Painful reminder of relinquishing child	25.6%	10
Possibility of seeing adoption go wrong	23.1%	9
When contact needs differ	10.2%	4
If new partners resist contact	10.2%	4
When adoptive and BPs do not get along	7.7%	3
Support of open adoption by family and friends		
Need to educate family & friends re OA	38.5%	15
Anti-adoption view by society	20.5%	8
Feeling grandparent status threatened	7.9%	7

Response of family to contact with birth parents

	Group 1 limited n=10	Group 2 mod n=6	Group 3 full n=20	Group 4 extended n=12
Very supportive	2	3	11	5
Moderate supportive	4	2	2	5
Neither sup or unsup	1	1	7	2
Moderate unsupport	-	-	-	-
Very unsupportive	3	-	-	-

Response of friends to contact with birth parents

Very supportive	3	4	11	5
Moderate supportive	3	2	3	5
Neither sup or unsup	3	-	6	2
Moderate unsupport	1	-	-	-
Very unsupportive	-	-	-	-

Note Percentages in table do not sum up to 100 as more than one category of response could be recorded.
Source 'Open Adoption in New Zealand: Issues for Adoptive Parents' Megan J Fowler. Thesis re Master of Arts in Psychology, University of Auckland 1995. 115 pages. Refer to Thesis for full details, limitations, discussion, comments and conclusions re above data.

1994 Iwanek—
Open adoption an evolving practice

"The focus of any *open adoption* is to ensure that a child has continual access to all of his or her family members. As the child grows older, he of she usually participates in making decisions about the type and the frequency of contact. It is generally accepted that both sets of parents benefit from the ongoing contact; birthparents know how the child is progressing, and adoptive parents are better able to parent the child because they have already access to genetic and biological information, as do they also have support when the need the arises.

There is as much variety in these open adoption agreements, as can be found in all other forms of relationships-each one is unique, with the amount and type of contact varying from correspondence and telephone calls, to person to person contact and other family members being involved. It appears that most adoption practices have developed an increased degree of contact as time has gone by. Iwanek 1994

What makes open adoption work?

All relationships are dynamic and will not remain static, as all relationships are prone to change over time. We may find that in some relationships things may not work so well, and that a lot of effort needs to be made to make it work. For open adoption to work, there have to be some fundamental beliefs about the concept:

— There has to be a belief that children have a right to knowledge of, and access to, all their family members including birth and adoptive families.

— There needs to be recognition of the fact that **adoption is a life-long process**, and not a one-off event that finishes once the legal process is completed; and

— There has to be a belief that children need information to feel whole and to help them form their personal identity. Iwanek 1994

Some considerations for social work practice

It is often suggested that open adoption has no advantages for adoptive parents or children, and that it can be harmful to birthparents as it hinders their ability to cope with the loss and mourning of their child. Practice over the years has suggested that adoptive parents benefit greatly in open adoption practice, as do birthparents and the child. It is generally considered that contact with birthparents has not hindered the grieving process; rather, it has been of considerable help as it has required birthparents to confront their grief head-on...Good social work practice should, and does, encourage self-determination. The role of the Social Worker in open adoption is, therefore, one of educating, supporting, facilitating, enabling and empowering people to make decisions for themselves, confident of the fact that people know what is best for them in most situations.

Has open adoption a future?

For open adoption to remain a viable option we must be careful not to romanticise it and create another myth such as: 'in open adoption everyone lives happily ever-after'. We have to ensure that open adoption is still an emergency measure for a crisis situation, that must promote the well being of all parties involved. Open adoption must not stop us from looking towards keeping families together whenever this is possible. Using open adoption as an enticement for women to give up their children, by suggesting that everyone wins and that there is no pain, is giving the wrong idea about adoption and will result in open adoption breaking down after placement because it did not

achieve the expectations that were promoted, particularly for birth parents. Iwanek 1994

Quotation

'Open adoption is more a relationship than an institution or a process. When open adoptions are successful it is not because the institution is well designed but because the people involved have worked hard at the relationship. It is the relationship that is all important for a positive outcome for all concerned.'" Lois R Melina 1993.

Above extracts from 'Open adoption an Evolving Practice' by Mary Iwanek, Senior Adoption Officer DSW August 1994.

Adoptive parents power to override agreements

"Adoption rests all the legal powers in respect of the child in the adoptive parents. The adoptive parents can open the door to the birth family if they choose. Once the adoption order is made they can slam the door shut. The power to facilitate or deny open adoption remains with the adoptive parents. This could not be altered without fundamental changes to adoption as know it. Arguably, the real question is not 'whether we should have open adoption' but 'whether we should replace adoption with some other legal care status such as enhanced guardianship, custodianship, or parental rights orders." Trapski's Family Law Vol.5 Brooker's 1995 H3.02

Power swing from birth to adoptive parents

"The change in power balance between birth parents and prospective adoptive parents as the adoption proceeds has not been fully thought through. With the demand for children greatly outstripping supply, an applicant for adoption who demonstrates an enthusiasm for, or at least acceptance of, open adoption is likely to be viewed with greater favour. At this stage the power balance is in the birth mother's favour. But once the final adoption order is made, the birth mother is reduced to a state of legal impotence, and any assurances or agreement as to future access or communication are unenforceable. Virtually absolute power passes to the adoptive parents." Trapski's Family Law Vol.5 Brooker's 1995 H5.02.

United Nations convention on rights of the child

"Several articles of the United Nations Convention on the Rights of the Child, ratified by the New Zealand Government in March 1993, bear on the question of separation of the child from birth parents. Under—

Article 8, State Governments which are parties to the convention: 'Undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.'

Article 9.1 requires parties to the convention to: 'ensure that a child not be separated from his or her parents against their will, except where competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interest of the child.'

Article 9.3 Parties to the Convention shall: "respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's interests." These articles make a strong statement in favour of open adoption with the option of an ongoing relationship between the child and birth parents. It may be argued that a closed adoption system infringes a child's right to freedom of association which is assured by s17 New Zealand Bill of Rights Act 1990." Trapski's Family Law Vol.5 Brooker's 1995 H8

Ultimate proof

of whether or not open adoption is a successful adoption practice will be seen in the outcome of those children experiencing open adoption throughout their lifetime.

Open adoption —— Law Commision Report 2000 Report No.65

28 Over the last 20 years, social workers have initiated a dramatic change in adoption practices. Since the early 1980s, research has been conducted in relation to the benefits of open adoption [62] and the practice has grown substantially. There has been a marked increase in the number of adoptions providing for some form of continuing contact between the child and the birth parents; most adoptions now involve some degree of contact from the beginning of the adoption arrangement.

29 New Zealand has been described as "leading Western adoption practice with respect to openness". [63] Although open adoption is being widely practised, it is not recognised in law and Family Court judges struggle to reconcile open adoption with the Adoption Act, which acts as a statutory guillotine, effecting the complete severance of ties between birth parents and children and suppressing the fact of their relationship. [64] The Adult Adoption Information Act went some way towards resolving some of these issues and allows most birth parents and adult adoptees to access identifying informations

Open adoption

78 In the late 1970s and early 1980s people began to question the need for secrecy. Bethany [179] was instrumental in initiating the practice of "open adoption". Open adoption involves varying degrees of contact between the child, members of the child's adoptive family, and members of the child's birth family. Contact may range from the birth parents and adoptive family meeting prior to the adoption, to regular meetings between the birth parents and adoptive family, to intermittent ongoing contact. The degree and regularity of contact is decided by the parties involved. As initial reports indicated that this practice had real benefits for all parties involved, social workers also began to promote the practice of open adoption and have facilitated its growth over the last 20 years- to the extent that New Zealand has been described as "leading Western adoption practice with respect to openness". [180]

79 Today the AISU arranges for the birth parents themselves to select the adoptive parents from a selection of profiles of couples waiting in the approved pool of prospective parents. Birth parents are encouraged to meet the adoptive parents, and many make independent arrangements for continuing contact (letters, etc) or access

(meetings) with the child. A number of community support groups have formed to assist families to maintain open adoption arrangements.

80 At the centre of open adoption is the best interests of the child. Empirical studies carried out in the United States support the belief that open adoption is in the adopted child's best interests. [181] While an open adoptive arrangement may also assist the birth mother in coming to terms with her loss, [182] and help the adoptive parents [183] to understand their child, open adoption ultimately benefits the child and helps alleviate the disadvantages associated with closed stranger adoption. Barnardos commented in its submission that:

> An "open" adoption relationship is where the child maintains ongoing contact with his/her birth parent. The goal of an open adoption process is to ensure that the child feels as psychologically secure as possible. There is no secrecy about where the child comes from or who their birth family is. Open adoptions are not shared parenting arrangements as both the birth and adoptive parent/s have their own separate and distinctive roles.

Mary Iwanek, National Manager of AISU, has written of the benefits conferred by open adoptions. [184]

> For children, open adoption enables them to stay in touch with important birth family members in their lives, not having to lose out on knowledge about their original (birth) families. The general feeling of birth families has been that current knowledge about the well being of their biological child has helped them cope with their grief. They feel that by being able to grieve, things become easier over time. Adoptive parents have reported that they [are] secure in their role as a parent, and they feel that having been chosen by the birthparents to raise the child, they feel more secure in that role. Contact with birth families has given adoptive parents the opportunity to secure access to health and behavioural information at times when it has been needed. Both adoptive parent and birth families believe that they have benefited from open adoptions - particularly those who previously had closed adoptions. They feel more secure and less fearful of the birthmother turning up on their doorstep unexpectedly wanting to claim back the child, or fantasies of guilt and shame on behalf of birthparents who wonder if their child will ever think about them, or feel bad towards them for having been adopted.

81 *Secrecy in adoption is now the exception, rather than the rule.* Many families involved in the adoption process see the deeming provision [185] in the Adoption Act and the re-registration of birth as unjustifiable legal fictions, and consider that pretending the adoptive parents were responsible for the child's birth is ludicrous.

Types of adoption.

82 In the 1955, 67.6 per cent of adoptions were by strangers and 32.4 per cent were by non-strangers. Of the non stranger adoptions, the majority were adoptions by birth parents and step-parents, and the rest were by other relatives or other non-strangers. In 1996, only 21.1 per cent of adoptions were to strangers whilst 78.9 per cent were to non-strangers. Today, most adoption orders are made within a family or step-family. The deeming provisions of the adoption legislation create genealogical distortion and more often than not the legal emphasis upon secrecy is unrealistic.

Submissions

83 The discussion paper asked whether adoption as an institution should be retained, whether a new system could be adopted, and whether a flexible "care of children" system that encompasses options from temporary guardianship to permanent legal care of children could be adopted.

84 Thirty-eight of eighty submitters stated that adoption as an institution should he abolished. Of the forty two who supported retaining adoption as an option, the majority were concerned that a substitute for adoption would not provide sufficient permanency of status for the child.

85 Sixty three submitters agreed and one disagreed with the proposal that the needs of contemporary society require amendment of the law. Of the submitters who described their ideal system, sixteen suggested that a system of open adoption should be adopted, seventeen supported the use of guardianship in a modified form, [186] and nine supported the concept of legal parenthood proposed in the discussion paper. [187]

NOTES

[62] Studies indicate that open adoption can be a positive experience for both birth parents and adoptive parents - *see* M Iwanek "A Study of Open Adoption Placements" (1987). Mary Iwanek is now the National Manager of the AISU. See also M Ryburn Open Adoption (Avebury, Sydney, 1994) [*Open Adoption*].

[63] Open Adoption, above n 62, 16.

[64] See for example In the *Guardianship of J* (1983) 2 NZFLR 314 (CA); *Adoption of PAT* above n 57; *In the Guardianship of P* (1983) 2 NZFLR 289 (HC); *Hamlin v Rutherford* (1989) 5 NZFLR 426 (HC). See also the United Kingdom case *Re 0 (a minor) (wardship: adopted child)* [1978] Fam 196 (CA).

[65]See chapter 16 of this report.

[179] Salvation Army home for unmarried mothers. Open Adoption, above n 62, 16.

[180] HD Grotevant and RG McRoy *Openness in Adoption: Exploring Family Connections* (Sage Publications, California, 1998) [*Openness in Adoption*].

[182] United States studies indicate that birth mothers in closed adoptions experience significantly worse grief resolution and have poorer role adjustment than birth mothers who place a child in open adoption arrangements (*Openness in Adoption* above n 181, 169).

[183] Furthermore, the research referred to by Grotevant and McRoy indicates that adoptive parents in open adoptions feel more secure in their roles as parents, are not overtly fearful that the mother will try to reclaim the child and are not worried about the permanence of the relationship with their child (*Openness in Adoption*, above n 181, 129).

[184] M Iwanek "Open adoption: an evolving practice" in Has Adoption A Future: Proceedings of the Fifth Australian Adoption Conference (1994) 284.

[185] Section 16 Adoption Act.

[186] Modified to enable permanent legal status to be given to relationships.

[187] See below paragraph 96 for an explanation of the proposal. [96 We considered renaming adoption "legal parenthood" to give our proposals the opportunity of starting with a clean slate. We were concerned that because the current formu-

lation of adoption is so well understood, a reformulation would encounter resistance and be seen as something "less" than adoption. Emphasising the legal nature of the new relationship might address these concerns and avoid the negative connotations that the word adoption has for many people.]

Source Law Commission Report No 65 'Adoption and Its Alternatives' A Different Approach and a New Framework.' September 2000. Clauses 28-29, 78-85 pp 19, 39-41.

Open Adoption Practice

Meaning of open adoption

Trapski—H.3. Anne Else described closed stranger adoption as "a social experiment with unknown and uninvestigated outcomes, conducted on a massive scale": *A Question of Adoption* p 197.

Movement towards open adoption

H.3.01. As some of the negative features of closed adoption have emerged, informed opinion has swung towards opening up the adoption process. "Open adoption" is now posited as an ideal for adoption legislation and social work practice. It is, perhaps, a slogan in search of a definition. There are significant legal and structural difficulties which impede a completely open adoption process. It has been suggested that the only way in which true open care arrangements can be achieved is by abolishing the concept of adoption altogether: A Else, *A Question of Adoption*.

Those who advocate open adoption feel an adoption order meddles with genealogy and blood lies, and creates a series of legal fictions. Adoptive parents become fully and exclusively the child's parents, and the biological parents become, in law, strangers to the child. In these respects, adoption differs markedly from other care options such as custody, guardianship, or wardship.

Advantages of open adoption

H.3.02. Those who argue in favour of open adoption stress three aspects:

(a) The birth parents and the adoptive parents should have the opportunity to meet, get to know each other, and maintain ongoing contact and exchange of information;
(h) The child should know about his or her birth parents and birth origins, and should, in both childhood and adulthood, have the information and support to be able to initiate and sustain contact with the birth parents and birth family;
(c) Adoption laws and practices should facilitate the free flow of information and case of communication and contact between the people involved.

In one sense, open adoption is a contradiction. Whereas an adoption order severs the child's legal lies with the birth parents and family of origin, open adoption practice encourages an ongoing relationship with communication and contact. What adoption takes away, open adoption practice seeks to nurture and sustain.

An allied problem is that adoption rests all the legal powers in respect of the child in the adoptive parent.. The adoptive parents can open the door to the birth family if they choose. Once the adoption order is made they can slam the door shut. The power to facilitate or deny open adoption remains with the adoptive parents. This could not be, altered without fundamental changes to adoption as we know it. Arguably, the real question is not "whether we should have open adoption" but "whether we should replace adoption with some other legal care status such as enhanced guardianship, custodianship, or parental rights order": *Adoption: Should it be Abolished?,* YELP discussion paper, Auckland, Youth Law Project, cal991; I Johnston, "Is adoption outmoded?" (1985-88) 6 Otago LR 15.

Definition of open adoption

H.3.03. Open adoption is a concept developed as part of social work practice and no precise legal definition is possible. The Children and Young Persons Service of the Department of Social Welfare describes open adoption as:

"a process by which the birth parents and the adoptive parents meet and exchange identifying information. The frequency and regularity of contact between the birth parents and adoptive family is an individual arrangement, which is agreed upon by all parties. It is commonly known as a 'contact agreement'. By its very nature, it is a flexible agreement that can be reviewed over time by either party, as the need arises."

Adoption Practices Review Committee, in its 1990 report to the Minister of Social Welfare, asks "What is open adoption?" and answers its own question as follows:

"Open adoption can mean different things to different people and can take different forms. Social work practices differ throughout the country. At one end of the spectrum, it involves nothing more than the exchange of letters and photographs, sometimes through the mediation of the Department of Social Welfare. At the other end of the spectrum, it can mean a degree of co-parenting between birth and adoptive parents. In between there is a wide range of different styles of contact, co-operation, and mutual care. Open adoption may involve not just the parents, but also the families and we have heard of moving experiences as families get to know each other and share their lives a little.": *Adoption Practices Review Committee Report to the Minister of Social Welfare* (referred to in this chapter as the "*Review Committee Report*"), Wellington, 1990, p 39.

Development of open adoption practice

Trapski—H.5.01 Open adoption practice in New Zealand has developed largely from initiatives of individuals and voluntary agencies. Pioneers in this field have been the Bethany Centre, Auckland (especially Eunice Elichlier and Thelma Smith), Mary lwanek (formerly of Victoria University's Department of Social Work and Social Policy, and now New Zealand Manager, Department of Social Welfare Adoption Services), and Catholic Social Services in Christchurch.

Because of the lack of specialist training of adoption social workers and the lack of up-to-date policy and practice guidelines in the DSW adoption manual, departmental practice has lacked uniformity and has been variable in quality- *Review Committee Report* ch 7 and p 43.

Even the Adoptions Local Placements Manual (1995) has only a short section on open adoption. However, it sees social workers as having "a role to educate adoptive parents and birth parents on the positive outcomes of open-

ness in adoption", and comments that it 'has been well documented that although open adoption is not a panacea, or an option for everybody, it can reduce the worry and the hurting as well as some of the guilt and other problems associated with secrecy:" *Adoptions Local Manual (1995), 5.4.*

Despite the official coyness, there has been a massive shift to open stranger adoption. The National Manager, Adoptions has estimated that 90 percent of stranger adoptions are new open adoptions where some contact was agreed: M Iwanek "Adoption in New Zealand: Past present and future in adoption and healing" *Proceedings of the International Conference on Adoption and Healing* 1997, p 67. There is a growing literature providing guidelines for good practice. See M Adcock et a] (eds), *Exploring Openness in Adoption,* UK, Significant Publications, 1994.

Change in power balance

H.02 The change in power balance between birth parents and prospective adoptive parents as the adoption proceeds has not been fully thought through. With the demand for children greatly outstripping supply, an applicant for adoption who demonstrates an enthusiasm for, or at least acceptance of, open adoption is likely to be viewed with greater favour. At this stage the power balance is in the birth mother's favour. *But once a final adoption order is made, the birth mother is reduced to a state of legal impotence, and any assurances or agreement as to future access or communication are unenforceable*. Virtually absolute power passes to the adoptive parents.

An open adoption arrangement should be a voluntary agreement reached by people who genuinely desire ongoing communication or contact. It will work best if based on mutual affection and trust.

Negotiating an open adoption

H.5.03 There are various stages the practitioner must work through when negotiating an open adoption arrangement. The practitioner will:

(a) On first official contact with the birth parents and the proposed adoptive parents, explain the concept of open adoption and its benefits and drawbacks.

(b) If a birth mother wishes to offer her child for adoption, encourage and assist her to involve the father of the child and her family. Although, in legal terms, the decision is usually for the birth mother alone to make, the birth father and birth mother's parents and family members may all have a personal, emotional, and cultural interest in the decision made. Their input and support should reduce the risk of the mother being later exposed to conflicting pressures.

(c) If the birth mother decides in favour of adoption, work through the open adoption options with her (and with the birth father and any family members who are supportive of her). The options will include whether she wishes to participate in selecting suitable adoptive parents, the qualities she wants in the people who will care for her child, whether she wishes to meet them before deciding, whether she wishes to hand over the child to them personally, whether she wants to receive information and photographs on a regular basis, whether she wants to be able to visit the adoptive parents and see the child, and whether she wishes to be consulted about the name chosen for the child.

(d) As part of the preparation of the proposed adoptive parents, discuss open adoption and find out their wishes and feelings. Part of this preparation will focus on the needs of the child and the common experience that children are likely to be curious about their birth parents as they grow older and may seek information or contact.

(e) If the birth mother wishes to select suitable people to adopt her child, provide her with profiles of three or four potential adoptive applicants which fit the criteria she has laid down. If none of these are approved she will be given additional profiles...

(f) Once the birth mother makes a selection it may be possible to arrange a meeting between her and the proposed adoptive applicants. The preparation and discussions may have taken place before the child is born. If she has decided in favour of particular applicants, she may want them to be present at the birth and/or to visit her and the baby in hospital. She could also stay in the home of the proposed adoptive parents before or after the birth of her child. However, too close involvement with the adoptive parents before the birth of the child may put pressure on the mother and make it more difficult for her to change her mind.

(g) The handing over of the child to proposed adoptive parents is an important emotional and symbolic occasion which can release deep feelings. There needs to be careful preparation. The birth father and members of the two families may be involved, or it may be a personal transaction between the birth mother and the adoptive applicants. Follow-up support of everyone involved should be provided.

(h) It may be helpful to draw up an open adoption agreement, or at least to make a written record of agreed arrangements for future communication, contact, or access. This will help clarify the terms of the open adoption and limit the possibility of misunderstanding. Although those involved should be encouraged to work out their own arrangements, an experienced counsellor or social worker will help everybody avoid unrealistic expectations. Any agreement should nominate a counsellor or counselling agency with whom any differences that arise can be discussed.

Limitations of open adoption

H.5.04 The limitations of open adoption should be recognised. In both legal and human terms it cannot be a joint custody or shared parenting arrangement. Access and other contact should not be so frequent or unplanned as to undermine the role of the adoptive parents as primary carers. It is equally important to recognise that for open adoption to work successfully, skill and patience are usually required.

A 1987 follow-up study of open adoptions, M lwanek, *A Study of Open Adoption Placements*, Wellington, Depart-

ment of Social Welfare, 1987, showed that, after some initial problems, both birth and adoptive parents generally reported that open adoption had worked well for them and for their children. Birth mothers were gratified that they knew where their child was and how the child was faring in the adoptive family. Adoptive parents were relieved from the fear that the child's birth mother would one day turn up on the doorstep and take away the child. One adoptive mother said movingly (at p 33):

"We all have a special relationship with our son and one does not detract from the other. I am sure he has enough love for all of his parents, [as] parents are capable of loving more than one child."

Judicial response to open adoption

H.6 Family Court Judges in their adoption jurisdiction are not normally concerned with post-adoption issues such as the birth parents and members of the birth family having ongoing contact with the adoptive parents. There is no power to attach terms and conditions to an adoption order, nor for the parties to apply to the Court for directions as problems arise after the making of the adoption order.

The Courts have tended to approach the notion of open adoption with cautious approval: *Re Guardianship of J* [1983] 2 NZLR 314; (1983) 2 NZFLR 314; *DGSW v S* 8/10/84, Judge Bisphan, DC Christchurch; Re Adoption *19/87 and 20/87* (1988) 3 FRNZ 581, also reported as *Re W* (1988) 4 NZFLR 648; *H v R and H* (1989) 5 FRNZ 104, also reported as *Hamlin Rutherford* (1989) 5 NZFLR 426; and see D Stevenson, "The new style of adoption" (1987) 1 FLB 146.

The Courts have chided social workers for bringing before them matters outside their jurisdiction: *Re Adoption 1/89* (1989) 5 FRNZ 553; see also *Re an Application for Adoption by X* (1976) 14 MCD 259. However, information about an arrangement for ongoing contact through an open adoption does bear on the welfare and interests of the child and can properly be included in the social worker's report.

Issues of open adoption have come before the Courts from time to time. The Court issued a warning to Department of Social Welfare (now Child, Youth and Family Services) in *S and S v M* (1984) 1 FRNZ 312. The child's mother had health problems and approached the department with a view to finding foster parents for the child. The social worker suggested an open adoption, and foster parents were found who wished to adopt. The mother agreed to the adoption only on the social worker's assurance that she would have continuing access rights. An interim adoption order was made. The foster parents believed that contact with the birth mother would cease when the order became final. The birth mother successfully applied for revocation of the interim order on the basis of lack of true consent, a decision affirmed by the High Court on appeal. The High Court Judge commented that departmental social workers "May not fully appreciate the pitfalls in current theories of open adoption and perhaps of shared custody arrangements".

An instance of an ill-conceived open adoption plan falling apart with unfortunate consequences was *H v R and H* (above), where a birth father unsuccessfully applied to the High Court in wardship to enforce promised access rights for himself and his whanau. The open adoption involved the child having ongoing contact with the birth mother, the birth father, and maternal and paternal grandparents. The plan collapsed.

Legal means of enforcing open adoption agreement

H.7. The Adoption Practices Review Committee pointed to: "a recurrent concern that there is no legal provision for open adoption. Open adoption has developed under a law which was drafted with closed adoption in mind, and although there is nothing to prevent open adoption, there is ultimately no legal sanction for it either": *Review Committee Report* p 41.

There are several legal means by which a birth parent could seek to enforce an open adoption agreement.

Wardship proceedings in High Court or Family Court

H.7.01 The birth mother (or the birth father or any member of their families) can apply to the High Court under sI0B Guardianship Act 1968 to have the child made a ward of Court, and for orders for access or ongoing contact. The Court has a wide jurisdiction to make any order necessary for the welfare of the child. A successful application would be unlikely unless the applicant had an existing relationship with the child which could be shown to he beneficial to the child. An unsuccessful attempt was made in *H v R and H* (1989) 5 FRNZ 104, also reported as *Hamlin v Rutherford* (1989) 5 NZFLR 426. In *P v P* (1985) 1 FRNZ 684, maternal grandparents obtained access rights through wardship orders. Under ss I0A-10E, Guardianship Act 1968, the Family Court now has a limited wardship jurisdiction.

Care and protection proceedings in Family Court

H.7.02 Care and protection proceedings are unlikely to he successful unless there are genuine and serious concerns about the child's health or welfare (see Trapski's Family Law. vol 1, Wellington, Brooker's, 1991, 1.4). If one of the grounds in s 14 Children, Young Persons, and Their Families Act 1989 is proved (s 14(1)(a)-(i); Trapski's Family Law. vol 1, 1.4), the Court can make a custody order or sole guardianship order in favour of the Director-General of Social Welfare, and can then make access orders in favour of any person: s 121; and ss 44, 78, 101, and 110 Children, Young Persons, and Their Families Act 1989. The Court can also confer any other rights in relation to the child that it thinks fit: s 121(2)(e)-, *Trapski's Family Law* Volume 1, I.12.

Proceedings in the Family Court to vary or discharge the adoption order

H.7.03 To obtain a discharge of in adoption order, leave to apply must be obtained from the Attorney-General and then mistake or material misrepresentation proved: S 20(3) Adoption Act. Even if it is possible to surmount these obstacles, the Court would probably not discharge the adoption order unless it was in the best interests of

the child; Court of Appeal decision in *DGSW v L* [1989] 2 NZLR 314, also reported as *Re Adoption CA 72/89* (1989) 5 FRNZ 164 (CA).

The possibility of seeking a variation of the adoption order as a means of enforcing an open adoption agreement does not seem to have been explored. The consent of the Attorney-General or proof of "mistake of a material fact or material misrepresentation" are not prerequisites. Under s 20(1) the Court may vary an adoption order "subject to such terms and conditions as it thinks fit".

On an application for variation it would it within the Court's jurisdiction to vary the adoption order by adding a condition as to access. This was Judge Boshier's view in *Re Adoption of C* (1995) 13 FRNZ 233; [1995] NZFLR 795, at p 247 at p 208, where he observed:

"In my view, the Adoption Act 1955 must be read and interpreted in a fashion consistent with the welfare and interests of children having regard to current standards. Those are very different to those which prevailed in 1955. Open adoption is now regularly recognised as important in so far as it enhances a particular aspect of a child's long-term development. I see s 20(1) as having a statutory scheme to impose conditions to give effect to the paramount issue of children's welfare or interests if required. I see nothing in the Adoption Act, particularly s 16, which runs contrary to a liberal interpretation of s 20(1). I consider there is jurisdiction to vary an adoption order and provide for access if required."

In *Re Adoption of PAT* (1995) 13 FRNZ 651; [1995] NZFLR 817 (HC), Blanchard J look a different view, commenting that (p 656; p 822):

"It is not simply a matter of looking at the welfare and interests of the child, determining that, in the opinion of the Judge, they would be best facilitated through access to a birth parent, and concluding that s 20 must permit the Court to make an order to that effect."

His view was that the Family Court's discretion must be exercised in a manner consonant with the purposes for which it was conferred under the statutory scheme.

Judge Boshier's decision can be seen as an attempt at judicial creativity to avoid obstacles to open adoption, and to breathe life into an adoption Act out of touch with modern thinking. The observations of Blanchard J put a brake on that judicial creativity. The issue was obiter in both decisions and the matter cannot be said to be finally decided.

One commentator describes Blanchard J's analysis as disappointing and wrong in principle, preferring the more adventurous approach of Judge Boshier: W Atkin, "Case Note: Open Adoption and the Law' (1996) 2 BFLJ 44.

Guardianship appointment in the Family Court

H.7.04 The Family Court has the power at any time to appoint a guardian of any child (ie, any unmarried person under the age of 20 years). Where the child already has a guardian or guardians, the Court-appointed guardian will act as an additional guardian of the child. The Court may appoint a guardian generally or for a particular purpose. The guardianship continues until the child turns 20 or earlier marries. s8(1) Guardianship Act 1968.

Once an adoption order is made the biological parents of the child lose their status as guardians and the adoptive parents assume guardianship. There is no reason in law why the Family Court should not, immediately after making the adoption order or at any other time, appoint as an additional guardian a biological parent of the child or other relative from the child's family of origin. Such appointment will only be made where it will promote the welfare of the child: s 23(1) Guardianship Act,

The additional guardianship order must postdate the final adoption order or it will cease to have effect by operation of s 16(2)(h) Adoption Act 1955. Additional guardianship gives the relinquishing parent all the rights and duties of a guardian of the child, including a right to custody, unless there is a custody order in force. By reason of s 3 Guardianship Act the additional guardian is entitled to share in the making of important decisions in respect to the child's upbringing.

While on the face of it this may seem an ingenious way of securing the rights of a third party to an open adoption arrangement, there are a number of difficulties. It seems odd that the relinquishing parent, having been shown out the front door of the family home, is immediately readmitted through the back door. The adoption order will have extinguished the relinquishing parent's guardianship rights and responsibilities, but the appointment as additional guardian will restore these rights and responsibilities. The adoption order has created artificial parenthood in favour of the adoptive parents, but the additional guardianship order has restored parental rights and responsibilities to the relinquishing Parent.

There is no reported case where a birth parent has been granted full guardianship; the circumstances would have to be unusual. However, a birth mother's desire for continuing contact with her child has been secured by way of an order granting guardianship "for a particular purpose". *In Application by W* 27/11/95, Judge von Dadelszen, FC Palmerston North FP054/409/95, the Court made an order appointing the birth mother (who had failed in her application to revoke the interim order on the grounds of lack of consent) as an additional guardian. Judge von Dadelszen restricted the additional guardianship to access by the birth mother of the child on not less than four occasions per year and provision of photographs of the child at not less than monthly intervals. The terms of the additional guardianship order are stated not to extend to any involvement in the decision-making with respect to the upbringing of the child.

This seems a curious use of guardianship which, by definition, gives the guardian the right of control of the upbringing of the child: s 3 Guardianship Act 1968. While s 8(1) Guardianship Act permits the appointment of a guardian "for a particular purposes", it goes against the very nature of guardianship to completely exclude the guardian from involvement in decision-making concerning the child's upbringing. The Judge does not seem to have considered the implications of s 16(2)(b) Adoption Act nor the problem highlighted by the High Court and Court of Appeal in granting access under the Guardianship Act to strangers and the enforcement of any such order: *Tito v*

Tito [1980] 2 NZLR 257 (CA); *Re Adoption of PAT* (1995) 13 FRNZ 651; [1995] NZFLR 817 (HC).

In *T v F* (1996) 14 FRNZ 415, Judge Inglis QC noted that, on a literal reading of s 8 Guardianship Act 1968, the Court has an unfettered discretion concerning the appointment of an additional guardian. However, this discretion must, by s 23 Guardianship Act, he exercised (in the basis that the welfare of the child in question is the first and paramount consideration. His Honour took the view (at p 425) that s 8 "was drafted in a way that was careful to avoid technical or artificial limitations on the circumstances in which it might be appropriate for the Court to consider the appointment of a guardian and what the guardian's duties were to be". His Honour further saw no limitations in the Adoption Act on the Court's discretion to appoint an additional guardian:

"in principle if a s 8 appointment is shown to be needed in the interests of the child there is nothing in either s 8 or the Adoption Act to require the Court to distinguish between a natural child and an adopted child. The essential question is: does this particular child in these particular circumstances need an additional guardian or not? In the end the discretion under s 8 is wide enough to respond to the particular needs of the particular child in the particular circumstances."

Judge Inglis went on to note that there are strong considerations against granting a s 8 application. The policy of the Adoption Act is in normal circumstances to sever the natural family ties and substitute the family relationships of the adopting parents. If s 8 is used merely to facilitate an open adoption there must he compelling reasons that the welfare of the child requires the order. There is also the question of whether the appointment of the natural guardian would be necessary as an adoption can only proceed if it will promote the welfare and interests of the child. Further, there is the possibility that the guardianship arrangements given to the additional guardian under the order may result in future litigation and disputes to the child's detriment.

The Court also emphasised (at p 426): "where, as here, the application for the appointment of an additional guardian is based on the need to preserve and enhance the child's cultural heritage, care is needed to ensure that the application is not made merely as a matter of principle, but is designed to ensure in a concrete and effective way that the child will in fact secure the advantages that are claimed. The success of such an application is likely to depend on the ability of the proposed guardian to provide those advantages."

In Nesbitt v Aickin 20/6/96, Judge Adams, DC Kaitaia FP029/092/94, the Court held it had jurisdiction to consider a birth mother's application for limited guardianship of her adopted son under s 8 Guardianship Act 1968. Although the Court considered it wrong to appoint a guardian as a means of circumventing an adoption order and giving effect to an open adoption agreement, it held it could be appropriate to appoint a guardian for particular purposes to promote the welfare of the child, even if the effect of the order was to puncture the discrete legal family created by the adoption order.

Custody and access orders

H.7.05 In some situations, the birth mother can apply for custody or access to the child she has given in adoption. Once the final adoption order is made she will no longer be the child's parent or guardian and so will require leave of the Court under s 11(1)(b) Guardianship Act 1968 to bring an application for custody. Once she has been given leave, the application will be dealt with on its merits with the welfare of the child being the first and paramount consideration: s 23(1). If a final adoption order has not been made she can apply for custody, as of right, as the mother and guardian of the child.

There is greater difficulty in obtaining an access order. Section 15 Guardianship Act only permits the making of an access order in favour of a parent or step-parent of the child. There is no equivalent provision which permits persons other than a parent to apply for access with leave of the Court. Section 16 of that Act empowers the Court to make access orders in respect of grandparents, uncles, aunts, and siblings of the child.

After the final adoption order has been made the access provisions of the Guardianship Act provide no means by which a birth mother can secure access as her parental relationship is severed by the adoption order.

While an interim order is in force there is no such difficulty. A mother entitled to access under an open adoption agreement was successful in obtaining an interim access order in *Re B and B (adoption)* 30/3/01, Judge Callaghan, FC Christchurch FP009/32/99.

The question arises whether an access order made in favour of a birth mother prior to the making of a final adoption order will survive the making of a final order. If an application were made to discharge the access order, it is unlikely that the access order could survive because its jurisdictional underpinning would have been removed.

United Nations Convention on the Rights of the Child

H.8 Several articles of the United Nations Convention on the Rights of the Child, ratified by the New Zealand Government in March 1993, bear on the question of separation of the child from the birth parents.

Under art 8, State Governments which are parties to the convention:
"undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference."

Article 9.1 requires parties to the convention to:
"ensure that a child shall not be separated from his or her parents against their will, except where competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."

Article 9.3 adds that parties to the convention shall:
"respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

These articles make a strong statement in favour of open adoption with the option of an ongoing relationship be-

tween the child and the birth parent(s).

It may be argued that a closed adoption system infringes a child's right to freedom of association which is assured by s 17 New Zealand Bill of Rights Act 1990.

Source *Trapski's Family Law* Vol.5. 'Adoption' pp318-319, 221-327. H3,5-8. Brooker's

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CASE LAW

Birthfather access to adoptee

1951 Woodward SM New Plymouth MC *In re an Adoption: E.v.B.* BF access order upheld. Application for stepparent adoption of three girls aged 4,6,13. After the de facto marriage broke-up the birth mother retained the children. The birth father was very devoted to the children. He applied to the Supreme Court and was granted a visiting access rights order. The birth mother, now remarried, applied to adopt the children. **Held** "That although a Magistrate's Order of Adoption might not override the right of access given by the Supreme Court to the father, that right had been granted in the interests of the welfare of the children and a Magistrate making an Order of Adoption should ensure that the full exercise of the right was not interfered with under any impression or pretext that it had been affected by adoption. The adoption was therefore granted subject to the condition that the adopting parents file an affidavit to the effect that the father's rights of access contained in the present or any other Supreme Court Order were not restricted or impeded." Thus although, by adoption, the Infants Act 1908 s21(2) as amended by Statutes Amendment Act 1949 s27 made the birth father a total stranger in law to the children, he was to retain access to them by Order of the Supreme Court. (1952) 47MCR 25

Open adoption critical view

1983 Chilwell J Whangarei HC *In the Guardianship of P // In re P.O.v.P* A birth father sought help of the Court to obtain access to his natural son adopted by the mother. A quotation is given from *Re J*. "The mother was desirous of having an unconventional form of adoption referred to as an 'open adoption'. The foster couple were prepared to entertain an open adoption. The phrase has no legal definition but it is a concept which is vague and imprecise. It appears to envisage a full legal adoption pursuant to the Act and without derogating from the legality of the status of an adoption. The word 'open' seems to import a de facto loosening of the private structure of adoption, which has been one of its main characteristics in the past. The idea seems to be getting some recognition in official circles for a letter from the Department of Social Welfare states: 'Nowadays adoption is not the closed procedure it has been...' Also a welfare report purports to define 'open adoption' as 'an adoption where the adoptive parents allow for the child's continuing contact with birth parents'. It would appear, and the Court hesitates for sound reasons to put it more strongly than that, a natural parent, to whatever extent evolves, remains very much a figure in the formative stages of the child who is legally adopted into another family. The dynamics of such a relationship examined in terms of the welfare of the child are simply unknown, and that is the fairest way the Court can put it. Wisdom dictates that the utmost caution be exercised in this extremely delicate area. It would be appropriate for the Director-General and his legal advisors to make an immediate examination of these developments." (1983) 2NZFLR 289 at 303 // (1984) 10 NZRL 138. Quote from 1983 Jeffries J. Wellington HC. *Re J* Report 2FLN 122 (2) does not include the full text.

Open adoption v guardianship

1983 Jeffries J Wellington HC *Re J* An application by grandparents of a boy aged 5 for an order that the child be placed under the guardianship of the Court. The mother requested Social Welfare to place her child in an 'open' adoption. A family which the court accepted was eminently suitable had been found. The mother objected to the grandparents becoming the guardians. The boy's Canadian father expressed the wish that the child should stay within the family as he had already suffered considerable psychological disturbance. **Held** (allowing the application) The child should go to his nearest willing blood relatives, the most usual and beneficial arrangement for a child, despite the unusual circumstances of this case. 2FLN122/ N180

Court of Appeal open adoption recognised

1983 Court of Appeal *In the Guardianship of J* Appeal against judgment of Jeffries J, in *Re J* placing the child under the guardianship of the Court and appointing the grandparents as agents of the Court. The child was born in December 1977. In August 1982, his mother after several unstable relationships, turned to feminism and lesbianism. She placed the child with social welfare with intention of open adoption. The child visited the proposed adopting parents. The birthmother's parents commenced proceedings under the Guardianship Act 1968 and in July 1983 an order was made placing the child under the guardianship of the Court, appointing the mother's parents as agents of the Court. The birthmother appealed.

Justice Cooke is reported, "She contemplates what is called open adoption. The legal incidents of this would be no different from any other adoption under the Adoption Act 1955. In law the adoptive parents would be deemed to become the parents of the child and the child would be deemed to cease to be the child of his existing parents. The adoptive parents would be solely responsible for the upbringing of the child but they would be free to consult the natural mother and to allow her access to such extent as they saw fit; and continuing contact between her and the child would be contemplated. It is a concept comparatively new in New Zealand but having support from the Department of Social Welfare both generally and in this particular case. In both respects it also has the support of Social Workers employed by Barnardo's New Zealand who are familiar with the circumstances of the present case. In general it is a concept that may gain ground in New Zealand, partly because of the numbers of solo parents and partly because of the shortage of babies for adoption. The evidence of Dr Dodd is that it is successful in other countries." at 315 **Held** Cooke J. "(Allowing appeal). There was no presumption in favour of the grandparents as the nearest willing blood relatives; the advantages and disad-

vantages of their having custody were weighed against the proposal for open adoption and taking all the factors into account it was considered by the Court that in the long-term the child was more likely to be fulfilled and to become a more rounded personality with the proposed [open adoption] family". (1983) 2NZFLR 314

Open adoption unfulfilled- order revoked

1984 Casey J Auckland HC *S and S v M* Appeal against revoking interim order- no valid consent. A birth mother unable to care for her child discussed alternative arrangements with a DSW social worker. Open adoption was recommended and accepted, on the understanding given that there would be continuing access. Adoptive parents were found, and they understood from their social worker that contact would be made by the birthmother only during the settling in period. An interim order was granted by the Court. However, it became obvious that the birth mother envisaged permanent access, and this the adoptive parents were not prepared to give. The birthmother applied to the Court to revoke the interim order - this was granted by Kendall J DC North Shore, on ground of no true consent. That decision is now appealed. The mother was aware that there was no legal provision under the adoption procedures for the inclusion of any legal or formal access arrangements. However she was assured by the social worker it could be arranged. The Judge found "She was consenting to an adoption which would give her liberal access on a permanent basis. Consent to the potential effect of an order is fundamental to the whole adoption process...The absence of true consent is a fatal flaw...the appeal must be dismissed." **Held** "Final consent to an adoption is not validly given or fully informed if it is based on a misunderstanding of the consequences of such consent, and where the intention is not to effect a final separation but to facilitate an adoption with permanent access rights reserved...I direct that a copy of this decision be sent to the Director of Social Welfare, as it seems that some of the staff may not fully appreciate the pitfalls of open adoption and perhaps of shared custody arrangements." 1FRNZ 312

Change to adoption openness

1986 Mahon DCJ Dunedin DC *I and I v S* Comment: "There has been a marked change in community attitudes towards adoption in recent years with openness and lack of privacy being one of the hallmarks and with another being recognition that children require to know and require to be able to identify with their natural parents." 2FRNZ 112 at 117

Open adoption dispute

1989 Heron J Wellington HC *H v R and H // Hamlin v Rutherford* An application by the birthfather for wardship of K a 16-month-old female child. The birthmother was European, birthfather Maori. The birthparents met at Outward Bound. They lived together but the relationship broke up a few weeks before K was born. The birthmother is blind and a talented musician. It was agreed after a meetings with a DSW social worker, that an open adoption would be proceeded with. The birthfather gave his consent on the understanding of continued access. An open adoption agreement was drawn up and the child placed with friends of the birthmother pending adoption by them.

Open adoption contract in brief: **1** The birthmother may contact the adopting parents once a month and arrange to see the child. **2** The birthfather may contact the adopting parents once a month and arrange to see the child. If he wishes to have photos and letters then he can eg request these from the adoptive parents. **3** The adoptive parents will contact the birth parents if the baby is ill or has had an accident. **4** The birthfathers parents telephone the adoptive parents when they wish to arrange to visit the child. They will be sent photos and progress reports on a regular basis. **5** Same provisions apply to the birthmother's parents. The agreement may be renegotiated at any time. A social worker from DSW is available to assist with resolving issues arising from the agreement.

No sooner had the child been placed with the proposed adopters, than they were beset with frequent calls, at least twice a week from the birthfather. They responded but became concerned at his behaviour and requested that access be suspended meantime. Social welfare also agreed that access should be suspended pending renegotiation of the contract. The result was that access was resumed on a monthly basis after a period of 3 months without access. There was continued difficulty, and the birthfather applied to the Court for Interim access; this was refused by the Court pending a substantive case. **Held** "(1) The child was to be a ward of the Court for a period of six months after a final adoption order was made. (2) The Court consented to the adoption of the child by the second defendants, appointing them agents of the Court, and gave them the care and control of the child. (3) The issue of the necessity and validity of the plaintiff's consent to the adoption was properly an issue for the District Court when considering the application for adoption. (4) The best interests of the child would be served by the adoption proceeding. (5) The cultural experiences available from the child's Maori blood relatives was 'a future uncertain, but undoubted advantage, but it should not assume predominance.'" (1989) 5FRNZ 104 // (1989) 5NZFLR 426

Incapacity ill health- open adoption

1990 MacCormick DCJ North Shore FC *Rayner v Morris.* Dispensed. Application to dispense with birth parents' consents. Adoption of a boy aged 7 by foster parents after nearly 4 years fostering. The birthfather is schizophrenic of clear incapacity. Child has been in Social Welfare care from age of two. "Both Mr and Mrs Rayner have stated that if their adoption application is granted then they wish it to be an open adoption so that Nicholas suffers no identity crisis as he grows older. They advised the Court that the adoption of Genevieve was an open adoption and that they had a very good and relaxed relationship with Genevieve's mother maintaining contact by regular correspondence with visits when they had been to Christchurch. This had been two or three occasions since their move to Auckland. Letters were produced to the Court evidencing the open nature and regularity of this contact...In granting the adoption the Judge commented, 'In my view, however, that [adoption] should be complemented by the adoption being an open adoption in the

widest and fullest sense of that phrase.'" [1990] NZFLR 313 at 316

Note Open adoption and aggrieved birth parents. We have a significant development in open adoption. (a) In the case above, *Rayner v Morris,* the birth parents' consents were dispensed with, but the adopting parents with a record of open adoption are keen to keep the door open to birthparent access. They remained willing and wanting to develop an open adoption with aggrieved birth parents. This was not an action of appeasement to reduce tension or impress the Court, but rather a realistic genuine desire of well informed persons. In the second case, below, *Re Adoption Application A9/90*, the natural father actively opposed the adoption but the adoptive parents remain quite relaxed and keen to establish an open relationship with him whenever he wishes. It both cases the adoptive parents believed continuing open contact was in the best interests of all concerned.

1990 Inglis DCJ QC Napier FC *Re Adoption Application A9/90* "The adoptive parents could see no particular difficulty in bringing the children [from Canada] to New Zealand for regular holidays so that they can see their mother, the natural father (if he wishes to see them) and the extended families on both sides. It should be said that a notable feature of the case is the easy and relaxed relationship which exists with all family members in New Zealand." Interim order granted. [1990] NZFLR 254

Surrogate open adoption

1990 McAloon DCJ Nelson DC *Re Adoption of C // Re P (Adoption: Surrogacy)* A couple entered into a surrogacy arrangement. Part of the contract was that the surrogate be paid maintenance per week plus expenses, a total of approximately $15,000. The Court had to decide if this payment was in breach of the Adoption Act 1955 s25 prohibiting premium payments regarding an adoption. Held maintenance payments did not breach the Act. A final adoption order was granted.

"The [social welfare] report states that M's [surrogate mother] relationship with Mr & Mrs P continues to be one of friendship but that she regards C as the child of Mr & Mrs P. It is stated in the report that there is a high degree of openness on the part of M towards Mr & Mrs P and that both Mr P and M maintain comfortable contact with each other. Some of M's older children know of C as do extended family members of M. Mrs P has a positive relationship with M and it is the intention of Mr & Mrs P that C will have access to information... Extended family members of Mr and Mrs P regard C positively. In this context of course it must be acknowledged that Mr P is the birth father of C." at 235-6. *Re Adoption of C* (1990) 7FRNZ 231// *Re P (Adoption: Surrogacy)* [1990] NZFLR 385

Changing reality toward adoption

1991 Pethig DCJ Wellington FC *Re Application by Nana.* "It is clear that the original purpose of adoption...which has in the past been accepted by the Courts has long since gone." The Judge commented, "One need only note that the distortion of relationships that stepparent adoption involves make that feature no longer of special significance in many cases.' After citing large increase in stepparent adoption, "So it is clear that the original purpose which I earlier set out and which has been accepted by the Courts has long since gone. Adoption is a legal fiction and in this Court the cases originally envisaged are a minority of the adoption orders made in this Court. And in those now made with 'strangers' the practice is and has been for some years for the adoption to be open at least in the sense that the birth parents or parent meet the adopting parents and to a greater or lesser extent as they agree, contact can be maintained. In that climate and particularly when such large numbers of adoptions nowadays are by a stepparent and where consequently there can be no change in the custodial or other arrangements but the motivation is solely that by the stepparent, it can no longer be said with the same force that the Act has some inherent integrity...In each case it comes down to the question of the welfare and interests of the child irrespective of the motivations of others.." [1992] NZFLR 37 at 47

Less risk with openness in adoption

1994 MacCormick DCJ Pukekohe DC *Adoption Application by D* [1994] "It seems to me quite clear from research that there are significant disadvantages arising from closed or secret adoption compared with open ones. This needs to be brought into account. In particular if these children learn of their situation from anybody other than them, then there is a serious risk that their relationship with Mr and Mrs D will be undermined. It is important that they learn of the situation from Mr and Mrs D before they learn of it from somebody else which almost inevitably seems to happen one way or another with disastrous consequences." [1994] NZFLR 813 at 816

Open adoption access provisions

1995 Boshier DCJ Auckland DC *Adoption application by C*. As part of this case the Judge, considered the legal options and means whereby an 'open adoption' could safeguard the access rights of parties concerned.

Type of order The sole issue falling for consideration is, to what extent can the Court require the adoptive parents to provide access to the natural mother. Regrettably the Adoption Act contains no ability to make an order for adoption on terms and conditions which include access. Recognising however that continuing contact with birth parents is often important, there has been increasing acceptance of the notion of 'open adoption'. The notion of 'open adoption' was described in the New Zealand Children and Young Persons Services brochure to which I referred to earlier as: "Open adoption is a process by which the birth parents and the adoptive parents meet and exchange identifying information. The frequency and regularity of contact between the birth parents and adoptive family is an individual arrangement which is agreed upon by all parties. It is commonly known as a 'contact agreement'. By its very nature, it is a flexible agreement that can be reviewed over time by either party, as the need arises. At present in New Zealand these arrangements cannot be legally enforced."

In *In the Guardianship of J* (1983) 2NZFLR 314 at 315 the Court of Appeal looked favourable upon the notion of

open adoption. Cook J said: "She contemplated what is called open adoption. The legal incidence of this would be no different from any other adoption under the Adoption Act 1955. In law the adoptive parents would be deemed to become the parents of the child and the child would be deemed to cease to be the child of the his existing parents. The adoptive parents would be solely responsible for the upbringing of the child but they would be free to consult the natural mother and to allow her access to such extent as they saw fit; and continuing contact between her and the child would be contemplated."

The applicants here propose an open adoption in so far as C already knows who her birth mother is and that they propose ensuring that that remains so particularly by facilitating ongoing contact. Given though that the Court seems unable to bind them to ongoing contact pursuant to an adoption order, what safeguards can be imposed to protect C's long-term welfare? In my view, s20(1) is a means by which such a safeguard could be included in an order, if required. It will be clear from this decision that I expect the undertaking as to ongoing access to be honoured, If it is not, or there are otherwise difficulties, I would consider an application to vary the order. Section 20(1) seems to me to provide sufficient discretion to include terms and conditions whereas an adoption order made in the first instance appears to contain no such discretion. Section 20(1) provides: "The Court may, in its discretion, vary or discharge any adoption order (whether the order was made before or after the commencement of this Act) or any adoption to which subs (2) of s19 of this Act applies, subject to such terms and conditions as it thinks fit."

I consider that in the event that an applicant for variation is subsequently brought the Court could include in the 'terms and conditions' an order as to access. Counsel's research has not disclosed any authority on the point. In the only decision referred to me,: *E v B* (1952) 47 MCR 25, which concerned the predecessor of this Adoption Act the learned Magistrate required the applicants to file an affidavit undertaking not to restrict or impede access as a condition of making an adoption order. The decision does not attempt to address jurisdiction or the enforceability question... As Richardson J noted in *Director-General of Social Welfare v L* at 129: "...statutory powers are not exercised in a legislative vacuum. They are not unfettered in that sense. When the particular provision does not specify the criteria to be applied, the power must be exercised in conformity with the purpose that the provision serves in the statutory scheme.".

In my view, the Adoption Act 1955 must be read and interpreted in a fashion consistent with the welfare and interests of the children having regard to current standards. Those are very different to those which prevailed in 1955. Open adoption is now regularly recognised as important in so far as it enhances a particular aspect of a child's long-term development. I see s20(1) as having a statutory scheme to impose conditions to give effect to the paramount issue of children's welfare or interests if required. I see nothing in the Adoption Act, particularly s16, which runs contrary to a liberal interpretation of s 20(1). I consider there is jurisdiction to vary an adoption order and provide for access if required. I accordingly conclude that I would expect there to be a continuation of ongoing supervised access. If there is not, an order to that effect may be contemplated upon an application for variation. I do not see enforcement as posing any insuperable difficulty. My preliminary discussion with counsel on this issue persuades me that there is scope within the Guardianship Act for enforcing access ordered pursuant to the Adoption Act. I am content to leave that issue for the moment. For all of the above reasons, there is an interim order granting the applicants an order for the adoption of C as moved. [1995] NZFLR 795 at 807-9

Appeal re access order in open adoption

1995 Blanchard J Rotorua HC *Adoption of PAT* Case demonstrates tension between closed adoption of the Adoption Act 1955 and today's open adoption practice. Appeal from a decision of Taupo DC October 1994. The birth father a schizophrenic currently serving a prison term for sexual offences against children, refused to give his consent unless an access order was made in his favour. The DC Judge was satisfied that the applicants would agree to a limited and supervised access by the birth father. As there was a legal impediment to making an adoption order subject to an access order. He made an adoption order leaving access arrangements to be dealt with by agreement between the parties...*The single issue to be resolved on this appeal is whether the Court had jurisdiction to make an access order in favour of a birth parent at the time of making an adoption order.*

The Judge reviewed the literature on the move from 1955 closed adoption to the current practice of open adoption. Noting that the Adoption Act 1955 does not prohibit birthparents and adoptive parents from arranging a form of *de facto* open adoption. Then quotes Williams J *Re M* (Adoption [1994] 2NZLR 237 at 239 'because the Adoption Act [1955] remains on the statue book, closed adoption cannot be regarded as absolute'. He then considered various options for access arrangements—

Guardianship Act 1968 confers upon the Court no express power to order access in favour of persons other than parents (including stepparents) and specified relatives ss15,16. There is jurisdiction to make a custody order conditional upon the granting of access to a 'stranger' s11: *Tito v Tito* [1980] 2NZLR 257 (CA). However, the Court of Appeal questioned the appropriateness of such an order in many circumstances because it is unlikely that the access would be enforceable; the s19 warrant procedure would probably be inapplicable: pp 260,261,262

Use of variation order s20(1) Adoption Act 1955 Detailed consideration was given to the possibility of using a variation order to place an access condition on an adoption order to safeguard open adoption access. The Judge rejected the proposal.

International instruments consideration was given in this case to the United Nations Convention on the Rights of the Child.

Other possibilities There are other possible mechanisms for enforcing open adoption agreements outside the Adop-

tion Act itself...The most significant is the High Court's wardship jurisdiction. Birth parents may apply under s9 of the Guardianship Act to have the child made a ward of the Court. The High Court has flexible and extensive jurisdiction in this area. While the jurisdiction long exercised by the Court has been recognised by statute, there has been no move by the Legislature to confine it. The jurisdiction would permit the granting of access to a birth parent, although non-relatives must seek the leave of the Court to bring a proceeding (s9(2)(d), and successful applications for access are unlikely in the absence of clear evidence that it will promote the welfare of the child (see *Hamlin v Rutherford* (1989) 5NZFLR 462). The Courts are likely to take a cautious approach. A further possibility is use of the care and protection proceedings...in the Children, Young Persons, and Their Families Act 1989, but again circumstances out of the ordinary will need to be demonstrated before access is likely to granted to a birth parent under that Act. These potential courses of action are consistent with the general premise of our current legislative scheme, namely that: (i) adoption orders are absolute and operate to sever biological ties completely, and (ii) legally enforceable access for persons who are in law strangers to the child is inappropriate, except in relatively rare circumstances.

Conclusion It may be that circumstances in which the welfare of the child justifies access by a birth parent are more common than was recognised when the current legislation was enacted. This may to an extent be taken into account in the exercise of the flexible wardship jurisdiction which Parliament conferred on the Court under the Adoption Act 1955 and Guardianship Act. Whatever the merits of open adoption for the welfare and interests of the child. I find that there is presently no statutory jurisdiction to order access in favour of birth parents when an adoption order is being made. Accordingly the appeal must be dismissed. It is to be hoped that the question will soon be addressed by Parliament. **Held** (Dismissing appeal) **1** There was no statutory jurisdiction to order access in favour of birth parents when an adoption order was being made. Any extension of jurisdiction was a matter for Parliament. **2** The question of jurisdiction was one of statutory interpretation, having regard to the intention of the legislation derived from the plain meaning of the words in the light of the overall purpose of the enactment. Certainly, a liberal construction was justified in order to ensure the welfare and interest of the child, but that did not license the extension of the scope of the Act beyond that intended by Parliament. Looking at the Adoption Act as a whole, the making of access orders in favour of a birth parent was inconsistent with the scheme of the Act, particularly as manifested by s16, the position in law being that, on adoption, the birth parents became legal strangers to the child. **3** A possible mechanism for enforcing open adoption was the High Court's wardship jurisdiction. Birth parents could apply under s9 of the Guardianship Act 1968 to have the child made a ward of the Court. The High Court had extensive and flexible jurisdiction in this area. [1995] NZFLR 817

Open adoption and the law at 1996

Atkin—"The practice of 'open adoption' has been policy in New Zealand for many years now. We have long put behind us the closed adoption practices prevalent well into the 1970s and the pretense that went with such adoptions. It is sometimes said that the Adoption Act 1955 does not provide for open adoption. The spirit of the Adult Adoption Information Act 1985 is consistent with open adoption and ensures that the details of adoptions occurring today cannot be kept forever secret. Less clear is whether the law can make open adoption work. A so-called 'open adoption agreement' will not have validity as a legal contract and is therefore unenforceable. However, it is possible to envisage other ways of ensuring some legal rights for birth parents. Two recent cases are worth noting, one for its creative use of guardianship coupled with adoption, and the other for its conservative refusal to countenance access rights being granted to birth parents.

First case In *W v L* (Palmerston North Family Court. FP054/409/95, 27 November 1995) Judge von Dadelszen dismissed an application by the birth mother to revoke an interim adoption order. However, at the end of his judgment, the Judge appointed the birth mother an additional guardian along with the adopting parents, but with restricted guardianship rights. Under s8 of the Guardianship Act 1968, a person may be appointed a guardian 'either generally or for any particular purpose' and thus jurisdiction exists for a birth parent to have a limited form of guardianship. The three relevant purposes of the guardianship order were as follows: (a) That the Applicant be able to see the child on not less than four occasions per year. (b) That the Applicant be provided with photographs of the child at not less than one-monthly intervals. (c) The Applicant's rights shall not extend beyond those specified in this order and in particular shall not include any rights set out in section 3 of the Guardianship Act 1968, it being acknowledged that the rights set out herein do not extend to any involvement in the decision making with respect to the upbringing of the child but they are to give effect to the intent of the Parties that the adoption be an open adoption. If this arrangement should break down, the parties can presumably fall back on the provisions of the Guardianship Act, and in particular s13 which provides for applications to the Court in the event of a dispute between guardians. A mere guardian does not have the right to apply for access under ss15 or 16 of the Act, but can apply under s9 for the child to be made a ward of the High Court. The High Court then has its well known wide ranging powers to deal with the situation if there is no resort to s13."

Second case *Adoption of PAT* [1995] NZFLR 817. [see case detail previous page p287A]. "The sole issue before Blanchard J was whether an access order could be granted alongside an adoption order. The answer was in the negative. As part of the backdrop to *PAT,* there existed some intriguing dicta from Judge Boshier in *Adoption application by C* [1995] NZFLR 795,808. Judge Boshier noted that in the words of the little used s20 of the Adoption Act a Court can vary an adoption order subject to such

terms and conditions as the Court thinks fit. While the reference to terms and conditions might be thought a little anomalous in view of the fact that there is no provision for the original order to have terms and conditions (except with respect to religion), Judge Boshier suggested that where an open adoption arrangement had run into trouble, the adoption could nevertheless be varied to include terms relating to access.

In *PAT*, Blanchard J relied on the narrow range of applicants under s15 and 16 of the Guardianship Act to deny the possibility of making an access order in favour of a birth parent at the same time as an adoption order. Of course a birth parent might apply for access prior to the adoption and the Court would then be seized of the matter. An access order could then be made either before or at the same time as the adoption order. Blanchard J thought, perhaps rightly, that a prior order would not survive the adoption because the latter extinguishes existing rights (821). However, the reasoning for rejecting a contemporaneous order is less convincing. It appears to rest on the assumption that an access order would undermine the effect of an adoption order. In another place (822) the Judge says that 'the making of access orders in favour of a birth parent is inconsistent with the Act's scheme, particularly manifested by s16. The whole thrust of the Act is in favour of severance of ties'.

With respect, if this approach is correct, then *W v L* cannot stand. No can any suggestion, which Blanchard J later accepts, that High Court wardship could be used to provide for open adoption. The Adult Adoption Information Act should not have been passed and overseas jurisdictions such as England which allow for access orders have got it all wrong. Even our own law contemplates the possibility of strangers having access to children. Section 121 of the Children. Young Persons, and Their Families Act 1989, admittedly in defined situations, empowers the Court to grant access to a parent 'or any other person'. This hardly suggests a child's legal parent is inconsistent with the parents' rights, be they natural or adoptive parents.

Not surprisingly, Blanchard J was unwilling to redeem the situation by accepting Judge Boshier's novel interpretation of s20. The reasons are, with respect, bemusing. The words of s20 were described as 'clear and unambiguous. Prima facie they would appear to confer an unfettered discretion' (822). This might have been the end of the discussion but the Judge looked to the context of s20 and then made his comment already quoted about inconsistency between adoption and access. The questionable nature of this statement has already been explored.

Section s20 [re variation order] could be construed against the standard rubic in s5(j) of the Acts Interpretation Act. Section 20 should be given a fair, large and liberal interpretation according to the legislative purpose. There is little to guide us on this, as the issue of open adoption and access was simply not one which was relevant in 1955. We may need to look to 'the modern context in which the Act must now operate as well as the ancient'. As Burrows says, 'purpose' and 'workability' tend to merge.* What may be needed is an 'ambulatory' or 'updating' method of interpreting the Adoption Act. If we set about the task in this way, can there be little doubt that the Boshier rather than the Blanchard approach better reflects modern practice and policy? *PAT* contains a disappointing analysis which is ultimately wrong in principle. It should not be the last word. On the other hand *W v L* contains a valuable model which could well be developed in future cases." W Atkin 'Open adoption and the law' *Butterworths Family Law Journal* June 1996 Vol.2. pp44-45.*Reference- Burrows *Statute Law in New Zealand* (Butterworths, Wellington) 1992 112,175

BP Guardianship re open adoption declined

1996 Adams DCJ Kaitaia DC *N v A* An application by birth mother 'A' of a male child 'S' for an order appointing her a guardian in addition to the adoptive parents. The child born 27/9/1983, and three weeks later placed for an *open adoption* with a second cousin E. An interim order was issued 2/4/1984 and final adoption order 9/10/1984. The birth mother visited the child when he was about 5 years old and more frequently over the next four years. In 1992 the E's marriage separated, the birth mother felt that as the child was no longer in a two parent family she should take an increased role. Breaking point was reached in 1994. The birthmother has now applied to be appointed as an additional guardian of S.

Open adoption "Open adoption, in any form, has no formal legal recognition. The Court of Appeal decision *In the Guardianship of J* (1983) 2NZFLR 314 was delivered only days before the adoption application for A was signed. Cooke J (as he then was) stated p315 '[The mother] contemplates what is called an open adoption. The legal incidents of this would be no different from any other adoption under the Adoption Act 1955. In law the adoptive parents would be deemed to become the parents of the child and the child would be deemed to cease to be the child of his existing parents. The adoptive parents would be solely responsible for the upbringing of the child but they would be free to consult the natural mother and to allow her access to such extent as they saw fit; and continuing contact between her and the child would be contemplated. It is a concept comparatively new to New Zealand but having support from the Department of Social Welfare both generally and in this particular case... In general it is a concept that may gain ground in New Zealand, partly because of the numbers of solo parents and partly because of the shortage of babies for adoption.'

The concept has gained ground and inevitably pressure has built to discover a means whereby legal expression may be found for a concept not in contemplation when the Adoption Act 1955 was passed." Judge Adams then considered cases *Adoption by PAT* and *Tito v Tito.* "It appears that the Adoption Act [1955] cannot stand a strained interpretation which would make it more relevant to modern views on open adoption but nevertheless some mechanisms to that end are occasionally available. One is the wardship jurisdiction of the High Court under s9 of the Guardianship Act." at p615. [For detail of Jurisdiction to make

a guardianship order of the purpose of access- considered in this case *see* Guardianship in XXX this book.]

"In my judgment it is wrong to appoint a guardian as a device to circumvent an adoption in order to give effect to the terms of an open adoption arrangement. To do so would be wrong for the reasoning in *Adoption of PAT*. I would distinguish the circumstances in *W v L*...Judge von Dadelszen where a guardianship order to secure access to the birth mother in quite limited terms was made by consent. I hold that it is proper to appoint a guardian where the welfare of the child will be promoted by the provision of a quasi parent for the general or particular purposes even though the effect of the order punctures the discrete legal family created by the adoption order. Access may in relatively rare cases be such a particular purpose. Such cases would likely be akin to those relatively rare cases where wardship of the High Court might otherwise have been employed but the applicant would need to satisfy the Court it was appropriate that they be appointed to the status and position of guardian. Thus it is my view that I have jurisdiction to consider the application in this case"at 618.

Held 1 Applying s23(2) of the Guardianship Act 1968, there was no indication that S looked for a formalised relationship with his birth mother. **2** A guardian is a person with general control over the upbringing of a child, in a position to direct the child, and natural or Court appointed guardianship generally implies a right of custody but subject to any custody order. **3** Open adoption, in any form, has no formal legal recognition. **4** It is proper to appoint a guardian where the welfare of the child will be promoted by the provision of a quasi-parent for general or particular purposes even though the effect of the order punctures the discrete legal family created by an adoption order. Access may in relatively rare cases be such a particular purpose. **5** There was nothing in s8(1) to indicate any limit upon jurisdiction and there was jurisdiction to consider the application in this case. **6** This was not one of those relatively rare cases in which the needs of the child cry out for re-introduction of a natural parent after adoption. It was neither necessary nor desirable for S's welfare that he be provided with another quasi-parent, even if it was for limited purposes. **7** The respondents were entitled to the dignity of controlling their own family without intervention by the Court or legal intervention by the applicant." [1996] NZFLR 605 Most detailed report to date

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NSW Law Reform Commission Report

Arguments for reinforcing and increasing openness in adoption.

4.45 "Proponents of open adoption argue that the secrecy promoted in the past adoption proved unnatural and damaging in adoptive relationships. They argue that it is fallacious to believe that a child placed with a biologically unrelated couple will never want to know about or meet his of her biological family. Further, denying the reality of adoption and the existence of two sets of parents, adoptive and biological, places unnecessary stress in an adoptive family; family members will always be working to minimise the factors that point to the existence of another family. For example, adoptive parents may play down their child's differences from themselves, whether physical, emotional or intellectual, in an effort to deny the fact that these traits may be inherited from the biological family. As children are often immensely perceptive to unspoken messages, the child may collude with the parents in their efforts and also attempt to minimise his or her differences from them, thus creating a crisis in identity in teenage or adult years.

4.46 Open adoption, advocates argue, prevents the parties to an adoption 'fantasising' about each other and creating false images of each other's personalities. For example, birth parents may create a whole picture of their child and his or her family in their minds which is in fact entirely false. Adoptive parents, particularly in the past but even sometimes today, may stereotype birth mothers as irresponsible and amoral young women from whom their child is lucky to have been separated. They may pass their perception on to their child which may have a negative effect on their child's self-identity and jeopardise any future relationship with the birth parent when the adoptee is an adult. Adoptees often fantasise about their birth parents, wondering what they look like and why they placed them for adoption. Adoptees often experience feelings of rejection, believing that the reason they were relinquished was because they were 'not wanted' or loved.

4.47 Proponents argue that open adoption can provide the means to avoid all of these problems. Birth parents can explain why they placed the child thus minimising the adoptee's feelings of rejection. Adoptive parents and birth parents can gain an accurate perception of each other instead of assuming that the other party fits a particular stereotype.

4.48 Open adoption, it is argued, allows adoptees to develop a proper sense of identity. The plethora of material written by and about adoptees in search of their birth parents documents the problems some adoptees encounter in developing a coherent sense of self. 'Genealogical bewilderment' is a noted phenomenon amongst adoptees, stemming from lack of knowledge of immediate biological family and family history. Proponents of open adoption argue that adoptees would not need to go through this painful experience if they had access to information and the opportunity to meet their birth family when they were growing up.

4.49 Another factor contributing to the development of 'open adoption' is the growing realisation that the introduction of 'closed' adoption may involve the imposition of an alien cultural standard on people whose child-rearing practices are based on extended family networks, in which placement with other relatives is quite consistent with knowledge of actual parentage and continued membership of the kin groups associated with the birth parents. This problem has been discussed in connection with Maori people in New Zealand but has application to a number of groups in Australia, notably Aboriginal and Torres Strait Islander people.

4.50 Finally open adoption is supported by the argument that confidential adoption treats children like property,

where the birth parents transfer all rights of enjoyment to the adoptive parents and the adoptive parents then have exclusive power to determine who shall have access to their new possession. Open adoption, in contrast, recognises that children are people with their own relationships and ties that exist by virtue of who they are, not simply by virtue of what their parents determine. In other words, adopted children have a relationship with their biological parents because they were born to them.- this is a relationship in fact, that neither the birth parents nor the adoptive parents can eradicate. Children come to adoptive parents with this relationship, in the same way that they come to their adoptive parents with brown eyes or a particular personality and it is not the adoptive parents', birth parents' or adoption agency's right to deny or destroy this relationship.

Arguments against open adoption

4.51 There is considerable resistance to the practice of open adoption often from adoptive parents. One submission stated that: 'Open adoption is experimental and may result in psychological damage being inflicted on the child- such practice that experiments with the lives of children should be banned'.

4.52 Criticisms have been made of open adoption on the basis that there is no reliable research evidence to support it. Some commentators argue that there is no evidence that the practice is positive and that the number of healthy, well-adjusted adoptees in the world is testament to the fact that closed adoption is successful. One commentator claims that open adoption is 'unsupported by anything other than the sparsest anecdotal data- data with virtually no sound theoretical rationale or scientific research to back it up'.

4.53 Opponents of open adoption also argue that contact with birth parents during childhood will jeopardise the adoptive parent-child relationship and prevent the child bonding or attaching to the adoptive parents. They argue that the child will become confused about who his or her 'real' parents are and feel insecure about his or her position in the adoptive family. Studies have documented that some children worry that their biological parents will take them away.

4.54 Some people argue that adoptive parents will be inhibited by birth parents and not feel able to care for their children exactly as they wish. They may feel that they are not 'entitled' to the child and that they are continually being reminded that they are not the child's biological parents. This may 'not only re-emphasize biological infertility, but lead to feelings of psychological infertility as well. They are not allowed to really psychologically parent the child.

4.55 Finally, opponents of open adoption argue that continued contact with or knowledge of a relinquished child will only prolong birth parents' grief. By not making a complete break with the child, birth parents are continually reminded of their loss and prevented from mourning properly, healing and then getting on with their lives.

Conclusions

4.56 The Commission's provisional view is that the case for openness in adoption is very strong, and that the arguments against it are not convincing. While it is true that there has been little lengthy and detailed research on open adoption, it does not necessarily follow that the practice should not be pursued....

4.57 Further, it seems to the Commission that while there has been little long-term research on open adoption, there has been research on closed adoption that has resoundingly stated that closed adoption is not in the best interests of adoptees and birth parents. In a number of studies, adult adoptees and birth parents have stated that they would have liked information about each other during the adoptee's childhood and even the opportunity to meet. Further, the Commission found in its review of the Adoption Act 1990 that many adoptive parents regretted not having access to information about their children's birth families when they were growing up. Many felt that it would have made their task of parenting easier if they had had access to medical information and information about the birth family so that they could answer their children's questions more accurately and honestly.

4.58 It seems to the Commission that the trend in open adoption is the result of an accumulation of adoption knowledge from workers and members of the adoption community over the past thirty years or more. Adoption workers have applied certain theories to their practice and they have monitored results. Adoptees, birth parents and adoptive parents have lived with the results of these theories and have spoken out about the positive and negative effects they have had on their relationships and their personal identities. The consensus of this experience seems to be that adoption needs to be more open and honest about the reality of adopted children's dual parentage. It seems to the Commission that this consensus of experience constitutes a considerable body of reliable research on which to justify the trend in favour of openness.

4.59 From the point of view of adoptive parents, there is strong evidence to suggest that the more open an adoption, the less threatened adoptive parents and consequently children feel by birth parents. Studies have found that 'the more frequent and direct the contact [with biological parents] the less the adoptive parents worried about being the child's real parents or feeling entitled to the child. Parents who had letter-only contact were those who worried the most about biological parents wanting or taking the child back.' This illustrates the familiar pattern in adoption that parties are threatened by what they do not know. Limiting access to real knowledge can lead people to unnecessarily believe the worst of others.

4.60 The argument that birth parents are forced into a continual process of grieving by open adoption is easily dismissed on two grounds. *First*, is seems clear that it is in fact closed adoption that precipitates a continual grieving process. Birth parents claim that relinquishment without contact or information feels like the child has died, but without any of the finality of death. Birth parents have spent years worrying and wondering about their children, desperate to know if they are healthy and happy in their adoptive families. They say that if they had been allowed

some information about their children their feelings of loss would have been easier to bear. *Second*, birth parents should be able to make the decision about whether open adoption is damaging to them for themselves. For too long birth mothers have been treated as irresponsible and incapable women who need social workers and adoptive parents to order their lives for them. If a woman can make the monumental decision to relinquish a child for adoption then she is surely capable of deciding whether contact is beneficial to her well-being and that of her child.

4.61 The Commission is therefore strongly inclined to recommend that adoption legislation should support the policy of open adoption. *The promotion of openness and honesty is relevant to numerous issues in all forms of local and inter-country adoptions.* They include:

- € access to information while the child is under 18;
- € access to information when the child is over 18;
- € contact with birth family during childhood;
- € involvement of birth family during childhood;
- € involvement of birth family in selection of adopters;
- € birth certificates...

4.64 It is correct to approach the NSW Adoption Act 1965 on the basis that as far as possible deception and secrecy should be avoided. This is not to say that all information should be open to universal scrutiny. It means that the relevant provisions of the Act should be approached on the basis that unless there is some clear justification for them, any rules involving deception of the withholding of information should be removed..."

'New South Wales Law Reform Commission Discussion Paper No.34' Review of the Adoption of Children Act 1965 NSW. April 1994. p60-66.

Birth certificates of adopted persons

NSW Law Reform Commission Report 14.13 "The form of birth certificates of adopted people was discussed in many submissions, and was the subject of considerable diversity of views.

The present law 14.14 The present law and practice may be summarised as follows. When a person is adopted the order for adoption is transmitted to the Registry of Births Deaths and Marriages, and that officer prepares a new birth certificate, known as an 'amended' certificate. The amended certificate is indistinguishable from the birth certificate of people who have not been adopted. The amended certificate gives the child's name as determined in the order of adoption, and the true date and place of birth. It sets out details of the names, occupations, ages and places of birth of the adoptive parents under the categories of 'mother' and 'father'. It sets out the date and place of the adoptive parents marriage. It also lists, under the category 'previous children of relationship', any children of the adoptive parents who were born before the date of birth of the adopted person...

Issues and options 14.16 Clearly having access to the original birth certificate has meant a great deal to adoptees, and the Commission's recent review of the 1990 Act indicates that this right should continue. However, it has been submitted that the continued use of the amended certificate is objectionable because it misrepresents the truth about the adoptee's life.

14.17 Evidence to the Commission indicates that adoptees have different needs in relation to the birth certificate. Some are content with the present situation. They appreciate the right to have the original, birth certificate. They are happy to use the amended birth certificate, and pleased that in its present form it does not normally reveal their adoptive status. They take the view that they should have the right whether or not to disclose to people that they are adopted. As stated in the New South Wales Committee an Adoption submission: 'The current system, although perpetuating undesirable secrecy, does give privacy. Schools and sporting organisations apparently require the sighting of a full birth certificate at the time of registration of a student/player deeming extracts to be inadequate.'

14.18 Other adoptees, however, would like to be able to use their original birth certificate for official purposes. Even though the present form of birth certificate does not disclose the fact that the person has been adopted, the information in particular cases may suggest this, or at least appear puzzling. For example, if the adopted person was born in another State, or another country, which the adopting parents had never visited, people who did not know of the adoption might seek an explanation of the stated place of birth.

What should be done? 14.19 In the Commission's view, there is much to be said for a form of birth registration in which the documentation is an accurate record of certain key events, such as birth, change of name, adoption and marriage. On this approach, there would not be a need for a separate birth certificate to issue upon adoption. While the Commission draws attention to this as a possible long-term reform of the system of registration, it recognises that the implementation of such a change would be an enormous task, that much of the relevant information is not now available, and that privacy aspects of such a change would require careful consideration. Further, it is sufficient in the present context to focus on recommendations relating only to adoption.

14.20 Turning to the options that might realistically be considered in the short and medium term, one possibility would be for the law to be flexible, perhaps by providing that some categories of adoption should not involve the issuing of a new birth certificate, or alternatively by providing that the court may determine in each case whether it is appropriate for a new birth certificate to be issued. The Commission's tentative view is that such an approach may prove unduly complex, and might suggest a distinction between two categories of adoption...

14.21 In this respect, the options appear to be as follows:

1. Retain the present system For the reasons given above, this is not entirely satisfactory, as the existing certificate is misleading and incomplete, and causes distress.

2 Supplement the present system by registering a separate document, a certificate of adoption, which would include pre-adoption and post-adoption information. Such a document would set out the child's original birth details, and also the date and place of adoption, and the names,

occupations and address of the adoptive parents. The question of access to this document would need to be determined...This was the Commission's preferred option. *'New South Wales Law Reform Commission Discussion Paper No.34*' Review of the Adoption of Children Act 1965 NSW. April 1994. pp334-339. For New Zealand 1990 Report re adoptee birth certificates *see* p284 XXXthis book.

Recent English case law *see* 'Adoption Case-law Review' L Mendoza, English Journal, *Family Law* Nov 1996 pp681-685.

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Open Adoption - Australia

Marshall & McDonald- Australia—In adoption practice for many years the principle that the child should be told of its adoption was firmly in place and for some years leading up to the adoption information legislation of the 1980s and 1990s the disadvantages of 'secrecy' in adoption were beginning to be better understood. In anticipation of law reform in this area, workers began to discuss with prospective adopters the possibility of children, on reaching 18 years, being able to obtain information about and possibly establish contact with, their birth parents. While this was threatening to some prospective adopting parents, others saw it as a basic human right that children should know of their origins.

Rapid move toward open adoption

From the beginning the movement towards 'open adoption', over and above that which was required by law, developed rapidly.

— The term can now refer simply to an exchange of information or to a situation where the relinquishing parent/s can have a role in the life of the adopted child.

— In most states the birth parent is offered the opportunity to be involved in the choice of adopting parents, and a range of options as to the degree of contact wished for, both at the time of placement and later.

— Almost all will choose to be involved in the choice of parents and many opt to meet the adopting parents around the time of placement, but they may not then go on to have contact.

— This meeting between the parents is seen by many workers as a very positive development.

— It tends to promote good will between the parent figures and to predispose them to one another.

— A recent American study has identified the birth mothers' role in choosing the adoptive parents as being strongly associated with positive outcomes. [L. K Cushman, D Kalmuss and N.P. Brickner, 'Openness in Adoption' p7]

— After the order is made, some relinquishing parents will choose to distance themselves for perhaps three or four years before taking up any form of contact with the adoptive family.

— For some there may be a lot of contact in the early months or years and then this will fall off.

— For some mothers such a continuous reminder of their secondary role in the child's life becomes too painful, and for this or other reasons they withdraw.

— In some states, notably Victoria and Western Australia, the particular arrangement agreed to forms part of the Order of Adoption and is legally enforceable.

— In other states such as South Australia the arrangements are by agreement only and are not legally enforceable.

— The degree of satisfaction and benefit which all the parties derive from contact will of course depend on a variety of factors, including the compatibility of the two families, and the changing needs and circumstances of their lives.

— It will depend also on the parents' ability to work comfortably and tolerantly within the power relationship created by the adoption, how able they prove in managing, in the interests of the child, the inevitable differences that will arise.

— Experience in foster care and disputes about children in Family Court matters suggest at least the possibility of conflict when multiple parent figures are involved in the life of a child. Adoption workers involved in helping to negotiate these very sensitive and vulnerable relationships are clear sighted about the difficulties involved and the range of new issues which such contact raises. However, the workers with whom this issue has been discussed by the authors view these developments positively.

— They point to the **advantages to both sets of parents and to the child that they become for each other real people with all the virtues and failings, not unknown figures liable to be either romanticised or demonised**. Only time and qualitative research can demonstrate the benefits or otherwise of these arrangements on the adopted person, the birth parent/s and the adoptive family.

Source Marshall and McDonald '*The Many Sided Triangle- Adoption in Australia*' 2001. pp76-77

Open versus closed Adoption

Russell— USA The traditional closed adoptions of the past meant that birth families and adoptive families were not to communicate with each other. Intermediaries such as social workers, attorneys, or doctors were the communication links between the two families. It was expected that no direct contact would take place before or after the adoption proceedings. Russell 1996 p30

Open adoption is a relatively new option in adoption practice. At first thought to be a progressive and unique way of adopting, it is now becoming the chosen style of adoption if not yet the norm in adoption practices. Russell 1996 p30

Current open adoption practices involve birth parents choosing who will be the adoptive parents for their child, communicating over the years, and deciding on the kind and amount of contact that shall be maintained. Russell 1996 p31

There are different definitions and agreements about how open an open adoption will actually be. Sometimes an open adoption means only that the birth parents choose the adoptive parents. Other times it means that communication will be maintained between the birth family and adoptive family over the course of the adopted persons life. Russell 1996 p31

Sometimes the initial expectations of an open adoption arrangement are changed either by agreement or by default. It is a good idea to get social security numbers from the other triad members so you can always find them. In addition, a written agreement signed by the birth parents and the adoptive parents will clarify communication expectations. Russell 1996 p32

Perhaps the most challenging aspect of open adoption is ongoing communication. Emotions are a very real aspect of adoption and will impact communication. The pain of adoption can be so great that a triad member may need to take a break from the relationship, with or without an explanation of his or her absence. Sometimes assumptions, fears, and sadness need to be discussed again to clarify expectations and feelings. Russell 1996 p32

Perhaps the most important principle to keep in mind whether the adoption is open or closed is that adoption is for the child. The adults involved need to sometimes put their personal feelings aside to consider what is in the best interest of the adoptee. p32

Source Marlou Russell 'Adoption Wisdom' 1996 pp30-32

OPEN ADOPTION

Griffith— from my book 'The Right to Know Who You Are' Canada 1992 Sec 7 p1-6.

Open adoption as standard practice

Reuben Pannor, Annette Baran—The authors place "closed adoption" and "open adoption" in opposition to each other. Moving beyond open adoption in selected cases, they call for an end to all closed adoptions.

The secrecy, anonymity, and mystique surrounding the traditional adoptions of the past have left behind numerous psychological problems for adoptees, birth parents, and adoptive parents. This practice should not be perpetuated but must be replaced by a form of adoption that practices openness and honesty, and thereby permits a healthier and psychologically sounder adoption practice.

This concept was first presented in an article entitled "Open Adoptions" (Baran, Sorosky, Pannor 1976), in the belief that open adoption was an alternative for a selected group of birth and adoptive parents. Since that time, the authors have come to believe firmly that all adoptions should fall within the open adoption framework.

Definitions

Adoption of older children has been open for many years. (Borgman 1982). Continuing contacts with previous birth relatives and foster parents have been recognized as necessary for the child's sense of identity. Step-parent, relative, and foster parent adoptions all acknowledge the existence of previous parents, who often remain an integral part of the child's life. All adoptions, including the placement of newborn infants, should now be open in the best interests of the child, birth parents, and adoptive parents.

Open adoption is a process in which the birth parents and the adoptive parents meet and exchange identifying information. The birth parents relinquish legal and basic child rearing rights to the adoptive parents. Both sets of parents retain the right to continuing contact and access to knowledge on behalf of the child. All child rearing parents, adoptive or non-adopted, meet the daily physical and emotional needs of the child, represent basic stability and security, and offer a value system with which the child identifies.

The interest and involvement of the birth parents of an adopted child need not be any different from the nurturing that all children receive from meaningful relatives and friends.

The frequency and regularity of contact between the birth parents and adoptive family is a highly individual arrangement which must be agreed upon by all parties. If it is accepted that both birth and adoptive parents share a common interest in the child, the fear and paranoia inherent in the closed system can be eliminated. A relationship can be achieved that allows the birth parents a role within the child's life that does not undermine the primary parenting position of the adoptive parents.

Open adoption must permit the adoptee, the adoptive parents, and the birth parents to function with the same degree of freedom, having the same access to information and the same opportunities to resolve their problems, as is possible for those outside of the adoption triangle.

Adult adoptees, questioned about their feelings after a reunion, replied, "I don't feel adopted any more". Asked what they meant by this, they replied, "We don't feel different any more; we feel like everyone else". Closed adoption denies these fundamental rights to adoptees, setting them apart as different from the rest of the population and, in fact, penalizing them for being a part of the adoption community.

In open adoption the birth parents assume more responsibility for the decision to relinquish. As full participants in the placement, entrusting the child to a known family, they are better able to cope with feelings of loss, mourning, and grief

For the adoptive parents, knowing the birth parents can avert fears and fantasies that negatively affect the relationship with their adopted children. It also permits them to give the children knowledge based upon first-hand contacts. Seeing birth parents as real people with strengths and weaknesses, rather than as phantoms who are potential intruders, might permit adoptive parents to respond with more understanding and empathy when a birth mother requests information about or a visit with the child.

For the adoptee, feelings of rejection by the birth parents can be diminished in an open adoption. The maturing child is more likely to gain a realistic understanding of the problems that led to his or her adoption through exchange of pictures, personal contacts, and correspondence with birth parents. A continuing link with the birth parents will help to dispel the notion that many adoptees have that their birth parents are not interested in them and do not care about them.

Open adoption can enable adoptees to learn the true circumstances that led to their adoption**,** in contrast to the romantic stories, untruths, and distortions they have been told or imagined. It would help them to better understanding that placing a child for adoption is probably one of the hardest decisions parents can make. Open adoption would also diminish the feelings of many adoptees that an existing block to the past may, in fact, create a block to the future as well. The secrecy that has enveloped adoptions, fostering both "good" and "bad" illusions for adoptees, would be lessened if not eliminated.

End of pretence of closed adoption

Genealogical bewilderment has been well described in the literature (Sants 1965). This state of confusion and uncertainty that develops in adopted children who either have no knowledge or only uncertain knowledge of their birth parents would not be a greater problem for adoptees than for children in the general population if their adoptions had been open.

This is not to say that adoptees would then be free of problems, but rather that they could deal with their problems without the burdens imposed upon them by the secrecy of closed adoptions

In their book, *The Adoption Triangle* (Sorosky, Baran, Pannor 1978), the authors said that the taking of a child

from one set of parents and placing that child with another set who "pretend" that the child is born to them, giving the child a new name and a new identity, disrupts a basic, natural process. The authors further pointed out, as have Erikson (1968) and Lifton (1974), that the need to be connected with one's biological and historical past is an integral part of one's identity formation.

Closed adoption blocks this process, necessitating for many adoptees the need for a search and ultimate reunion that may provide the means for bringing together the broken connections from the past. Open adoptions would eliminate the need for a search that for many has been painful and sometimes fruitless.

Crucial to an understanding of the need for open adoption is what Kirk (1964) refers to as the basic need to understand that adoptive kinship is not the same as consanguineous kinship. He correctly points out that the dogma of "No differences" leads to unnecessary inequities, felt injustices, and serious social tensions. He offers a detailed examination of the difference between biological parenthood and adoptive parenthood, pointing out the importance of being able to fully accept the difference.

Closed adoption provided the environment for adoptive parents to "pretend" that the adoptive child was, in fact, born to them. Too little attention was given to the adoptive couples' need to resolve feelings about infertility problems.

Most couples plan to conceive and give birth to children. Adoption is a second choice for those who cannot. To allay their anxieties and further encourage the fantasy that adoption is the same as if the child had been born to them, the adoption field promised anonymity and secrecy. We further assured them that this was in the best interests of the birth parents, who would soon put the experience behind them, start a new life, and never bother them again. Wasn't this what the adoptive parents wanted to hear? Wasn't our practice oriented toward finding babies for childless couples? The fact that this might not be in the best interests of the child or the birth parents somehow eluded us. The fact that the child would grow into an adult and the birth parents would grow and develop with new and changing needs also eluded us.

Past and future issues

Why were we adoption professionals not more critical of our practice? During the 1940s and 50s we were relinquishment-oriented. Social workers felt that they had failed in their jobs if too many mothers choose to rear their children. In defending our practice, we put the onus on the birth parents, whom we labeled "disturbed" if they fought the pressures of relinquishment. We supported the needs of the adoptive parents, whom we saw as the primary clients. These practices have failed to address the major issues in adoptions, perpetuating myths and numerous psychological problems.

Myths made liars of us

Many of these myths have come back to make liars of us. Many birth parents, who had been told that the relinquishment of their children would be a resolution to their problems and that the experience would be forgotten, were told otherwise by their continuing pain and mourning. Many adoptive parents have not been able to overcome the fact that the adopted child has another set of parents. Many adoptees have demonstrated a need and a right to establish a connection with their biological and historical past.

Genetic Issues In a paper entitled *"Issues Regarding Health Matters and Open Versus Closed Adoption"*, Wilson (1982:3), a noted pediatric geneticist, stated:
"Since I am a pediatrician specializing in genetics, my remarks will be directed at the genetic aspects of health. I believe that many of the health issues involved in open versus closed adoptions are in genetics. A full genetic history may not be obtained in a routine medical history; therefore, the usual medical records may be insufficient for genetic evaluation. The rapid expansion of knowledge and technology has made genetics much more applicable to medical care. As medical genetics expands further (as it will), it will become even more relevant than it is today. Therefore, persons will need to know as much as possible about familial disorders occurring both before and after the adoption. Genetic evaluation requires ;-

1 Access to information about the natural family and

2 Verification of the information, either of which is difficult to obtain, if not impossible, in closed adoptions.

While we continue to struggle with the problems inherent in closed adoption, new and potentially more problematic solutions to infertility are emerging.

ART has even bigger issues Some of these practices are, in fact, not really new, such as artificial insemination by donor, and surrogate parenting, but they are being practiced on a larger scale with little concern for good standards or for the psychological implications for those intimately involved. Present knowledge of the many pitfalls in traditional adoption practice and the need to push forward with open adoption should stand us in good stead as we tackle these new issues.

Adoption similarity with Recyled families As Kirk (1982) points out, many of the problems faced by adoptive families have much in common with the patterns evolving in so-called mainstream families, resulting from divorces and remarriages that create numerous step-parent households. These families deal with complex and overlapping loyalty demands, putting a special emphasis on acceptance of differences good communication, trust, and integration- needs similar to those we are attempting to deal with in adoption.

Conclusions

1 Secrecy cannot be guaranteed

Adoption professionals must acknowledge to everyone connected with adoption that secrecy and anonymity cannot be guaranteed. In addition to the hundreds of self-help groups throughout the United States and Canada, there are now an increasing number of well- written handbooks available. Simply stated, the technology for successful searches exists outside of agencies, court barriers, and sealed records, and will expand in our computerised age. Open adoption will permit birth parents, adoptees,

and adoptive parents to make decisions about the kind and extent of relationships they desire. In closed adoption these decisions are often based upon pent- up frustrations, humiliation, distortions and rejections. Open adoption will provide a sound basis for building a healthy adoption institution.

2 Open adoption will neither be easy nor free from problems. Quite the contrary. It will call upon the best skills and knowledge of adoption professionals, but it is time for us to meet the needs of the adoption triangle.

Source Reuban Pannor, M.S. W., ACSW, LCSW, is director, Community Services, Vista Del Mar Child-Care Service, Los Angeles, CA. **Annette Baran,** M.S.W., ACSW, LCSW, is a psychotherapist in private practice in Los Angeles, CA. This article was adapted from material presented at the first national conference on open adoption, sponsored by the National Ad Hoc Committee to Re-Evaluate Adoption Placement Philosophy, April 1982.

From an experienced adoption social worker

Burgess— The virtues of Open Adoption, reassuring for both birth parents and adopters, carries with it a new openness for the adopted child as well. He has the chance to learn of his heritage merely for the asking from those informed persons who share his concerns and interests. . . .

Today in 1988 a new generation of adoptive parents regard the birthmother of their children as members of the family. They welcome them as relatives to be known as members of the family. They welcome them as relatives to be known to the children as their birth-mothers. At a recent conference in Traverse City, Michigan, the clients of the Community Family and Children Services expressed fulfillment and positive satisfaction in their commitment to this new way in adoption.

Adoptive parents viewed this open adoption as liberating them from anxiety. They see it as a way to grant their children rights to honest heritages and a chance to grow with knowledge and appreciation of their birth parents in a natural way."

Source Linda Cannon Burgess 1989 *Adoption: How It Works,* Tilton, N.H.: Sant Bani Press. This author's newer book views changes in adoption from wide social work experience.

Benefit of semi-open adoptions

McRoy—"No one type of adoption can regarded as "best" for every family situation...Given the balance of the risks and values of openness in adoption, and the majority of adoptive and birth families who have appropriate pre-adoption counseling available to them, the greatest benefit and the least risk seems to occur in families with semi-open adoption...Semi open adoption serve to promote Kirk's notion of acknowledgment of difference, without moving toward insistence of difference. This process also tends to minimize problems regarding role expectations of adoptive parents and birthparents."

Source Ruth G. McRoy, Harold D. Grotevant, & Kerry L. White, 1988, *Openness in Adoption: new practices, new issues,* New York: Praeger.

Serrano— "Open adoption is a new idea and one which may very well have immense emotional benefits for all the parties involved. [It may be] another way of increasing our range or responses and actions to better meet the complex demands of human relations and human needs."

Source Alberto Serrano, Forward in Kathleen Silber & Phylis Speedlin, *Dear Birthmother,* 1983 San Antonio, TX: Corona.

Client self-determination

Silber & Speedin— "The social worker was 'shocked' that we had corresponded with our daughter's biological mother.' Some of our readers will identify with that social worker. Past patterns of adoption sometime seem more comfortable and safe than a 'new approach to adoption.' We would advocate, however, leaving that critical decision to the individuals involved in the actual adoption experience."

Source Silber and Speedin *Dear Birthmother* p189

Need for Sweeping changes in adoption practice

Annette Baran and Reuben Pannor—What have we done adoption in reform in last 20 years?

"What have we, in the adoption-reform movement, really been doing during the last two decades? It seems to us that, if we take off our blinders, we must admit that we have been co-opted in supporting a system that causes pain and lifelong suffering to all the parties involved. A study of the conference programs, the adoption literature and the media attention clearly points up the direction we have taken. We are all involved in patching up and maintaining a flawed institution. We talk about and offer so-called solutions to adoptees, birth parents and adoptive parents. We try to help them live within the system today as well as tomorrow. Let us now recognize and acknowledge our own vested interest in perpetuating this system.

The time has come to utilize our knowledge and experience with the past and present to forge a totally new direction for the future. We offer the following issues for serious consideration.

Relinquishment of children to a new set of parents, as a final, irrevocable act, severing all rights of the birth parents, must be discontinued.

Open adoption...is not a solution to the problems inherent in adoption. Without legal sanction, open adoption is an unenforceable agreement at the whim of the adoptive parents. Instead, a form of guardianship adoption would be in the best interests of all concerned, with special benefits for the adoptee.

It decreases the abandonment/rejection issue and permits the child to know that the birth parents cared but could not raise him. *We have always maintained that adoptive placement is the last resort,* to be considered only when all other options have been thoroughly explored. *However, our practice has never reflected this concept.* Indeed, we are now embarked on a world of "How to" books, video tapes, and seminars to teach couples methods and ruses of locating and convincing pregnant women to give up their babies. We are a heavy presence in the high school classroom, and the advertising columns luring vulnerable and economically deprived pregnant teenagers. In fact,

in the California legislature a bill was introduced recently to fund recruitment teams who would present the virtues of adoption in the public schools. What have we done to underwrite and support keeping babies and helping the family stay together?

Education for contraception?

Where in the world of adoption reform have we heard any emphasis on prevention and education and contraception? Knowing the agony and lifelong pain that results from an unplaned pregnancy and subsequent relinquishment, why have we not made prevention a major issue? Why is the United States the leader of the western world in teenage pregnancies? This issue has been clouded by religious dogma and politicized to obscure the real problems.

The struggle to open records and address the wrongs of the past must continue.

However, simultaneously and with equal emphasis, we must begin to look at the future and address the need for sweeping change. Change that radically reduces unplaned pregnancies; change that makes it possible for babies to remain with their birth or extended families; change that institutes a different system for the birth parents who must place their babies, legally permitting an on-going connection with the child.

Do we have the courage to address the issues that will truly eliminate the problems we have struggled with for so many years?"

Source Annette Baran and Reuben Pannor, 1990, It's time for sweeping change, *Decree,* Summer, p. 5.

Adolescent birth mothers rejecting adoption

In 1990 it appears that approximately 3% of pregnant adolescents choose adoption for their infant. There is a social attitude against adoption, found in the peer group, counsellors, the birthmother's family and in cultural values.

Those teens who do choose adoption will experience "an enduring sense of loss." ..."Severing of legal ties does not mark the end of a birth mother's involvement with the child."

Information on all aspects of adoption is needed by the adolescent and the peer group and a wide range of professionals. To meet the needs of all parties involved, "structural changes in the delivery of counselling and supportive services" are needed in adoption planning, including broad public education.

Source Michael P. Sobol, and Kerry J. Daly, 1991, The adoption alternative for pregnant adolescents: decision making, consequences and policy implications. In press *Journal of Social Issues.* Authors at Department of Psychology, University of Guelph, Ontario.

Further readings on open adoption

* N.F. Belbas, 1987, Staying in touch: empathy in open adoptions, *Smith College Studies in Social Work* 57(3), June, 184-98: Those studied felt uprepared for open adoption by prior experiences or attitudes but felt comfortable enough with it after some experience to recommend some level of openness.

* C. Chapman, P. Donner, K. Silber and T.S. Winterberg, 1987, Meeting the needs of the adoption triangle through open adoption: the adoptive parent, *Child and Adolescent Social Work Journal,* 4(1), Spring, 3-12. Authors many be contacted at St. John Vianney Parish, Houston, TX 77029:

"Open adoption offers benefits to all members of the adoption triad. Seminars, readings, panels are offered to adoptive parents. Birth parents are no longer perceived as a threat and the adoptive parents gain a feeling of entitlement to parent from the birthparent."

* C.J. Sorich and R. Siebert, 1982, Toward humanizing adoption. *Child Welfare* 61(4), 207-16:

Some degrees of openness (letters, communication via an intermediary, or face to face) "allows the birthparents to work the feelings of loss, pain, and guilt; provide the adoptive parents with a fuller understanding and acceptance of those who gave their child the gift of life; and ultimately, give the adoptee a fuller sense of identity."

* K.W. Watson, 1988, The case for open adoption, *Public Welfare* 46(4), Fall, 24-28:

"Open adoption, because it provides a way for children to integrate their birth family history into their lives and to feel more comfortable about being placed in adoption, leads to an easier identity formation...We all deal better with what we know and with openness than secrecy; human beings have the capacity to endure suffering and grow through it because they have the capacity to learn, to care about each other, and to heal and be healed."

And in the same journal issue, the opposite point of view by

* A.D. Byrd, 1988, *Public Welfare* 46(6), Fall.

See also

* A.P. Derdeyn and J.W. Wadlington III, 1977, Adoption: the rights of parents versus the best interests of their children. *Journal of American Academny of Child Psychiatry,* 16(2): 238-55.

* N.W. Paget, 1978, Closed-circuit television: a revolution in adoption practice, *Child Welfare* 57(2), 69-82.

* R. Pannor and A. Baran, 1984, Open adoption as standard practice, *Child Welfare* 63(3), 245-50.

* K. Silber and P.M. Dorner, Children of Open Adoption, Corona Press, San Antonio, TX, 1989.

* L. Guemple (Canada), and P. Morrow and C.M. Pete (Alaska) on ancient Inuit and Yupik Eskimo cultural practices of open adoptions, Sec. 8:6.

* For account of an unplanned open adoption after newborn children were switched in the hospital in 1936 in England, see Sheila Y. Bourner, Solomon's choice, in Family Tree Magazine, October 1991. Address 15/16 Highlode Industrial Estate, Stocking Fen Road, Bamsey, Huntingdon, Cambs, England, PE171RB. Tel.0487-814050.

* For a Canadian open adoption in Alberta by the Kokko family, see Pat Ohlendorf-Moffat, Growing up with two moms, Chatelaine, January 1992, pp. 57, 59,123,124.

National Federation for Open Adoption Education

N.F.O.A.E. is a new network of counseling and educational programs and practitioners dedicated to the... development and dissemination of more humane forms of adoption and the establishment of standards for high quality, comprehensive open adoption counseling.

"I encourage other professionals to become involved in the National Federation for Open Adoption Education (NFOAE). The more support we can generate for open adoption the better for all members of the adoption triangle." (Jeanne Warren Lindsay, Open Adoption: A Caring Option, 1987.)

"Open adoption is not the Pandora's Box of evils that some thought it would be. It may reduce the toxicity of closed adoptions. " (Research by Deborah H. Siegel, PhD, presented at American Adoption Congress Conference, Philadelphia, 1992.)

Source K C Griffith— Extracts from my book '*The Right to Know Who You Are*' Canada 1992 Sec 7 p1-6.

RELATIVE ADOPTION

In-family adoptions

An increasingly accepted practice, 42% of adoptions by DSW were to a relative or close friend. "If a child is orphaned, or parents are unable or unwilling to provide for their child's care, a family member often steps into the caregiving role. Grandparents, aunts or uncles, elder brothers or their cousins, or close family friends are an important back-up resource in all cultures. Care by extended family members is particularly important in Maori and Pacific Island Polynesian cultures where members of the whanau, aiga, or extended family have traditionally played a significant role in the care and upbringing of children." Trapski's Family Law Vol.5 Brooker's 1995 B9

Maori adoptions normally between relatives "The adopted child would almost invariably be a relative by blood of the adopting parent." Native Appellate Court Rule.4 1895. "Adoptions were made to ensure that children remained in the family, thereby retaining their tribal identity and rights of succession. A child might leave if, for example, the parents belonged to differing tribes. If one parent died, the other might take the child back to its own tribe. Adoption by a member of the deceased parents tribe would prevent this." Geo Graham 'Whangai Tamariki' Journal of the Polynesian Society 1948 Vol.57 No.3 p268 He also draws from manuscripts dating back to 1842 that indicate the prevalence of adoption, but always limited to members of related groups. The object was to retain the memory of family relationships severed by distance or from other cause. KCG

Maori and Polynesian relative adoption

"In some respects, these adoptions are ones which truly reflect Maori and Pacific Island culture and practice. Informal adoption within the family has been common for a very long time and, in some ways, allowing that arrangement to be formalised is simply completing the process which has already taken place. On the other hand, adoption of this kind may distort relationships and create confusion of roles more than in any other context. The reason for this is that the birth parent is likely to be living nearby, even in the same household and may even be known as 'mother' or 'father' on a day to day basis. In this situation, guardianship rather than adoption may be much more appropriate. Further, it reflects the fact that parenting may be shared by a whole range of people within the whanau. We understand nevertheless that particularly for some Pacific Island communities formal adoption is regarded as highly important and guardianship is not an acceptable option. We raise the possibility, however, of combining adoption with additional guardianship for the birth mother...A motive for relative adoptions, especially for Pacific Island families, is to overcome immigration difficulties. Adoption is entirely inappropriate where this is the sole reason for the application, but need not be so where the child has been part of the family for some time. We recommend that further attention be given to this question by the Department of Social Welfare and the immigration authorities, in close consultation with members of the Pacific Island communities." 1990 Report p64

Adoption Options
Special internal report of DSW 1993-94

Adoption by strangers*	344	29.5%
Adoption by one parent and spouse	444	38.0%
Adoption by relatives or close friends	332	28.5%
Adoption by foster parents	47	4.0%
Total	1167	100%

A total of 1167 children were adopted in New Zealand between 1 January 1993 and 31 October 1994.
**Adoption by stranger*, refers to adoption by a non-relative or person not a close friend. It does not necessarily mean closed adoption, many were open or semi open adoptions

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Disadvantages of adoption by relatives

1979 Review—"In respect of adoptions by other near relatives I think...that a guardianship order is all that is needed. An adoption by relatives not only extinguishes the child's legal relationship with one side of his or her family, it also distorts to a greater or less degree the relationships on the side within which the adoption takes place. Moreover it was pointed out to me that where the parents are living (as is likely to be the case with grandparent adoptions, for instance) they are relieved of the statutory obligation to maintain, which is transferred to the adopting relatives, and this may be most unsatisfactory in the circumstances. Grandparents will also usually suffer from an age disadvantage...I suggest therefore that adoptions by relatives as at present defined in the Adoption Act [1955] (s2 as amended by the Status of Children Act 1969) be prohibited." Webb 1979 pp20-1

1987 Review

"Recommends that adoptions by relatives as defined in the current Act be prohibited. These adoptions extinguish the child's legal relationships with one side of the family and they distort the natural relationships on the other side of the family. For example, if a child, is adopted by his or her aunt and uncle, the aunt and uncle legally become the child's parents; the child's natural mother becomes, in law, the child's aunt; and any natural siblings become the child's cousins. The problems of artificiality and interference with familial relationships are compounded in adoptions by grandparents, by age and generational factors. Adoption by relatives may have been utilised formerly to hide an ex-nuptial birth but with the decreasing stigma which attaches to ex-nuptial birth, this reason has lost much of its importance...The Working Party concluded that guardianship orders were more appropriate than adoption in these circumstances." Review 1987 pp12-13

Advantages of adoption by relatives

Trapski—"In Maori and Pacific Island Polynesian cultures a particular relative or close friend may be identified as having a special relationship with a child. The matua whangai, or special person, may be offered the privilege of choosing a name for the child (as happened in *Re Adoption*

034/001/90 (1991) 7FRNZ 444) and may become the child's principal carer or an alternative carer. While such arrangements are sometimes loosely referred to as 'adoption'; they are usually the antithesis of adoption under the Adoption Act [1955] because the arrangements are open, known, and accepted within the family and community and do not displace the role and status of the birth parents. Research shows that children cared for by relatives make good progress. Placement with relatives is less traumatic and minimises the number of changes to which the child has to adapt. The security, flexibility, and continuity which family care offers makes it a preferred option in the placement of children. The whanau principle is a keystone of the Children, Young Persons, and Their Families Act 1989." Trapski's Family Law Vol.5 Brooker's 1995 B9.01

Full time care givers' legal status

Where a relative or close friend undertakes the day to day care of a child, the parental rights and responsibilities remain with the birth parents unless the carer secures some legal status in relation to the child, whether by a custody order under s11(1)(b) Guardianship Act 1968 or s101(21)(c) Children, Young Persons, and Their Families Act 1989, by appointment as guardian s8(1) Guardianship Act, by a direction of a Judge in wardship proceedings under s9 Guardianship Act 1968, or by an adoption order.

DSW in-family adoption

"The placement of a child within the family is an alternative that all birthparents, especially those with Maori children, should consider. Maori people have a strong sense of belonging, and their sense of identity is linked to their whakapapa, and rests on knowing where they come from. Traditionally, in Maori and Island Polynesian cultures, members of whanau and aiga played a significant role in the care and upbringing of their children. These alternative care arrangements are sometimes referred to as 'adoption' but they are the antithesis of the concept of adoption under the Adoption Act. These arrangements being not only open, known and accepted within the family, but more importantly do not displace the role and status of the birthparents. Placement with relatives offers continuity in the child's life and relationships, which should make it a sensible option in most cases. In 1991, some 25% of adoptions handled by the Department of Social Welfare were in-family adoptions. Legal adoption, however, is not considered the most desirable option for permanent placement of children with close relatives as it unnecessarily distorts natural family relationships. In a report commissioned by the Justice Department in January, 1979 Patricia Webb suggested that Guardianship Orders were more appropriate in situations where adoption by parents, stepparents, or other close relatives was being considered. People who approach the Department with the intention of adopting a family member should be encouraged to consider guardianship and custody instead of adoption. These options provide sufficient protection in terms of permanency and of securing some legal status in relation to the child, without the severance and/or distortion of natural links with all family members.

It must be stated that there are fewer legal restrictions on adoption by close family relatives i.e. grandparents, brothers, sisters, uncles or aunts. They need be only 20 years old to adopt and, while the child's best interests will be considered by the Court, there is no legal requirement for an age difference. (Adoption Act, 1955, Section 4 (b)). Relatives do not require placement approval under the Act. (Section 450 of the CYP&F Act 1989 which repealed and replaced Section 6(4) of the Adoption Act 1955, and broadened the definition of "relative".) However, the requirement for a social worker's report, as for stepparent adoptions, may be applied here, as family members can not always be assumed to be a fit and proper person to have the custody of a child. The only restriction on adoption by relatives is that which applies to all such adoption situations. An adoption order shall not be made in respect of a female child, in favour of a sole male applicant who is not her father, unless there are special circumstances justifying the order. Adoption Act 1955 s4(2)." Adoptions Local Placements Manual CYPS DSW 1995 5.1 *see* 5.1.1-2 for detail.

Conclusion

While there has been considerable legal criticism of adoption by close relatives, in particular by grandparents, the practice continues to flourish.

Family cover-ups

Until the 1970s, adoption of a close relative was sometimes used to cover up an infamily illegitimate pregnancy. The adoption was often concealed from the child and all outsiders. This is no longer needed in today's more accepting social climate. The Adult Adoption Information Act 1985, whereby all new adoptees have an absolute right to know the truth of their origins, has blown the lid of the practice of concealment. The concealment also created much stress and trauma in families when the adoptee discovered the deception.

Legal opposition

Main opposition to relative adoption has come from legal professionals concerned at the legal distortion of the family relationships it creates. Adoption by a grandparent means the grandparent now becomes the child's mother (as if born to her); the child's natural mother becomes that child's sister; and aunts and uncles become siblings; The mother's other children become the child's nephews and nieces. The distortion was unacceptable.

Adoptee response

I have brought the issue up with adult adoptees who have experienced adoption by a close relative, resulting in a severe legal fiction distortion of family relationship. None have raised significant difficulty with the legal distortion of relationships. As far as they are concerned, they know the truth and simply never have, nor intend to, buy into the legal fiction. When I have explained the legal distortion of relationships that occurs, it's often received in bemused irrelevance. As one person put it, 'It sounds like a legal circus of their own creation, and I guess they have enough clowns to keep it running.' However, in reality the legal distortion can have quite complex results with, for example, estates and intestacy.

Cultural importance

By the 1990s it was accepted that infamily adoption is an important integral part of Maori and Polynesian culture. We have moved toward acceptance of the importance of infamily adoptions in special circumstances. This is now recognised in both social work practice and case law. The abolition of infamily adoption would also be contrary to the Treaty of Waitangi principles re maintaining Maori cultural values and practices. KCG

Case law

Grandparent adoption

1936 Luxford SM Wellington MC *In re An Infant* Granted. Application by a grandmother to adopt her grandchild. It came before the Magistrate on the child's 15th birthday. In making an adoption order, he held that a child is under the age of fifteen years until midnight on the day of the fifteenth anniversary of its birth. (1936) 31MCR 42. Decision questioned by Campbell 1957 pp18-19

Appeal grandparent adoption

1974 Macarthur J Nelson SC *K v E* The grandparents had brought up the child from 12 days old. Relationships between the birth mother and her grandparents were very estranged. The Magistrate found the birth mother had failed to exercise the normal duty of parenthood, and dispensed her consent. An interim order was made in favour of the grandparents. An appeal by the birth mother against dispensing her consent was dismissed. [1974] 2NZLR 535

Open adoption v grandparent guardianship

1983 Jeffries J Wellington HC *Re J* An application by grandparents of a boy aged five for an order that the child be placed under the guardianship of the Court. The mother requested DSW to place her child in an 'open' adoption. A family which the Court accepted was eminently suitable had been found. The mother objected to the grandparents becoming the guardians. The boy's Canadian father expressed the wish that the child should stay within the family as he had already suffered considerable psychological disturbance. **Held** (allowing the application) The child should go to his nearest willing blood relatives, the most usual and beneficial arrangement for a child, despite the unusual circumstances of this case. 2FLN122/ N180

Maori grandparent adoption refused

1986 Hillyer J Auckland HC *R v Department of Social Welfare// MR v Department of Social Welfare* An appeal against a District Court Judge refusal of grandmother of child's application to adopt. The grandmother had had care of the child from birth, and remained in contact with the birth mother. The FC Judge had made custody and guardianship orders in favour of the grandmother but refused an adoption order. The grandmother was of Ngapuhi. The child was now 5. **Held** The welfare and interests of the child are not promoted by the permanent severance of an existing legal bond between parent and child, especially where custody and guardianship orders include all that is necessary for the care and control of the child by would-be adopter. 2FRNZ 75 // (1986) 12NZRL 256 // (1986) 4NZFLR 326

Maori grandmother seeks revoke of interim order

1989 Inglis DCJ QC Wellington FC *T v S No.1 // Re Adoption 17/88* An application by the child's Maori grandmother under Adoption Act 1955 s12 to revoke an interim order of adoption. The child's mother was European and father of Maori descent on his mothers side. The *Tuhoe* Grandmother had not known about the child until it was 6 months old and the interim order had been in force 3 months. "The grandmother's application represents a clash between two sets of values. There is the European concept, expressed in the Guardianship Act 1968 and again in the Adoption Act 1955, that the responsibility for decisions of this kind affecting a child rest solely on the child's parents as legal guardians. There is the traditional Maori concept that the responsibility for decisions affecting a child does not rest with any one person but with the whanau, hapu or iwi. It is not for the Court to judge which is the better view, but it is right to say that wherever legally possible the Family Court, if called upon to make a decision affecting a child, will try to follow the path where the child's steps will tread more comfortably and which will be safe for the child. But of course the Family Court, like any other Court, must follow the law as it is laid down by Parliament. The child is in fact, on their father's side, a blood relative of a most respected Maori scholar...It is no surprise that the grandmother and her people perceive their mokopuna's future as raising issues of principle of the greatest importance and concern. They demand the child's return: it is said that she is 'the living embodiment of her ancestors'. There is great anger at the way the Department of Social Welfare handled the child's placement." at 412. [1990] NZFLR 411 // 5FRNZ 360. For detail refer 'Cultural Issues' pp221-227G this book.

Grandparent adoption

1991 Inglis DCJ QC Hawera FC *Re Adoption Application 021 001 91* Granted. Application by grandparents to adopt the child of their daughters failed marriage. The child's parents consented to the adoption. The grandparents have had the major role in caring for the child since his birth in 1987. The social worker, in a detailed and careful report, recommended that a final order be made. All members of the family are highly qualified professional people, of high standing and reputation in the community. The change of status, "would in law transform the child's grandparents into his parents, his mother into his sister, and himself into the brother of his mother's siblings. The Courts in New Zealand have tended in such situations to shy away from an adoption process which distorts existing family relationships, preferring to achieve the same basic objective by the adjustment of guardianship rights within the family...The Family Court, does not make special rules for particular segments of that community. But where the question before the Court concerns the welfare and interests of a child it is a proper use of the Court's discretion to choose the path on which the child may walk most comfortably. **Held** (making a final adoption order) That existing family relationships will

be adjusted by the adoption is only one circumstances to be considered and weighed among others. An important element will be the security of adoption which is virtually irrevocable. In the present case there were particular cultural factors favouring adoption as a solution and diminishing the perceived disadvantage of the legal readjustment of family relationships. Within this particular family the proposed adoption was the only realistic solution with the family's outlook and values." [1991] NZFLR 510 // 7FRNZ 427. *See* Case comment Gordon W Stewart NZLJ January 1992 pp5-8

Adoption of Fijian nephew

1991 Kendall DCJ Auckland DC *Application by Webster // Re Adoption A1-2/90* Granted. New Zealand Fijian residents seeks to adopt 18 year old nephew. Had already adopted the brother of proposed adoptee. The mother of the children had died. **Held**...(3) In relation to adoption there are three policy principles to be considered. "*Firstly,* should an adoption order be made if there are other methods available to the Court to give the child a secure and settled family situation? *Secondly*, in relation to adoption by relatives, because adoption extinguishes existing legal family relationships on one side and distorted relationships on the other side, then adoption should not be considered desirable unless the benefits secured by adoption cannot be met by other means. *Thirdly*, if adoption is purely for immigration purposes the adoption should be refused." Final order granted. [1991] NZFLR 537 // 7FRNZ 569 *See* p260 this book.

Maori grandparent adoption

1991 Boshier DCJ Otahuhu FC *Re Adoption of A // Re Adoption of AD // Re Adoption of AD* Granted. Application by Maori grandparents to adopt their grandson. The child, aged 19 months had been living with the grandparents since birth. **Held** (granting final order) "(1) What this case amounted to in reality was whether the wishes of the whanau to have an adoption made should be given effect by the provisions of the Adoption Act 1955. In terms of Maori customs and values. A's interests and welfare would be promoted by the adoption proceeding. Also of importance was that there would be openness over the arrangements and no disruption of lineage or succession. Although an adoption order would create some artificiality in law in terms of family relationships, the advantages of adoption here outweighed those difficulties. (2) Although it was not necessary to have due regard to alternative orders under the Guardianship Act 1968, in cases where matters of custom of the Tangatawhenua were involved there was considerable merit in giving effect to the concept of adoption." [1992] NZFLR 422 // 8FRNZ 370

Adoption of nephews from India

1991 Pethig DCJ Wellington FC *Re Application by Nana.* Granted Mrs Nana, a widow applied to adopt three teenage sons of her brother. "Adoption would result in his aunt becoming his mother, his parents becoming his aunt and uncle, and his brother his cousin." The child's Counsel pointed out stepparent adoptions were often older children and non stranger adoption was now the norm. "It is clear that the original purpose of adoption...which has in the past been accepted by the Courts has long since gone." The Judge commented, "One need only note that the distortion of relationships that stepparent adoption involves make that feature no longer of special significance in many cases.' After citing large increase in stepparent adoption, "So it is clear that the original purpose which I earlier set out and which has been accepted by the Courts has long since gone. Adoption is a legal fiction and in this Court the cases originally envisaged are a minority of the adoption orders made in this Court. And in those now made with 'strangers' the practice is and has been for some years for the adoption to be open at least in the sense that the birth parents or parent meet the adopting parents and to a greater or lesser extent as they agree, contact can be maintained." Interim order granted. **Held**...(4) Although a change in the child's status within the family, between the child and his or her natural parents, was important, to limit the question to that was to overlook the importance of care and control of the child. (5) (Obiter dicta) The original purpose of adoption was gravely suspect as a modern exposition of its purpose and certainly was not its practice. The Act was in need of review to accord with modern practice. [1992] NZFLR 37 *see* p260 this book for more detail.

Distorted relationships

1991 Smellie J Auckland HC *Re Adoption of A and J // M v Kendal* An adoption by a grandparent, then followed by a re-adoption. It was pointed out that by those orders, if they stand, the boys natural mother becomes their sister, as does their Aunt D while their Uncle R has the same status of a brother. In addition, however, S (The birthmother) has had further children in the intervening years and once again those children, instead of being stepbrothers or sisters, become nephews or nieces." 8FRNZ 221 // [1992] NZFLR 63. *See* p187 this book for detail.

Adoption by close friend- tamaiti whangai

1991 Inglis DCJ QC Marton FC *Re Adoption Application 034 001 90* Granted. In this case there was no blood relationship or tribal connection between the applicant and the child. However, the Court decided the bond was so strong that adoption was culturally appropriate. The applicant, a single 46 year old Maori of the Taitokerau people, applied to adopt a child aged 5. The child's father was European and the mother a Maori of the Ngati Pamoana of the Atihaunui a Paparangi. The applicant pointed out, this is not a traditional Maori adoption in the usual sense for there is no blood relationship between him and the child. It is however a traditional Maori adoption in the sense that it is accepted by the parents that they do not own the child and that the bond between the child and the applicant has been recognised and that it has been accepted that it will be best for the child if he recognises the applicant as his father. The birth parents consent to the adoption. The Maori Community officer recommend adoption. The applicant had been the main care giver since the child was 9 months old. The applicant had been asked to name the child at its birth. The child had become his tamaiti whangai, and had been baptised in the Ratana Church. **Held** "(Making a final order) In considering whether the welfare and interests of the child would be promoted by

adoption it was important not to look at the matter solely from a European viewpoint. In this case there was nothing to suggest the welfare and interests of the child would not be promoted by the adoption, which in fact had already been a reality for some considerable time." The Judge noted, "It is not as if the child will ever lose his natural parents or his natural family. I am satisfied that even if an application were refused, nothing would change. But there might be disappointment that the Family Court had not sensed and understood the particular emotional and cultural reasons favouring the formality of adoption in this case. [1991] NZFLR 507 // 7FRNZ 444

Adoption by grandparents

1993 Neal DCJ Invercargill DC *Re Adoption of Q* Granted final adoption order. Adoption application by grandparents to adopt grandchild. The birth parents consented. DSW supported adoption. A factor in advocating adoption was giving more protection to the child. The birth mother was now living with a man with a history of criminal convictions for sexually deviant crimes involving children. **Held** Notwithstanding the mother's consent to the adoption, given the history of this matter, and in particular the inherent instability in the mother's household and the strains between her and the applicants, there is a need for the extra security afforded by adoption which in turn will benefit the child and further his welfare and interests. 10FRNZ 340

Adoption by sister of sister's child

1993 Green DCJ Otahuhu FC *Application to adopt M* Refused. The applicants sought to adopt M, the daughter of the female applicant's sister. M had lived with them since a few days old. Both birth parents consented. The Ministry of Maori Development supported the adoption. **Held** (declining the application) (1) The Court was bound by the High Court decision in *MR v Department of Social Welfare* (1986) 4NZFLR 326 which held that in respect of adoption by near relatives, a guardianship order was usually all that was needed and that it was wrong to sever a child's legal relationship with one side of his or her family when it was doing no harm. A further consideration in this case dissuading the Court from granting the application would be the artificial and possibly damaging situation that would occur between M and her sister whose status should not be interfered with. [1993] NZFLR 744. Case successfully appealed to High Court, an adoption order granted. *See Re M Adoption* [1994] 2NZLR 237 // *Re Application for Adoption by RRM and RYM* (1993) 11FRNZ 245 // [1994] NZFLR 231

Appeal adoption of sister's child

1993 Williams J Auckland HC *Re application for adoption by RRM and RYM // Re M (Adoption)* Appeal against refusal of District Court to grant an adoption order, refer 1993 Green F Otahuhu FC. *Application to adopt M*. Williams J commented, "I cannot see that the problems which concerned the District Court Judge have any substance. In short, the bestowal by the natural mother of this child, on her sister is a matter of great cultural significance because of the latter's inability to have children. That gesture should be supported and enhanced for the significant benefit of the child by making of an adoption order at 249.

Held Allowing the appeal and making an adoption order: (1) A rigid application of the doctrine of precedent is not always appropriate in cases of this kind, which ultimately depend on an assessment of their own facts, particularly as those facts impact upon the welfare and interests of the child. (2) The changing patterns of adoption, increased awareness of children's rights, and a move against secrecy as manifested in the Adult Adoption Information Act 1985 have not rendered the Adoption Act 1955 obsolete. Although attitudes to adoption may change, all the 'modern trends' can be considered and reflected in the case by case application of the overriding concept of the welfare and interests of the child. (3) There were significant differences between the facts of *R v DSW* and the present application. That case dealt with a grandmother seeking to adopt her daughter's child in the face of opposition from the Department of Social Welfare. In contrast, the present application featured an 'open adoption', which had firm support from all quarters, and it involved the proper consideration of distinctive cultural factors. [1994] NZFLR 231 // (1994) *RRM and RYM* 11 FRNZ 245 // *Re M (Adoption)* [1994] 2NZLR 237

Adoption of brother's child adoptive mother's illness

1995 Keane DCJ Lower Hutt DC *Application to adopt J*. The child now aged two had been gifted from birth to the applicants. The female applicant was the sister of the child's birth father. The applicants were unable to have any children. The birth parents had willingly handed over the child by way of a gift to the applicants and consented to and supported the adoption of the child by the applicants. The female applicant was now suffering from cancer, but at present in remission. A key issue, and also raised by the Director-General was to what weight should be given to the female applicant's state of health in determining the application.

Held (making a final adoption order) **1** Anything less than adoption would fail to reflect the intention and reality that the child was intended to be and had been, the applicants' child, and would be a source of distress for the applicants, the child and the rest of the family and would cause the child an ambiguity of identity. It was therefore in the best interests of the child that an adoption order be made. **2** The status of the female applicant's health was not an absolute bar to the application succeeding. If she enjoyed continued remission there was no doubt that she was a fit and proper parent. If not, the child and the male applicant would have the support of the birth parents and the wider family. **3** Factors relevant in making an adoption order in this case were that the child's primary bond was with the applicants: the child also belonged securely within an extended family: the birth parents supported the application and relinquished their bond with the child as an expression of love for the applicants; and the birth parents acted in the knowledge that the female applicant was unwell. [1995] NZFLR 859

Samoan grandparent adoption cultural issues

1995 Tompkins J Auckland HC *Re Appeal by T.* This was an Appeal against a refusal of a District Court to grant an adoption order, mainly on grounds that stepparent adoption has been discouraged by case law referring to *MV v DSW* Hillyer J (1986) 4NZFLR 326, and *Application for Adoption by RRM and RBM* [1994] NZFLR 231. It became apparent on Appeal that the District Judge had not been made aware of the detailed cultural and religious issues involved. In granting the appeal the HC took special note of the cultural and religious issues in this case. He stressed that case law re exercising discretion on adoption by relatives must not be a fixed guide, each case must be examined in its full context.

He noted Butterworths Family Law in New Zealand (6th ed) at para 6.704 at p731, contains the following observation concerning adoption by relatives, with which I am in agreement. "However in some cases an adoption order might be apt. In particular 'adoption' by relatives reflects both Pacific Island and Maori practice and grandparent adoptions might thus be more readily allowed when Maori are involved. The perceived disadvantage of the legal readjustment of family relationships is not so apparent for a traditional Maori family." This observation is apt not only in the case of Maori but also Polynesians generally...On any application for adoption the dominant considerations must be those set out in s11, so that the application falls to be determined by the Court deciding whether the applicant is a fit and proper person to have custody of the child and has sufficient ability to bring up, maintain and educate the child and whether the welfare and interests of the child will be promoted by the adoption. The circumstances in each case must be considered in the light of those overriding principles.

I agree with Williams J that precedent is unlikely to provide any but the broadest guidance to how those principles should be applied. Further, I see no reason why, in the application of those principles, full regard should not be had to the cultural attitudes of the family concerned. For example, the Maori and Polynesian approach to whanau and family is in many respects different from European. The extended family will frequently provide mutual support, emotional, cultural and financial, and will share in the raising of children. Thus an adoption that may be considered inappropriate in a European setting may well promote the welfare and interests of the child in a Polynesian family...The appellants in their further affidavit, stated that while in European society it may appear unusual and even perhaps a legal fiction for the grandparents to adopt a child where the natural mother still has clear relationship with the child, this is not the case in Samoan society. Samoans believe it is the people who bring up a child who are his parents...in Samoan custom it was normal for grandparents to adopt a grandchild.

Held 1 The Welfare and interests of the child would be promoted by the adoption because it accorded with Samoan culture; a bond in the nature of a parental bond had already been established between the appellants and the child; it accorded with reality at present; and it accorded with the appellants' firmly held religious beliefs. **2** *MR v Department of Social Welfare* (1986) 4NZFLR 326 was not to be regarded as authority for a general proposition that adoption orders should be made in favour of grandparents only in exceptional circumstances. The circumstances in each case must be considered in light of the overriding principles set out in s11 of the Adoption Act 1955. Precedent was unlikely to provide anything but the broadest guidance as to how those principles should be applied. Further, there was no reason why, in the application of those principles, regard should not be had to the cultural attitudes of the family concerned. [1995] NZFLR 773 at 777 // *Re T (An Adoption)* [1995] 3NZLR 373-378. *See* pp313-314 this book for religious detail.

Grandparents: access custody and adoption

Caldwell—"The increase in the elderly population is one of the most striking features of New Zealand demographic changes...official projections indicate a doubling [over 60 year olds] to over 1 million by 2026, or one in four persons... The number of grandparents can be expected to increase correspondingly...Grandparents are increasingly assuming child rearing responsibilities...Notwith-standing the occasional case to the contrary, the Court clearly has no power to make a direct access order for grandparents...

— Grandparents seeking adoption

As a generalisation, relative adoption is not favoured because of the inevitable family distortions created...For the present, however, there is no rule against grandparent adoption. Indeed, adoption is sometimes seen as the optimum solution for a particular child's needs for security. (*Re Adoption Application 021/001/01*). A guardianship order is always open to review and, particularly where there is no confusion in the child's mind as to the true relationships, the extra security of grandparent adoption can promote a child's interests and welfare. (*Re Adoption of Q* (1993) 10FRNZ 340). Additionally cultural considerations may favour adoption as the favoured option (*Re Adoption Application 021/001/91*). Certainly where Maori custom is involved, the adoption needs to be viewed from a Maori perspective. [Applies to Polynesian adoptions]

— Grandparents opposing adoption

By invoking the wardship jurisdiction of the Court, grandparents might be able to successfully block a proposed adoption. (*Parker v Pearce* (1985) 4NZFLR 150) but cf *In the Guardianship of J* (1983) 2NZFLR 314.)

— Grandparent seeking to revoke interim order

Once an interim order has been made a grandmother, whether European or Maori, has no interest or standing to apply to have the order set aside. (*TvS No.1* [1990] NZFLR 411. The Family Court did state a case for the High Court on this finding (*TvS No.2* [1990] 2NZFLR 429), but no report of any HC decision is available.

— The Maori and European grandparent

Judge Inglis has correctly noted that it would be a 'grave error' to suppose that only Maori have strong feelings and beliefs over their grandchildren (*T v S No.1* [1990] NZFLR 411 at 421); but nevertheless grandparents do play an es-

pecially important part in the whanau care of a Maori child. As explained by Durie-Hall and Metge, grandparents pay particular attention to tasks that parents often avoid, such as fostering a child's self-esteem by praise and expressions of affection, developing verbal skills through storytelling and discussions and participating in discussion on sex and emotional matters. The concluded that:'...ideally, children should have easy access to both parents and grandparents: separation from either can result in their missing out on vital aspects of their pyschological development'- (Durie-Hall and Metge. 'Kua Tutu Te Puehu, Kia Mau' in Family Law Policy in New Zealand (ed Henaghan and Atkin, OUP 1992 at p64.)

Research into American grandparents has revealed that they too can play important roles for a child, including those of historian, role model, mentor, story-teller, and nurturer. American writers on child development have indicated that the grandparent-grandchild relationship has the potential to affect the development of children in a way that cannot be duplicated in any other relationship. (cf Wilcoxon 'Grandparents and grandchildren: an often neglected relationship between significant others' 1987 65 Journal of Counselling and Development. 280)

Growing numbers of elderly persons and increased health and longevity, when combined with the growing number of families where both parents work, means that grandparents are increasingly likely to assume caregiving roles. With respect to custody and adoption, the relative openness of the relevant statutory provisions has allowed the Courts to focus on the child's welfare when dealing with grandparent applications. The statutory bar on grandparent access is, however, inexplicable and also increasingly anachronistic.

Just as most children benefit from continuity of relationship with both parents following the breakup of a relationship, so too do many children benefit from continuity of a frequently special relationship with their grandparents. Particularly in the aftermath of a traumatic relationship breakdown, access to loving grandparents can help mitigate the pain suffered by the child and help the child adjust to the new situation.

Legislative change is needed here to ensure that there is a mechanism for the Court to order grandparent access, over any custodial caregiver's objection, where that would be in the individual child's interests. Until that happens, the Courts will need to be creative." John Caldwell, 'Grandparents: access custody and adoption' *Butterworths Family Law Journal* March 1994 pp69-73

NSW Intra-family adoptions

"The most common response of commentators and legislators is that the power to make intrafamily adoption orders should be retained, but the legislation should include guidelines to reduce the likelihood that it will be used inappropriately...In the Commissions view, the law should ensure that the decision to allow adoption reflects an informed and careful assessment of whether the child's interests will be promoted by the various legal consequences of adoption, and in particular, whether the desired objectives might be equally achieved without court orders, or by other court orders such as orders for custody, of change of name." *'New South Wales Law Reform Commission Discussion Paper No.34*' Review of the Adoption of Children Act 1965 NSW. April 1994 p78

Once an interim order has been made a grandmother, whether European or Maori, has no interest or standing to apply to have the order set aside. (*TvS No.1* [1990] NZFLR 411. The Family Court did state a case for the High Court on this finding (*TvS No.2* [1990] 2NZFLR 429), but no report of any HC decision is available.

STEPPARENT ADOPTION

The dilemma

The Court faces in stepparent adoption has been succinctly stated by an English Judge—

1975 Cumming-Bruce J *In re B* "I appreciate that in this case, as in many, it is strongly in the child's interest that he should be settled in the family life of the mother and her second husband; that he should form a close relationship with the father represented by that husband. I also appreciate that in this case, as in many, the fact that a child continues to have a relationship with his natural father is a source of practical inconvenience and irritation to the mother, who wishes to put her first husband out of her life as completely as possible. And, of course, the second husband may be expected to wish to keep the first husband completely out of their family life. Also, it is common experience that the emotional effect upon the child of an attempt to maintain dual and frequently conflicting loyalties to both parents, and to the stepfather, is deeply disturbing and sometimes gravely destructive to the stable development of his personality...It is quite wrong to use the adoption law to extinguish the relationship between the protesting father and the child, unless there is some really serious factor which justifies the use of the **statutory guillotine**. *The courts should not encourage the idea that after divorce the children of the family can be reshuffled and dealt out life a pack of cards* in a second rubber in bridge. Often a parent who has remarried and has custody of the children from the first family is eager to achieve just that result, but such parents, often faced with very grave practical problems, are frequently blind to the real long term interests of their children." [1975] 2WLR 569 and 583. Weekly Law Reports April 4, 1975. Also see XXX this book.

Trapski—"Where a custodial parent remarries, he or she frequently wants the new partner to adopt the child(ren) as a tangible expression of an acceptance of the child(ren) and of the unity of the new family group...Adoption applications are often made in the early days of the new marriage when its stability is in the formative stage and the custodial parent feels a lack of security in the new relationship, particularly after an unhappy earlier marriage. Stepparent adoptions give full parental powers and responsibility to the birth parent's new partner. The new partner's legal status in relation to the child is thus aligned with his or her role as the child's actual caregiver... Although it may seem neat and tidy to legally reconstitute the new family group one must avoid the false notions" *see* detail Trapski's Family Law Vol.5 Brooker's 1995 B8

Two forms of stepparent adoption

Johnston—**1** The child's natural parents were unmarried but one with custody (usually the mother) has since married someone else and wants that spouse to become the legal parent of the child.

2 Where the natural parents were husband and wife but there has been a divorce and the custodial parent has remarried and wishes to integrate the child fully into the new family.

"Presumably such adoptions usually occur with the consent of the non-custodial natural parent because there are very few reported applications to dispense with consent in such circumstances... Moreover, a refusal of consent by the non-custodial natural parent is the only real obstacle to these 'stepparent adoptions'. This is because where consent is given a Court is unlikely to inquire very closely on its own initiative into whether adoption is the most appropriate course as far as the child's interests are concerned and there is no requirement that a social worker report to the Court on the application. Yet there is evidence that such adoptions, while no doubt fulfilling the needs and desires of the applicants, are not necessarily in the best interests of the children concerned" Johnston 1981 NZLJ p349

Motivation for stepparent adoption

Ullrich —"The motivations of these adopters can only be guessed at, but, presumably, many relatives and parent plus spouse adoptions are made in order to disguise an uncomfortable fact of life such as extramarital pregnancy. In others of these cases the motivation will be to integrate the child into the new family structure and to give a stepparent a legally valid parental role. Whatever the motivation, the fact is that the true relationships of the child have been concealed and there is a great deal of psychological evidence to support the view that abusing the child's trust in such a fashion is likely to result in more damage than benefit...A further aspect of this type of adoption is that it effectively severs any rights or potential rights in any natural parent not a part to it. No doubt in some cases this is one of the reasons for going ahead with adoption. Not only can the natural mother sever the putative father's parental rights completely by such adoption proceedings but the natural father can still be obliged to maintain the child." Ullrich 1979 p253

1979 Review

Webb—"Adoption by parent and stepparent...I suggest it should no longer be permissible. It is unnecessary and there is therefore nothing to counter the arguments against it. The objections are similar to those applicable to adoption by parent alone in particular the extinguishing of the child's legal relationship with one side of its family. This is especially serious, inasmuch as the child in stepparent adoptions is very likely to be an older child who will already know, and be known by, these other relatives." Webb p17

Motivations for stepparent adoptions

1990 Report "Typically, the situation arises after the dissolution of the natural parents' marriage. There may be several different motives for stepparent adoptions.

— Motives

1 May be a genuine attempt to formalise a de facto situation, ie where the parenting of the child in question is being done consistently by both the natural parent and

the stepparent.
2 The other natural parent may be unknown, dead or have disappeared, or have abandoned the former family. Adoption gives the child a legal parent and severs the legal link with the other one.
3 The adoption may express the stepparent's full acceptance of the child as part of the newly constructed family.
4 The adoption may be part of a trade-off in the wind-up of the previous marriage. Consent to adoption may be bought in return for a forgiveness of arrears of maintenance or for a lesser share of matrimonial property. We have heard that these adoptions can be a time of celebration in which all including the children share...

—Concerns expressed

1 The severing of the link with the other natural parent may not be good for the child if that parent still has an interest in the child's life. As it was put to us, the adoption may really be an attempt to freeze out a troublesome natural parent. There have been cases where such a parent has had to come back into the child's life technically as a stranger and, for example, seek wardship through the High Court.
2 The adoption not only cuts the link with the parents, but it also cuts out the parent's family, especially grandparents.
3 There is concern about what happens to the child if the second marriage breaks down.
4 The Court does not have to call for a social worker's report and finds it awkward to question the adoption when the parties have come to Court for a consent order and for the resulting celebration.
5 The motives for the adoption may not necessarily be in the best interests of the child, but rather in the interests of the adults." 1990 Report p62. *See* extra Note pXXXA

Critical review

Trapski'—Informed New Zealand opinion has begun to question stepparent adoption and the fast-track provisions in the Adoption Act 1955 for stepparent adoption. Trapski's Family Law has a good summary of current arguments—

Arguments for stepparent adoption

(a) It aligns the legal status of the stepparent with the actual responsibilities of the stepparent for the child's day to day care. A person with care responsibilities should have equivalent parental rights.
(b) It is likely to enhance the child's sense of security as part of a new family unit. Children find it hard to have two fathers or two mothers and may feel threatened by the possibility of being removed from the settled family unit by a birth parent.
(c) For many parents and stepparents additional guardianship is not a preferred option. It does not give the child any rights of inheritance from the stepparent and the thought that the biological parent may unsettle the new family unit by claiming custody or seek to enforce access rights may cause anxiety.

Arguments against stepparent adoption

(a) In most cases, the child is already living in a family situation with the parent and stepparent so the adoption order will not usually alter the care arrangements for the child.
(b) There is evidence that applications for adoption by a parent and stepparent are made early in the marriage when the stepparent's relationships with the parent and with the child are relatively new. The danger for the child is giving parental rights to a stepparent who is still working out those relationships.
(c) The motives of a parent and stepparent seeking a joint adoption often have more to do with personal interests of the adults than the welfare of the child. A mother may see adoption by a stepparent as securing from her spouse a legal and symbolic commitment to her and her child. A stepfather may want legal parental status to gain greater authority over the child or to shut out the birth father, whom he may see as a threat to himself or to the marriage relationship.
(d) A stepparent adoption order severs the child's links with the other birth parent and his or her family. If the child has never known the other birth parent's family this may not create problems, but where the child knows, and has a beneficial relationship with, the other birth parent or his or her family, adoption may not be in the child's interests. Unfortunately there is often a financial inducement to encourage a birth parent to consent to a stepparent adoption which relieves the birth parent from future financial obligations towards the child.
(e) It is not in the child's interests that a stepparent adoption be rubber stamped without any inquiry into the suitability of the stepparent to assume parental rights and responsibilities.
(f) The fact that a social worker's report is not required in stepparent adoptions means there is no recognised way to convey the wishes of the child to the Court, thus defeating the provisions of s11(b) Adoption Act [1955]. To overcome this defect in the legislation, some Family Court Judges direct that a report be furnished or appoint counsel to assist the Court on stepparent adoption applications. However, there is no obligation to do so and practice varies.
(g) Where the stepparent is of a different race to the child, an adoption may confuse the child as to his or her racial and tribal identity.
(h) With an increasing incidence of the breakdown of marriages and a high level of remarriage, a child may have a series of legal 'fathers' or 'mothers' before reaching adulthood.
(i) There are other ways to give stepparents parental rights and responsibilities which do not interfere with the child's genealogical ties and family identity. A stepparent can be appointed an additional guardian of the child under s8 Guardianship Act 1968. Trapski's Family Law Vol.5 Brooker's D20.01

Used to provide new birth certificate

Before 1969 adoption was often used to legitimate a child, to remove the stigma of illegitimacy from the birth certificate. However, the Status of Children Act 1969 abol-

ished the term 'legitimate'. Thus since 1969 there has been no need to use adoption as an instrument to legitimise a child in law, all such children or persons, no matter when born, now deemed to be legitimate. However one advantage remains concerning the child's birth certificate. On adoption a new birth certificate is issued in the names of the adopting parents without any reference to adoption. It is often said that a simple change of the child's name by deed poll can be used to give the same effect. However, the original birth certificate was issued in the original names, whereas with adoption a new birth certificate in the new adoptive names is issued.

More criticism

"1 Such adoptions sever the child's legal links with one side of its original family and attempt to disguise the real relationship, even though these will often be known to the child.

2 The legitimate objectives of the adopters (in particular, the objective of securely integrating the child into the new family unit) can usually be achieved without resort to adoption. Relevant here are orders for custody and guardianship, orders denying or restricting access by the non-custodial parent, and provisions for formal change of the child's surname.

3 Adoption is too irreversible compared with the alternatives.

4 Adoption does not necessarily advance the child's interests at all and may even be damaging psychologically." Johnston 1981 NZLJ pp349

Stepparent adoption assessment lack

Trapski—Not only is a social worker report not mandatory, but there are also assumptions of fitness. "It may seem strange that the Adoption Act 1955 assumes, without requiring any inquiry or evidence on the point, that any person the child's parent chooses to marry is 'a fit and proper person to have custody of the child and of sufficient ability to bring up, maintain, and educate the child', and that the 'welfare and interests of the child will be promoted by the adoption': s11(a),(b). However, there is a certain consistency about these provisions. Adoption law imputes a fictional marriage to an adoptive parent. If a parent does marry, it is presumed that the chosen spouse is a suitable parent for the child and that the creation of a parental relationship between the child and the spouse automatically benefits the child. These provisions are further evidence of the 'child as parental property' emphasis of the Adoption Act 1955." Trapski's Family Law Vol.5 Brooker's 1995 D19

DSW on stepparent adoption

5.3 "Under Section 3(2) of the Adoption Act 1955, husband and wife can make a joint application to adopt a child who is the natural child of one of them. Although it is understandable that a married couple may want to legally reconstitute the new family, a change of legal status by adoption may disadvantage the child in terms of his/her relationships with the natural parent and the family of origin. The granting of a stepparent adoption order has the same effect as any other order of adoption, severing the child's links with the other natural parent and his or her family. There is no requirement under the Adoption Act 1955, that a social workers' report be obtained in this type of adoption. In recent years, however, there has been an increasing number of requests from the Family Courts for social workers's reports. A recent practice note from Judge Ellis makes reports in stepparent adoptions mandatory. The Principal Family Court Judge is negotiating an agreement with the NZCYP Service for the preparation of a social workers report in all instances of step parent adoptions. As yet referrals from the different Court Districts vary, with some being erratic, but others making automatic referrals to NZCYPS. In time this matter will be clarified, and the referrals process standardised. There seems to be a growing view that adoption is not the most appropriate legal process to deal with family integration in stepparent situations. The motives for seeking a joint adoption by a parent and a stepparent may have more to do with the personal interests of the adults than the welfare of the child. It is certainly not in the interest of the child that a stepparent adoption should be rubber-stamped by the Court without any evidence of the suitability or appropriateness of the adoption proposal. The high incidence of breakdown of second and subsequent marriages is one more reason for caution over using adoption orders as the legal means to secure parental rights and responsibilities.

There are other ways in which stepparents can be given parental rights and responsibilities without interfering with the ancestral ties and family identity of the child. A stepparent can be appointed additional guardian of the child under Section 8 of the Guardianship Act 1968. If the parents, in addition to the guardianship order, wish to change the child's name they can do that by Deed Poll, provided that the consent of all of the child's guardians is obtained. The major issue in many stepparent adoptions, is weighing the security that adoption can offer to the child in the new family, against the loss of legal and possibly psychological links with the original family. The argument is that legal security can be provided by alternative means to adoption, while the loss of links with the natural family cannot be restored. The preservation of these links may outweigh other considerations in assessing the child's welfare and interest.

Processing an application for a stepparent adoption follows the same procedure as any other adoption where the child is already placed in the prospective adoptive parents' home. It is necessary to obtain police check, references, and a medical report in respect of the stepparent but not the birthparent. Reference to infertility on the medical report can be omitted, but it is important to ensure that all character references are obtained and properly followed up. The report to the Court will need to be of the same standard and as well documented as any other adoption report. In addition to information about the adoptive parents situation and that of the child to be adopted, social workers should try to contact, whenever possible, the other birth parent, whose links may be being severed through the adoption. It is not appropriate to go to extraordinary lengths to do this, however it is appropriate to ask for

assistance of other districts where necessary. The children's views (age appropriate) can be ascertained with the parent's agreement, in their presence, or on their own with parental permission. Where parents are unwilling for the child(ren) to know of the adoption, they need to know that this will be included in the report, with a recommendation to postpone a decision until this issue has been resolved. Counsel to assist the court can be requested for this purpose or as means to obtain counselling, where needed. Where an interim order is made, to allow for outstanding issues to be addressed, it is appropriate to recommend to the Court that the final order report be seen by the Judge." Adoptions Local Placements Manual 5.3 CYPS DSW 1995

Importance of openness

"It is generally healthier to help the child to accept that he is a member of a reconstituted family and that he has two 'fathers' (or 'mothers') rather than to conceal the truth from him or to encourage him to feel uncomfortable or ashamed about those facts, which is what resort to adoption can do. Adoption is not an accurate expression of what normally happens in the formation of a step family. In reality the child acquires a new day-to-day parent and the role of the absent natural parent changes but does not come to an end; the child acquires an *additional* parent not a total substitute. The adoption reality, on the other hand is that the adopters acquire a child to the exclusion of all others and its use in the stepparent context can easily amount to treating the child as property. The most accurate legal expression of the reality of a stepparent family would seem to be guardianship not adoption. Although the failure of guardianship to give 'ownership' may render it less satisfactory from the applicants' perspective, this should not be allowed to obscure the child's interests. It is generally healthier to help the child to accept that he or she is a member of a reconstituted family and has 'two fathers' (or 'mothers') rather than to conceal the truth, or to encourage the child to feel uncomfortable or ashamed about those facts, which is what resorting to adoption can do". Butterworths Family Law No.12 Nov 1993 para 6.708

Case law

The Adoption Act 1955 saw no difficulty with stepparent adoption. However, more recent research and Judicial experience indicates there can be serious difficulties, or improper use of the provision. There have been strong recommendations that stepparent adoption be abolished and replaced by guardianship orders. On the other hand stepparent adoptions remains very popular. This ambivalence is reflected in reported decisions.

Adoption v guardianship "The issue in many stepparent adoption cases is whether the welfare and interests of the child are best promoted by adoption or by the appointment of the stepfather as additional guardian. This involves balancing the additional security to the new family unit offered by adoption against the loss of legal links with the original family. It was stressed in *Re Adoption 021/001/91* (1991) 7FRNZ 427 at 428 that an important element in such cases is the security and virtual irrevocability of an adoption order. Against this must be balanced the admonition of Judge Aubin is *S v Y* (1984) 3NZFLR 166 at 173 that: 'It is incumbent upon the Court to consider whether [the child's] needs can adequately be met by legal arrangements short of adoption, such as appointing the stepparent a guardian of the child, thus cementing the reality of the present family arrangement while not destroying the relationship between the child and the natural parents.' Where a child's links with the family of origin are actually or potentially of benefit to the child, the preservations of this links may outweigh other considerations in assessing the child's welfare and interests." Trapski's Family Law Vol.5 Brooker's 1995 D21

Stepparent adoption with access conditions

1951 Woodward SM New Plymouth MC *In re an Adoption E.v.B.* The father and mother of three illegitimate children lived together for 5 years. They separated and the mother took the children in the husband's absence. *Habeas Corpus* proceedings were then instituted by the father as a result of which by order of the Supreme Court the children were left in the custody of the mother but the father was given rights of access. The mother subsequently married another man whereupon the husband and wife brought these proceedings for the adoption of the children. **Held** That although a Magistrate's Order of Adoption might not override the right of access by the Supreme Court to the father, that right had been granted in the interests of the welfare of the children and a Magistrate making an order of Adoption should ensure that the full exercise of the right was not interfered with under any impression or pretext that it had been affected by adoption. The adoption was therefore granted subject to the condition that the adopting parents file an affidavit to the effect that the father's rights of access contained in the present other Supreme Court order were not restricted or impeded. (1952) 47MCR 25

Consulting adoptee in stepparent adoptions

1984 Pethig DCJ Hastings FC *Burrows v Whittington and Burrows* "I think I should say that the evidence in this case confirms my concern that before a stepparent becomes the child's adoptive parent, there should be an investigation by a Social Worker as to the children's real wishes and a report completed for the Judge. It does not happen under existing legislation: s10(1) Adoption Act 1955. It is my belief that there are many applications where the change of status is unnecessary and a complication for the children. There are, however, human constraints on the Court when presented with a seemingly happy "new family" on an application to adopt where the adults have for various reasons agreed upon the course and where the children dutifully say 'yes' or 'no' appropriately to the Judge's questions. I think an independent assessment of the children's perception and welfare is long overdue." (1985)11NZRL 119 at 120

Stepparent adoptions need social worker report

1984 Pethig DCJ Hastings FC *Burrows v Whittington and Burrows* Mr and Mrs W married and had three children. The marriage broke up and Mrs W then married

Mr.B, who became stepfather to the children. Final adoption orders were made in respect of the three children in favour of Mr & Mrs B. That marriage also broke down. (1985) 11NZRL 119 at 120. *See* p146 this book for detail.

Joint adoption by birth parents declined

1987 Cartwright DCJ Auckland DC *Re Adoption A132/85*. Samoan birth parents seek to adopt their own child. Declined. Judge Cartwright, declined the application to adopt as unnecessary. The adoption by both birth parents was unprecedented, and unnecessary legal fiction. She was strongly of the opinion that immigration be granted, adjourned the case sine die, in order for Internal Affairs to reconsider. She was open to a new application by the applicants if required. 3FRNZ 462

Stepparent adoption refused

1987 McAloon DCJ Christchurch FC *Re Adoption A009/16/87* Mr & Mrs R recently married and intend to live in Japan. Mrs R already had two daughters, they applied for a stepparent adoption to reconstitute the family. **Held** 1 When the applicant's desire that a family unit be brought into existence the pertinent question is whether adoption is necessary to bring this about and whether, if the answer to the question is affirmative, such an adoption should proceed at this stage. 2 In the circumstances the existence of a family unit can be adequately secured by the appointment of Mr R as an additional guardian. 3FRNZ 485

Stepparent adoption

1987 Pethig DCJ Upper Hutt FC *W v S* Application by BM and step father. The natural father had been in prison, has an alcohol problem and shown no interest in the child, but objected to the adoption. **Held 1** A serious defect in the hearing of an adoption application simpliciter is the Court's lack of power to appoint counsel for the children. **2** The natural father has persistently failed to maintain his son and has failed to exercise the normal duty and care of parenthood. As the child knows who his father is, it may be that at some time in the future he will have some interest in his biological line. However, as time has gone by and the contact not maintained, reality should be recognized in legal form. Final adoption order made. 3FRNZ 476 // (1987) 4NZFLR 659

Stepparent adoption without child's consent

1991 Boshier DCJ Auckland FC *Re E* An application by M a 33 year old adoptee to discharge an adoption order on grounds of misrepresentation pursuant to the Adoption Act 1955 s20. The applicant was born in 1957. An application was made and granted for her stepparent adoption by her birth mother and stepfather in 1975. At the time of the application M was aged 17 and engaged, and by the time the adoption order was made she was married, and no longer living at home. However these facts were not revealed to the Judge. M did not discover the fact of her secret adoption until at the age of 30 in September 1988 when she applied for a birth certificate. **Held** "Granting the application and discharging the adoption order): (1) The Court was satisfied that although M should have been consulted over the adoption application, she had not been. Her rights at the material time were such that to fail to recognise them was fatal. The adoptive parents had the clear duty to convey to M what they were seeking and to convey to the Court what the whole of the situation was. So material was the representation from start to finish that it could not be sustained. The Court was satisfied that had the Magistrate known of the correct factual situation, he would not in all probability have made the order for adoption. (2) Section 11(b) of the Adoption Act [1955] bestows very clear rights so far as consultation is concerned." [1992] NZFLR 216 // 7FRNZ 530

Stepparent adoption of 17 year old declined

1995 Adams DCJ Whangerei DC *Re Adoption Application by T* to adopt, 17 yrs old, by BM and new husband. **Held** dismissing the application

1 Although in this case the consent to adoption form identified the applicants, it was incomplete in that there was no placement by a social worker, and that aspect of the form, which was left blank, was an inappropriate part of the form in the circumstances of this adoption. The defect raised doubts about the quality of the legal advice given by the solicitor. Proof of the elements necessary to support the making of an adoption order must be on the balance of probabilities. On the evidence there was some doubt as to whether the father gave real consent of a kind contemplated by the Adoption Regulations in pursuance of the objects of the Act. A competent standard is to be required for the presentation of documents where the matter at issue is of such importance, and the issues of substance underlying defects in the form are of concern. The consent form filed was not sufficient evidence of properly informed consent of the father.

2 Although the applicants satisfied the criteria in s11(a) Adoption Act 1955, in that they are both fit and proper persons to have custody of L, making an adoption order would not promote L's welfare and interests. There were two unusual features in this case. The first was the mature age of the subject person, and the other was the fact that L was not likely to live, with the applicants. In that sense the adjustment of relationship which is sought was formal rather than real. L, already had a place in the applicants, family, and there was nothing to indicate that her place in the family would be diminished if the adoption order was not made. L's surname could be changed by means other than adoption,- deed poll. If she was adopted L would lose the legal tie to her father and his family, and would lose whatever inheritance rights she may have had from her father. Any value which may have been added to Ls welfare and interests by adoption was no more than cosmetic. Her parents relationship with Mr T was ex-cellent...in the circumstance...adoption not appropriate.

Criticism of step-family adoption

"*MR v DSW* (1986) 4NZFLR 326 // (1986) 12NZRL 256 // 2FRNZ 75 discusses the artificiality on intrafamily adoption. I am drawn to the view that stepparent adoptions have many negative aspects to them. When a functional stepfamily exists, the welfare an interests of the child or young person will generally be promoted by a continuation of the stepfamily relationships, simply calling them what they are. I share the reluctance of many Judges to 'cut and paste' relationships within the struc-

ture of the Adoption Act unless there is a clearly demonstrable advantage for the child. Experience in many cases shows that people have later regretted that they had been adopted, thereby denying a part of the reality of their genesis. 13FRNZ 490 // [1996]NZFLR 28

Reasons for increased stepparent adoptions

"After World War 11, along with rest of the western world, New Zealand experienced increasing marriage breakdown. Social pressures operating at the time when the Adoption Act 1955 was passed resulted in more liberal grounds for divorce in the Matrimonial Proceedings Act 1963. More divorces led to more remarriages and legally reconstituted families. The availability of adoption coupled with the desire of adults to cement durability into their new marriage, thereby distinguishing it from their earlier marriage, led to a proliferation of stepparent adoptions. Such adoptions were usually supported by evidence that the child was well integrated and accepted into the new family. If that were the case it is difficult to see how adoption would add benefit for the child unless inheritance or exclusion of the previous paternal family (including father) were seen as factors of advantage to the child." John Adams 'Confusion Clarified- guardianship and adoption'. Auckland District Law Society Paper 1993 pp5-6. *See* Guardianship p239-242C this book.

INTERCOUNTRY ADOPTION

'Intercountry adoption is a strange blend of humanitarian outreach and semi-commercial exploitation on an international scale, with significant political implications.'

Overseas adoptions

"The rapid shrinkage in developed countries of the number of children available for adoption has stimulated interest in inter-country adoptions. Infertile couples or people moved by the plight of unwanted or exploited children have looked to adopt children from overseas. In the United States, West Germany, Sweden, Norway, Switzerland and many other developed countries thousands of overseas children are being adopted each year. Children are being adopted from Vietnam, Korea, India, Hong Kong, Lebanon, Thailand, Zaire and from South American countries such as Brazil, Columbia and Peru. Adopters sometimes pay large sums of money to lawyers or adoption brokers in return for a child. There has been a succession of scandals and stories of baby-snatching, child supermarkets and racketeering. In some cases children are genuinely taken from orphanages or saved from squalor, child prostitution or starvation. But there are alarming accounts of children being grabbed in the street or kidnapped from their families and sold off by unscrupulous operators. There are documented cases of parents being offered money to hand over their child for adoption overseas. Some developing countries are passing laws to control trafficking in children but such laws are hard to police. At an International level there have been conferences and a United Nations Declaration in 1986 sets out the social and legal principles which should be applied to protect the interests of children in inter-country adoptions. Children should not be treated as a commodity to be traded. The interests of the child should override the personal needs of the adopters and the commercial interests of the placement agents and brokers." R Ludbrook *'Adoption- Guide to Law and Practice'* 1990 p41

Overseas and Intercountry adoption

Trapski— L1.01 Meaning of intercountry adoption

"Intercountry adoption" is the term used where a child who habitually resides in one country (the country of origin) is adopted by a person or persons who habitually reside in another country (the receiving country). The adoption may take place either in the country of origin or in the receiving country: see definition in art 2 Hague Convention 1.83. An extended definition is offered by J Couchman:

(a) The child and the adoptive parent(s) are habitually resident in different States
before the adoption;
(b) The adoption takes place in either State;
(c) The child has been or is to be moved to the State where his or her adoptive parent(s) are habitually resident: J Couchman, "Intercountry adoption in New Zealand: A child rights perspective" (1997) 27 VUWLR 421.

The Family Court is often asked to make adoption orders in relation to children from overseas who are resident in New Zealand with family members or family friends, under either a visitor's permit or other short term immigration entitlement. Although such adoptions are sometimes described as intercountry adoptions, it is not required that they conform with the Hague Convention. They are often described as immigration adoptions because one purpose of the adoption application is to confer New Zealand immigration status on the child. They are dealt with earlier in this text: see B.2.

L1.02 Growth in intercountry adoption

Intercountry adoption has become a hotly debated issue here and internationally. One of the most bitterly contested aspects of the United Nations Convention on the Rights of the Child was the articles relating to intercountry adoption. Venezuela and other South American countries expressed an implacable opposition to the whole concept of intercountry adoption: see, M Freeman, Moral Status of Children: Essays on the Rights of the Child, Amsterdam, Martinus Nijhoff Publishers, 1997, p 123.

The publicity given in 1989 to the desperate plight of children in institutions in Romania, and the response of New Zealanders who wished to take Romanian children into their homes, drew attention to intercountry adoptions and stimulated debate. It has been estimated that more than 150 Romanian children have been adopted by New Zealanders: information from Intercountry Adoption New Zealand. In 1991, at least 85 Romanian children were adopted by New Zealanders: Romanian Committee for Adoption figures quoted in International Children's Rights Monitor (1992) vol 9/1, p 24. Adoption of Romanian children by New Zealanders is no longer possible. Brazil, China, and Paraguay have been popular sources of children for private intercountry adoption. Intercountry adoptions through the Department of Social Welfare have been mainly from Columbia, Fiji, Hong Kong, India, Peru, Russia, and Thailand.

By way of comparison, in Australia in 1999/2000 there were 566 intercountry adoptions, 301 of which were granted by Courts in New South Wales. Children were mainly from South Korea, Ethiopia, India, Romania, Thailand, and the Philippines. In the same year there were 265 Australian domestic adoptions: Adoptions Australia 1999/2000 Australian Institute of Health and Welfare, Canberra.

Recently there has been some uncertainty about adoption of Russian children by New Zealanders following a decree issued by the Russian President in April 2000 and an announcement by Child, Youth and Family Services on 22 November 2000. Child, Youth and Family Services had announced that adoption of Russian children by New Zealanders was to be suspended, following legal advice from Crown Law Office that participation in these adoptions would breach New Zealand's obligations under the Hague Convention. However, a later announcement suggests that adoptions of Russian children are still being considered.

The publicity engendered by the Romanian situation highlighted a wider problem with international, as well, as national implications. The demand in the industrialised

world for children to adopt (particularly from infertile couples), and the high prices people will pay for a child, have led to child trafficking on a huge scale. It is not just a question of finding a family for orphans or for homeless or institutionalised children. There is overwhelming evidence of children being abducted from their families and of dealers making huge profits from the supply of children. Child trafficking is big business in some South American countries. One agency in Peru was proved to have sold more than 4,000 children and a clinic in Argentina sold nearly 1,400. Other countries from which children have been exported for adoption include Albania, Brazil, Chile, Colombia, Costa Rica, Ecuador, Haiti, Hong Kong, India, Korea, Paraguay, the Philippines, Poland, and Sri Lanka: International Children's Rights Monitor (1991) vol 8 special issue 29, vol 9/1 pp 21-24, vol 9 3/4 p 22, and vol 112/3 p 12.

L.1.03 United Nations initiatives to regulate intercountry adoption

The United Nations has long recognised the problems and has acted to control the worst excesses and abuses of intercountry adoption. There was no specific reference to adoption in the UN Declaration on the Rights of the Child 1959 but a separate Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally was adopted by the General Assembly in 1986: see Annexure A.14.

Governmental and non-governmental organisations finalised the United Nations Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the "Hague Convention on Intercountry Adoption") in 1993. New Zealand has ratified the Hague Convention and incorporated it into New Zealand law through the Adoption (Intercountry) Act 1997, which came into force on 1 January 1999. The text of the Hague Convention on intercountry adoption can be found at Adoption (Intercountry) Act 1997 in this work.

L1.04 Arguments in favour of intercountry adoption

The merits and demerits of intercountry adoption have been a topic for heated debate within countries that provide children for adoption overseas and within receiving countries.

In New Zealand the debate has been carried forward by special interest groups who support or oppose intercountry adoption. Each group tends to support its case with arguments, based on the welfare of the child: see D J McDonald, "Intercountry adoption: An examination of the discourses" in D P Morris (ed), Adoption: Pass Present and Future, Auckland, Uniprint, 1994.

Some of the arguments offered by proponents of intercountry adoption are:

(a) It offers better life chances for orphans, abandoned children, children in institutions, and children who face exploitation or persecution in their country of origin.

(b) New Zealand offers children economic, social, and educational advantages which they would not enjoy were they to be brought up in their country of origin.

(c) New Zealanders who are willing to undertake the demanding task of caring for disadvantaged children should receive encouragement and support.

(d) Intercountry adoption provides a means by which infertile couples and others can provide care and support for needy children while meeting their own needs for children to love and care for.

(e) New Zealand's imminent implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption will effectively curb any abuses that currently occur.

L1.05 Arguments against intercountry adoption

Some of the arguments against intercountry adoption are:

(a) Overseas parents who offer their children for intercountry adoption may do so as a result of financial inducements or improper societal pressure.

(b) Despite the ban on payment for giving a child in adoption, there are many examples of parents, agents, and lawyers receiving payments for giving a child in adoption or arranging an adoption. While such payments are unlawful and attract criminal penalties in New Zealand, there may be no effective controls in the child's country of origin.

(c) Intercountry adoption usually results in cultural displacement of the child, with the child losing touch with his or her culture of origin and never being fully accepted in the receiving country.

(d) Children who are the subjects of intercountry adoption have often been traumatised by their early life experiences and by the sudden removal to a new environment. The adopting parents may not be equipped to deal with these problems: see Dr R A C Hoksbergen, "Foreign adoptive children will often encounter attachment problems in adoption and healing", Wellington, NZ Adoption Education and Healing Trust, 1997.

While the Hague Convention may curb some intercountry adoption abuses, the reality is that most intercountry adoptions by New Zealanders take place outside the statutory scheme and without any involvement by the New Zealand Courts or the Department of Social Welfare.

L1.06 Arguments for the abolition of adoption

A third school of thought opposes adoption in any context and argues that non-parental carers should have their status recognised through the making of guardianship and/or custody orders through the New Zealand Courts, where a decision will be made on the basis that the welfare of the child is the paramount consideration: see A.10.03.

Source *Trapski's Family Law* Vol.5 Brooker's 21/11/2003 L1-L1.06

International Adoption: Issues for Concern

Peter Dodds— "I was born on German soil to a German mother and father, one of thousands of German children adopted by United States citizens in the 1950s, 60s and 70s. When I was one, my birth mother relinquished me to an orphanage where I lived for two years prior to my adoption by foreign parents. I have recounted my story

of international adoption in the book *Outer Search/inner Journey: An Orphan and adoptee's Quest*, the first book written on the subject by a foreign born adoptee." p9

International Adoption Overview

Those in the industrialised nations of the West, and if I may include Oceania in that group, are increasingly using international adoption as a method of building a family. International adoptions became prevalent after World War II, when orphaned and abandoned children were sent for adoption from one European country to another and to the United States. Between 1947 and 1957, fewer than 1,000 inter-country adoptees entered the United States; of these approximately 70 percent were of European origin. During Wars in Korea and Vietnam, many orphans and children fathered by Americans in those countries were adopted by families in the United States. In the ten years following the Korean War, 60 percent of adoptees who immigrated-to the United States were Asian. Since mid 1950s, more than 130,000 foreign born children have been adopted by American families—44,000 in the last 5 years. In 1996, the Immigration and Naturalisation Service reported nearly 14,000 foreign children were adopted accounting for about one-1/6 of all non-relative adoptions in the United States. This trend is expected to increase.

The most publicised reason that United States citizens adopt children from foreign nations is a humanitarian one—the adopting parents will provide a better life for the foreign child than she or he would know in their native land. That is the argument that sells in the press. It is an idea bolstering the myth that Americans must save the world, this time riding to the rescue and saving foreign children... What is over looked in international adoption is the plight of the foreign child who suffers lost identity through the severing of ties to its culture, heritage, history and language. Supporters of international adoption are quiet about the children who are left behind...

International adoption isn't the answer to improving the overall plight of children in economically depressed or war-torn countries. Even the strongest supporters admit the movement of adoptees across international borders represents only a tiny fraction of the neglected, abused and abandoned children in these countries...

International adoptions are seen by most Americans as a solution for families needing children rather than children needing families. *By the 1970s, the purpose of international adoptions was shifting from the humanitarian one of providing families for abandoned children, and increasingly becoming a way for the childless to satisfy their desire to have children. This shift is important because it signals that the wellbeing of children has taken second place to the desires of those seeking to adopt.*

When talking to parents who have, or are considering international adoption, an entirely different set of reasons surface other than rescuing children. What are the more common reasons parents adopt from overseas?

✱ The policy of legal abortion and acceptance of single parenthood have diminished the availability of infants and children. Competition is fierce and parents unable to adopt domestically may choose the international route.

✱ The domestic adoption process is lengthy and prospective parents may be unwilling to endure the long wait.

✱ A sense of greater security in the permanency of raising a foreign child as compared to one adopted domestically. Distance and the protection of government provide safety from possible unwanted intrusions and the spectre of the birth mother one-day appearing on the doorstep.

✱ Not all parents are comfortable with the growing policy of "open adoption." At this time most international adoptions are not "open adoptions."

✱ International adoption is a viable alternative for people not meeting the prerequisites for domestic adoptions-couples exceeding age guidelines, single parents or gay couples can find children to adopt in some countries.

✱ And last, international adoption allows greater choice for the adopting parents. Adopting parents can often choose their child's sex and age.

Historically, in the United States, the trend was to match children ethnically, racially, culturally and whenever possible by religious affiliation. Thus, the origination of Catholic and Jewish adoption agencies. In like manner, other adoption agencies geared to particular groups sprouted such as agencies focused on matching Black children with Black families, Asian children with Asian families, Hispanic children with Hispanic families, etc.

With the social/political changes that have occurred within the United States in the last 20 years, matching children with families has become difficult. With the availability of a greater pool of prospective parents and a smaller supply of white children for adoption, trans-racial adoption has become more popular. However, this trend has spurred debate. A significant number of Black social workers bitterly oppose the adoption of Black children to non-Black families arguing it would deprive Black children of their cultural heritage, while at the same time preventing them from developing coping mechanisms to deal with societal racism. In 1972, the National Association of Black Social Workers issued a position statement to this effect and reiterated it in 1986 saying Black children who grow up in ethnically different families suffer serious identity conflicts and barriers to socialisation. The NABSW's view on trans-racial adoption has been supported by American Indian groups...

Concerns of countries surrendering their children?

Damien Ngabonziza, Programmes Officer at the International Social Services in Geneva, Switzerland summarises the major concerns:

✱ African countries generally view inter-country adoption as a form of *neocolonialism* and do not, for the most part, sanction the adoption overseas of native children.

✱ Sending countries without strong child protection laws and welfare policies are the most vulnerable to the black market sales and trafficking of children.

✱ The adoption of a comparatively small number of children in a large population of desperately needy youngsters is too often seen as a panacea, and it ignores the

wellbeing of the majority.

✱ Inter-country adoption does nothing to solve the problem of high birth rates nor poverty, two of the root causes of international adoption.

✱ Inter-country adoption does not enhance the development of child welfare services in developing nations.

✱ Inter-country adoption is fraught with difficulties arising from differing cultural values and relationships regarding access to one's roots, contacts with birth families and ties to the country of origin.

So what does the research say?

Child Welfare September-October 1995, reports, "The findings from the few available outcomes studies of inter-country adoptees are at times conflicting. There is some evidence indicating that transient emotional and behavioural difficulties occur in some inter-country adoptees."

The current state of research based on follow-up studies is fragmented. The studies have been criticised for: the short time frame; the Eurocentric constructs employed; inadequate sampling methods, low response rates; unwarranted extrapolation from one situation to another. substantial disagreement on the criteriological problem of whether a qualified success" is actually a success?

Impact of international adoption on the adoptee?

As I read through international adoption literature in the United States, what strikes me most is that the voice of the foreign born adoptee has yet to be heard. Literature describes "how to adopt" a foreign child and actions that adopting parents can take to bridge barriers separating them from their child. The word "bridge" indicates there is a chasm. What is this chasm? For internationally adopted children, the chasm represents lost language, heritage, culture, history and country.

What is written about international adoption comes from the perspective of adults, American adults, so it is difficult to piece together a picture of consequences international adoption has on the foreign born adoptee. But there are pieces, and when put together a disturbing picture begins to emerge:..

All children internationally face physical and emotional upheaval.

✱ The trauma of departure accompanied by separation and loss.

✱ Netherlands. 70 to 80% of the international adoptive placements run smoothly. 25% of placements, need professional help, for a longer or shorter period of time.

✱ Change of language. Language plays a critical role in the beginning period of adjustment. Initially, most children have little proficiency in English and the majority of the adoptive parents do not have language capabilities to converse with their children. Communication becomes very challenging to say the least. It also happens during one of the most intense periods of grief reaction on the part of some children. They have left behind everything familiar, and encounter everything new and different but their expression of grief is not understood by anyone! It is only natural for them to resort to physical expression of their grief and anger—like self-hurting behaviours, aggressive and hostile behaviours, and crying.

✱ Language is a crucial part of culture. Most children learn English fast enough to facilitate communication. However, the more proficient in English the child becomes, the more they lose their native language. This loss is significant since language is a crucial part of culture. As these children lose their attachment to their culture of origin, it may disturb their identity formation.

✱ Appearance. The people in the new country will probably look different.

✱ Smells and food will also be different.

✱ Sleeping arrangements. Most international adoptees had previously shared sleeping quarters, sometimes because of lack of space and sometimes because of cultural mores. In orphanages, children share their bedroom with many others. To some children, Western beds are unfamiliar as they formally slept on the floor. A newly adopted child may be picked up from the airport then placed in a room alone and expected to go to sleep. It is no wonder that some adoptees experience sleep or night terrors.

✱ Identity formation. Later in life, the greatest obstacle for transition to emotional well being for the international adoptee will be the process of identity formation. They have a heightened interest in their native culture during adolescence as they struggle with the most important development task at that age—identity.

Identity formation is a task of adolescence in which youths strive to define who and what they are in relation to career, life goals, friendship patterns, sexual orientation,

religion, moral value systems and group loyalties. For internationally adopted children, this task of forming, clarifying, and reclarifying their identity is an ongoing process that must include all the of the previously mentioned issues, plus ethnicity. These cross-racially, cross-culturally adopted children become aware at very early ages that they look different from their adoptive parents.

✱ Racial stereotyped. People in an attempt to understand who the foreign born adoptee is apply stereotyped notions or generalisations about their race or culture of origin. These create an internal conflict and, therefore, an examination of their ethnicity must become a part of successful identity formation.

✱ Rejection. Many adoptees feel awkward and rejected in their interactions with immigrants from their native lands, who are perplexed by the thoroughly American behaviour of some inter- country adoptees. The foreign adoptee may encounter a second rejection by their own people.

Dr. Juliet Harper is Senior Lecturer on Psychology at Macquarie University in Australia and a Child Psychotherapist. She works with adoption disruption, where the adoption is terminated, with families who have adopted internationally. Her work provides insight into the unique problems of inter-country adoption. She found disruptions usually have a predictable pattern and occur because of one or more of three circumstances:

(a) The existence of unidentified factors such as critical information which is not recognised by the family or social worker.
(b) The mis-assessment of the capacity or readiness of the family or child to make an adoptive attachment, and
(c) The emergence of unpredictable circumstances which preclude the normal progression of the adoption.

For children adopted from other countries who have acquired the language and identity of their new families, disruption of their adoption is difficult to conceptualise since this loss is in effect loss of their whole existence. It renders them a stranger in the world in which they find themselves, as well as in the world from which they came.

Reasons families have sought Dr. Harper's assistance have ranged from behavioural problems on the part of the international adoptee such as lying, sexual acting out and temper tantrums to developmental delays, difficulties in relating, fears and anxieties, issues of identity and finally disruption...

Why any adoption disrupts is difficult to determine objectively she states, because of the complexity of the issues involved and the degree of emotion invested in the process. There is tremendous guilt associated with the admission that parents are not coping and the visibility of the inter-country adoptive family increase the guilt. Furthermore, when the adoption disrupts little support or sympathy may be extended towards the family by the community because having adopted an abandoned child from another culture they in turn abandon it themselves.

Dr. Harper found adoptive parents' gave several factors as reasons contributing to disrupted adoption: (a) The child was older than desired. (b) They weren't provided enough information about their child or the information was misleading. (c) Negative circumstances on the first encounter. (d) The child's early history created attachment problems. (e) The child did not relate to the parents or did not fit into the family. (f) The child was not the one they had prepared for. (g) The child was angry or appositional.

Dr. Harper also looked at the disruption from the child's point of view. She found it difficult for the children to articulate why they felt things had not worked out and this was only revealed after a period of separation from the adopting parents, and when it was obvious that a return to that family was not possible. Although most children had quickly developed English, their vocabulary was very concrete and problems in comprehension tended to he masked by their apparent verbal fluency. She found the children had been inadequately prepared for adoption, having little idea of what was expected of them, and they were not able to respond adequately to parenting offered by the adoptive mother. Other reasons for the disruption from the children's point of view were that they did not like the family or felt rejected by the family, did not want to come to Australia and always felt different.

Child welfare experts from Great Britain, the Netherlands and Australia often refer to the inter- country adoptee as a special needs child. Although the profile of inter-country adoptees does not fit Nelson's operational definition of 'special needs' children—that is those with physical, emotional or development handicaps, older children, and sibling groups. However, special problems are associated with foreign children traumatised by war, hunger, extreme poverty and institutionalisation. A common developmental handicap affecting older inter-country adoptees involves learning a new language and culture. Following a study of disrupted placements involving Dutch inter-country adoptees, Dr. Hoksbergen stressed the relationship between positive developmental outcomes and long-term, specialised medical and educational interventions. Thus, from the perspective of developmental issues, the 35 percent of immigrant adoptees over the age of one who enter the United States could be defined more properly as a type of 'Special needs' placement.

Because of the difficulties inherent with international adoption, the Netherlands, regarded as a country with liberal social policies, in 1988 enacted the Act on Inter-country Adoption in which the legal procedure involved in adopting foreign children was laid down. The purpose of the program is to give prospective parents the necessary knowledge and make them aware of the full scope of adoptive parenthood, so that eventually they can make a well considered choice whether or not to adopt a foreign child. The Act on Inter-country Adoption includes requirements for prospective adopting parents including:

• the parents must be married
• a maximum age limit of 41 years
• the age difference between the prospective parent and the foreign child should not exceed 40 years
• the maximum age limit of a foreign child should not exceed 5 years

The Act on Inter-country Adoption also requires applicants to complete an extensive information and preparation program for those who are submitting an application for the first time. From 1990 through 1993, about 40 percent of the couples applying for a foreign child withdrew their application.

International Adoption and Corruption

International adoption has become an increasingly competitive and lucrative enterprise, with intermediaries charging between $5,000 to $30,000 and more for their services. It is now a multi-million dollar a-year business. Secondary businesses have mushroomed-look at any adoption magazine and you will see advertisements not only for agencies that place children, but also attorneys specialising in international adoption, travel agencies, and vendors with selling the latest ethnic books and toys.

Organisations and people involved with international adoption have enormous sums at stake. Big money can open the door to trafficking children. Although it is estimated that 75 percent of international adoptions are completed in good faith, a major concern is the increasing commercialisation and lack of adequate safeguards, resulting in criminal abuses, abduction and sale of children.

Because inter-country adoption delivers much-needed currency to poor nations, it has also been criticised for promoting corruption. Annual yields in 1994 from the adoption business in South Korea was about $15 - $20

million; in Guatemala, some $5 million- and in Honduras, approximately $2 million. The United States can be criticised for its participation in international adoption due to its lack of control over legal and social procedures through which such placements are financed and arranged. Given the preferential demand for healthy infants in the United States adoption market, an important policy issue is the extent to which the practice of international adoption results in pregnancies for profit, coercion of birth parents, and the corruption of child welfare services.

Inter-country adoptions are generally facilitated through private non-profit adoption agencies or independent adoption agents. Requirements for licensure of an adoption agency, such as staff that meet certain professional and ethical standards and non-profit status, are regulated by state governments... Independent adoption agents are intermediaries who are not licensed to place children, but function as brokers in the adoption process. Such agents include attorneys, social workers and health care workers. Adoptive parents who choose independent agents over licensed agencies generally do so out of a desire to circumvent bureaucratic channels. Trafficking and sale of infants is more likely to occur when independent adoption agents are involved because there is opportunity for improper financial gain at each stage of the adoption process.

Some of the more questionable practices of independent adoption agents, the pirating of clients, for example, have also been used by licensed, non-profit agencies wishing to stay competitive in countries where independent adoptions are legal. Results from studies show that a high percentage of inter-country adoptees in residential care, those with disrupted adoptions, were those adopted privately and associated with families that did not have adequate social support resources.

International policies re international adoption

In 1992, a meeting of child welfare experts was held in Manila, Philippines on "Protecting Children's Rights in Inter-country Adoptions and Preventing the Trafficking and Sale of Children." Their recommendations emphasised the need to encourage local alternatives to international adoptions, beginning with social services to help keep families together included—

• Economic assistance to parents and families, such as food and clothing, to help keep families intact;

• Counselling to help stop abuse and conflicts in families.

• Family planning education and services to help prevent unwanted pregnancies; support for single parents, and single mothers especially.

The Manila conference recommended that if a child cannot be raised by her or his parents, care within the extended family, with support if necessary, should be the next goal. If this is not possible, efforts should be made to secure domestic adoption. Only when all such alternatives have been exhausted should international adoption he considered.

UN Convention on the Rights of the Child

Most child rights experts agree this as the standard by which adoption procedures should be judged. International concern to safeguard the rights of children offered for international adoption is reflected in renewed efforts to provide suitable alternatives in the child's home country.

✱ Article 8 ensures the child's right to preserve her or his 'identity, including nationality,' name and family relations. International adoption is to be considered only when all possible means of giving the child suitable care in her or his own social and national setting have been exhausted.

The United Nations Children Fund in 1993 published a guide for providing services to children in conflicts—

• Every effort needs to be made to maintain family unity and avoid separation of children from their families.

• Efforts to reunite families should be made as soon as possible. • Unaccompanied children should receive emergency care and be provided a legal guardian. • Placement decisions for the care of children should assure long-term, nurturing relationships- children should be cared for within their own families, communities and cultures, and their language, culture and ethnic ties preserved.

Alternatives ways to help neglected children

Those who desire to help children in economically deprived, or war-torn countries, have alternatives to international adoption—

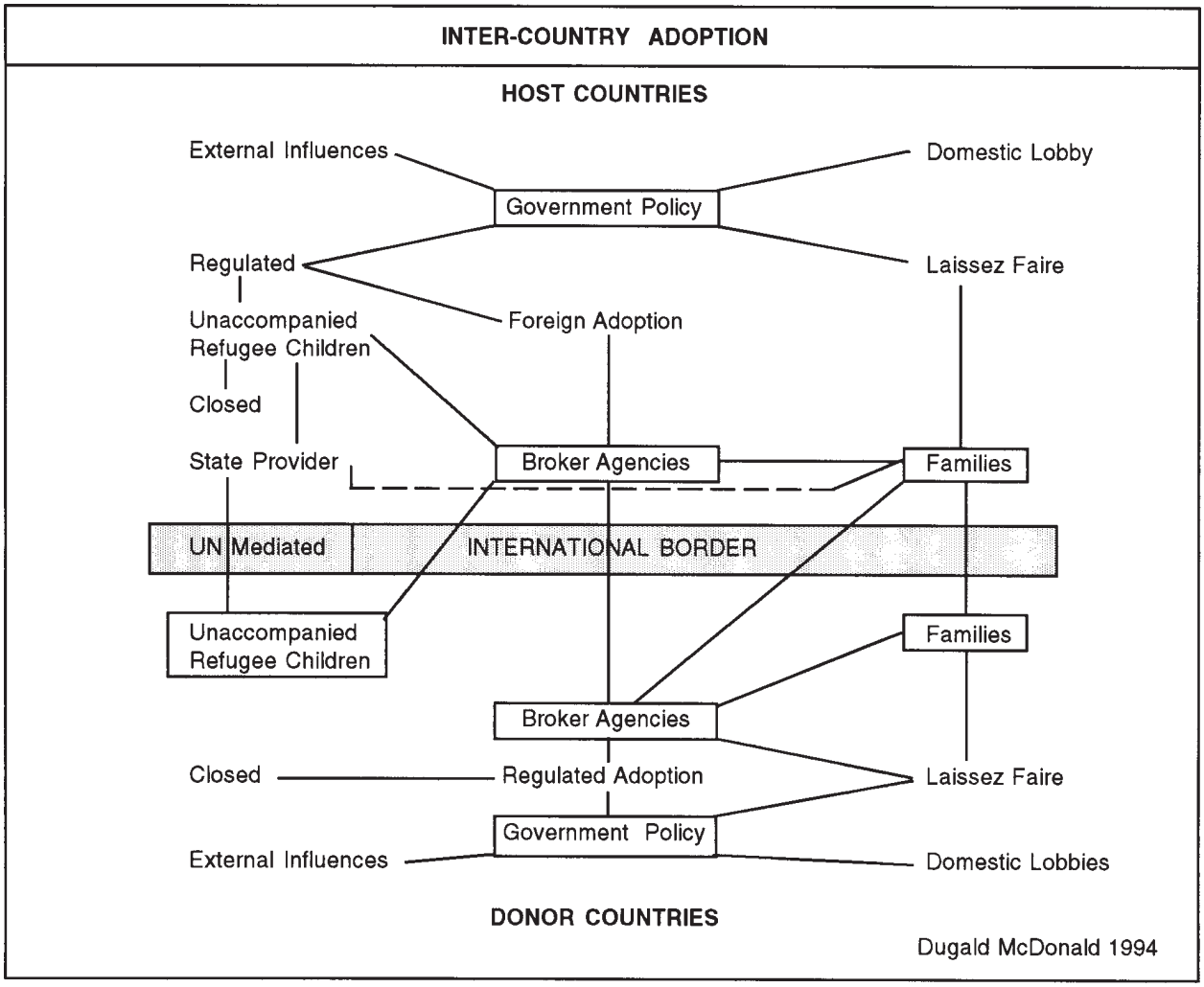
✱ *United Nations Children's Fund* provide resources so countries can gain the means to care for their own children.

✱ *World Vision*, an international partnership of Christians whose mission is to work with the poor and oppressed to promote human transformation. They help children and families in more than 100 countries. World Vision is not an adoption agency and does not facilitate adoptions. It works to help children become productive citizens in their own countries. *Child sponsorship* promotes positive and lasting change by using sound community development principles with programs in nutrition, education, health care, agriculture, and vocational skills training for children, parents and their communities.

A Look at the Future

With rapid advances in technology, the childless are likely to increasingly turn toward the scientific manufacturing of children to satisfy their desire to become parents. The early signs are: artificial insemination, frozen embryos, cloning.. Those involved with the international adoption industry will face huge changes. I foresee the international adoption industry shifting away from brokering foreign children and moving toward brokering children produced by science. When this happens, who will speak for the world's neglected, abandoned and abused children?

Source Extracts from 'International Adoption: Issues and Concerns' Paper by Peter Dodds, *Adoption looking forward Conference* Lincoln University, Christchurch Feb14-15, 1998. Sponsored *Canterbury Adoption Awareness and Education Trust*.



Complex web of inter-country adoption

McDonald—"As we experience it today, the practice of child adoption is a complex, multi-faceted activity, often involving many parties, set at the interface of legal, welfare and health institutions, and embedded within explicit or implicit polices. While presumed to be socially cohesive by intent, it is frequently socially divisive. That divergence takes on added dimensions when one examines the practices of inter-country adoption." p44

Flow Chart

"The flowchart above attempts to bring some precision to the complexities of inter-country adoption by showing the actors involved and mapping the combinations of interactions between them. Reading from the bottom up in this partially mirrored configuration, government, or 'the state', acting under forces both external and domestic, has to decide whether it wishes to regulate adoption and foreign adoption, or whether to stand aside to let customary practice or market forces prevail. The term *liassez-faire* is used to cover the indifference of the state to any adoption; it does not preclude an interest by the state in the movements of citizens or foreigners for the purpose of adoption. Similarly, the term *regulated* might cover all instances from *closed*, or *prohibited*, to pro-forma and ineffectual regulatory power. Depending upon the pathway chosen, broker agencies may or may not be involved. Brokers include individuals acting alone scouts, touts, lawyers, social workers or others or corporate bodies, secular or religious-based, in the private, state or voluntary, non-governmental sectors. The legal adoption may take place in either country or both. By whatever policies permitted it, an by whatever route taken, the final step is when a child is passed across the border from a donor to a host country. In this practice of children crossing national boundaries for the purposes of adoption the conceptualisation of the *adoption triangle* can be shown to have very limited utility. Such practices are not a direct relationship between birth parents, adoptive parents and the child, as they primarily involve the contract between the state and its children. It is from this contract that we infer the range of rights and entitlements attracted by children and others. In regard to those rights, we need to ask about the circumstances and policies under which a state is prepared to relinquish its future citizens for cross-national adoption, and the policies under which the host country is prepared to receive them." pp46-47.

The adoption discourses

The range of arguments for or against inter-country adoption can be polarised into many competing discourses, some of which are in direct opposition and others variants or expansions of specific themes.

Social Justice discourse

Claims of exploitation on the basis of race, class and gender form the basis of this discourse opposed to inter-coun-

try adoption. Here the issue is not so much the effects of amputation from family or the child's later life adjustment, but the abuses experienced by racial groups, the poor and birth mothers. Commonly, these three variables go together in practices where foreign white couples adopt the children of other-race, poor women...Through stigmatising attitudes, children of mixed race may be hard to place in their own-country adoption, and through institutionalisation become available on the foreign market...It is predominantly young, unmarried girls who give up their children owing to the twin pressures of social stigma and poverty.

Protectionist discourse

Advocates of intercountry adoption tend to base their claim for legitimacy of the practice on the single imperative of improving the life chances of children who would otherwise face shortened lives of misery and degradation. It is the needs of the child for rescue, for secure and stable family nurturing, not political niceties, which motivate and legitimate placements...This powerful moral argument is backed by mass appeals to sensitive affluent nations to the very real plight of children in poor countries. The discourse is driven by two disparate motivations of Christian duty and self-interest.

(a) Saving children is not only the highest expression of lived Christianity, but it also connotes selflessness, and the preservation of family values. To rise above politics and to do battle for moral principles against apathy and impenetrable bureaucracy can be most fulfilling.

(b) Childless prospective adopters, driven by the search for completeness, can at one and the same time act out of self interest while adhering to the principles of family insurance for children... The moral worth of the protectionist discourse can legitimate the decision to seek a foreign child for adoption.

Children's rights discourse

The core question of identity. Since the mid 1970s, Western countries which practised closed-record adoptions by strangers have seen a revolt against secrecy in adoption which has resulted in changes. New Zealand has been in the forefront of that revolt. This 'openness in adoption' movement was driven largely by adoptees and birth mothers, and captured the attention of clinicians and researchers worldwide...In addition to activism for retrospective access and policy changes, changing social attitudes, professional wisdom and reduced consumer choice came together to challenge the closed-record practices and to introduce a climate of openness in the adoption industry. Against this background...there has developed a wariness of the hazards of adoption by strangers. This raises the question of how the safeguards now being introduced for efficient identity formation can be applied to adoption by strangers in cross-national placements? There is skepticism that all conditions can be satisfied.

Latent consequences discourse

There are two underlying themes to this discourse, where the term *latent*, is used in the sense of hidden and unintended. The first theme connects in part with follow-up studies and the identity issue. The second derives from adult survivors' perceptions of the quality and justice of their childhood care under guardianship and adoption.

Follow-up studies

The current state of our knowledge is fragmented. There is substantial disagreement on the criteria of what is to be measured and to what standard.

1 The criteriological problem of whether a qualified 'success' is actually success? Children are resilient and adaptable under extreme adverse conditions and it must be no surprise that after an initial period of unsettled behaviour many people adopted cross-nationally are able to make a adjustments required to fulfil the expectations of them. However studies of British child immigrants brought to New Zealand 1949-1954, of which many were adopted, indicates substantial grievances as adults.

2 The moral issue of whether practices can be adjudged in best interests of the child if one or more of the subjects suffer grievance as adults? Is the 'greatest good for the greatest number' the criterion? Study of unaccompanied child immigrants and adult grievances led (McDonald) to develop the notion of *second-order infringements of human rights*. One of the great insights into the evaluation of reformist policies for child welfare is that the remedies themselves can in time become problems in search of a solution. The remedy most popularly sought by adult survivors is the public recognition of the cessation of the practices that led to their own sense of grievance.

Tangata Whenua discourse

Maori customary practice contributed in two major ways. — Influence on adoption and decision-making practices, —Re-examination of its partnership with Pakeha. As Maori in the 1980s claimed back more of their kinship-based rights from assimilationist and racist policies, the movement influenced not only adoption but the whole issue of the relationship between the state, families and their children. They made a major contribution to the Children, Young Persons and their Families Act 1989. A similar contribution to reform of the Adoption Act has been politically stalled.

Overview

Forty years after the Adoption Act 1955 brought in closed records, and after twenty years of activism in the field of child adoption, three current trends are evident.

1 Politicians are still reluctant to 'grasp the nettle' of a policy review- the stock answer for 15 years 'It's under review!'

2 Inter-country adoptions have gained some legitimacy under the protectionist discourse and continue at a moderately high rate.

3 The competing discourses are shaping up into renewed activism on all sides. Opposing factions with clear aims and objects have come into the public domain to ask that their own rational claims about adoption be heard and that, equally rationally, the other side should recant and embrace the new discourse. As we cleave to one side or the other, we have to examine our own motives in holding fast to a particular discourse, and invite others to share that examination. We have to ask whether in the short term it is realistic to expect a synthesis between competing dis-

courses, all of which claim the high moral ground.
Source Extracts from Dugald McDonald, *'Intercountry Adoption: An Examination of the Discourses'* in 'Adoption: Past, Present and Future Conference' 1984 Auckland Moa. pp43-61.

Causation of intercountry adoption
Donor country pressures

There are four basic underlying causations for birth mothers giving up children for adoption.

1 Economic- birth mothers lack sufficient means to support the child.
2 Social stigma-social nonacceptance-loss of family status and honour, illegitimacy, racism-nonacceptance of mixed racial child.
3 Lack of effective contraceptive means.
4 Lack of abortion. The four core factors can be greatly aggravated by (i) Social and political upheavals. (ii) Wars create severe poverty and family dislocation.

Host country pressure

1 Lack of adoptable children means intercountry may be the only source for a child.
2 Charitable and religious motives. Mass media impact of starving children. When you come down to basic facts it was the same story in New Zealand. Economic and Social issues were the major reason for the baby surplus in our country in times of depressions and the 1940-60s.

Racial issues

Children in European host countries have become a scarce commodity. The primary demand from Western countries is for European-like children. Hence a preference for Romanian, Russian or Spanish South American children. Children from Somalia or Africa are seldom sought. Charity can be highly racially selective.

World statistics

Else— "The publicity engendered by the Romanian situation highlighted a wider problem with international as well as national implications. The demand in the industrialised world for children to adopt (particularly from infertile couples), and the high prices people will pay for a child, have led to child trafficking on a huge scale. It is not just a question of finding a family for orphans or for homeless or institutionalised children. There is overwhelming evidence of children being abducted from their families and of dealers making huge profits from the supply of children. Child trafficking is big business in some South American countries. One agency in Peru was proved to have sold more than 4,000 children and a clinic in Argentina sold nearly 1,400. Other countries from which children have been exported for adoption include Brazil, Chile, Columbia, Costa Rica, Ecuador, Haiti, Hong Kong, Paraguay, the Philippines, Poland, and Sri Lanka." International Children's Rights Monitor (1991) Vol.8 special issue 29 and vol 9/1 pp21-24. Since 1960 more than 300,000 children. South Korea at least 75,000. Adopted into Netherlands over 17,240 since 1970. Else 1990 p20

Baby brokers

Else— "The involvement of profiteering 'baby brokers' and the fact that donor countries simply do not have enough healthy genuine orphans and abandoned children available has led to trafficking: mothers are denied help or children are stolen, bought or 'made to order' to meet the ever-present demand. In Honduras, baby brokers pay teenage girls to get pregnant, feed them to ensure a healthy product, the place babies in 'fattening houses' (or, orphanages') before offering them for adoption." Else 1990 p20.

Orphans?

While many children offered for intercountry adoption are genuine orphans, it has become increasingly evident many are not. The harsh reality of market forces means a baby broker can get a higher price for an orphan child than one with birth family attachments. Also some Governments only allow the export of 'orphans'. For adopters favouring closed adoptions, an orphan child has considerable attraction. It insures:

(a) No problems with birth parents contacting.
(b) The child will be unable to search out their origins.
(c) The Adult Adoption Information Act, will be of no use to the child, or any threat to the adopters.
(d) Adoption of an orphan can be seen as an act of charity that absolves any guilt of taking another persons child.
(e) With orphans there are no birth parent consents.
(f) Lack of any known birth relatives may reduce need for cultural contact. The detachment of children from their families has become part of the industry. In Somalia 1995, Aid agencies selecting orphans for resettlement abroad, soon found in many cases birth parents and relatives suddenly became reattached when any possibility of obtaining foreign citizenship occurred. Of large numbers of children in institutions in Donor countries, often very few are either orphaned or abandoned, most have parents and are not available for adoption.

Political response

In 1990 there was strong political pressures to fast track intercountry adoption procedures, *see* Esle 1990 21p she also documents false representation by a New Zealand adoption agency concerning Romania. A similar case concerning Russia occurred in 1994. The political pressured resurfaced again in 1994 when some politicians tried to fast track new legislations under a Statutes Revision Amendments Bill. The matter has been deferred. Government has indicated its intention to 'accede' to the Hague Convention, and any new adoption legislation will have to conform.

New Zealand policy on Intercountry adoption

Trapski—**L.5.01 Merits and demerits of inter-country adoption** Like other adoption issues, the benefits and dangers of intercountry adoption are a matter of considerable public debate. Some people consider there is a personal and national responsibility to "rescue" children from overseas countries and give them the benefits that a secure home and the New Zealand way of life is assumed to offer. Others see intercountry adoption as misguided idealism which takes away overseas children's personal, family, and cultural identities, and encourages abduction of children, trafficking in children, and other fraudulent and abusive practices.

For a review of the various approaches to intercountry adoption, see D McDonald, "Intercountry adoption: An examination of the discourses", in P J Morris (ed) *Adoption: Past, Present and Future*(Auckland, University of Auckland Centre for Continuing Education, 1994. John Triseliotis has written that most intercountry adoptions are adult-centred: J Triseliotis, *Inter-country Adoptions: Practical Experiences*, Humphrey and Humphrey (eds), London, Tavistock and Routledge, 1993. He has also pointed to the range and complexity of the intercountry adoption debate, involving as it does political, moral, empirical, policy and practice issues: "Inter-country adoption", 15 Adoption and Fostering 46.

It is often claimed that intercountry adoption is (or should be) a service for children. The view that children will inevitably be better off being brought up in the comparative affluence and political stability of New Zealand rather than in their country of birth is simplistic, based as it is on the assumption that economic and political factors are more important influences on the welfare of a child than social and cultural factors. Decisions about the future welfare of a child are always difficult: those which involve a comparison between the social and cultural norms of one culture and those of another are particularly challenging. Intercountry adoption should recognise and uphold children's rights by acknowledging and respecting their needs for attachments in relation to their biological family, and the culture, religion, and country of origin.

Intercountry adoption came into prominence in New Zealand much later than in many other industrialised countries. Until 1988 most such adoptions were by relatives, particularly from children Western Samoa by relatives in New Zealand. It was not until worldwide publicity was given to the plight of children in Romanian orphanages that intercountry adoption by non-relatives began to increase markedly. Most intercountry adoptions do not appear in Department of Child, Youth and Family Services statistics as many take place overseas and come to official notice only through the Department of Internal Affairs' records of applications for citizenship by descent. In 1996 there were 47 intercountry adoptions processed by the Department of Child, Youth and Family Services compared with more than 500 processed by the Citizenship Division of the Department of Internal Affairs: see M Iwanek, "Adoption in New Zealand: Past, present and future" in *Adoption and Healing* NZ Adoption and Healing Trust, Auckland, 1994, pp 62, 68.

Source *Trapski's Family Law* Vol.5 Brooker's 20/6/2002 L5.01

The danger of interracial adoption is that the child is suspended between two cultures

Lifton— "Foreign adoption is not the solution, but a tiny, insignificant Band-Aid on a huge, gaping wound and an enormous amount of denial...International adoption has gone from the rescue of war orphans to the legal, and in many cases illegal, trafficking of children. We are seeing the exploitation of poor women in undeveloped countries as they are encouraged to give up their children to fill the increasing needs of infertile couples in developed countries—which in turn fills the pockets of those who facilitate these arrangements". B J Lifton *Journey of the Adopted Self* 1994 Basic Books USA p82

Proposals to liberalise procedures

Ludbrook— "From time to time there are demands from interested groups to change policies and practices to make it easier to adopt an overseas child. A storm recently erupted at the plight of Romanian children institutionalised under the Ceausecu regime. The Minister of Social Welfare made a public statement reaffirming the need for a cautious approach to inter-country adoptions but he indicated that the Department would introduce more flexible guidelines in considering applications. The official policy remains that inter-country adoptions are 'an option of last resort' which will promote the best interests of a child 'only in very special circumstances'". Ludbrook 1990 p42. Note further Bills have been introduced in 1995-6.

Growing recognition of ethnic origins

Rockel & Ryburn— Set against the trend of increasing interracial adoption since the mid 1970s there "was a growing recognition of the importance of preserving and respecting ethnic and cultural differences. This valuing of differences has led us, like increasing numbers of adoption social workers, to believe that children have a right to be placed with parents of the same race, wherever possible. Such a policy requires a major rethinking of the way adoptive parents are recruited and adoption placements made. It is the only way, we believe, to ensure that children gain a sense of themselves as being normal. Only placements with parents of the same race can instill in children a knowledge of their culture and history...The question of the transracial adoption of children from overseas countries is complex. It is undoubtedly true that some children might be condemned to a short life of terrible deprivation in their own countries. By divorcing these children completely from their roots, however, transracial adoption can create major problems for them acquiring the clear sense of personal identity that all need in order to live happily and successfully...Some donor countries are trying to stop transracial adoption, on the grounds that many birth parents did not consent, and they are being robbed of their children. "We recognise that, although we may seriously question whether transracial adoption should continue those who adopted transracially in the past did so with good intentions, and in the wish to love and nurture a child. Those children whose adoptive parents have made serious efforts to give them a sense of interest and pride in their own culture are likely to have done well." Rockel-Ryburn 1988 pp182-183

Transracial adoption

"Transracial adoption is a topic which inevitably arouses sensitivities. In the United States from the beginning of 1997 federal legislation eliminates race as a factor for consideration in all adoption and foster placements by state agencies of those receiving federal funds. A speaker at the conference argued that far from ensuring equal protection rights the new law may reinforce 'old prejudices

and discriminatory practices towards African Amer-icans' (Professor Ruth Howe of Boston College Law School). In South Africa as part of deracialisation, transracial adoptions were permitted by a law change in 1991. This could be seen as part of the destruction of apartheid but a powerful presentation argued against transracial adoptions so long as South Africa remains a race-conscious society. Professor Tshepo Mosikatsana pointed out that a legacy of apartheid is that accredited adoption agencies tend to be in the cities rather than in rural areas and they target white prospective parents rather than African and coloured people. Adoption therefore is still racially based, reinforced by the under-resourcing of the black communities. Given the over-supply of babies, he called for an aggressive policy to recruit black adoptive parents. There does not appear to be anxiety about adoption between different tribes and indeed Professor Mosikat-sana said 'if there was no racism in this country, I would not have a concern about transracial adoption'.

Source 'Report on Major Family Law Conference South Africa' in *Butterworths Family Law Journal*, September 1997 Vol.2 Part 7 p172A.

Adoption and intercountry adoption

Henaghan—The Adoption Act 1955, which has as one of its objectives the promotion of the interests of the child, [127] does not meet the requirement of Article 21 that the best interests of the child shall be the 'paramount consideration'. [128] The Social Welfare Department, in consultation with the Immigration Department, takes a hard line an intercountry adoption which it views as an 'option of last resort' which promotes the best interests of a child 'only in very special circumstances'. Pressure to adopt Romanian orphans opened the policy a little. The Department of Social Welfare has no legal powers to prevent New Zealanders adopting overseas children in the children's own country: any such adoption will depend on the laws of that country. The Immigration Department has the sanction of preventing the child re-entering New Zealand if the adoption has not been lawfully obtained. To ensure entry of the child back into New Zealand, it is essential to organize an overseas adoption through the New Zealand Department of Social Welfare. The Department follows international codes of practice and only works with governmental and transnational agencies, such as International Social Services based in Geneva; [129] it will not work with private agencies or overseas adoption brokers. p188

Notes

[127] Section 11 Adoption Act 1955.

[128] The New Zealand Court of Appeal have held that even though the wording of the statute does not require the child's welfare to be paramount, because the effect of adoption is to change guardianship then the same principle as in the Guardianship Act 1968 should apply- the child's welfare is paramount. *Director General of Social Welfare v. L* [1990] NZFLR 125.

[129] R. Ludbrook (1990), *Adoption: Guide to Law and Practice,* Wellington: GP Books, pp. 41-6.

Source Extract from- Mark Henaghan *'New Zealand and The United Nations Convention on the Rights of the Child: A Lack of Balance'* p188 in Book 'Children's Rights: A Comparative Perspective' Edited Michael Freeman. Pub Dartmouth 1996.

Child rescue hypocrisy

Benet—"Western insistence on the child-rescue aspect of adoption has led to hypocrisy: instead of giving the child in adoption to rich foreigners, an Asian mother may now use the subterfuge of abandoning it to an orphanage, so that it can be adopted as an 'orphan'. The open recognition that it is the rich who adopt the children of the poor may be distasteful to modern sensibilities, but concealing the facts does not alter them."

Source M.K.Benet 'The Character of Adoption' 1976 p37. Jonathan Cape.

Immigration

Adoption used to obtain immigration status

"Where an application is made to adopt a child not domiciled in this country, the Court must be satisfied that the child's welfare will be promoted by their being a member of a family in New Zealand rather than by the advantages that flow merely from residing in New Zealand; an application for adoption involves the creation of a parent/child relationship and is not a substitute for an entry permit to this country." 1984 Mahony DCJ *Re an Adoption of L and L* 1FRNZ 144. Endorsed by Sinclair J Auckland HC *L and L v P* (1986) 4NZFLR 75 at 78.

Trapski— "It is not the responsibility of the Family Courts to restrict immigration. The Court must deal with adoption applications on their particular facts and within the context of the Adoption Act. If adoption is being used solely to secure immigration status of a child, and brings no other benefits to the child, the Courts are unlikely to be sympathetic to the application. In *Re an application by F* (1980 1DCR 27, the Court refused a 29-year-old's application to adopt his younger brother. The Court was not satisfied there was a bona fide desire to create a parent-child relationship.. also *L an L v P* (1986) 4NZFLR 75. Trapski's Family Law Vol.5 Brooker's 1995 B2

Circumvention of immigration regulations- Samoa

This became a major problem in the late 1980s. Up until then, if a New Zealand citizen, legally adopted a child overseas, that child was normally automatically given New Zealand citizenship. The Government took statutory action in 1992.

1990 "It has been estimated that nearly 1,000 Pacific Island children are adopted annually by Island Polynesians resident in New Zealand who adopt relatives from their island of origin and bring them back to New Zealand. *With Samoan families adult-adoption is permitted under local laws.* The adoption is recognised as legally valid under New Zealand law and there will not usually be grounds for refusing immigration entry. These procedures have been used as a means of evading immigration restrictions and the government has been looking at ways of plugging what is sees as a loophole in immigration laws." R. Ludbrook *'Adoption- Guide to Law and Practice'* 1990 p43

\Understanding Samoan adoption custom

Customary Samoan adoption has similarities to Maori adoption. It is an open natural arrangement in extended family. Western concepts of, secrecy, complete break and legal fiction are irrelevant, inappropriate and offensive.
Father Vito, a Roman Catholic Samoan chaplain giving evidence on an adoption application for an 18 year old girl to be adopted by her half sister, gives insight on customary Samoan practice. Supporting the application, "P suffers the stigma of having been born illegitimate, *'Uluelaela'*. In Samoan society...she lacks status and dignity. She needs recognised parents, and Mr & Mrs A's wish to adopt her is a usual and fully accepted answer. In Samoa a simple declaration would suffice, and have the support of custom. In New Zealand such a declaration would be recognised by the Samoan community just as readily. It would lack, however, the force of the New Zealand law. Adoption of children born out of wedlock usually occurs, as soon as the child is weaned. It can also occur when the child has attained 18 years. It happens in effect, when illegitimate children leave their homes to attend school and require protection and support. P is reaching the age when she will marry and this must be negotiated. She is also at an age at which, according to Samoan custom, she still requires close supervision. Young Samoan adults, even those who have attained their majority and married, are expected, and themselves expect, to remain obedient to their parents. It is desirable that P receive that support and direction in the fullest sense." *Re Adoption FP17/87* (1988) 4FRNZ 715

There is an excellent in-depth study of Western Samoan Village adoption, customs and practice by Bradd Shore, 'Adoption, Alliance and Political Mobility in Samoa' 1972 Thesis (MA) University of Chicago. A copy is held at the University of Canterbury.

Adoption for immigration purposes

"Adoption applications have been used to gain immigration status in New Zealand. In all situations the Courts must be satisfied that the adoption will promote the welfare of the child/person by being a member of a family in New Zealand, rather than considering the advantages which might flow from residing in New Zealand, as opposed to staying in the country of origin. It is not the responsibility of the Family Court to restrict immigration, but the Court must be satisfied that an applicant for adoption does have a bona fide desire to create a parent child relationship, and that the adoption application is not merely a vehicle for entry into New Zealand. In reporting to the Court, social workers should comment on the appropriateness of establishing a parent child relationship between the applicant and the person to be adopted, as well as the potential to promote the welfare of the child/person by becoming the adopted child of a family in New Zealand.
In 1992 the Government passed the Citizens Amendment Act by which a child, 14 years or older, adopted by a New Zealand citizen will not automatically become a New Zealand citizen, (Section 3(2) of the Citizens Amendment Act 1992). This ruling applies both to New Zealand adoptions and overseas adoptions recognised under Section 17 of the Adoption Act 1955." *'Adoptions Local Placements Manual'* 1995 CYPS DSW 5.8

Samoa uncovers irregularities

1995 "Action over entry row: Two Justice Department officials in Western Samoa have been suspended in the wake of an investigation into the use of falsified birth certificates to sidestep New Zealand entry requirements. The two under suspension hold senior positions at the department's births, death and marriages division. The inquiry followed a request from the New Zealand Department of Internal Affairs which found irregularities in a number of Western Samoan applications for New Zealand residency and citizenship. Examples included falsifying birth dates to make children up to five years younger. New Zealand law allows Samoan children under 14 to be adopted by New Zealanders and to gain citizenship. It is believed the names of applicants were also changed. The Secretary of Justice, Mr Tuala Kers-lake, said it was unclear if the fake documents had been issued deliberately, or if it was simply that routine checks had been ignored." NZ Herald 20/3/1995 per APP Apia.

International adoption may circumvent legal process

"Section 3 of the Adoption Act 1955 allows for an adoption order to be made for any child from any country, whether or not the child or the applicants are resident in New Zealand at the time. Thus citizens of any country are able to effect an adoption of a child living in a second country, by adoptive applicants living in a third country-often based on somewhat dubious, privately commissioned background documents. These adoption scenarios are so removed from the recommendations of the UN and Hague Conventions that it is difficult to see them as having been effected in the best interests of the child. Such adoptions are clearly designed to suit the purpose of the adoptive parents, and to circumvent the legal processes not only in the child's country of origin, but also in the adoptive parents; country of residence.

Such adoptions under the New Zealand Adoption Act 1955 have been undertaken by adoptive parents who are resident in Australia, the UK and the USA. While normally it is the authorities in the child's country of origin who are charged with assessing whether an intercountry adoption of one of their citizens is in that child's best interests, in these adoptions that responsibility is not only undermined, but is in effect disregarded. The authorities in the adoptive applicants' country of residence are equally disturbed by this practice, as it bypasses the processes they have implemented to ensure that inter-country adoptions are in the best interests of the children involved." **Source** Iwanek, Nelson, Quinlivan 'Adoption in the International Year of the Family' IYF Symposium Wellington October 1994.

Korean War and inter-country adoption

Benet— "It was the Korean War that brought inter-country adop-tion fully into the American national conscious-

ness. The half-Asian children of the American soldiers became the responsibility of the occupying army, since many of their mothers were unwilling and-above all-unable to raise them." Benet p 121

Government reluctant re Inter-country adoption

Benet— "The Governments of the United States, Australia, and the other child-importing countries have been reluctant to get too involved in inter-country adoption, to the cha-grin of the potential adoptive parents. This is not so much out of concern for the transplanted children, who by all accounts do perfectly well (although it may be out of concern for the care taken in placement), nor because of worries about the effect of international adoption on the social systems of the donor countries.

One major concern is-

(a) Relations with the Governments of the countries sending the children, which could be damaged by accusations of baby-snatching.

(b) A less reputable, but none the less present, concern is to avoid importing large numbers of children seen by the majority in the host country as undesirable, whether racially or in terms of health and fitness.

(c) The state agencies claim that they do not have the staff to deal with requests for overseas babies; but the private agencies, whose sources of supply have dried up, have repeatedly offered their services and more often than not been rejected.

(d) Another fear of the state is its loss of autonomy if it were to delegate too much power to the voluntary agencies.

Simply discouraging international adoption by inertia, however, is arguably more irresponsible than allowing it to happen. It would be most responsible of all, of course, to obviate the need for it-but it seems that the only countries that have begun to do this are those that have entirely seceded from the capitalist order." Benet p131

Intercountry Adoption organizations

ICANZ. (Inter Country Adoption New Zealand). A voluntary organisation established as an Incorporated Society in 1989. It has a Board of Trustees comprising of six members and its national co-ordinator, is based in Auckland. Services offered include, Information and education to prospective adopters. Contacts arranged in the sending country. Assistance throughout the procedure with documentation. Provision of post-adoption support and advice. Address ICANZ 6 Weston Avenue, Mt Albert, Auckland NZ. Phone 09-846-7272 FAX 09-846-9293

Requests to DSW from overseas.

"Periodically, the AISU [Adoption Information Services Unit] is requested by overseas couples to hold profiles for them in the AISU waiting pool. The AISU is not able to accede to this. Although Section 3 of the Adoption Act 1955 states that a Court may decide upon an application made by any person whether domiciled in New Zealand or not, (applicants are not required to be resident in New Zealand), the UN Convention on the Rights of the Child gives the child the right to grow up in its own country. The AISU is charged with the responsibility of first finding an alternative home for a child in need of one, within New Zealand. As there are many couples willing to do this, there should be little difficulty in complying with the requirement to place a child in its country of origin." 3.3.15 Adoptions Local Placements Manual CYPS DSW 1995.

Studies of intercountry adoption

"A number of studies have claimed that inter-country adoption 'works' and that the adopted do well in their new families and countries. Like early studies of adopted children, these are typically small-scale, short-term 'snapshots' of children as seen by their parents, with a high rate of non-response. Even so, given the massive cultural adjustment demanded of even a young baby (let alone an older child), severe problems which few adoptees are prepared for frequently arise. Because of language, cultural and psychological barriers, children adopted beyond babyhood cannot communicate their early 'memories, fears, hopes, anxieties and experiences' to the adopters. 'Loss of the mother tongue or refusal to speak it' is frequent, and very often the past associated with it is denied or repressed. Parents are likely to interpret this as lack of interest in the old culture and acceptance of the new. It seems that few make a lasting effort to keep the child in touch with its original culture- an extremely difficult task anyway, given the dearth of local links and their own unfamiliarity with it." Else 1991 p204

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Infant adoption: transracial

Pavao— When all reasonable efforts have been made to keep the child with the birth family or within the same ethnic community, transracial adoption is a positive solution. Children do need families that are permanent and cannot be left in transitional homes for most, or all, of their childhood. This, unfortunately, has been done for too long in the foster care system in this country [USA], a system that is a national disaster. We all want children to have the option of being in their families of origin or communities of origin as a first choice, but if that is not feasible at the time a child needs a family, then we must look for other families that can provide permanency and safety for the child. In a transracial adoption, it is crucial, needless to say, that the family adopting a child of another race is sensitive to racism and has respect for their child's ethnicity and culture of origin. The family must be willing to see itself as a transracial family, not to see the child as of another race. The family should be willing to consider living in a diverse community so that the child can become familiar with and positive about his or her own culture, ethnicity, and racial background and can have posi-

tive adult role models of the same race. Pavao 1998 p129

Infant adoption: International

Pavao— Infant adoptions from other countries are often transracial as well, so the same issues apply. Most common today in the United States are Chinese infant adoptions. It is important for adoptive families to have respect for and an understanding of their child's country of origin. It is also important for agencies doing international adoptions to work with the sending countries and bureaus to make sure that as much information as possible is transmitted to the adoptive family so that they will have it when the child is older and asking questions. How we talk to internationally adopted children about the complex societal issues involved in their adoptions is important; I discuss it further in terms of the developmental issues families face. Pavao 1998 p130

Adoption of older children

Pavao— Because of my interest in normalizing adoption, I am reluctant to say that there are special needs in all adoptions, but this is in a sense true. Adoption calls upon children to make sense of fundamental issues concerning identity and origin early on, and the process requires special treatment. There is loss and trauma- the leaving of the birth mother and the move to another place-associated with all adoptions. For older children who are adopted, the trauma too often has been multiple and cumulative. The Child Welfare League of America has stated that 93% of the children over age three, both nationally and internationally, who are available for adoption have suffered sexual abuse, physical abuse, or neglect before being freed for adoption. This amount of early trauma is very important to detect and to understand. It used to be- and sometimes still is today- that parents were shielded from knowing about their children's trauma. This is certainly not in anyone's best interest.

The issues for the older child adopted from another race and culture are even more complex. There is the task of making sense of why no one in their family or in their community or country wanted them. Original language loss and new language acquisition for older children impacts their auditory processing and learning styles. In all older child adoptions, it is important to work to preserve positive connections in a safe and healing fashion.

Source Pavao 1998 p130

INTERCOUNTRY ADOPTION APPLICATIONS PRACTICAL & LEGAL CONSIDERATIONS

Adoption Information and Services Unit
AISU Website **re Intercountry adoption**

How do I adopt intercountry?
What is intercountry adoption?
The term intercountry adoption applies to the adoption of children in one country by people living in another country. When children are unable to be cared for by their immediate or extended family, or a family in their country of origin, intercountry adoption can provide an alternative opportunity for a healthy and supportive family life.

What kind of families do these children need?
Children who are adopted across borders are usually infants or children who may have experienced neglect or abuse resulting in delayed physical and emotional development. To meet these special needs they require a family that is flexible, patient, capable and understanding.

Some individual countries have set criteria about the nature of adoptive parents they feel best suit the children in that nation. These criteria may relate to age, marital status, ethnicity or current family composition for example.

How do I make an application to adopt from overseas?
If you wish to adopt, you can make an application at your nearest Adoption Information and Services Unit (AISU) of Child Youth and Family. Not all countries have adoption laws that allow the adoption to have effect under New Zealand law. Your local AISU office will have the current list of the countries to which this option applies.

If the child you wish to adopt is known to you already e.g., a family member, also contact your local AISU office to discuss what options and procedures would be involved.

An application form needs to be completed, giving basic details about yourself. You are also asked to give permission for medical and police checks to be obtained and to supply names of people who know you we!l who are prepared to provide references which are relevant to your intercountry adoption proposal. Some countries require additional supporting documents, for example psychological reports or financial records.

What else is required of me?
As well as completing the documentary assessment, you will be invited to attend an education and preparation programme. This programme provides an opportunity for you to explore issues surrounding adoption, your own circumstances, and time to examine attitudes and beliefs about adoption. The programme includes a seminar focusing specifically on the issues of intercountry adoption and parenting a child with special needs.

When am I assessed?
A number of interviews with social workers are held during and after the programme. This social work assessment also provides you with an opportunity to raise any matters with social workers.

How am I matched to a child?
There are a number of steps that help in determining the best match of a child and a family. Your family's circumstances and your ability to support a child with special needs are detailed in a Home Study Assessment Report written by your adoption social worker, once your social work assessment has been completed. This report is sent to the designated authority in the country you have chosen. After considering this document, the authority will determine if there is a child in their care that may benefit from the abilities you demonstrate. Should a match be found, they will complete a child study report that profiles the particular child's needs and background and forward this to New Zealand.

How do I know the child I am matched with is legally available for adoption?
Children available for intercountry adoption will usually have an official certificate indicating their status and their profiles will be presented via a designated authority in that country. Countries which have agreed to the Hague Convention or countries which have agreements with New Zealand based on this convention's principles, are committed to promoting only adoption practices which are approved under that Convention.

Who decides if I have the ability to meet a particular child's needs?
The process of decision making involves the authority in the child's country of birth, the AISU, the children themselves if old enough to understand and of course you, the prospective adoptive parent.

Where does the adoption occur?
Every country individually determines whether the adoption will occur in its Court or in the New Zealand Family Court. Similarly, countries have different expectations around visiting the country and meeting the child before the placement and how long the prospective adoptive parents are required to stay in the country. This orientation period can be days or weeks. The length of time from application to placement is also country dependent and may range from three months to two years or more. Completion of the documentation, assessment and matching process does not guarantee the adoption will take place. It is the Court's responsibility to make an adoption.

What happens after the child joins my family?
Most countries expect a number of reports over a specific period of time on how the child is fitting in to your family and how his/her needs are being met. As soon as possible after your family's return to New Zealand, you should inform your adoption social worker that the adoption has occurred in order for the interviews for this post placement reporting can begin. These interviews are also an opportunity for you to discuss anything that may have arisen since the placement.

What support is available when I bring the child home?
The social workers at your local AISU office will continue to be accessible and there are also intercountry adoptive parent support groups established in many centres. In

addition, the school or health centre in your local area may offer special needs services.

How much will an intercountry adoption cost?

There are costs incurred in arranging an intercountry adoption and the amounts vary according to the child's country of origin and may include for example, fees for administration time, lawyers, authentication of documents or caregiver costs. These charges should all be receipted and individually documented. The Adoption Information and Services Unit does not charge for any of the services it provides.

What information will I have about the child's life experiences prior to the adoption?

It is important for an adopted person's identity formation to have as much information as possible about their beginnings in life. The information on the Child Study may be quite limited as some children available for intercountry adoption have been orphaned or are abandoned. Intercountry adoptive parents have found it invaluable to meet the child's caregivers and spend time getting to know the area or institution in which the child may have spent some years.

Can you have an 'open' intercountry adoption?

An open adoption is a process by which the birth parents and the adoptive parents exchange information and may meet. Due to the circumstances of many of the children available for intercountry adoption, or the regulations of the child's country of origin, an open adoption is rarely a possibility.

However, although the birth parents may not be known, having a 'spirit of openness' is achievable in an intercountry adoption by acknowledging and readily discussing the place of the birth family in the adopted person's life.

I am a foreigner living overseas, can I adopt a New Zealand child?

Only when children are unable to be cared for by their immediate or extended family, or an alternative family in New Zealand, would intercountry adoption be considered. Adoption of New Zealand children by foreigner's overseas therefore rarely occurs, as all New Zealand born children can be readily placed with New Zealand families.

I am a New Zealander living overseas, can I adopt in New Zealand?

New Zealand has acceded to an international agreement, the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ('the Hague Convention'). Under this Convention, adoptions are only facilitated for people habitually resident in the facilitating countries.

If you live in a Hague Convention country you would need to apply to the central authority in your current country of residence and this country would then assess you and forward your documentation to the New Zealand Central Authority (NZCA). The NZCA would then determine if there was a NZ child in need of intercountry adoption that would benefit from the capability and skills that are described in the home study assessment report provided on you.

It is however highly unlikely that a NZ child would be matched to you as only when children are unable to be cared for by their immediate or extended family, or an alternative family in New Zealand, would intercountry adoption be considered. Adoption of New Zealand children by people overseas therefore rarely occurs, as all New Zealand born children can be readily placed with families permanently resident in New Zealand.

I am a New Zealander living overseas and need information from the New Zealand authorities.

I am a New Zealander living overseas and need information from the New Zealand authorities in order to adopt in the country in which I currently reside. What can Child, Youth and Family provide me?

There is only limited information that can be provided if you do not live in New Zealand. Child, Youth and Family can not assess your suitability and provide confirmation of this, or confirm its support of your adoption proposal, if you are not resident in New Zealand.

An assessment needs to consider any applicant's capacity and ability to care for a child in the context of their permanent living environment. Whilst you may be able to describe the living arrangements you intend to have upon a return to New Zealand, the physical situation, support network, employment and care arrangements you would be describing would be hypothetical and not therefore a suitable basis on which to determine if the needs of a child were able to be met.

The Department may be able to provide confirmation that you would be eligible to make an application to adopt in New Zealand if you match the criteria of the Adoption Act 1955.

You are able to request from the Department of Internal Affairs confirmation as to whether an adoption in the overseas country would enable your child to gain New Zealand citizenship.citizenship@dia.govt.nz .

You are able to contact the New Zealand Immigration Service to get advice on whether or not your overseas adopted children would be entitled to enter New Zealand with your family http://www.immigration.govt.nz.

You are also able to contact the New Zealand Police to obtain a copy of your NZ Police record http://www.police.govt.nz/service/vettingfamily.

How do I contact AISU for more information?

You can contact an AISU office directly - full list of details on this Website. Alternatively, click here to email the National Office AISU team. Remember to give as much detail as possible in your message, and state your location and contact details so that the appropriate team can help you. **Source** AISU Website www..... January 2005

Practical Guide to Intercountry adoption

Robert Ludbrook—

Three Government Departments are involved in intercountry adoptions:—

1 *Social Welfare Department* report proposed adoption.

2 *Immigration Division of the Labour Department* has to give entry clearance to allow the adoptee to enter this country and the

3 *Citizenship Division of Internal Affairs* has to decide whether the child will be granted New Zealand Citizenship. The three Departments have worked together in formulating policies towards proposed inter-country adoptions but conflicts do still occur.

Adopting a child in their own country

Adopters will sometimes travel to the child's country of residence and adopt the child under the law of that country. An overseas adoption is recognised in New Zealand if it gives the adopters a superior right to that of the birth parents to the custody of the child and

(a) the adoption order was made in the United States or a Commonwealth country or

(b) the overseas adoption grants the adopters rights equal or superior to those of the birth parents over the adoptee's property should he of she die without making a will. The Department of Social Welfare has no legal powers to prevent a New Zealander adopting an overseas child in the child's own country, nor do the New Zealand Courts have any jurisdiction in the matter. The Social Welfare Department may be able to give useful advice. But the proposed adopters will need to take advice from lawyers or other advisors in the child's home country. New Zealand government agencies become involved when the adopters want to bring the child back to New Zealand. The New Zealand adopters will be entitled to return to New Zealand but an entry permit for the child will have to be secured from the New Zealand Immigration authorities. If the overseas adoption is recognised under New Zealand law [and the child is at or under the age of 14*] the child is deemed to be a New Zealand citizen by descent and it is unlikely that entry clearance would be refused. The adopted child must be registered as a New Zealand citizen before he or she reaches 22 years or the New Zealand citizenship will lapse. *Citizenship Amendment Act 1992 only children at or under age 14 given automatic citizenship. *see* Citizenship pXXX

Adopting overseas child via New Zealand Court

Prospective New Zealand adopters must demonstrate that they are able to provide continuity in respect of racial, cultural and religious attachments. What this means is that New Zealanders who want to be considered must be able to show ongoing links with the child's birth country, race and culture. This policy has been questioned.

1 There is a theoretical argument that it is illogical to demand that the child's existing attachments be fostered when, of its very nature, adoption destroys those attachments.

2 Another argument is that in the case of babies any psychological attachment with the country of origin will be tenuous.

3 A third criticism is that the insistence on continuity of attachment gives disproportionate emphasis on one factor: there are many other factors bearing on the welfare of the child. Against the loss of the child of existing attachments must be balanced the gains from being brought up by committed adoptive parents in a developed country. Research suggests that foreign children do well in their country of adoption but that they find it hard to preserve a sense of their racial an cultural identity and they are likely to suffer racism.

Criteria for seeking to adopt overseas

International codes of practice as to inter-country adoptions have strongly influenced Departmental procedures in New Zealand. The Department of Social Welfare will not work with private agencies or adoption brokers overseas. It will only work with governmental agencies and trans-national agencies such as International Social Services base in Geneva. A New Zealander wanting to be considered for adoption of an overseas child should first approach the Department of Social Welfare for information of a general nature. The Department has on its files information about governmental adoption agencies and adoption procedures in a number of overseas countries.

To proceed further an applicant must complete self-assessment forms setting out family and background information and attend interviews with Departmental social workers. The procedure differs little from that for an in-country adoption except that the Department will want to be satisfied that applicants have the personal, social and cultural characteristics to equip them to parent a child of that particular nationality, race and culture and can provide an appropriate home and community environment. A further Departmental requirement is that applicants must be 'willing and able to provide an open type' adoption in respect to the child's country and culture and, where possible, the child's family and wider kin group e.g. return visits to country of origin'. This means that any applicant must be able to offer the child continuing contacts with the child's home country and culture and, if possible, an ongoing relationship with the child's birth parents and family of origin.

Procedures adoption of overseas child

Intercountry adoption involves the authorities in the country of the child's birth (the donor country) and the country of the adoptive parents (the receiving country). Where New Zealand is the receiving country the Department of Social Welfare will not embark on a detailed assessment of the suitability of applicants unless it is first established that a particular overseas agency has children available for adoption and that the applicants meet the general criteria laid down by that overseas agency. Once the availability of a child has been established and the Department is satisfied that the applicants meet the general criteria of the overseas agency the Department completes what it calls a 'Home Study', and in-depth assessment of the suitability of the applicants. If the applicants are approved the overseas agency is asked to nominate a child who requires an overseas adoptive home. Usually the child will be living in an orphanage of other institution.

The 'Child Study' is a detailed background report which the overseas authority is asked to prepare on the child's cultural and family background. It may take several months to prepare. The possibility of ongoing post-adoption contact with the family of origin is dealt with in the Child Study. The completed Child Study is discussed with the applicants. If they want to adopt the child offered they are asked to put their decision in writing.

Collection of overseas child

Once the prospective adoptive parents have made a commitment to care for the overseas child offered them they are encouraged to make contact with the child by sending a letter, photographs, gifts through the overseas agency. They also need to apply to the Immigration Service at the Labour Department for an entry visa for the child. The two departments work closely together and the Immigration Service will normally accept Social Welfare's recommendation and arrange for a visa to be entered in the child's passport at the New Zealand Embassy or High Commission nearest to where the child lives. The adopters then travel at their own expense to collect the child. They usually stay in the overseas country for two or three weeks to learn about the child's family and cultural background and, where possible, to meet members of the child's birth family. This will give the child and the proposed adopters time to get to know each other before making the journey to the new surroundings in a strange country.

Social Welfare oversight after arrival

The child in settling into a new country will have to make huge adjustments: Language, diet, housing, climate, parenting styles may all be completely unfamiliar to the child. The Department of Social Welfare provides social work support for the adopters and for the child during the settling in period and will usually provide post-placement reports to the overseas agency.

Final adoption order and Citizenship

The procedure for obtaining an interim order and final adoption order is substantially the same as with the adoption of a New Zealand child. Social Welfare has to furnish a report and the Court must be satisfied that the adoption will promote the child's welfare and interests. The overseas agency will have had the responsibility of obtaining the written consents to adoption. When a final order has been granted the Immigration Service will, on request, grant the right to permanent residence in New Zealand. The child is deemed to be a New Zealand citizen by birth under s2(2)(b) of the Citizenship Act 1977.
Source Ludbrook *'Adoption-Guide to Law & Practice' 1990* pp41-46

Recognition in New Zealand of overseas adoptions

Trapski—**L.2 .** There are two separate statutory pathways for determining whether an overseas adoption will be recognised in New Zealand.

Recognition via Adoption Act 1955

L2.01 If it meets the criteria in s 17 Adoption Act, an adoption made in an overseas country according to the law of that country will be recognised in New Zealand.

1. Critera

The criteria are that:
(a) The adoption is legally valid according to the law of the place where it was made; and

(b) The adoption gave the adoptive parents a right to the custody of the adoptee superior to that of the adoptee's birth parents; and

(c) Either: (i) The adoption order was made by the order of a Court in a Commonwealth country or the US; or
(ii) The adoption gave the adoptive parents rights superior to or equal with that of any birth parent to inherit the adoptee's property in the event of the adoptee dying intestate without other next of kin: s 17(2)(a), (b), and (c).

2 High Court Declaration

If there is doubt whether an overseas adoption will be recognised in New Zealand, an application can be made to the High Court under the Declaratory Judgments Act 1908 seeking a declaration as to the validity of an overseas adoption in New Zealand: *Re S* 26/8/98, Hammond J, HC Auckland M262/98. In that case a declaration was sought because the New Zealand Immigration Service in New Delhi had advised that a visa could not be issued for the child unless a ruling was produced from a New Zealand Court that an Indian adoption had the same effect as a New Zealand adoption.

3 Some overeas adoptions may be incompatible with Adoption Act 1955

Adoption of adults is permitted in some, countries, and s 17 contains nothing to suggest that an overseas adult adoption would not be recognised in New Zealand.

It is the adoptive parents' rights of inheritance from the adopted child, and not vice versa, that is the determining factor in adoption orders made in countries other than the US or Commonwealth countries: s 17(2)(c)(ii). In a critical article, J Couchman comments that s 17 permits the recognition of adoptions made overseas which would not meet the criteria set out in the Adoption Act 1955. The statutory criteria in s 17 make no reference to the welfare of the child nor do they prevent recognition of adoptions where the birth parents have not given a free and informed consent or where payment has been made in return for the adoption: J Couchman, "Intercountry adoption in New Zealand: A child rights perspective" (1997) 27 VUWLR 421.

In *Application to adopt C* (2000] NZFLR 685, Judge Mather pointed out that s 17(2) Adoption Act 1955 does not sit comfortably with ss 11 and 12 Adoption (Intercountry) Act 1997 and that s 17(2) would be easier to apply if it required overseas adoption orders to have the effect of terminating pre-existing legal parent-child relationships as required under the 1997 Act. This case is an example of the legislative thicket that counsel and the Courts have to work their way through where the two Acts intersect.

Recognition via Adoption (Intercountry) Act 1997

L2.02 Since 1 January 1999, intercountry adoptions arranged with other Hague Convention countries have been recognised in New Zealand: see s 11(1) Adoption (Intercountry) Act 1997 and s 17(5) Adoption Act 1955 (as inserted by s25 Adoption (Intercountry) Act).

A certificate signed by the competent authority in the country where the adoption took place, and stating that the adoption was made in accordance with the Hague Convention, is prima facie evidence of the adoption: s 11(2).

However, the Family Court may rule that a Hague Convention adoption will not be recognised if it is manifestly contrary to New Zealand public policy taking into account the interests of the child: s 11(3) Adoption (Intercountry) Act 1997 and art 24 Hague Convention. An application to the Family Court to refuse recognition of a Hague Convention adoption can he made only with the prior approval of the Attorney- General: s 11(4). Anyone can apply for such an order, provided that the approval of the Attorney-General is first obtained, and the Court must hear the application as soon as practicable: s 11(5).

Obtaining a New Zealand birth certificate

L-2.03 The Births, Deaths, and Marriages Registration Act 1995 contains machinery for the registration in New Zealand of overseas adoptions if they meet the criteria in s 17(1) Adoption Act (see 1.2.0l): s 25(a) and s 24. Birth certificates for children adopted overseas in a Hague Convention country can be issued even where the adoption does not meet the criteria in s 17 Adoption Act 1955: s 25(a), as amended by 30 Adoption (Intercountry) Act 1997, and see s 11(1)(b) of that Act. Once registered, the provisions of the Births, Deaths, and Marriages Registration Act will apply to the overseas adoption as if it was a registered New Zealand adoption: s 25. A birth certificate can be issued showing the adoptive parents as the child's parents with or without the notation "adoptive parent(s)": s 24(2) and (3).

Law Commission's recommendations

L2.04 The Law Commission, in its 2000 report, thought that s 17 was originally intended to be a conflict of law provision which would ensure that immigrants to New Zealand would have their adoption recognised in New Zealand law.

The Commission found that s 17 is being used for another purpose, that is to enable New Zealand residents to adopt children living overseas. The report proposes that s17 apply only to adoptions made overseas where the adoptive parent(s) are not habitually resident in New Zealand. Section 17 could then no longer then be used to effect an intercountry adoption: *Adoption and Its, Alternatives: A Different Approach and a New Framework,* NZLC R65, September 2000, paras 303 to 311.

Source *Trapski's Family Law* Vol 5 'Adoption' L2.01-L2.04 Brookers.

Adoption by overseas applicants of New Zealand children.

L.3 Intercountry adoption is the term commonly used to refer to adoption by New Zealand adoptive parents of children who are resident in, and whose family and cultural attachments are with, an overseas country. However, it can also refer to New Zealand children adopted into overseas families.

During the 1950s and 1960s it was quite common for New Zealand children to be adopted by overseas couples. Over that period there were more children available for adoption than there were New Zealand applicants to adopt. Today, there are fewer than 200 children available each year for adoption by strangers in New Zealand and the Department of Social Welfare refuses to entertain applications from people living overseas who seek to be assessed and placed on a waiting list for a New Zealand child: *Inter-Country Adoption Resource Paper,* Wellington, Department of Social Welfare, October 1989, E.14.9. Overseas applicants are informed that there are plenty of adoptive families available in New Zealand to meet the needs of available New Zealand children. See also art 21 United Nations Convention on the Rights of the Child.

However, if an overseas relative or close family friend seeks to adopt a New Zealand child as a result of a family agreement, the department will assist: *Inter-Country Adoption, Resource Paper* E.14.9. While these adoptions are, strictly speaking, intercountry adoptions, they occur infrequently and cause few problems. Clearly, the department has to be satisfied that the overseas applicants are fit and proper persons who are able to support and care for the child, and that the welfare and interests of the child will be promoted by the adoption: s 11 Adoption Act. To this end, the department will obtain a "home study" report from a recognised social service or adoption agency in the Overseas country: *Inter-Country Adoption Resource Paper* E.14.9, E.15.1-6. A factor given careful consideration is the extent to which the child will be affected by removal to another country with racial, cultural, and religious differences, and a different way of life. A change of country will usually involve some dislocation in the child's locality, community, family networks, and way of life.

Difficulties resulting from Adoption (Intercountry) Act 1997

L-3.01 A complication resulting from the Adoption (Intercountry) Act 1997 was referred to in *Re T* (1999) 19 FRNZ 11. A couple resident in Australia wished to adopt a New Zealand child with the support of the child's parents under a private adoption. It appears that an adoption would not be possible by reason of the Adoption (Intercountry) Act because s51 Adoption of Children Act 1965 (NSW) prevents adoptions where the arrangement has been made privately. A Hague Convention adoption (United Nations Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption) is not possible where the adoption would not be lawful in Australia: see art 5.

Source *Trapski's Family Law.* Vol.5. 'Adoption' . L.3-L.3.01. Brookers's. 20/6/02

Adoption by New Zealanders of overseas children

Trapski—**L.4** In this country the most common form of intercountry adoption involves persons in New Zealand adopting an overseas child. In some cases this is an in-family adoption but more commonly adoption is by a couple unrelated to the child.

Intercountry adoptions by family members L4.01

1 Inroduction

New Zealand society has become increasingly ethnically diverse and multicultural with correspondingly more movement of people between overseas countries and New Zealand. Often families living in New Zealand seek to adopt a family member living overseas. These adoptions are called "in-family" adoptions (as opposed to "stranger" adoptions). Many of the intercountry adoption proposals in which the department is involved are in-family adoptions. These applications relate particularly to children in the Pacific Islands and parts of Asia such as the Philippines. In-family intercountry adoption raises immigration policy issues as well as questions about the welfare of the child.

2 Department policy

The department's policy is set out in Inter-Country Adoption Resource Paper E. 14.7: "The Department has a commitment to facilitate family decision-making and to support the family's right to make their own arrangements within the kin group, for the care and parenting of their children. However, it can be regarded as simplistic to adopt a 'blanket approval' approach to proposals for in-family intercountry adoption."

The resource paper goes on to identify (at E.14.7(i) and (ii) two reasons for caution:

(a) Kinship adoption can distort family relationships; and (b) Although members of the extended family in New Zealand may provide some continuity in meeting the child's emotional, psychological, cultural, and religious needs, dislocation to the child's community, locality, and way of life still affect the child's welfare. The department recognises that adoptive families in New Zealand who are members of "minority groups" are usually particularly well equipped to help a child cope with community life as a member of a minority group.

The department recognises that a motive for such adoptions may be to give the child advantages in terms of education, employment, living standards etc, which it is perceived New Zealand residence can provide: *Inter-Country Adoption Resource Paper* E. 14.7; B.2.

In-family intercountry adoptions are dealt with by the department in the same way as stranger intercountry adoptions :Inter-*Country Adoption Resource Paper* E.14. 1; L.4.

The Children. Young Persons and Their Families Service (now the Department of Child, Youth and Family Services) unsuccessfully opposed an in-family intercountry adoption in *Re Adoption of N P* (1998) 16 FRNZ 612, also reported as *Re N B* [1988] NZFLR 481. A 36-year-old Thai woman and her New Zealand husband sought to adopt the woman's 16-year-old sister. The judgment sets out in detail current departmental policy on intercountry adoptions at pp 5-6:

"Current Inter-Country Adoption Policy. Inter-country adoption is a service for children. It recognises and upholds the rights of children by acknowledging and respecting their needs for attachments in relation to their biological family, culture, religion and country. This policy was agreed by the New Zealand government in 1989 and amended in 1990.

"**Criteria "The adoptive applicants must:**

(i) have the qualities and characteristics (legal and personal/social) that will allow them to he approved in principle and duly eligible for an adoption order under the Adoption Act 1955;

(ii)(a) have the racial, cultural and religious characteristics, relevant skills and knowledge, or (b) have acquired or be in process of acquiring relevant skills and knowledge relating to racial, cultural and religious characteristics;

(iii) be willing an [sic] able to provide an open-type adoption in respect of the child's country and culture, and where possible, the child's family and wider kin group, eg through, amongst other things, return visits to the country of origin.

Countries.which, at the last time their adoption laws were assessed, were found to have legislation which fulfilled the requirements of s17 Adoption Act:

American Samoa
Andorra
Australia
Austria
Belgium
Bolivia
Brazil
Burkina Faso
Burundi
Canada
China
Colombia
Cook Islands
Costa Rica
Cyprus
Denmark
Ecuador
El Salvador
England
Fiji
Finland
France
Georgia
Guyana
Hong
Kong India
Japan
Kenya
Lithuania
Malaysia
Malta
Mexico
Nauru
Netherlands
North Mariana Island
Norway
Papua New Guinea
Paraguay
Peru
Philippines
Poland
Romania
Russia
Scotland
Sierra Leone
Singapore
South Africa
Spain
Sri Lanka
St Lucia
Sweden
Tahiti Tonga
Trinidad and Tobago Tuvalu
Ukraine
United States (13 states)
Vanuatu
Venezuela
Western Samoa
Zambia
Zimbabwe

Countries that, at the time of last assessment, did not meet the criteria of s 17 and had not ratified the Hague Convention were:

ChileDominican Republic
Indonesia
Korea
Sarawak
Taiwan
Thailand

For an up to date list of countries whose adoptions are recognised in New Zealand *See* Website .citizenship@dia.govt.nz .

"The child must:

(i) have a need for home and family life which cannot be met by his/her biological family/kin group or by any family rebuilding options available in his/her own country;

(ii) be legally 'free' for adoption, ie either parental consents (in a form acceptable to the New Zealand Court), or documents to support an application for dispensation of parents'/guardians' consents (eg abandonment certificate, death certificates of parents), must be available;

(iii) be eligible for immigration to New Zealand; and

"The authorities in the child's own country must: be able to supply the child with knowledge of and/or documentation about his/her personal, family, cultural, racial and religious background and heritage."

Intercountry adoptions by non-family members

L4.02 The Department of Child, Youth and Family Services (formerly the Department of Social Welfare) policy in relation to intercountry adoptions has tended to be cautious although it is more liberal than the policy in neighbouring countries. See "Adoption - in whose interest? " The Dominion, 12/1/90. The department will only deal with Government agencies, recognised adoption agencies, or international social services branches, and attempts to work within international codes of practice: *Inter-Country Adoption Resource Paper* E.14.5(i). Despite this policy, a considerable number of third world children have been adopted in this country. In at least one case the placement broke down almost immediately. See "Interview with Robin Wilson", *The Bulletin*, Department of Social Welfare, 4/6/91, p 43.

One problem in controlling stranger intercountry adoption is that if New Zealanders travel to the child's country of origin, take physical possession of the child, and obtain an adoption order there, the adoption may be recognised under s 17 Adoption Act 1955. The child will then be entitled to New Zealand citizenship as a legal child of New Zealand citizens. Another method is for New Zealanders to travel to the overseas country, then return to New Zealand, obtaining entry for the child under a temporary visa. Once the child is settled in the new family they apply for an adoption order and, having obtained the order, obtain permanent entry for the child. Once settled with the New Zealand family, the option of sending the child back to his or her country of origin is unrealistic and the Family Court is likely to grant an adoption order to promote the child's welfare and interests. See *Re adoption of Y T* (1993) 10 FRNZ 426, also reported as Application to adopt *Y T* [19931 NZFLR 746.

Although the Department of Social Welfare, the Documents of National Identity division of the Department of Internal Affairs, and the New Zealand Immigration Service have worked out an agreed protocol for dealing with intercountry adoptions, it still remains possible for New Zealanders who secure an overseas child to bypass the recommended procedures and present the Family Court and the immigration authorities with a fait accompli. See *The facts About Romanian Adoption*, Wellington, Refugee and Migrant Commission, 1991. The commission's address is PO Box 11-236, Wellington, or PO Box 86-064, Mangere Fast, Auckland.

Adoption applications in respect of children domiciled overseas

L.4.03 New Zealand Courts can entertain adoption applications in respect of children domiciled overseas: s 3(1) Adoption Act 1955. This provision is separate from and not affected by the Adoption (Intercountry) Act 1997, which came into force on 1 January 1999.

One might expect that adoptions arranged through the Adoption section of the Children, Young Persons and Their Families Service will be expected to comply with the requirements of the Hague Convention:.. . But there appears to be no obstacle to New Zealanders who seek to adopt an overseas child making private arrangements and applying to the Family Court for an adoption order. The Court would need to be satisfied that the adoption would promote the welfare and interests of the child, and the Judge would be likely to require detailed information as to the child's family, social, and economic circumstances in the country of origin.

In theory it would he possible for Australian parents to adopt an Indian child by means of a New Zealand adoption order: s 3(1) Adoption Act 1955, but it is unlikely that a New Zealand Family Court Judge would lend support to such an arrangement. It is surprising that s 3(1) was not amended by the Adoption (Intercountry) Act.

Source *Trapski's Family Law.* Vol.5. 'Adoption' . L.4-L.4.03. Brookers's. 20/6/02

New Zealand policy in intercountry adoption
Merits and demerits of intercountry adoption

L.5.01. Like other adoption issues, the benefits and dangers of intercountry adoption are a matter of considerable public debate. Some people consider there is a personal and national responsibility to "rescue" children from overseas countries and give them the benefits that a secure home and the New Zealand way of life is assumed to offer. Others see intercountry adoption as misguided idealism which takes away overseas children's personal, family, and cultural identities, and encourages abduction of children, trafficking in children, and other fraudulent and abusive practices.

For a review of the various approaches to intercountry adoption, see D McDonald, "Intercountry adoption: An examination of the discourse", in P 3 Morris (ed) *Adoption Past, Present and Future*, Auckland, University of Auckland Centre for Continuing Education, 1994. John Triseliotis has written that most intercountry adoptions are adult-centred: J Triseliotis, *Inter-country Adoptions Practical Experiences,* Humphrey and Humphrey (eds), London, Tavistock and Routledge, 1993. He has also pointed to the range and complexity of the intercountry adoption debate, involving as it does, political, moral, empirical, policy and practice issues: "Inter-country adoption", 15 Adoption and Fostering 46.

It is often claimed that intercountry adoption is (or should be) a service for children. The view that children will inevitably be better off being brought up in the comparative affluence and political stability of New Zealand rather

than in their country of birth is simplistic, based as it is on the assumption that economic and political factors are more important influences on the welfare of a child than social and cultural factors. Decisions about the future welfare of a child are always difficult: those which involve a comparison between the social and cultural norms of one culture and those of another are particularly challenging. Intercountry adoption should recognise and uphold children's rights by acknowledging and respecting their needs for attachments in relation to their biological family, and the culture, religion, and country of origin.

lntercountry adoption came into prominence in New Zealand much later than in many other industrialised countries. Until 1988 most such adoptions were by relatives, particularly of children from Western Samoa by relatives in New Zealand. It was not until worldwide publicity was given to the plight of children in Romanian orphanages that intercountry adoption by non-relatives began to increase markedly. Most intercountry adoptions do not appear in Department of Child, Youth and Family Services statistics as many take place overseas and come to official notice only through the Department of Internal Affairs' records of applications for citizenship by descent. In 1996 there were 47 intercountry adoptions processed by the Department of Child, Youth and Family Services compared with more than 500 processed by the Citizenship Division of the Department of Internal Affairs: see M Iwanek, "Adoption in New Zealand: Past, present and future" in *Adoption and Healing* NZ Adoption and Healing 'Trust, Auckland, 1994, pp 62, 68.

Criteria for intercountry adoption eligibility

L5.02 To fulfil the eligibility criteria for intercountry adoption, the child must:

(a) Have a need for home and family life which cannot be met by the child's biological family, or kin group, or by any family rebuilding options available in his or her own country;

(b) Be legally "free" for adoption (ie there must be consents by parents or guardians, or documents to support an application for dispensation with consent such as an abandonment certificate or parental death certificate);

(c) Be eligible for immigration to New Zealand.

The adoptive parents must:

(a) Be legally married to each other: Adoption Local Placements Manual 3.7.1.1;

(b) Have the qualities and characteristics (legal, personal, and social) required of adoptive parents by the Adoption Act;

(c) Have: (i) The racial, cultural, and religious characteristics, and relevant skills and knowledge; or (ii) Acquired (or be in the process of acquiring) such skills and knowledge as will equip them to parent and provide an appropriate family and community environment for a child of a particular race, culture, and religion.

(d) Be willing and able to provide an open adoption in respect of the child's country and culture, and, where possible, the child's family and wider kin group, through means such as return visits to the country of origin.

Prospective applicants may also be able to establish eligibility if they:

(a) Have previously resided in the child's country for a substantial period of time;

(b) Have family members or close friends in New Zealand of the child's race, culture, or religion;

(c) Have already adopted a child of that country, race, or culture;

(d) Have other close involvement in everyday family and community life with people of the child's race, culture, or religion; or

(e) Can show a comprehensive knowledge or understanding of the child's country, race, culture, or religion, or can show a plan to equip themselves with the relevant skills and knowledge.

The authorities in the child's own country must be able to supply the child with knowledge or documentation of the child's personal, family, cultural, racial, and religious background and heritage.

Danger of deception and forged documents

L5.03 In dealing with overseas countries great care must be taken to ensure that documents are genuine and have not been forged or obtained by deception or false pretences. In some overseas countries poor families may be vulnerable to the blandishments offered by dishonest agents and "official" documents and reports can be easily forged.

In an English case a poor Romanian family were deceived into permitting their 4- year-old girl to be taken to England for an extended holiday with the promise that medical treatment would be provided to correct a serious eye condition. She was kept in England and an application was made for her adoption, supported with documents the purport of which was falsely represented to the Court. The deception was discovered and the Court refused an adoption order but made the child a ward of Court, giving the applicants care and control and giving the biological parents a right of access. The Court acknowledged that the natural parents had a prior claim to the child but took into account her strong desire to remain in England and the fact that it was too late to remove her from her settled home: *Re R (No1) (Intercountry Adoption)* [19991 1 FLR 1014; [1999] Fam Law 289.

Source *Trapski's Family Law* Nol 5 'Adoption' L5.02-L5.03 Brookers 26/6/2002

Intercountry adoption by New Zealanders Hague Convention and non-Convention adoptions

Trapski— **L.6.01** There are now two parallel systems operating by which New Zealanders can adopt in New Zealand children from overseas:

(a) If the child's country of origin is not a party to the Hague Convention, the Convention does not apply and the proposed adoptive parents can make their own arrangements, either through the Department of Child, Youth and Family Services (formerly the Department of Social Welfare) or independently with the authorities in the country where the child resides.

(b) If the child's country of origin is a party to the Hague Convention, the Convention applies and arrangements can be made only through the New Zealand Central Authority, which is the Department of Child, Youth and Family Services.

Options available for non-Hague Convention adoptions

L6.02 A New Zealander wishing to adopt a child from a non-Convention Country would be well advised to seek guidance from the Adoption Services Unit of the Department of Child, Youth and Family Services (formerly the Department of Social Welfare). Considerable assistance can be obtained from Intercountry Adoption New Zealand ("ICANZ"), a non-Government organisation which has up-to-date information on the availability of overseas children for adoption and on the necessary procedures. It will probably be necessary for the person(s) seeking to adopt to travel to the country where the child is living, adopt the child in that country, and obtain a New Zealand passport or entry clearance so that the child can gain entry to New Zealand.

A decision has to be made whether to adopt the child in the child's country of origin or to bring the child to New Zealand and seek an adoption through the Family Court.

Adoption through New Zealand Family Court

L6.03 The procedure for intercountry adoption by New Zealand residents is complex, involving several Government departments. The various steps in the process are detailed in the Department of Child, Youth and Family Services' *Inter-Country Adoption Resource Paper*.

The procedure for intercountry adoption through the New Zealand Courts is as follows:

(a) Applicants contact their local Department of Child, Youth and Family Services office for background information and to seek an initial opinion as it) their eligibility for intercountry adoption.

(b) If eligible, the applicants contact an approved agency in the country from which they wish to adopt a child. That agency will apply its own criteria to establish the applicants' suitability.

(c) If the response is favourable, the applicants ask the Department of Child, Youth and Family Services to proceed with a home study on the suitability of the applicants themselves. The procedure closely follows that for an Intercountry adoption:

(d) If the home study is favourable it is sent to the approved overseas agency for assessment.

(e) If the home study is approved by the overseas agency, a child report on a child available for adoption is sent to the Department of Child, Youth and Family Services.

(f) If the applicants wish to proceed with the adoption of that child the overseas agency is notified. Usually at this stage there is an exchange of photographs, letters, etc.

(g) The applicants apply to the New Zealand Immigration Service for a temporary visa for the child. If the application is approved and the child has a passport issued by his or her country of birth, the New Zealand High Commission or Embassy which is closest to the child's country issues a visa, subject to a health clearance.

(h) Applicants then go to the overseas country, fulfil any legal requirements, and return to New Zealand with the child.

(i) Applicants ask the Department of Child, Youth and Family Services to issue a placement approval and apply to the Family Court for an adoption order.

(j) Departmental social workers supervise the placement, send reports to the child's country of origin, and write the necessary reports for the Court.

(k) Applicants obtain an adoption order through the Family Court and then apply to the Department of Internal Affairs for New Zealand citizenship for the child.

(1) Once citizenship has been obtained for the child, applicants apply to the Registrar-General of Births and Deaths for a New Zealand birth certificate for the child.

(m) A copy of the adoption order and evidence of citizenship is sent by the applicants to the New Zealand Immigration Service. If the child is not entitled to New Zealand citizenship (eg the applicants are not New Zealand citizens or the child was more than 14 years old at the time of adoption: s 3 Citizenship Act 1977, as amended by s 3 Citizenship Amendment Act 1992), application for residence must be made to the New Zealand Immigration Service.

Adoption abroad of children from non-Convention countries

L6.04. The procedure for intercountry adoption in an overseas country is:

(a) The adoptive parents travel to the overseas country and make arrangements to adopt a child under that country's adoption legislation. Each country will have specific criteria regarding the age of the adoptive parents, assurances that the child will receive full-time care from one parent, how many children may be adopted by one couple, etc. Documentation and cost varies but, in addition to travel costs, payment may be required for orphanage fees, translators fees, medical and legal fees, child escort fees, processing the adoption, and securing a passport for the child. Detailed information is available from ICANZ Intercountry Adoption New Zealand, 6 Weston Ave, Mt Albert, Auckland (ph 09-846 7272, fax 09-846 9293).

(b) To ensure the overseas adoption will be recognised in New Zealand, the adoptive parents check it meets the requirements of s 17 Adoption Act 1955. If it does, then under s 3(2) Citizenship Act the child is "deemed to be the child of a New Zealand citizen". If the adoption order was made after 18 November 1992 and the adoptee had attained age 14 at the time of the adoption order, there is no automatic right to citizenship: s 2(2)(b) Citizenship Act 1977.

(c) Once the overseas adoption has taken place, the adoptive parents obtain a passport for the child at the nearest New Zealand Embassy or High Commission or, if they are not New Zealand citizens, they apply to the New Zealand Immigration Service for a visitor's visa to bring the

child into New Zealand. The matter is referred to the Documents of National Identity division of the Department of Internal Affairs for a decision whether the adoption is recognised under s 17.

Extent of intercountry adoption by New Zealanders

Trapski— **L.6.05** Intercountry adoptions have been part of the New Zealand adoption scene for many years. New Zealand was originally a receiving country for unaccompanied migrant children from Britain. Then in the mid-1900s, this country became an exporter of children for adoption, having more available for adoption than could be easily placed. With the significant reduction in local children available for adoption from the 1970s onward, the situation has been reversed and it is estimated that New Zealanders adopt some 500 to 600 hundred children from overseas each year. Over the last three decades intercountry adoption has grown enormously. The movement of children has been overwhelmingly from economically disadvantaged Third World countries towards economically secure industrialised nations. It has been estimated that each year 15,000 to 20,000 children are the subjects of intercountry adoption: J Couchman (above) at p 422.

The adoption unit of Child, Youth and Family (AISU) reports that intercountry adoptions now represent 28 percenj of its workload compared with two percent in 1992. In 1992 adoption of childretl from Samoa accounted for more than half of intercountry adoptions handled by AISU. The ASIU facilitated adoptions from non-Convention countries (such as Hong Kong, India, and Thailand) where it is satisfied that the processes in the country concerned comply with the requirements of the Hague Convention. In the last decade CYFS has facilitated over 500 adoptions of children from Russia but changes to the law in Russia raised questions as to the legality of Russian adoptions. This is. still a matter of dissension but adoption of Russian children is again being facilitated by CYFS. It is reported that CYF approved 408 adoptions of foreign children in the 2000/01 financial year of which 49 were Russian children: see Agency Fights to Continue Adoption Work, Dominion 2212/02 and From Russia to Love: With Strings Attached, *Sunday Star Times* 16/12/01.

Source *Trapski's Family Law.* Vol.5. 'Adoption' L.6.01-L.6.05 Brookers'21/11/03

1962 Annual Report of DSW re Overseas Adoptions

"**20.** During the year the Government agreed to the entry into New Zealand of 50 Hong Kong orphan children for the purpose of adoption 10 to be placed with Roman Catholic applicants through the Roman Catholic authorities and 40 with Protestant applicants through the National Council of Churches in New Zealand. This allocation was fixed on an approximate proportional basis having regard to religious affiliations in the community. Applications were received by these organisations who made the initial selections. Child Welfare Officers interviewed the selected applicants and indicated in each case whether or not it would be likely that approval for the placement of a child would be given under section 6 of the Adoption Act [1955]. Particulars of the applicants were then sent to Hong Kong, where the final selections were made by the Roman Catholic authorities there and by the Hong Kong delegation of the International Social Service. It was found that the children were not orphans but foundlings whose parents could not be located and who were placed under the guardianship of the Director of Social Welfare by the Hong Kong by the Hong Kong Supreme Court. For the purposes of effecting the adoptions in New Zealand the Director officially delegated his powers of guardianship to the Superintendent of Child Welfare who consents to the adoptions here. So far the full complement of 10 Roman Catholic children has arrived but only five of the Protestant children. All these children have been girls and reports to date indicate that they are settling well into their adoptive homes. It is expected that the other 35 will arrive before the end of 1963.

21 Some hundreds of applications were received and, as not all of these families can receive a child from Hong Kong, we hope to be able to interest unsuccessful applicants in the plight of babies born in New Zealand of racial backgrounds other than European. There are an increasing number of these babies and adoption is the best means of providing them with the security of a family group. Towards the end of the year there was a perceptible falling off in some parts of the country in the number of persons applying to adopt a child. The decrease in applications, where it has occurred, has not been substantial and there is no reason to believe yet that it is significant. For many years now the demand for children for adoption has greatly exceeded the supply. There have been long waiting lists held in most of our district offices. This has become a matter of common knowledge. It is therefor understandable that some applicants, discouraged by a long wait, may have withdrawn their applications and that potential applicants have refrained from applying. When it becomes generally known that children for adoption are somewhat easier to obtain it is possible that the demand will increase again."

Source 1962 Annual Report Child Welfare Division of the Department of Education Annual Reports *Appendix to the Journals of the House of Repres5entatives*.

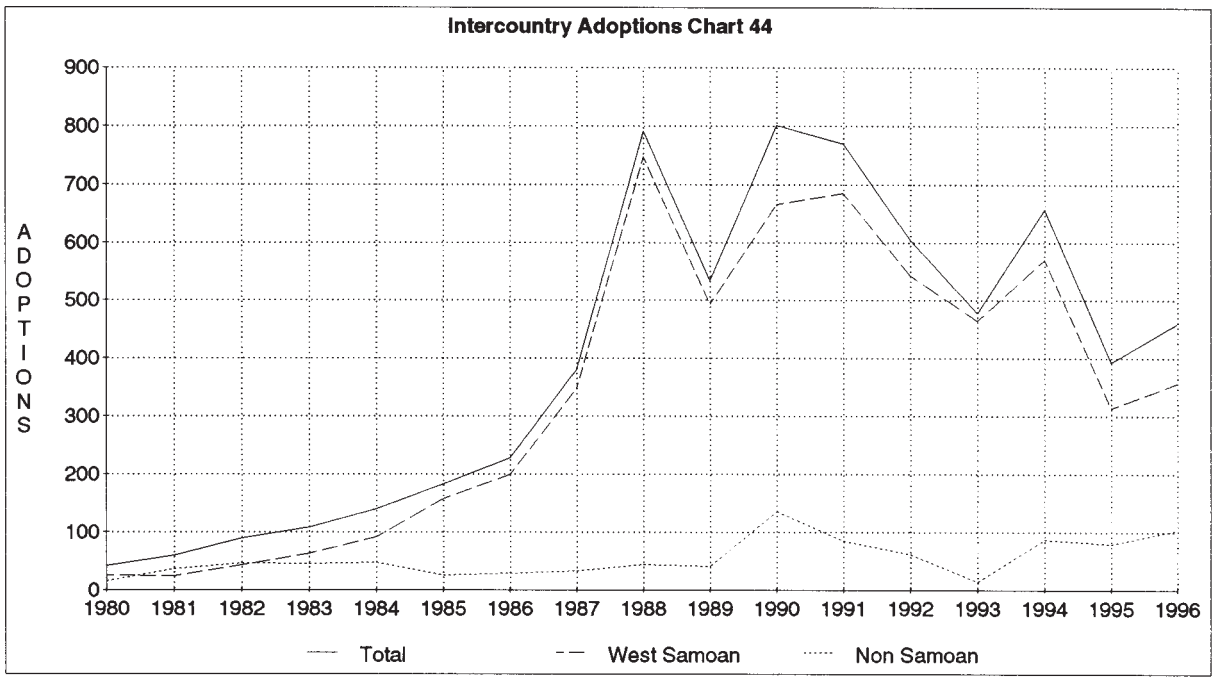


Chart 44. Intercountry Adoptions Annual. *Applications processed by the New Zealand Department of Internal Affairs for registration of New Zealand citizenship by decent - by virtue of adoption overseas.

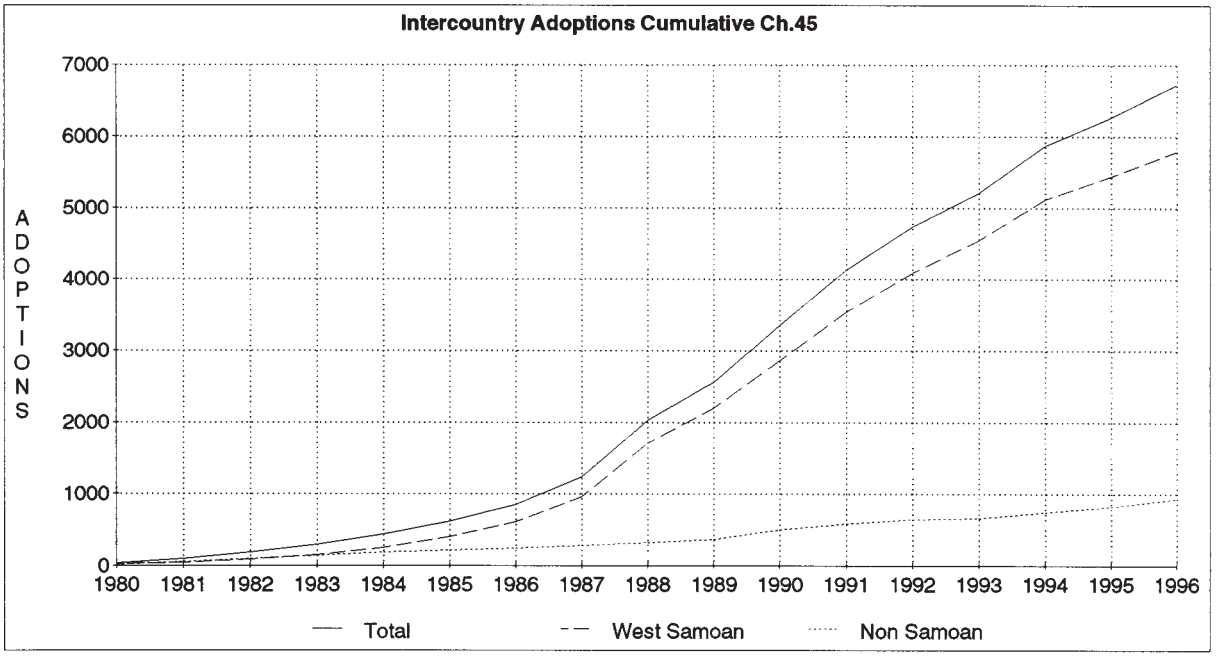


Chart 45. Intercountry Adoptions Annual. *Applications processed by the New Zealand Department of Internal Affairs for registration of New Zealand citizenship by decent - by virtue of adoption overseas.

Note: Charts 44-48. Do not include adoption orders of overseas children made by New Zealand Courts. That is, children brought into New Zealand on visitors permits etc followed by an application for an adoption order in a New Zealand Court.

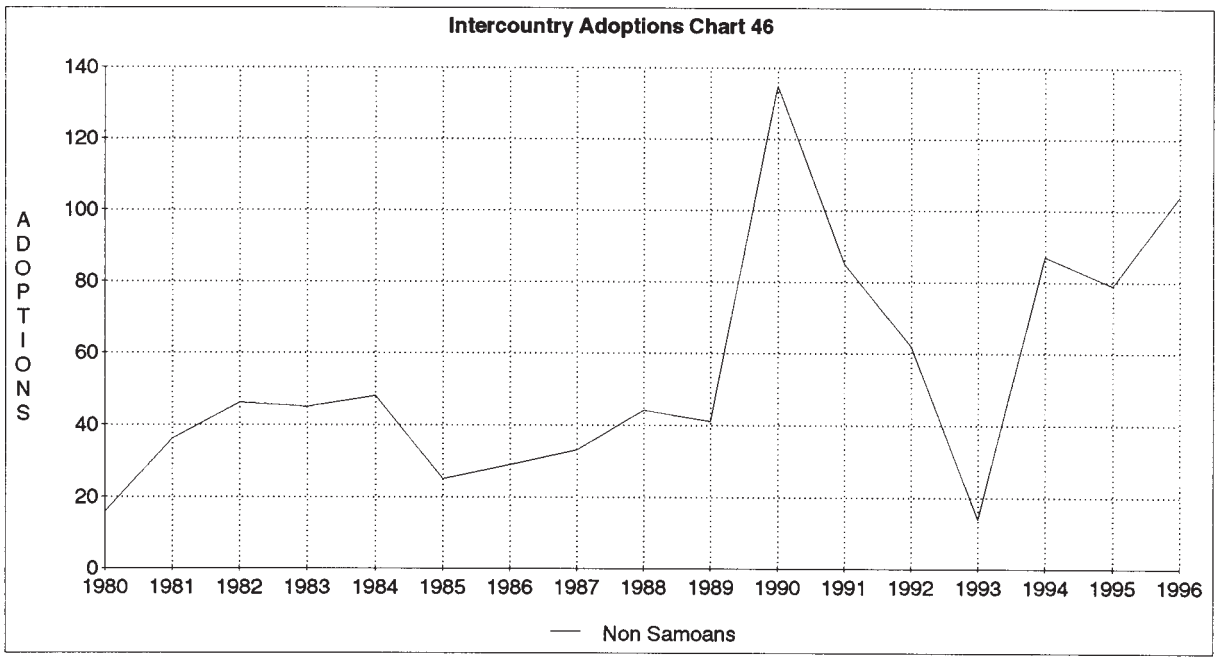


Chart 46 Intercountry Adoptions Annual Non-Samoan. *Applications processed by the New Zealand Department of Internal Affairs for registration of New Zealand citizenship by decent - by virtue of adoption overseas.

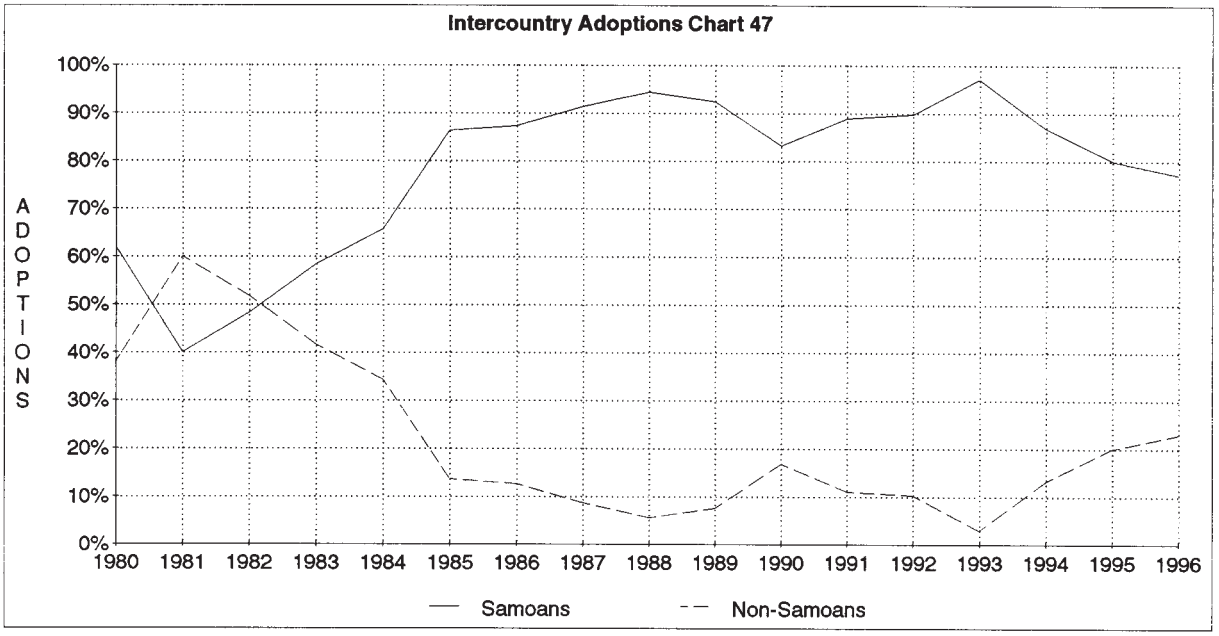


Chart 47 Intercountry Adoption Percentage Samoans and Non-Samoans. *Applications processed by the New Zealand Department of Internal Affairs for registration of New Zealand citizenship by decent - by virtue of adoption overseas.

Citizenship Division of the Department of Internal Affairs
Statistical figures for inter-country adoptions completed overseas, using those countries adoption legislation, are collected by the Citizenship Division of the Department of Internal Affairs. It is that Department that issues citizenship by descent to the overseas adopted child following the completion of an adoption in another country. The Department of Internal Affairs also determines whether or not the adoption legislation of another country is compatible with the adoption legislation of New Zealand. If the two legsilations are deemed to be compatible, then the Department of Internal Affairs issues citizenship by descent to the overseas adopted child.

Data Source Unless otherwise stated, the data source for the Charts and Tables on pp253-256, was obtained from the Citizenship Division of the Department of Internal Affairs.

Intercountry adoptions by Missionaries and teachers. account for most of the small numbers of adoptions from countries that normally will not allow adoptions by foreigners. Special permission can sometimes be obtained where the applicants have been living and working with the people for many years, were they can speak the language, know the village and relatives of the child.

Intercountry Adoptions Accepted by Citizenship 1980-1996

Country	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	TOTAL
American S	-	-	-	-	-	-	1	-	-	-	-	-	-	-	-	-	-	1
Australia	1	1	5	5	2	3	6	3	5	1	6	3	3	-	3	-	4	51
Austria	-	-	-	-	-	-	-	1	-	-	-	-	-	-	-	-	-	1
Belgium	-	-	-	-	-	-	-	1	-	-	-	-	-	-	-	-	-	1
Bolivia	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2	-	2
Brazil	-	-	-	-	-	-	-	-	-	-	-	-	2	-	-	-	3	5
Canada	4	2	4	6	8	6	2	5	8	4	1	-	2	1	3	3	1	60
Chile	-	-	-	2	-	-	-	-	-	-	-	-	-	-	-	-	-	2
Colombia	-	-	-	-	-	-	-	-	1	5	-	-	5	-	-	-	-	11
Denmark	-	1	-	-	-	-	-	-	-	-	1	-	-	-	-	-	-	2
England	6	9	19	12	19	9	6	4	11	8	12	10	3	3	6	6	9	152
Fiji	1	7	2	3	6	-	-	2	5	6	3	-	12	4	6	3	5	65
France	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	-	-	1
Ghana	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	-	1
Germany	-	-	-	-	-	-	-	2	1	-	-	-	-	-	-	-	-	3
Guam	-	-	-	-	-	-	-	-	1	-	-	-	-	-	-	-	-	1
Hong Kong	1	1	2	3	2	2	-	-	1	2	3	3	-	-	2	2	-	23
India	-	-	3	-	-	-	1	-	-	1		3	2	-	1	7	4	22
Japan	1	-	-	-	-	-	-	-	1	1	1	-	2	-	-	-	-	6
Malaysia	-	1	2	-	-	1	-	-	-	1	-	1	-	-	-	-	-	6
Malta	-	-	-	-	-	-	-	1	-	-	-	-	-	-	-	-	-	1
Mexico	-	-	-	-	-	-	-	-	1	-	-	-	-	-	-	-	-	1
Niue	-	-	-	-	-	-	-	-	-	1	-	-	-	-	-	-	-	1
Mariana I	-	-	-	-	-	-	1	-	-	-	-	-	2	-	-	-	-	3
Papua NG	1	-	-	3	3	-	3	4	1	-	-	1	1	-	1	1	3	22
Peru	-	-	-	-	-	-	1	-	1	1	-	-	1	-	-	-	-	4
Philippine	-	-	-	-	-	-	-	-	-	-	-	-	1	-	-	-	-	1
Rarotonga	-	-	3	1	-	-	-	-	-	-	-	-	-	-	-	-	-	4
Rhodesia	-	-	-	2	-	-	-	-	-	-	-	-	-	-	-	-	-	2
Romania	-	-	-	-	-	-	-	-	-	-	98	61	-	-	-	1	5	162
Russia	-	-	-	-	-	-	-	-	-	-	-	-	15	5	56	47	58	181
Sarawak	-	-	-	-	-	-	-	-	-	1	-	-	-	-	-	-	-	1
Scotland	-	1	-	-	-	-	-	-	-	1	-	-	-	-	-	-	-	2
Singapore	-	-	-	3	-	1	2	-	-	-	-	-	-	-	-	1	1	8
Solomon I	-	-	-	-	-	-	-	-	1	-	-	-	-	-	-	-	-	1
S. Africa	-	2	3	-	-	-	1	7	1	-	3	-	2	-	-	1	2	22
Sri Lanlka	-	-	-	-	-	1	-	1	-	4	1	-	1	-	-	1	-	9
St.Lucia	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	-	1
Tahiti	-	-	-	-	-	-	-	-	2	-	-	-	-	-	-	-	-	2
Tanzania	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	3	3
Thailand	-	-	-	-	-	-	-	-	-	-	1	-	-	-	-	-	-	1
Tonga	-	9	3	1	6	2	5	-	2	1	3	-	-	1	5	-	-	38
Tuvalu	-	-	-	1	-	-	-	-	-	-	-	-	1	-	-	-	-	2
Ukraine	-	-	-	-	-	-	-	-	-	-	-	-	2	-	2	-	-	4
USA	1	2	-	3	2	-	-	2	1	-	2	2	2	-	1	2	1	21
Vanuatu	-	-	-	-	-	-	-	-	-	1	-	1	-	-	-	-	3	5
Venezuela	-	-	-	-	-	-	-	-	-	2	-	-	-	-	-	-	-	2
W.Australia	-	-	-	-	-	-	-	-	-	-	-	-	2	-	-	-	-	2
W.Samoa	26	24	43	63	92	158	199	348	747	493	666	684	542	464	570	314	356	5789
Zimbabwe	-	-	-	-	-	-	-	-	-	-	-	-	1	-	-	-	-	1
TOTALS	**42**	**60**	**89**	**108**	**140**	**183**	**228**	**381**	**791**	**534**	**801**	**760**	**604**	**478**	**657**	**393**	**460**	**6718**

Age distribution Intercountry Adoptions 1986-87

Overseas adoptions- NZ citizenship

1986-87	United Kingdom	Western Samoa	Tonga	Other Countries*	Total
Up to 1 year	1	12	7	20	40
1 yr to 5year	2	22	1	7	32
6 to 10 year	-	28	-	2	30
11 to 15 years	3	58	2	2	65
16 to 21 years	-	79	2	-	81
Totals	6	199	5	18	228

Age distribution Intercountry Adoptions 1987-88

Overseas adoptions - NZ citizenship

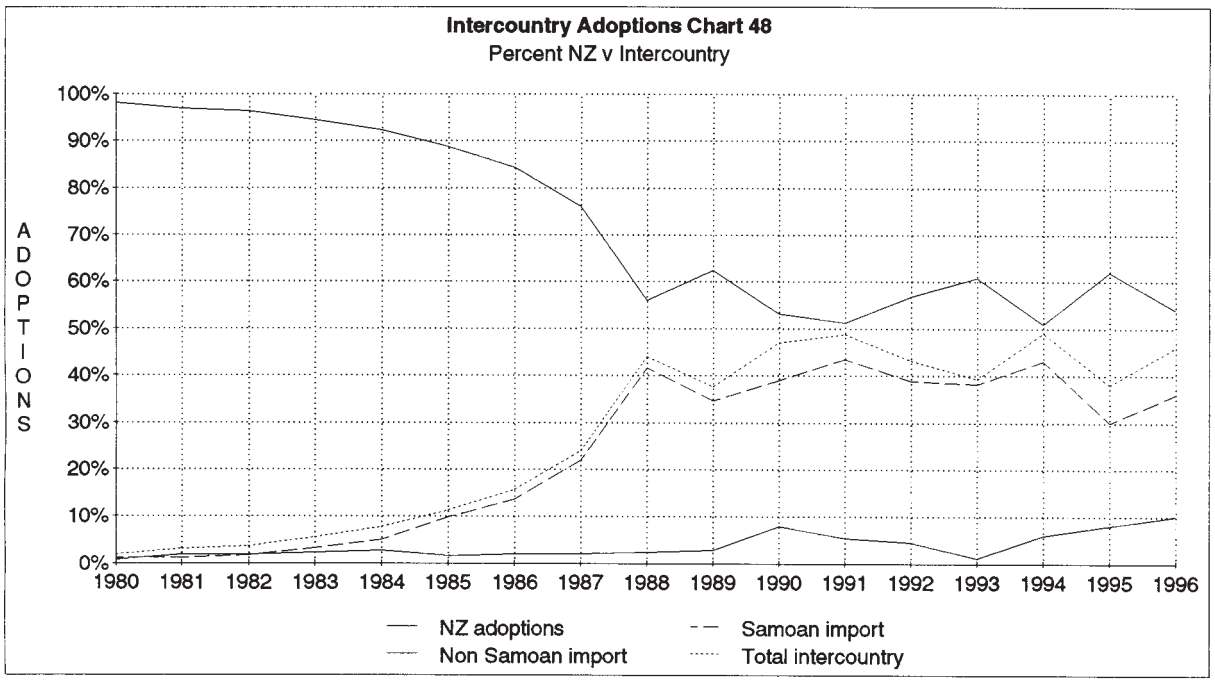
1987-88	United Kingdom	Western Samoa	Tonga	Other Countries*	Total
Up to 1 year	2	9	-	7	18
1 yr to 5year	1	17	-	10	28
6 to 10 year	1	60	-	9	70
11 to 15 years	-	110	-	3	113
16 to 21 years	-	152	-	-	152
Totals	4	348	-	29	381

Overseas persons adopted in New Zealand

Age Group	1986-87 Cases	1987-88 Cases
Up to 1 year	3	1
1 yr to 5year	17	15
6 to 10 year	19	13
11 to 15 years	15	11
16 to 21 years	14	3
Totals	68	43

Note. Children adopted overseas may be deemed to be New Zealand citizens by descent, provided the adoptive parents are New Zealand citizens otherwise than by descent and the overseas adoption complies with Section 17 of the Adoption Act 1955. However, **as from 1992** Citizens Amendment Act special conditions apply to new adoptees aged 14 or over. The Majority of intercountry adoptions were from Western Samoa and tend to be multiple extended family adoptions.

Source. Statistics N.Z Department of Internal Affairs.



Age distribution Intercountry Adoption 1980-1994

Age	Great Britain	Western Samoan	Romania	Total
<1 years	57	164	95	316
1-5 years	15	424	68	507
6-10 years	8	911	6	925
11-15 yrs	7	1663	-	1670
16-20 yrs	3	1801	-	1804
Total	90	4963	169	5222

Statistics for period 1980-1994 of persons who have been determined to be New Zealand citizens through their adoption in overseas countries by a New Zealand citizen.

Intercountry Adoption Citizenship Jan-March 1995

Age of adopted child	Western Samoa	Others*	Total
Under 1 year of age	2	10	12
1 to 5 years of age	2	7	9
6 to 10 years of age	5	5	10
11 to 15 years of age	1	1	2
16 to 20 years of age	0	0	0
No claim	1	1	2
Total	11	24	35

*Other countries include. Russia 17, Niue 1, Canada 1, Hong Kong 1, Singapore 1, England 1. Statistics period 1 January 1995 to 31 March 1995 of children who have been determined to be New Zealand citizens through their adoption overseas. **Source** NZ Department of Internal Affairs.

Samoan adoption decline first quarter 1995? A significant factor was the increase in processing time for citizenship applications of adoptees. The 1992 Citizenship Amendment Act placed special conditions on adoption of children 14 years or older, they no longer have an automatic right to citizenship. This led to a suspected increase in applications where the child's age has been adjusted downward. The possibility of false applications made the Department of Internal Affairs take extra precautions to verify documentation. This increased the processing time from about 20 days to 3 months, with consequent drop in the first quarter of processed applications.

Samoan adoption customs There is an excellent in-depth study of Western Samoan Village adoption, customs and practice by Bradd Shore, 'Adoption, Alliance and Political Mobility in Samoa' Thesis (MA) University of Chicago 1972. A copy is held in University of Canterbury Library.

Chart 48 Intercountry Adoptions Percentage. NZ adopts: is the percentage of total adoption orders granted by New Zealand Courts. Includes all local adoptions, and any children brought from overseas and adopted in New Zealand. **Non-Samoa import:** is the percentage of intercountry adoptions, where the child has been adopted overseas, other than Samoa, and granted New Zealand citizenship. **Samoan import**: is the percentage of Samoans, adopted in Samoa and brought to New Zealand and granted citizenship. **Total intercountry:** is the percentage of all intercountry adoptions, where the child is adopted overseas and then brought to New Zealand and granted citizenship.

Note that in 1991 intercountry adoptions, mainly from Samoa account for almost 50% of total adoption orders made in New Zealand for that year.

Intercountry adoption via New Zealand Courts
Period 1/1/1993 to 31/10/1994

Chile	1	Malaysia	1
China	2	New Guinea	1
Cook Islands	1	Philippines	11
Dominican Republic	1	Taiwan	2
Fiji	6	Thailand	3
Hong Kong	1	Tonga	11
India	5	Western Samoa	10
		TOTAL	**56**

Children brought in from overseas on visitors visas or permits and then adopted via New Zealand Courts. **Source** DSW

Intercountry adoption from Romania 1991

USA	2450	Switzerland	125
Italy	1106	Israel	110
France	748	Sweden	98
Canada	663	Cyprus	91
Belgium	363	New Zealand	85
Germany	343	Norway	39
Ireland	294	Austria	30
Great Britain	225	Australia	24
Greece	172	Netherlands	23
Malta	148	Denmark	18
Spain	134	**TOTAL for 1991**	**7328**

This table lists the receiving country of the 7,328 intercountry adoptions authorised from Romania in 1991. For the two years 1990-91 a total of almost 10,000 were exported.
Source Romanian Committee for Adoption (RCA).

INTERNATIONAL CONVENTIONS RE INTER-COUNTRY ADOPTION

L7 International Human Rights Instruments

Trapski— Intercountry adoption has international implications and has received attention in United Nations human rights law.

L.7.01 United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally

See Annexure A14. This Declaration was adopted by the General Assembly in 1986, and states the principle that "intercountry adoption may be considered as an alternative means of providing the child with a family" if the child "cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin": art 17.

Articles 18 and 19 require States to establish policy, legislation, and effective supervision for the protection of children involved in intercountry adoption, and require laws to be enacted and policies to be established for the prohibition of abduction and illicit placement of children. Article 20 states that placements should, wherever possible, be made through competent authorities with adequate safeguards, and no placement should "result in improper financial gain for those involved in it". There are further articles dealing with safeguards for ensuring the child is free for adoption, is able to migrate, will be granted the adoptive parents' nationality, and will have the adoption recognised in the overseas country: arts 20-24.

1.7.02 United Nations Convention on the Rights of the Child

See Annexure Al. In drafting the United Nations Convention on the Rights of the Child, adopted by the General Assembly in 1989 and ratified by the New Zealand Parliament in March 1993, there was much discussion of intercountry adoption issues, but art 21 does little more than repeat some of the principles enunciated in the 1986 declaration.

Article 21 establishes the following principles:

(a) The best interests of the child shall be the paramount consideration.

(b) Adoption must be authorised by competent authorities on the basis of all pertinent information: art 21(a).

(c) Parents and others required to give consent to adoption shall give an informed consent on the basis of such counselling as is necessary: art 21(a).

(d) Intercountry adoption shall be recognised as an alternative means of a child's care where the child cannot be placed with a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin art 21(b).

(e) The child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption: art 21(c).

(f) The placement must not result in improper financial gain for those involved: art 21(d).

The United Nations Committee on the Rights of the Child considers that art 21(b) must be interpreted as meaning that intercountry adoption should be considered a measure of last resort. Article 21(b) should be read along with:

(a) Article 20(3), which requires due regard to be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background;
(b) Article 7, which declares a child's right to know and be cared for by parents; and
(c) Article 8, which declares a child's right to preserve identity.

A commentary on the Convention argues that States are "under an obligation to take active measures to ensure that all possible efforts have been made to provide suitable care for the child in his or her country of origin": R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child,* Geneva, UNICEF, 1997, p 275.

Article 21(c) requires States that ratify the convention to ensure that the child enjoys safeguards and standards equivalent to those that exist for intracountry adoptions. There are also obligations to promote the objectives of art 21 by concluding bilateral and multilateral arrangements or agreements, and to ensure the placement of a child in an overseas country is carried out by competent authorities: art 21(e).

L.8 Hague Convention on Intercountry Adoption

L.8.01 The Convention

(1) Origin

The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (referred to as the Hague Convention) was concluded on 29 May 1993 after 6 years' discussion by members of the Hague Conference on Private International Law. Sixty-six countries participated in the final negotiations. The Convention, which came into force on 1 May 1995, is set out in full in the Schedule to the Adoption (Intercountry) Act 1997. The Convention was developed to restrict trafficking in children and to provide a multilateral approach. It supplements the provisions on adoption in the United Nations Convention on the Rights of the Child and provides for the implementation of these general principles.

(2) Objects

The objects of the Hague Convention are to:

(a) Establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;

(b) Establish a system of cooperation among Contracting States to ensure that those safeguards are respected and thereby prevent abduction, sale of, or traffic in children; and

(c) Secure the recognition in Contracting States of adoptions made in accordance with the Convention.

(3) Parties' obligations

Countries that are signatories to the Convention, whether source countries or receiving countries, incur obligations.

Source countries must establish whether a child being considered for adoption is "adoptable", must consider whether local placement of the child is possible, and determine that intercountry adoption is in the child's best interests. The receiving country must ensure that any consent to the adoption has not been induced by payment of any kind.

Receiving countries must:

(a) Determine whether prospective adoptive parents are eligible and suited to

adopt and have been counselled regarding intercountry adoption;

(b) Ensure that the child can enter their country and reside there permanently;

(c) Take measures to prevent improper financial gain from adoption, a duty shared

with source countries;

(d) Facilitate, follow, and expedite adoption proceedings;

(e) Collect and exchange information about individual children and proposed adoptive parents;

(f) Promote adoption counselling and post-adoption services in their country; and

(g) Provide information about particular adoptions and evaluation reports on their intercountry adoption experience.

Convention parties must designate a central authority to take responsibility for performance of Convention obligations. The chief executive of CYFS (formerly the Director-General of Social Welfare) is the New Zealand central authority: s 5 Adoption (Intercountry) Act 1997. The Convention allows delegation of its functions to public authorities or non-profit "accredited bodies". See L.8.04.

Because the adoption takes place overseas, most intercountry adoptions do not appear in the official statistics released by CYFS. They are not necessarily processed by the New Zealand Courts, and the only official record will be the application for registration of citizenship by descent processed by the Department of Internal Affairs: M Iwanek, "Adoption in New Zealand: Past, present and future in adoption and healing" *Proceedings of the International Conference on Adoption and Healing* 1997, p 68.

The Convention applies only to adoptions involving parties to the Convention. For general discussion on the Hague Convention, see H van Loon, "Hague Convention of 29 May 1993" (1995) 3 *International Journal of Children's Rights* 463-468.

L.8.02 Adoption (Intercountry) Act 1997

This Act (1997, No 109) was passed in December 1997 and came into force on 1 January 1999. On 18 September 1998 the Ministry of Foreign Affairs and Trade lodged the Act as part of New Zealand's accession to the Hague Convention. The Act declares that the provisions of the Hague Convention shall have the force of law in New Zealand (s 4) and appoints the chief executive of the Department of CYFS (formerly Director-General of Social Welfare) the New Zealand central authority for the purposes of the Convention (s 5), but allows the chief executive to delegate the functions of a central authority to "public authorities or New Zealand accredited authorities" (s 6(1)).

Where the Convention is in force as between another country (referred to in the Act as a "Contracting State") and New Zealand, no child who is habitually resident in that contracting State will be able to be entrusted to adoptive parents who are habitually resident in New Zealand unless the New Zealand central authority has approved the decision: s 10(1) and s 5. Where the central authority refuses to approve the decision it will have to give written notice to the proposed adoptive parents of the refusal and the reasons for it: s 10(2). If there is doubt as to whether a particular country is a Contracting State, a certificate will be obtainable from the Secretary for Foreign Affairs and Trade advising the status of the country in question: s 14.

Adoptions made in accordance with the Hague Convention have the same legal effect as an adoption order validly made under the Adoption Act 1955: s 11(1). A certificate signed by the competent authority in the State where the adoption took place confirming that the adoption was made in accordance with the Convention will be prima facie evidence of that fact: s 11(2). The New Zealand Family Court may refuse to recognise a Convention adoption order if the adoption is "manifestly contrary to [New Zealand] public policy, taking into account the best interests of the child": s 11(3) and art 24 of the Convention. No application will be able to be made to the Family Court without the prior approval of the Attorney-General: s 11(4).

Convention adoption will not have the effect of terminating the legal parent-child relationship unless it has that effect in the country where it was made or the New Zealand Family Court has ordered that the adoption be converted into one having that effect: s 12(1). The Family Court will be able to grant an adoption order if satisfied that the adoptive parent is habitually resident in New Zealand and has been a party to a Convention adoption of a child habitually resident in a contracting State. The Court will also have to be satisfied that the necessary consents required by paras (c) and (d) of art 4 of the Convention have been given for the purpose of an adoption that terminates the pre-existing legal parent-child relationship: s 12(2).

L.8.02A Children to whom Hague Convention applies - habitual residence

Article 2.1 of the Convention applies where a child habitually resident in one contracting state has been, is being, or is to be moved to another Contracting State for the purpose of adoption in the receiving State. While in most cases the child's habitual residence will be obvious there are situations where there may be room for doubt.

An application for adoption order following a surrogacy arrangement came under the scrutiny of the Family Court: In re application by L [2003] NZFLR 529. The birth mother was resident in Australia and the baby was born in Australia. The commissioning parents lived in New Zealand and were present at the birth of the child. The commissioning mother (a sister of the birth mother) breast fed the child and cared for him from birth, taking him back to New Zealand when he was 7 days old. The Court had to consider whether the Adoption Intercountry) Act 1997 applied. This turned on whether the child was "habitually resident" in Australia before being taken to New Zealand. It was conceded that the child was domiciled in Australia but Judge von Dadelszen noted that "habitual residence" and "domicile" are distinct legal categories. His Honour adopted the meaning given to "habitual" by Greig J in H v H (1995) 13 FRNZ 498 as "customary, constant, continual" and followed the English Court of Appeal decision in Re F (a minor) (child abduction) [1992] 1 FLR 548 to the effect thar a young child who lives with both parents acquires their common habitual residence. Accordingly it was held that the child was not habitually resident in Australia and the Adoption (Intercountry) Act did not apply to the adoption.

L.8.02B Convention applies only to adoptions that create a permanent child-parent relationship
Article 2.2 of the Hague Convention states that "The Convention covers only adoptions which create a permanent parent-child relationship". Adoptions under the Adoption Act 1955 clearly meet this criterion: see s 16(2).

L.8.03 Preparation of reports
If the New Zealand central authority is satisfied that the applicants for adoption are eligible and suited to adopt a child, it shall prepare a report which includes information about their identity, eligibility, and suitability to adopt and about their background, ability to undertake an intercountry adoption and the characteristics of the children for whom they would be qualified to care: art 15.1 Hague Convention. The report is transmitted to the central authority of the child's country of origin: art 15.2.

The central authority of the child's State of origin, if satisfied that the child is adoptable, shall prepare a report including information about the child's identity, adoptability, background, social environment, family history, medical history, and any special needs that the child may have: art 16.1(a). The overseas central authority must give due consideration to the child's upbringing and to his or her ethnic religious and cultural background (art 16.1(b)), must ensure that the necessary consents have been obtained in accordance with art 4 of the Convention (art 16.1(c)) and must make a determination on the basis of the two sets of reports whether the envisaged placement is in the best interests of the child (art 16.1(d)). The report is transmitted to the central authority of the receiving State together with the necessary consents and the reasons for supporting the placement: art 16.2.

Section 7 Adoption (Intercountry) Act imposes on the chief executive of the Department of Child, Youth and Family Services the responsibility for preparing reports under the Convention but the proposed adoptive parents must have the option of having the report prepared by a Government or non-Government agency.

L8.04 New Zealand accredited bodies
The chief executive of the Department of Child, Youth and Family Services can approve as accredited bodies non-profit organisations which have a demonstrated capability, are staffed by persons qualified by their ethical standards, training, or experience to work in the field and can demonstrate that it will operate in the best interests of the child and will respect the child's fundamental rights: ss 15, 16. The Act sets out detailed procedures by which accreditation can be granted or revoked: ss 17 to 23.

(1) Delegable functions
The functions that may be delegated to accredited bodies are set out in reg 3(1) Adoption (Intercountry) Regulations 1998:

(a) Collecting and exchanging information about the child's situation and the prospective adoptive parents;
(b) Facilitating proceedings with a view to obtaining the adoption;
(c) Promoting the development of adoption counselling and post adoption services;
(d) Providing general evaluation reports about experience with intercountry adoption;
(e) Keeping other countries' central authorities informed about the progress of adoptions;
(f) Preparing background reports;
(g) Obtaining permission for the child to leave the country of origin and enter New Zealand; and
(h) Facilitating the transfer of the child.

(2) Non-delegable functions
Functions which cannot be delegated to accredited bodies are set out in reg 3(2) Adoption (Intercountry) Regulations 1998:
(a) Obtaining medical reports;
(b) Police checks on the proposed adoptive parents; and
(c) Inquiries of referees.

L8.05 Declining approval or suspending accreditation In declining an application for accreditation the chief executive must give the applicant:
(a) A copy of any information on which the chief executive relies in declining the application: s 18(a);
(b) A reasonable opportunity for the applicant to make submissions in relation to the information: s 18(b);

The accreditation of an agency can be suspended or revoked if it:
(a) Has pursued or is pursuing profit objectives: s 19(1)(a);
(b) Is no longer suited to pursuing the functions delegated to it: s 19(1)(b);
(c) Has failed in a significant way to adequately perform any delegated function:s 19(1)(c);
(d) Has not provided the New Zealand central authority with access to its records relating to any adoption it has arranged: s 19(1)(d);
(e) Has not submitted to supervision by the chief executive of its composition, operation and financial situation: s 19(1)(e);

(f) Has charged excessive costs and expenses in relation to any delegated function: s 19(1)(f);
(g) has allowed the payment of unreasonably high remuneration to its principal officer or staff: s 19(1)(g).

The chief executive may, by notice in writing, either suspend its approval of an accredited agency and/or give the organisation 60 days notice of intention to revoke the approval: s 19(2) and (4).

There is a right of appeal to the District Court against any revocation or suspension of the approval of an accredited agency: s 20(1)(b). An appeal must be lodged within 28 days of receipt of notification of the decision or within such further time as the District Court allows: s 20(2). The decision of the District Court on an appeal is final: s20(8).

L8.06 Appeal against refusal or suspension of accreditation

As at 1 January 2003 no bodies have been accredited. One agency, Inter Country Adoption New Zealand (ICANZ) applied to CYF for accreditation under s 16 Adoption (Intercountry) Act 1997 but their application was declined under s 18. ICANZ has appealed to the District Court under s 20(1)(a). The District Court has the power to confirm, reverse or modify the decision: s 20(5) Adoption (Intercountry) Act 1997.

L8.07 Ratifying States

The Hague Convention on Intercountry Adoption is in force (or about to come into force) in the following countries:

Albania	Israel
Andorra	Italy
Australia	Lithuania
Austria	Mauritius
Brazil	Mexico
Bulgaria	Moldova
Burkina Faso	Monaco
Burundi	Mongolia
Canada	Netherlands
Chile	New Zealand
Columbia	Norway
Costa Rica	Panama
Cyprus	Paraguay
Czech Republic	Peru
Denmark	Philippines
Ecuador	Poland
El Salvador	Romania
Estonia	Slovakia
Finland	Slovenia
France	Spain
Georgia Sri	Lanka
Germany	Sweden
Iceland	Venezuela

The list is current to 1 July 2002. For an up-to-date list of countries where the Hague Convention is in force see www.hceh.net.

L9 Adoption of Child from Non-Convention Country

By ratifying the Hague Convention the New Zealand Government has bound itself to comply with the terms of the Convention in relation to adoption of children from Convention countries, but with intercountry adoption of children from non-Convention states is not affected.

Because the Convention depends on bilateral obligations between States parties, it could not be fully applied to adoptions involving non-Convention countries, but it would be possible for New Zealand, like Sweden, to refuse to recognise non-Hague Convention adoptions or to require parents adopting from a non-Convention State to submit the documentation required by the Hague Convention as a prerequisite for obtaining an adoption order: see Law Reform Commission of Ireland, *Consultation Paper on the Implementation of the Hague Convention*, September 1997, p 82.

New Zealand has negotiated an agreement with China which involves processes that parallel Hague Convention procedures: *Adoption and Its Alternatives: A Different Approach and a New Framework*, NZLC R65, September 2000, para 313.

The Child Youth and Family Service has apparently taken the view that the Hague Convention is the benchmark against which all intercountry adoptions should now be judged and has opposed adoptions of children from non-Hague Convention countries on the basis that such adoptions do not comply with the Convention: see B.2.03 and *Re application by H (adoption)* [2001] NZFLR 817. As a matter of law, Convention principles cannot regulate adoptions of children from countries which are not parties to the Convention.

Source *Trapski's Family Law* Vol.5 'Adoption' L7 to L9 21/11/2003.

New Zealand's International Obligations concerning Intercountry Adoption

A The UN Convention an the Rights of the Child

J Couchman—The only international instrument to which New Zealand is a party which concerns intercountry adoption, is the United Nations Convention on the Rights of the Child. [Note New Zealand has now Ratified the Hague Convention KCG] The relevant provisions of this Convention are articles 21 and 35. These provide:

Article 21

State Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall;

a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the parents concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

b) Recognise that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

c) Ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs, and

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale or traffic in children for any purpose or in any form.

The scope of article 21 is slightly ambiguous. For example, it may be argued that article 21(a) only relates to domestic adoptions. Equally, it may be argued that it is broad enough to cover both domestic and intercountry adoptions, and that paragraphs (b) to (e) do not restrict 21(a), but rather provide additional requirements in the case of intercountry adoption. [27] It is also arguable that New Zealand's only responsibility under article 21 is to children taken from New Zealand for the purposes of intercountry adoption. Article 2(1) of the Convention provides that: [28]

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their *jurisdiction*.

However, New Zealand's recognition of adoptions concluded overseas enables children to come to New Zealand (whereas many other states only recognise adoptions concluded in their own state - at which point the children concerned are within the state's jurisdiction). The fact that New Zealand deals differently with children who are the subject of intercountry adoption should not lessen the obligations owed to those children under the Convention.

In addition, for article 21 to have effect, it may impose obligations on states which are involved in either the sending or receiving end of intercountry adoption. A state should not be able to sanction breach of the article by another state, by receiving children adopted in breach of the article 21 requirements.

1 Examination of Provisions of the Convention

It is submitted that New Zealand is in breach of article 21 of the Convention on the Rights of the Child, due particularly to use of s17 of the Adoption Act 1955.

(1) Preamble to article 21

The preamble to article 21 requires that States which permit adoption ensure that the best interests of the child are the paramount consideration in adoption.

The Adoption Act 1955 does not actually require that this be the case. The closest the Act comes is s 11(b), which requires that the welfare and interests of the child be "promoted" by the adoption. The standard required by the Convention is arguably not met in the case of adoptions concluded in New Zealand. Moreover, the standard is most certainly not met in the case of intercountry adoptions recognised under s 17 of the Adoption Act. Section 17 sets up a definitive regime for recognition of overseas adoptions and does not require that the interests of the child concerned be the paramount consideration.

(ii) Article 21(a)

Intercountry adoptions concluded in New Zealand are subject to the same requirements as domestic adoptions, and are authorised by the New Zealand Family Court. Before the Family Court makes an adoption order, the Adoption Act requires that consent from the child's natural parents or guardians be filed in Court. [29] It appears, therefore, that the requirements of article 21(a) are met in the case of intercountry adoptions concluded in New Zealand.

In the case of intercountry adoptions recognised under s 17 of the Adoption Act, however, the requirement is simply that the adoption be legally valid, and have certain effects. There is no requirement that the adoption be "on the basis of all pertinent and reliable information", or "permissible in view of the child's status concerning parents, relatives and legal guardians". There are also no provisions relating to the article 21(a) requirement that consent to the adoption have been given by the child's natural parents or guardians.

(iii) Article 21(b)

Section 17 does not require that the child concerned be unable to be cared for in any suitable manner in the child's country of origin. If adoption legislation or practice in the child's country of origin allowed the adoption of abducted children, children who had been sold by their parents, or had state-encouraged abandonment of children (for example, where parents were punished for having more than one child in their family), the adoption could still be recognised in New Zealand if the s17 requirements were met.

(iv) Article 21 (c)

Article 21(c) requires that children concerned by intercountry adoption enjoy safeguards and standards equivalent to those existing in the case of domestic adoption. In the case of intercountry adoptions concluded in New Zealand, these requirements are met.

However, where adoptions are recognised under s 17, New Zealand does not ensure that children involved in overseas adoptions which lead to either their movement to New Zealand and/or recognition as New Zealand citizens, enjoy safeguards and standards equivalent to those of children adopted domestically.

Apart from the basic s17 requirements, the only safeguards such children enjoy are those embodied in the adoption law of their state of origin. In some cases, these requirements are stringent, requiring the New Zealand government to certify that prospective adoptive parents are of good character etc, or requiring the parents to meet other suitability tests. However, this is not always the case. Most countries which are "sending" countries are not countries with a stable political infrastructure. In some cases, there is evidence of corruption in government. In such states the rights of children often receive little respect.

(v) Article 21(d)

The Adoption Act contains provisions prohibiting most forms of advertising to do with adoption, and on exchange

of money during the adoption process (apart from certain, specified expenses). [30] These provisions are probably sufficient to fulfil this Convention requirement in the case of intercountry adoptions which occur in New Zealand.

However, New Zealand does not have the power to ensure that where adoptions are recognised under s 17, the adoption did not result in improper financial gain to any of the parties. This is not a s17 requirement. Where a child is adopted in New Zealand, adoptive parents are required to submit a statutory declaration to the effect that there was no illegitimate exchange of money to procure the adoption. Once again, in the case of intercountry adoption overseas, this is a matter for the law or practice of the state of adoption. It is well known that bribery is a frequent occurrence in the intercountry adoption sphere. Due to the poor economic conditions in many sending states, there are incentives for government authorities, adoption agencies, orphanages, natural parents and border control officials to try to procure money from prospective adoptive parents. The fact is that intercountry adoption is often a last resort for people who want a child at any cost.

(vi) Article 21(c)

New Zealand does not have bilateral or multilateral agreements on the topic of intercountry adoption with any other state. The Departments of Social Welfare and Internal Affairs are aware of the legislative and administrative requirements of some states, and of the officials and other organisations who deal with intercountry adoption there. In some cases, DSW will make reports on prospective parents because this is a requirement of the sending state. In other cases, the legality of the overseas adoption order has been questioned, as it is a s 17 requirement that the adoption be legally valid in the state of adoption. However, the situation is largely one of "non-intervention", because s 17 does not provide power for intervention.

(vi) Article 35

New Zealand does not currently have either bilateral or multilateral measures in place to prevent the abduction of, sale of, or traffic in, children.

The only provisions in domestic law to address the issue of child trafficking are in the Crimes Act 1961, which relate to kidnapping.[31] jurisdiction under the Crime Act for prosecution for these offences does not extend past New Zealand borders, [32] however, the Act does provide for prosecution of any person in New Zealand who aids, incites, counsels or procures a Crimes Act offence outside of New Zealand. [33] This could be applied to persons in New Zealand organising child trafficking for adoption purposes overseas. A defence is available, however, if that person is able to prove that the acts concerned were not an offence under the law of the place where they were committed. Clearly, these provisions will have limited application in the case of intercountry adoptions, where privately organised adoptions are the risk area. There is unlikely to be a complaint made in cases involving child trafficking (the child being the main victim) and, in any case, it would be very difficult to prove that the child concerned had been abducted or sold.

There has never been a prosecution under the Crimes Act for activity relating to intercountry adoption, although at the time of writing a case before the High Court in Auckland which concerns the alleged abduction and sale of a child who was brought to New Zealand from an unknown overseas state. This case is likely to be hampered by difficulties in assembling proof from overseas, especially as the identity of the baby concerned is not currently known. [34]

In conclusion, it is submitted that the current s 17 method of recognition for intercountry adoptions provides no safeguards which could fulfil the requirements of article 35.

2 Reporting on Compliance with the Convention

New Zealand, as a party to the Convention on the Rights of the Child, is required to submit reports to the Committee on the Rights of the Child within two years of the entry into force of the Convention for New Zealand, and every five years thereafter. [35]

Article 44 requires reports to detail "measures they have adopted to which give effect to the rights recognised herein and on the progress made on the enjoyment of those rights ", and requires that:

> Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of tile Convention in the country concerned.

New Zealand's first report was presented to the Committee in late 1996. It was compiled by the Ministry of Youth Affairs, which noted in the report that New Zealand's existing legislation was consistent with the Convention, subject to three reservations to the Convention (none of which involved adoption). [36]

However, New Zealand's report, where it referred to intercountry adoption, merely outlined the ways in which a child could be intercountry adopted into New Zealand - by adoption in New Zealand, or by adoption overseas, and recognition under s 17 of the Adoption Act 1955. Mention was also made of the citizenship status of children adopted in each way. [37] Article 21 of the Convention was not mentioned in the section of the report headed "Inter-country adoption". As article 21 was not mentioned the provisions of that article were not detailed, and no analysis was made of New Zealand's compliance or lack of compliance with each paragraph.

B The Hague Convention on Intercountry Adoption

On 29 May 1993 the Hague Convention on the Protection of Children and Co-operation in respect of Inter-country Adoption was opened for signature, ratification or accession. [38] The Convention is linked to the United Nations Convention on the Rights of the Child. The Convention's preamble reads:

> taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child.

If New Zealand becomes a party to the Convention, it will apply to situations where people habitually resident in New Zealand wish to adopt a child from another Contracting State, whether the adoption is to be concluded in New Zealand or in the child's State of origin.

The aim of the Convention is not to create uniform international laws for the conduct of intercountry adoption. The objectives of the Convention are stated as: [39]

a) To establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;

b) To establish a system of cooperation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children; and

c) To secure the recognition in Contracting States of adoptions made in accordance with the Convention.

No reservations are permitted to the Convention. [40]

The Convention requires the nomination in each contracting state of a "Central Authority", to carry out functions in relation to intercountry adoption under the Convention. Some of these functions may be delegated to accredited bodies. [41]

The requirements for a valid intercountry adoption under the Convention are categorised into requirements for fulfilment by either the state of origin, or the receiving state. For example, the requirements for the receiving state in a particular adoption are that the competent authorities of the receiving State:

a) Have determined that the prospective adoptive parents are eligible and suited to adopt;

b) Have ensured that the prospective adoptive parents have been counselled as may be necessary; and

c) Have determined that the child is or will be authorised to enter and reside permanently in that State. [42]

The means by which the receiving state makes a determination that prospective adoptive parents are eligible and suited to adopt is a matter for state law, however, such determination would need to be made within the framework and principles of the Convention.

Where the "receiving" State is satisfied that particular applicants are eligible and suited to adopt, it is required to prepare a report containing information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care. This report is transmitted to the Central Authority of the State of origin, [43] which has the power to reject it if it is not satisfied that the receiving state has fulfilled its obligations in respect of the suitability of the adoptive parents.

The State of origin also has various responsibilities, including determining:

—that an intercountry adoption would be in the child's best interests;

—that free consent has been given to the adoption of the child;

—that consent has not been procured by payment;

—and that, where the child is of sufficient age and maturity, they have been counselled and duly informed of the effects of the adoption. [44]

In addition, the Convention provides for such things as the promotion of adoption counselling and post-adoptive services [45] and the preservation by contracting states of information concerning a child's origin, so that the child may have access to this information in so far as that disclosure is permitted by the law of each State. [46]

1. Effect of Accession to the Hague Convention by New Zealand

Accession to the Hague Convention by New Zealand would provide more safeguards than are currently provided for children brought to New Zealand via inter-country adoption from other Contracting states. It would, basically, provide for more Government intervention in such cases. In addition, it would provide protection for children adopted from New Zealand via intercountry adoption, to other Contracting States.

However, accession would not provide protection for children adopted from non-Contracting States. In 1996, 77% of children involved in intercountry adoptions by citizens or residents of New Zealand were from Samoa. [47] In every case, the adoption involved was concluded under Samoan adoption law. Samoa has not indicated any intention to accede to the Hague Convention.

If the requirements of the Convention make it more difficult for people to adopt from states which are parties, there is every likelihood that they will turn to source States which are not parties to the Convention to evade those requirements. Prospective adoptive parents have shown their willingness in the past to change quickly from one source state to another in the event that their first choice suddenly looks more difficult, for example, from Romania to Russia in 1992.

Since 1992 the Departments of Social Welfare and Justice have been working to develop proposals for a new Adoption Act. Some of the changes proposed by officials involve greater recognition of the interests of children and greater openness in adoption. [48] Such changes may make domestic adoption more difficult, or less desirable, for prospective adoptive parents. Currently, there are fewer than 150 adoptions in New Zealand per year where the adopted child is not known to the adoptive parents (often called "stranger adoptions"). [49] In comparison, in 1980 there were 715 "stranger adoptions" in New Zealand. [50] It is becoming more difficult every year for prospective adoptive parents to find children available for adoption within New Zealand. Changes to adoption laws to make domestic adoption more difficult may further reduce the number of children placed by adoption each year and may increase the number of people seeking to adopt overseas.

For these reasons, it is imperative that New Zealand also provide protection for children who will not be afforded protection by the provisions of the Hague Convention.

2. The First Move to Accession

In 1996 Cabinet agreed to New Zealand's accession to the Convention. In pursuance of this aim the Adoption Amendment Bill (No 2) 1996 was drafted. The Bill was introduced into Parliament on 23 May 1996. The General Policy Statement of the Bill reads:

This Bill implements in New Zealand the Convention on Protection of Children and Co- operation in Respect of Intercountry Adoption (Hague Convention on Intercountry Adoption)

The Bill provides that the Convention in its entirety will have the force of law in New Zealand. It contains specific provisions relating to, among other things, the delegation of functions concerning intercountry adoption to accredited agencies, a system for the accreditation of agencies, and for the retention of information relating to adoptions involving a New Zealand party. It also reads:

Intercountry adoptions to which the Convention does not apply. The Convention only applies to adoptions between Contracting States. Adoptions in countries which are not parties to the Convention will continue to be recognised in accordance with s 17 of the Adoption Act 1955. Section 17 provides for the recognition of overseas adoptions providing certain criteria are met. These criteria differ from, and are less comprehensive than, the criteria for recognition required by the Convention. Therefore to ensure compliance with the Convention, the Bill amends s 17 to exclude its application to adoptions in Convention countries.

Thus, the Bill does not do away with recognition of adoptions under s 17. It provides that, where an adoption takes place in a state which is a party to the Convention, s 17 shall not apply, and the higher standards of the Convention shall, while reserving the right of New Zealand to continue to recognise other adoptions under s 17.

In addition, New Zealand courts will continue to be able to approve adoptions in New Zealand where the adoptive child is from another State - they will have to be approved in accordance with the Convention where the child involved is from another Contracting State.

Where the child is not from another Contracting State, however, the Convention standards will not apply (although it is expected that there is a reasonable standard of protection for Children in such cases, through New Zealand's domestic adoption law and policy).

Thus, the Bill provides the legal framework for New Zealand to meet its reciprocal obligations towards other signatory countries, but does not make compliance with the Convention the sole means of intercountry adoption into New Zealand. Whether this is the most appropriate option is, from a children's rights perspective, the central issue in relation to the Bill.

If the Bill becomes law New Zealand will continue to allow its residents and citizens to adopt children in, and from non-Contracting states, even though to do so will be in some cases contrary to New Zealand's international obligations under the Convention on the Rights of the Child; and even though New Zealand will have agreed, by accession to the Hague Convention, that intercountry adoptions should take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law. [51]

3 Progress of the Bill

The Bill was introduced and referred to the Commerce Select Committee. [52] The Committee received 119 written submissions, and heard 25 submissions orally. Sixty-six submissions supported the Bill, and provision for the approval of non-governmental organisations as accredited bodies to whom functions may be delegated. Twenty-eight submissions supported the implementation of the Hague Convention but opposed the provision for approval of non- governmental organisations. Ten submissions opposed all intercountry adoption. [53]

(i) Select Committee Report

The Committee recommended that

• An urgent inquiry be undertaken into adoption practices in New Zealand over the past 50 years;

• Once that inquiry is completed, an immediate review of the Adoption Act 1955 take place, taking into account the outcome of the inquiry; and

• Steps be taken to establish a centralised information centre for all documentation and origin information of adopted children so that it can be readily accessed when information is sought by them.

In addition, the Committee made the following decisions,.

• "Adoptable" will not be defined in the Act. This term is used in the Hague Convention in article 4, which states the requirements to be fulfilled in relation to a child by that child's State of origin. Article 4 requires that the State establish that the child is adoptable. Some submissions on the Bill requested that this term be defined in New Zealand to provide protection for children; however, the Committee was satisfied with competent authorities in a child's State of origin determining whether or not that child was adoptable. The Committee also noted that defining the term in New Zealand law could cause interpretation problems as the Hague Convention is a document which will require interpretation by a number of states, as well as at international level.

• The Bill was amended to require that accredited agencies operate in the best interests of the child - it had been submitted that they may operate, instead, in the interests of prospective adoptive parents.

• Clause 23 was not altered by the Committee. It amends the Citizenship Act to provide for citizenship by descent through Convention adoptions. Adoptions made in non-Convention countries will continue to be recognised for citizenship purposes if the requirements of s 17 of the Adoption Act are met. The Committee concluded that the wider issue of whether or not there should be automatic citizenship rights for children adopted under non-Convention adoptions was outside the scope of the Bill and a matter that would be more appropriately considered in a review of the Citizenship Act 1977 or the Adoption Act 1955.

Strong submissions were made by both Professor Angelo (Victoria University), and the Commissioner for Children, Laurie O'Reilly, recommending that the Bill be used as an opportunity to provide protection for all children brought to New Zealand for, or as a result of, intercountry adoption - not just those children adopted from other Contracting states.

Both the Commissioner for Children and Professor Angelo recommended that, where a child was to be adopted from a non-Convention country, recognition of

the adoption under s 17 be limited to instances where the adoptive parents had been determined as eligible and suitable to adopt, by the Director-General of Social Welfare, prior to the adoption. The suggestion was made that such a determination be made in accordance with the requirements of articles 4 and 5 of the Hague Convention on Intercountry Adoption. This was not accepted by the Select Committee. In addition, the Commissioner opposed delegation of functions to accredited agencies. In his opinion, the best way to ensure that the principles of the Convention are complied with is to have the Central Authority fulfil all functions required under the Convention. The Commissioner noted: [54]

> There is a significant risk of a fundamental conflict between a non-government organisation's commitment to the objectives of the Hague Convention and its role as a service agency meeting the needs and demands of prospective parents. It will be very difficult for a non- Government body to remain neutral and committed to the objectives under the Hague Convention, which include the encouragement of placement within the country of origin, where the organisation's very purpose will be to facilitate intercountry adoptions.

The Committee did not agree.

The Bill was carried over by the previous administration, to be debated by the new Parliament. It is currently set down for consideration by the committee of the whole House of Representatives.

V Intercountry Adoption- Where to from here?

If it is the desire of the New Zealand legislature to provide more protection for those involved in intercountry adoption, there are a number of ways by which this may be achieved. These include:

i Continuation of the Adoption (Intercountry) Bill 1996 in its current form and accession to the Hague Convention;

ii To recognise only intercountry adoptions concluded under the Hague Convention;

iii To recognise only intercountry adoptions concluded in the New Zealand courts; or

iv To change the law to provide protection for all children who are adopted intercountry by New Zealand citizens and residents.

A Accession to the Hague Convention

If the Adoption (Intercountry) Bill 1996 is passed into New Zealand law, it will enable New Zealand to accede to the Hague Convention on Intercountry Adoption.

There have been many concerns raised about the potential operation of the Convention in New Zealand, most specifically about the use of accredited agencies to carry out functions under the Convention. It remains to be seen whether or not the Convention would be smoothly implemented in New Zealand along the lines indicated by the Bill. In any event, the Convention proposes a significantly higher degree of protection than currently exists for children involved in intercountry adoption between Contracting states. It is hoped that this degree of protection will eventuate and perhaps encourage the implementation of a standard by which all intercountry adoptions, whether Convention or non-Convention, may be measured.

B The Convention on the Rights of the Child

Accession to the Hague Convention will not meet New Zealand's obligations concerning adoption under the United Nations Convention on the Rights of the Child. There will remain grave difficulties with compliance in the case of non-Convention intercountry adoptions.

There has been some interest in the Convention on the Rights of the Child shown by the New Zealand courts. Some principles of the Convention form the basis for principles featured in New Zealand legislation, however, actual provisions of the Convention are not incorporated into New Zealand domestic law.

Prior to 1981 it appears to have been presumed by the courts that an unincorporated treaty had no effect in domestic law. That is, it did not create rights or obligations in domestic law, and therefore could not be referred to by the courts.

Since 1981, however, there has been some willingness by the courts to see international obligations as relevant to the exercise of statutory discretion, in a line of cases including: *Ashby v Minister of Immigration*, [55] *Tavita v Minister of Immigration*, [56] *Puli'uvea v The Removal Review Authority and the Minister of Immigrations,* [57] and *Auckland Health Care Services Ltd v 'T'*. [58] In the latter three of these cases, it was concluded by the courts that the Convention on the Rights of the Child was relevant to either the exercise of a statutory discretion, or to the interpretation of a provision.

This is not to say that the Convention on the Rights of the Child has itself become directly enforceable in New Zealand courts, but that it may be referred to in the context of the interpretation of, or exercise of powers under, statutes concerning children in New Zealand. As the Convention continues to gain attention in this way, it is increasingly likely that the whole issue of compliance of New Zealand laws with the Convention will be raised.

C Recognise only intercountry adoptions concluded under the Hague Convention

This was recommend in a number of submissions to the Select Committee on the Adoption (Intercountry) Bill 1996. Such a restriction would have the advantage of making clear what standards for the protection of children involved in intercountry adoption were acceptable in New Zealand. It would also provide prospective adoptive parents with a definitive list of acceptable source countries for children. In addition, it would send out a message to both the Hague Convention and the United Nations that New Zealand is serious about protecting children involved in intercountry adoption.

D To accede to the Hague Convention, but recognise only intercountry adoptions concluded in New Zealand

A number of overseas jurisdictions recognise only intercountry adoptions by those habitually resident within their borders, when such adoptions are concluded in their own state. [59] The Hague Convention does not preclude this

type of restriction.

The effect of such a restriction in New Zealand would be to apply domestic adoption criteria to all intercountry adoptions with which New Zealand had involvement - whether these were Hague Convention adoptions or not. This would significantly improve the protection afforded to children involved in non-Convention adoptions and go a long way towards fulfilling New Zealand's obligations under the Convention on the Rights of the Child.

This option would involve a change to s 17 of the Adoption Act so that it no longer applied in the case of intercountry adoptions. It would also involve the Department of Social Welfare in all "New Zealand" intercountry adoptions, from "beginning" to "end', as is the case with intercountry adoptions currently organised by the Department.

Clearly this would have resource implications for government. It could also increase waiting time for prospective (intercountry) adoptive parents, and restrict those who are eligible to adopt, through current domestic adoption criteria. Whether or not this would be politically acceptable is debatable.

As already mentioned, the major difficulty with intercountry adoptions concluded in New Zealand is that the Department of Social Welfare is dependent on information from a child's country of origin to determine whether or not the child is truly adoptable; whether parental consent has been obtained, and so on. However, it is to be hoped that the government to government scale on which such enquiries are conducted gives them some degree of integrity.

E To change the law to provide protection for all children adopted intercountry by New Zealand citizens and residents

This is another option for fulfilling New Zealand's obligations under the Convention on the Rights of the Child. It could be implemented in a number of ways.

Most easily, such a policy could be implemented by an amendment to s 17 of the Adoption Act to provide, for example, for parents who wish to adopt a child from a non-Hague Convention Contracting State to meet standards equivalent to those for adopting parents under the Hague Convention.

On a more holistic basis, a framework could be developed for "New Zealand" intercountry adoption, based on principles from both the Convention on the Rights of the Child, and the Hague Convention on Intercountrv Adoption. The framework could provide for the carrying out of functions as required under the Hague Convention, and recognition of Hague Convention adoptions, as well as the carrying out of similar, legally imposed functions with regard to non-Hague Convention adoptions. Putting the intercountry adoption obligations of both Conventions into modern domestic law, as a code for practice and interpretation, would provide a yardstick for measurement of government practice, and for judicial challenge of negligent practice.

VI Conclusion

Over the past four decades intercountry adoption has become a world-wide phenomenon, bringing with it legal, political, and social difficulties. A transaction such as this, involving potentially conflicting laws of at least two states, a high level of emotional charge, and affecting the lives of children, must take place within a framework of co-operation between states. Such a system must provide minimum safeguards for all concerned.

The laws which regulate intercountry adoptions with which New Zealand has involvement were never intended for that purpose. As a result, they do not provide adequate protection for those involved in intercountry adoption. Conversely, they provide a framework for those who would wish to use intercountry adoption for their own, sometimes illegitimate purposes.

New Zealand's current provisions for intercountry adoption breach its international obligations under the United Nations Convention on the Rights of the Child. The Convention is relatively new, having come into force in 1989. New Zealand became a party in 1993. As it matures, continuing breaches of its provisions by developed nations are likely to become more publicised and more difficult to defend.

Notes

[27] The commentary and preparatory materials to the Convention do not throw any light on this issue; Detrick's (ed) *The United Nations Convention on the Rights of the Child: "A Guide to the 'Travaux Preparatoires"* (United Nations, 1992).

[28] Author's emphasis.

[29] Adoption Act 1955, s 7.

[30] Adoption Act 1955, ss 25-26.

[31] Crimes Act 1961, ss 209 and 210. 32. Crimes Act 1961, s 6. 33. Crimes Act 1961, s 69(3).

[34] The charges which have been laid in this case are for kidnapping, forgery, and uttering forged documents. The case, in which the defendants have been granted interim name suppression, has been set down for depositions in the High Court in Auckland, on 17 November 1997.

[35] Article 44, UN Convention on the Rights of the Child.

[36] Initial Report of New Zealand: *United Nations Convention on the Rights of the Child* Ministry of Youth Affairs, November 1995,90.

[37] Initial Report of New Zealand: *United Nations Convention on the Rights of the Child* Ministry of Youth Affairs, November 1995,37.

[38] The following states are now party to the Convention: Canada, the Philippines, Venezuela, Mexico, Romania, Sri Lanka, Cyprus, Poland, Spain, Ecuador, Peru, Costa Rica, Burkina Faso. The Netherlands, The United States of America, the United Kingdom, France and Italy were among ,the signatories but have not yet ratified the Convention (Ministry of Foreign Affairs and Trade, 8 September 1997).

[39] Hague Convention on Intercountry Adoption, article 1.

[40] Chapter VII [41] Chapter III of the Convention.

[42] Article 5. [43] Article 15. [44] Article 4. [45] Article 9.

[46] Article 30.

[47] Figures from Documents of National Identity Division of the New Zealand Department of Internal Affairs, 29 August 1997.

[48] Information from Department of Social Welfare Post-Election Briefing Paper, 1996,36-139.

[49] In 1996 there were 114 domestic adoptions in New Zealand (address by Hon Roger Sowry, Minister of Social Welfare, to *Conference on Adoption and Healing*, Victoria University of Wellington, 20-22 June, 1997).

[50] Figures from the Adoption Services Unit, Department of Social Welfare, October 1996.

[51] From art 1(a) Hague Convention on Intercountry Adoption.

[52] Those presenting submissions were assured that the Bill had been referred to the Commerce Select Committee rather than the Justice Select Committee, due to workload difficulties, not because the Bill was considered unimportant.

[53] From Commerce Select Committee report - tabled as Commentary to the second reading of the Adoption Amendment Bill (No 2) 1996. The Bill was reported back with the recommended title of Adoption (intercountry) Bill 1996.

[34] From submissions of the Commissioner for Children, to the Commerce Select Committee, on the Adoption Amendment Bill (No 2) 1996,4.

[55] [1981] 1NZLR 222

[56] 1HRNZ 30.

[57] [1996] 3NZLR 538. 58

[58] [1996] NZFLR 670.

[59] For example Australia, the United States of America, and Sweden.

Source 'Intercountry Adoption in New Zealand - A Child Rights Perspective' J Couchman. (Paper presented as part of LLB programme) *Victoria University Wellington Law Review* (1997) Vol 27 pp421-449. Article printed above is pp434-449 verbatim.

LAW COMMISSION REPORTS

LAW COMMISSION REPORT 2000 Report No 65. 'Jurisdiction, Inter-country adoption and citizenship' Ch 11.

Overseas adoption *Snapshot of adoption law*

56 Where a person has been adopted in any place outside New Zealand according to the law of that place and the Adoption (Intercountry) Act does not apply, New Zealand will recognise the adoption if it has certain legal consequences. [138]

57 A different regime is applied to intercountry adoptions between countries that are signatories to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. [139] The Adoption (Intercountry) Act purports to implement the Hague Convention. [140] The Act provides a framework for the approval of organisations as accredited bodies to arrange intercountry adoption, in accordance with the provisions of the Hague Convention. The overall aim of the Convention is to establish safeguards so that intercountry adoptions accord with the best interests of the child, such adoptions only proceed when the birth parents give free and informed consent, and information about the child is collected for the child's benefit. p29

Domicile of habitual residence

Ch11. 287 Section 3 of the Adoption Act allows a New Zealand court to entertain an adoption application by any person, anywhere, to adopt a child, whether or not that child is in New Zealand. We observed in the discussion paper that such an unfettered jurisdiction could allow New Zealand to be used as a "clearing house" for adoptions, but that there was no evidence to suggest that this provision had been misused. [365] Since then we have discovered that section 3 does create practical difficulties. People have attempted to use section 3 in the following instances: [366]

• A Middle Eastern woman living in a Middle Eastern country (but who has New Zealand permanent residency status) sought to adopt her nephew from the Middle East using New Zealand adoption law. They did not plan to reside in New Zealand.

• A New Zealand women resident in India sought to adopt an Indian child.

• An Australian citizen resident in Australia wanted to use New Zealand's Adoption Act to adopt a Russian child because the Australian State in which she resides does not accept unmarried applicants.

• A New Zealand citizen living in Australia adopted a child from Brazil using New Zealand law. Once the adoption was made the adoption was recognised in New Zealand and the child became a New Zealand citizen by descent and was free to enter Australia. Such an adoption would not have been permitted by Australian legislation.

288 In some cases, section 3 allows New Zealand adoption law to be used to circumvent more restrictive adoption practices in the child's or adoptive parents' country of origin.

289 Section 3 allows New Zealanders to adopt children from overseas using New Zealand adoption legislation, and in combination with section 17 could arguably allow New Zealand adopters to circumvent the provisions of the Hague Convention, as expressed in the Adoption (Intercountry) Act.

290 It also creates practical difficulties. Where the parties are not resident in New Zealand, they cannot be assessed appropriately, and post-placement services and monitoring cannot he provided. Such scenarios do not allow social workers to discharge their statutory obligation to report on the suitability of the applicant to adopt or the advisability of the adoption generally. [367]

Common Law Rules relating to adoption

291 Having discussed the potential for misuse of section 3 we should emphasise that adoptions so made may not be recognised overseas. The general rule [368] expressed in *Re Valentine's Settlement* [369] is that recognition of an adoption made overseas will depend upon whether the adopting parents were domiciled [370] in the country where the adoption order was made. Lord Denning MR went further and added the requirement that the child should also be resident in the country in which the adoption order is made.

292 This rule has implications for adoptions under section 3 made by persons habitually resident overseas to adopt a child who may or may not he resident in New Zealand. Although an order made using section 3 would he valid in New Zealand, it may not be considered valid overseas.

We recommend that jurisdiction be limited to cases where:
* the child is habitually resident in New Zealand or coming to reside in New Zealand; and
* the applicants are New Zealand citizens or permanent residents who are resident, and have for three years been habitually resi, dent, in New Zealand prior to the filing of the a plication to adopt.

Recognition of intercountry adoption and overseas adoption

293 According to the Hague Convention on lnter-country Adoption, an intercountry adoption occurs where: a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

Three way of intercountry adoption

294 There are currently three ways in which intercountry adoptions are carried out:

1. adoption of a child from a Hague Convention State in accordance with the provisions of the Adoption (Intercountry) Act;

2. adoption of a child in a country with "compatible" legislation. Section,17 of the Adoption Act provides for compatibility to be assessed and recognition of an overseas adoption to be afforded in New Zealand; and

3. adoption of a child from a non-Hague Convention State using the New Zealand Family Court. In such cases, a child is brought into New Zealand on an entry permit and is adopted in accordance with New Zealand law.

Hague Convention on intercountry adoption

295 New Zealand has ratified the Hague Convention and has incorporated it into domestic law in the Adoption (Inter-country) Act. This statute sets out the rules that must he complied with when the adoption of a child from another Convention State is contemplated by persons habitually resident in New Zealand.

296 The Hague Convention on Intercountry Adoption establishes safeguards to ensure that the child [371] and birth parents have been counselled, that the child is adoptable, and that the child's wishes and opinions have been considered. Competent authorities in the receiving State must ensure that.

- the adoptive parents are eligible and suitable to adopt;
- the adoptive parents have been given any necessary counselling; and
- the child is authorised to enter and reside permanently in the receiving State.

The authorities in the sending State must ensure that:

- the child is adoptable;
- the possibility of adoption within the State of origin has been

given due consideration;

- the persons, institutions and authorities whose consent is necessary for adoption have been.

—counselled;

-—informed of the effect of consent, in particular whether the adoption will result in the termination of the legal relationship between the child and his family of origin;

-—the birth mother has not given consent until after the birth of the child;

-—parents, guardians, children, institutions and authorities have given their consent freely, in the required legal form and expressed or evidenced in writing;

—the consents have not been induced by payment of compensation;

—the consents have not been withdrawn; and

- information about the child's origins and medical history is preserved.

297 Such safeguards are eminently sensible and ensure that all parties to the adoption are as informed and protected as they can possibly be. The Adoption (Intercountry) Act implements these principles and procedures in New Zealand domestic law and sets out a framework to allow the accreditation of agencies who wish to facilitate intercountry adoption. Hague Convention intercountry adoptions may be made by a New Zealand court or by a court of the sending State.

Intercountry adoption Finalised in New Zealand

298 An intercountry adoption may be finalised in New Zealand where a child is brought into New Zealand by the prospective adoptive parents on an entry permit, and an application to adopt is made to the New Zealand Family Court.

299 In these cases, a social worker is required by section 10 of the Adoption Act to furnish a report to the court. The social worker offers counselling and assesses the suitability of the prospective adopters. CYFS attempts to ascertain that the prospective adopters intend and have the capacity to foster the child's links with its country of origin, race and culture. They will check the overseas documentation to ensure that the child is free for adoption and that the adoption would be in the child's best interests. When these procedures have been completed, the social worker reports to the court and the Family Court may make an adoption order.

300 *There are, however, a number of practical difficulties* that emerge during this procedure. While the social worker is preparing the report, the child has been uprooted from the country of origin, is adapting to life in New Zealand, and is forming bonds with the prospective adoptive parents. Such placements breach section 6 of the Adoption Act unless social worker approval has been obtained in advance. Furthermore, there is no guarantee that CYFS will he able to obtain the information it needs to make a professional assessment of the placement. This places the child in an unacceptable position. The child may be uprooted for a second time if the adoption application is rejected because the applicants are unsuitable or the adoption is not considered appropriate. Alternatively, the child may be left in the care of unsuitable adoptive parents when adequate precautions have not been taken, simply because the court has felt compelled to endorse a fait accompli.

301 In contrast to this approach, Sweden allows intercountry adoption only where the Hague Convention procedures are followed and where the child is transferred to Sweden and an adoption order is made by the Swedish Child Welfare authorities.

302 A child adopted in such a manner is deemed to be a New Zealand citizen by descent, unless the child is adopted by persons who are not New Zealand citizens, in which case the child will not automatically be granted New Zealand citizenship. [372]

Overseas adoptions

303 Section 17 of the Adoption Act was intended to be a conflict of laws provision to ensure that immigrants to New Zealand who had adopted children in their State of origin would have the adoption recognised in New Zealand. These are not "intercountry adoptions" and would better he described as domestic adoptions in overseas states. Section 17 simply applies a formal test of the legal consequences of the adoption under the laws of the State where the adoption took place.

304 Section 17 accords recognition to an overseas adoption where:

- the adoption is legally valid in the State where it took place;
- the adoptive parents acquire, under the law of the State where the adoption took place, a right of custody of the child superior to that of the natural parents; [373] and
- either the adoption took place in a certain named State [374] or the adoptive parents acquire specified rights in respect of property of the adopted child.

305 *Section 17 is now being used for purposes far removed from the original intentions* of he 1955 legislators- [375] It is primarily used by persons habitually resi-

dent in New Zealand to adopt children habitually resident in countries that have not ratified or implemented the Hague Convention. [376] Once recognition is granted, such children are deemed New Zealand citizens by descent. [377]

306 *This provision creates the following difficulties*:
It does not require any assessment of how well that country's legal system protects the welfare and interests of the child.

—Adoptions made in Brazil are recognised under section 17 because the adoption order grants the adoptive parents rights superior to the birth parents and establishes succession rights. However, CYFS has expressed concern about Brazilian adoption practices. There is no statutory adoption service operating in Brazil, nor is there a reliable system of ensuring that the child is in fact available for adoption and that free and informed consent has been given. Such adoptions are usually facilitated by United States third party agencies. [378]

—Similarly, Russian adoptions do not conform with the principles of the Hague Convention as there is no clear process for matching the child's needs and the abilities of the adoptive parents.

—Adoptions in Samoa do not require the court to inquire into the suitability of the applicants (who do not even have to appear before the court). There is no enquiry into the child's circumstances or the appropriateness of the proposed adoption. Seventy-eight per cent of adoptions recognised using section 17 in the first six months of the 1999 fiscal year were from Western Samoa. [379]

- It does not give New Zealand any discretion to refuse to recognise an adoption made overseas.
- It does not pay heed to competent social work practice.
- It does not conform with New 'Zealand's international obligations. [380]

307 CYFS has used some recent cases as examples to highlight the inadequate protections: [381]

This concern is given weight by the recent media case of 8 children living in a Wellington home with a couple who have been recently... charged with "slavery" and "cruelty to children" (*The Dominion* 22/01/2000). It is the Department's understanding that some of the [children and young people] were resident with neither legal status nor biological link to the adults and others had been adopted by the couple in the Pacific Islands.

The importance of this issue was again highlighted in December 1999 when a man was sentenced to fourteen years imprisonment, and his wife for eight years, for multiple rape charges against their daughter, adopted from relatives in Samoa at age thirteen (*Otago Daily Times*) 24/12/99).

Although it is unknown whether an assessment of these couples would have revealed any risk indicators in this instance, it is likely that such unfortunate outcomes may have been avoided had a full assessment been made.

308 The lack of protection for children adopted by New Zealanders using this route is in marked contrast to the assurances that must he sought from Hague Convention countries. This anomaly was pointed out to the Select Committee during its examination of the Adoption (Intercountry) legislation. [382] Not all countries of origin are Hague Convention States. [383] It has been argued by Professor Tony Angelo of Victoria University of Wellington that: [384]

> The current regime does not fully support the policy that motivated the Hague Convention. It is strongly argued that if the interests of children are to he protected by systems such as the Hague Convention those systems should as a matter of domestic law, in addition to the public international law system, be made to apply to all adoptions which are, within the terms of the Convention, intercountry adoptions. That is to say that New Zealand should extend the same protections to children and parents engaged in intercountry adoptions which involve states not parties to the Convention as apply when the states involved are parties.

309 Although the Select Committee acknowledged such concerns, it thought they would he better addressed in a comprehensive review of the Adoption Act.

310 *We support* the proposition that the same protections should be extended to apply to intercountry adoptions between New Zealand and countries not parties to the Hague Convention.

Recommendations

311 Section 17 should apply only to adoptions made overseas by persons not habitually resident in New Zealand. [385] Intercountry adoptions [386] should he specifically excluded from recognition under this section.

312 Any adoption of a child habitually resident in another State, by a person habitually resident in New Zealand, should he classed as an intercountry adoption and the Hague Convention procedures (or agreed procedures) applied.

313 New Zealand has already successfully negotiated agreed processes with China that parallel the Hague procedures. We propose that the Central Authority established by the Adoption (Intercountry) Act [387] be responsible for negotiating acceptable intercountry adoption procedures with these countries. The Central Authority has counterparts in other Hague Convention States, and the status of the office is recognised around the world. Pending a more systematic process of approval of sending States, the Central Authority could make ad hoc decisions in relation to proposed adoptions from non-Hague Convention States.

314 At a more informal level, we propose that a committee be established to facilitate this process and to assist the Central Authority. We envisage that the committee could comprise representatives from the AISU, Ministry of Foreign Affairs and Trade, Internal Affairs (Citizenship division), Office of the Commissioner for Children, and a consumer representative.

*We recommend t*hat section 17 apply only to adoptions made overseas by persons not habitually resident in New Zealand. Intercountry adoptions should be excluded from the coverage of this section.

We recommend that intercountry adoptions be defined as "the adoption of a child habitually resident in another State by a person habitually resident in New Zealand".

We recommend that procedures akin to those set out in the Hague Convention be applied to intercountry adoptions involving non- Convention States.

We recommend that the Central Authority be responsible for negotiating acceptable intercountry adoption procedures with non- Convention States.

Citizenship

315 When a New Zealand citizen adopts a child from overseas, the child automatically gains New Zealand citizenship by descent. [288] This is a remarkably generous grant of citizenship. Other countries such as the United Kingdom, United States and Sweden usually grant such children residency but not citizenship. The benefits and privileges that flow from New Zealand citizenship and the ease with which adoptions can be obtained in some other jurisdictions (especially Samoa) mean that *adoption has come to be viewed by some as a means of circumventing normal immigration requirements*. An alternative interpretation is that adoption is a means by which New Zealand can obtain immigrants at a relatively early age, thus increasing the likelihood that they will become fully integrated, productive members of society.

316 By establishing a definition of "intercountry adoption" and requiring parties to go through appropriate procedures, many of the current abuses of the citizenship provisions will cease to occur.

317 There still remains, however, the issue of a foreign child who may have lived in New Zealand for some time before an application is made for adoption. Here we are contemplating the not so rare scenario where a young relative attends school in New Zealand, and is eventually the subject of an application for an adoption in order to secure New Zealand citizenship. The applicants and child are habitually resident (although not necessarily permanent residents) in New Zealand and inevitably such cases will fall within the jurisdiction of the Family Court.

318 This is a matter over which the Department of Immigration might properly exercise control. Children who have no legal right to be in New Zealand and who are not as a matter of New Zealand law placed under the guardianship of, or adopted by, the people with whom they are living in New Zealand, should not be permitted to remain in New Zealand indefinitely.

Law Commission Recommendations Jurisdiction, Intercountry Adoption and Citizenship Appendix A p220

We recommend that jurisdiction be limited to cases where..

• the child is habitually resident in New Zealand or coming to reside in New Zealand; and

• the applicants are New Zealand citizens or permanent residents who are resident, and have for three years been habitually resident, in New Zealand prior to the filing of the application to adopt.

We recommend that [Adoption Act 1955] section 17 apply only to adoptions made overseas by persons not habitually resident in New Zealand. Intercountry adoptions should be excluded from the coverage of this section.

We recommend that intercountry adoptions he defined as "the adoption of a child habitually resident in another State, by a person habitually resident in New Zealand".

We recommend that procedures akin to those set out in the Hague Convention be applied to intercountry adoptions involving non, Convention States.

We recommend that the Central Authority be responsible for negotiating acceptable intercountry adoption procedures with non- Convention States. p220

NOTES

[138] Section 17 Adoption Act.

[139] Section 17(5) Adoption Act. See chapter 11 for a discussion of the Hague Convention.

[140] For further discussion of the Adoption (Intercountry) Act see chapter 11. pp113-123

[365] Law Commission, above n 2, paragraphs 133-136. [366]Examples provided by the AISU.

[367] As required by section 10 of the Adoption Act.

[368] See PM North and JJ Fawcett *Cheshire and North's Private International Law* (12 ed, Butterworths, London, 1992) and L Collins (ed) *Dicey & Morris The Conflict of Laws* (12 ed, Stevens and Sons Ltd, London, 1992).

[369] [1965] 1 Ch 831.

[370] In more recent times, as a result of international conventions, States have begun to refer to habitual residence as being the connecting factor for determination of matters of status and the validity of an adoption order.

[371] Having regard to the age and maturity of the child.

[372] Sections 3(2) and 6 Citizenship Act 1977.

[373] The adoption legislation of the following countries was (when last assessed) found to he compatible with New Zealand adoption legislation: Australia, Belgium, Brazil, Bolivia, Canada, China, the Cook Islands, Denmark, England, Fiji, France, Ghana, Hong Kong, India, Japan, Kenya, West Malaysia, Malaysia, Malta, Mexico, Nauru, North Mariana Island, Papua New Guinea, Peru, Rhodesia, Romania, Russia, Republic of Georgia, Spain, Samoa, Scotland, Saint Lucia, Sierra Leone, Singapore, South Africa, Sri Lanka, Tahiti, Tonga, Trinidad and Tobago, Tuvalu, Ukraine, 13 States of the United States of America, Vanuatu, Venezuela, Zimbabwe and Zambia

[374] Countries which satisfy section 17(2)(c)(i) include Antigua and Barbuda, Australia, The Bahamas, Bangladesh, Barbados, Belize, Botswana, Canada, Cyprus, Dominica, Fiji, The Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Namibia, Nauru, New Zealand, Nigeria, Papua New Guinea, Samoa, St Lucia, St Vincent and the Grenadines, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom, Vanuatu, Zambia and Zimbabwe. The Governor-General by Order in Council has directed Austria, Denmark, Finland, The Netherlands, Norway and Sweden to be referred to under section 17(2) (c) (i) - Overseas Adoptions Order 1967 (SR 1967168).

[375] See paragraphs 287 and 306, which illustrate some of the scenarios for which section 17 is now being used.

[376] In 1980, 42 children entered New Zealand using section 17. By 1991, the number had reached 769 per annum. New Zealand has a high rate of intercountry adoption. In 1998 there were 116 intercountry adoptions per million population compared to 52 per million for the Netherlands, 26 per million for Sweden and 117 per million for Norway (which describes itself as having an extremely high rate of intercountry adoption).

[37] Out of 531 intercountry adoptions in 1996, 460 involved New Zealand citizens using section 17 and the citizenship by descent provisions (sections 3 and 7 of the Citizenship Act).

[378] At a recent conference on intercountry adoption held at Frankfurt in October 1999, participants expressed deep concern about the activities of such third party agencies.

379] Pacific Island adoptions make up 80 per cent of adoptions recognised in accordance with section 17 of the Adoption Act.

[380] See UNCROC, Hague Convention on Intercountry Adoption, UN Declaration on Child Placement.

[381] Submission, CYFS, 3 March 2000, 18-19.

[382] Report of the Commerce Select Committee on the Adoption Amendment Bill (No 2).

[383] As at 26 May 2000, Uruguay, the United Kingdom, the United States, Switzerland, Luxembourg, Ireland, Germany, Belarus, Belgium, Slovakia and Portugal had signed but not yet ratified the Convention; Mexico, Romania, Sri Lanka, Cyprus, Poland, Spain, Ecuador, Peru, Costa Rica, Burkina Faso, the Philippines, Canada, Venezuela, Finland, Sweden, Denmark, Norway, the Netherlands, France, Columbia, Australia, El Salvador, Israel, Brazil, Austria, Chile, Panama, Italy and the Czech Republic had ratified the Convention; and Andorra, Moldova, Lithuania, Paraguay, New Zealand, Mauritius, Burundi, Georgia, Monaco, Iceland and Mongolia had acceded to the Convention (www.hcch.net/e/status/adoshte.html).

[384] Submission, Tony Angelo, 19 June 2000, 3.

[385] As was the original purpose of section 17.

[386] Defined in similar terms to the definition in the Hague Convention.

[387] The Chief Executive of CYFS.

[388] Provided the child was under the age of 14 at the time of the adoption (sections 3(2) and 7 of the Citizenship Act).

Source Law Commission Report 65 *'Adoption and Its Alternatives' A Different Approach and a New Framework.'* September 2000. 'Jurisdiction, Inter-country adoption and citizenship' Ch 11. Clauses 56-57, 287-318. pp29, 113-123, 220

NSW Law Commission Report

11.1 "Intercountry adoption is arguably the most sensitive and complex aspect of adoption in Australia today. It involves all the issues relating to domestic adoptions together with a range of additional issues. It involves immigration law and policy, as well as international law. Because it involves the removal of the children from their country of origin, questions of foreign law and policy also arise. Children are being placed transnationally and often inter-racially so that questions relating to racial, ethnic, cultural and linguistic heritage need to be addressed. Understanding and balancing all of these issues can be a complex task. Inter-country adoption has been associated with often intense controversy. Some see it as a form of exploitation in which wealthy couples from First World countries, unable to adopt children there, seek to satisfy their needs from Third World...Others see it as a humanitarian act...a form of overseas aid." p248

Adoption information issues

13.65 "In inter-country adoption this information would be available to birthparents about adoptive families as a result of the social worker assessments of adoptive parents organised by the Department. If a birth parent from overseas were to apply to the Family Information Service... he or she would be given details of the adoptive parents and identifying information, once the adoptee reached 18..." p320 *'New South Wales Law Reform Commission Discussion Paper No.34*' Review of the Adoption of Children Act 1965 NSW. April 1994. p248,320.

NSW Law Commission 1994
Traffic and sale of children

12.4 "Prevention of the trafficking and sale of children is now high on the international agenda. The United Nations Commission on Human Rights appointed a Special Rapporteur to investigate the problem in 1990. It is relevant to the practice of inter-country adoption because there is a risk that some children who are adopted by foreign nationals may have been abducted and sold. This risk is considerably higher for couples who proceed through lawyers or other intermediaries and who pay large sums of money to facilitate the adoption. Even if couples act in good faith, they may be unwittingly contributing to the trafficking of children. For example, if they find a child through a lawyer, which some Australian couples do, the child may have been bought by the lawyer from a child abductor. In a study on the trafficking of children in Bolivia, evidence emerged of a woman who had abducted five babies in three months and sold all to a lawyer for an average of $US5 each. Forged relinquishment or abandonment papers can be arranged for such children and Western couples offered the children, oblivious to the circumstances in which they were obtained.

12.5 Inter-country adoption provides incentive and opportunity for child trafficking to occur. Some South American and Asian countries that have high rates of legitimate inter-country adoptions also have high rates of child abduction and sale. The combination of poverty, ineffective legislation and bureaucracy in donor countries, with money and desperation for children in receiving countries, provides the perfect climate for trafficking and sale to flourish.

Poverty and adoption

12.6. "Poverty is the single greatest problem affecting children in the world today. Two hundred and fifty thousand children die every week from malnutrition and disease. Many of these deaths could be prevented if communities were provided with the means to feed, immunise and medically treat their children. Poverty is not only responsible for the deaths of children, it is responsible for children's lack of adequate housing, access to education and basic opportunities in life.

12.7 Many children are relinquished for inter-country adoption because of poverty. Families may want to care for their children but they do not have the means to do so

because of the endemic poverty that affects their country or region of the world.

12.8 Poverty and adoption are often closely connected. In Australia [and also New Zealand] thousands of women relinquished their children because of poverty. Prior to the introduction of the single mother's pension in 1973, women without family support often had no choice but to relinquish their children for adoption. After 1973, the number of children relinquished for adoption steadily decreased from 9,798 in 1972 to 3,337 in 1980.

12.9 The connection between poverty and adoption is a cause for concern in the international community, especially among non-government organisations. Damien Ngabonziza, of the International Social Service argues that inter-country adoption can be a band aid solution for a small number of children and that it may ignore the real problems that children face. He states that 'the response to hunger is food, not ICA [International country adoption]. Likewise, poverty, lack of adequate health care and such do not require ICA as a remedy.'

12.10 Other commentators support this statement arguing that inter-country adoption is an inappropriate way to care for poor children because it does not address their real needs. They argue that the majority of poor children are not orphaned or abandoned. They have a family but that family cannot provide for them. Instead of providing the existing family with the means to support their children, inter-country adoption provides the child with a new family. Maria Josefina Becker of the Brazilian Federal Child Welfare Agency states that: "the great majority of poor children in Latin America, whether they are found in the streets of our cities or in public of private children's institutions, whose numbers are in the millions, are not abandoned. These children, together with their families, are victims of the serious economic conditions affecting our part of the world...To the extent that they actively undertake the search for children to be adopted, couples and agencies involved in international adoption, their generous and humane motives notwithstanding, increase the pressures favouring rupture between the poor child and his or her family rather than strengthening the ties between them...In this way conditions encouraging the 'production' of abandonment are created, apparently motivated by the assistance and protection of the child, which in reality serve the interests of adoptive parents."

12.11 There is concern in the international community that the real problem that children face -poverty- is forgotten because of the demand for children in the West. That is, some Western couples and organisations have a vested interest in believing that children need adoption rather than aid, because it satisfies their desire for children. Some Western couples want to believe that there are 'thousands of children in need of families' in poorer nations because this seemingly increases their chances of being allocated a child and also legitimises their desire to adopt from overseas...

12.12 The Regional Expert Meeting on Protecting Children's Rights in Inter-country Adoptions and Preventing Trafficking and Sale of Children organised by Defence for Children International in co-operation with the Philippine Government recommended that: "a reassessment of the need for ICA is clearly essential. There is a widespread misconception about the numbers of children in need of ICA. The "demand" for such children in the US, Europe and Australia is much larger than their "availability".

12.13 There is an inherent danger in the 'demand' for children in Western Nations. By virtue of their relative wealth, Western nations and their citizens are placed in a powerful situation in relation to poorer nations and their people. This power may be used to secure what Western couples desire -adoption- and this may sometimes be at the expense of children. One commentator illustrates this problem by describing three kinds of inter-country adoption: "The *first* type is that which places the needs of the child as a priority. This means those needs are identified and the appropriate adoptive parents located and evaluated by a responsible, professional and legally recognised agency...The *second* type is relative adoption...and the *third* type is that of couples, childless or not, who want to adopt and, because adoptive children are not readily available in their own country, travel overseas or turn to overseas resources, usually to deprived areas where there is a surplus of needy children, in the hope of locating a child to meet their own criteria. It is not in every case that the child's needs are the motivating factor, but rather the desires of the adoptive parents'. This third form of adoption is the kind that has caused the most concern in the international community. It is the kind that makes poor children and their families most vulnerable to abuse."
New South Wales Law Reform Commission Discussion Paper No.34' Review of the Adoption of Children Act 1965 NSW. April 1994. pp276-280

Aboriginal adoption

NSW Law Commission 8.4 "Aboriginal communities have been, and continue to be adversely affected by adoption. From 1883 until 1969, under the Aborigines Protection Board and later Aboriginal Welfare Board, it was government policy in New South Wales and other States, to forcibly remove Aboriginal children from their families. Children were placed in homes and trained as domestic servants or station hands. In later years, some children, particularly those who were 'light enough to pass as white', were fostered or adopted by non-Aboriginal families.

8.5 The *Convention on the Prevention and Punishment of the Crime of Genocide 1948* defines 'forcibly transferring children of [one] group to another group' with 'the intent to destroy, in whole or in part, a...racial...groups' as genocide. Australian government policies of that time would clearly fall within the terms of the Convention. The removal of children was part of the wider policy of assimilation which attempted to socialise Aboriginal people into non-Aboriginal culture and habits so they would not maintain their own culture. In the case of children this process has been described as 'breaking the sequence of indigenous socialisation so as to capture the adherence of the young, and to cast scorn on the sacred life and the ceremonies which remain as the only hold on continuity

with the past.

8.6 The policy of assimilation is clearly illustrated in this statement from the Aboriginal Protection Board, dated 1914. 'Several...were handed over to the State Children's Relief Department as neglected children. These will not tbe allowed to return to their former associations, but will be merged into the white population. To allow these children to remain on the Reserves to grow up in comparative idleness, and in the midst of more or less vicious surroundings, would be to say the least an injustice to the children themselves, and a positive menace to the State'.

8.7 The policy of removal of children continues to be the source of much suffering in Aboriginal communities. The experiences of children had in homes were rarely, if ever, positive. The children were invariably treated as inferior and denied access to their families, communities and heritage. Children who were fostered or adopted often suffered the same fate, despite the well-meaning intentions of some adoptive and foster families. One commentator states that: 'Every one of the five thousand children removed from their parents had, and have, their own private bitter memories of separation and later problems of adjustment. From the point of view of the Aboriginal race as a whole, we can hardly guess at the cost of wasted talent of those who spent a decade in the service of whites. We can hardly guess at the number of men and women who deny their own birth-right as Aboriginal citizens of Australia. The comparisons must tell the story. Perhaps one in six or seven Aboriginal children have been taken from their families during this century, while the figure for white children is about one in three hundred. To put it in another way, there is not an Aboriginal person in New South Wales who does not know, or is not related to, one or more of his/her countrymen who were institutionalised by the whites.'

Adoption and aboriginal law

8.9 Adoption, as it is currently defined, is an unknown institution in Aboriginal customary law. The separation of children from natural families and the absolute transfer of parental rights are incompatible with the basic tenets of Aboriginal society.

8.10 In its submission to the Commission, the Aboriginal Children's Service stated that: 'More than any other form of substitute care, adoption is perhaps most alien to Aboriginal thinking because, in its present form, it can totally and permanently separate and Aboriginal child from his family and potentially all Aboriginal people... Adoption legislation...is simply inadequate to deal with the special needs of Aboriginal children. Aboriginal children are not regarded in Aboriginal society as in the same way, property of the parents as they are in Anglo-Australian society. Often parents are not married, at least in any form recognised by Australian law. Further, the matter of secrecy is not nearly as appropriate as it is, or at least has been, in the case of children adopted within the Anglo-Australian community. Finally, the kinship networks available within the Aboriginal communities are such that adoption may be a form less useful in relation to at least some Aboriginal children than it is in the case of the nuclear family structures of Anglo-Australian society.

8.11 Adoption is a culturally specific way of caring for children that has its roots in non-Aboriginal concepts of family... A dominant feature characteristic of most Aboriginal families is the sense of kinship. This is a feeling of family togetherness, the ability to rely on each other, and the creation of spiritual bonding which helps to form strong family kinships. Kinship also includes the creation of inter-dependence and support between the members of a family...Spiritual bonding is the bonding which goes beyond a blood relationship. This is a bond which passes on a bit of the Dreamtime, thus passing on 'Aboriginality'.
Source *New South Wales Law Reform Commission Discussion Paper No.34*' Review of the Adoption of Children Act 1965 NSW. April 1994. pp190-193

Canadian Indian adoption For information on Canadian Indian aboriginal adoption *see my Book 'The Right to Know Who You Are— Reform of Adoption Law with Honesty and Integrity'* Keith C Griffith. Pub Kathrine W Kimbell Canada 1992. 8:2-6, 11. 18:11-12

Intercountry Adoption Case law

Petition for a divorce-adopted German person

1917 Chapman J Palmerston North SC *Masemann v Maseman* This petition for a divorce involved an adopted German person. Respondent was born in Germany of German parents, had been adopted according to German law by a German subject who married respondent's mother, and came with her and the child to New Zealand and was there naturalized. Both before and after naturalization respondent lived during his minority with his adoptive father and his mother in New Zealand.

Held 1. That s12 of the Aliens Act, 1908, which declares that when a man has become naturalized in New Zealand every child of his who during minority becomes resident with him in New Zealand shall be deemed to be himself naturalized, does not extend to parentage other than natural parentage, and s 21 of the Infants Act, 1908, defining the status of adopted children, only applies to adoption in New Zealand under the Act. [1917] NZLR 769

USA child NZ court adoption order

1946 Goulding SM Wellington MC *In re A: An Infant* / / Stepparent adoption. Granted. The mother was born in USA but raised in New Zealand, she married an American and lived in the States. They had a child and divorced. The husband can no longer be traced. The mother remarried and lives in New Zealand applies for stepparent adoption of the child, a USA citizen.

Held "(1) That, although the child was an American national, the Court had jurisdiction to make an order of adoption. The Magistrate pointed out there is no restriction upon jurisdiction of the Courts in New Zealand to make an order of adoption in respect to an alien child...'I foresee it is, possible that nice questions under International Law might some day arise as to whether or not a child of foreign nationality in respect of whom an adoption order is so made would thereby lose the right he or she would otherwise possess on attaining majority to elect his or her nationality; or whether such adopted child would owe allegiance to the nation of its birth or the country where the adoption order is made.' " (1946) 41MCR 13 // 4MCD 434

Dutch immigrants apply to adopt

1954 Paterson SM Hamilton MC *In re B (An Infant)* Granted. Applicants, alien Dutch immigrants. Jurisdiction regarding adoption of New Zealand infant by aliens.

Held Under the Infants Act 1908 s21 (2)(e) an order of adoption shall not effect the nationality or citizenship of the adopted infant. The inference from this is that jurisdiction of the Court to make adoption orders is not effected by the nationality of the parties. 8MCD 254.

Brunei in NZ adoption of brother

1979 Gilliand SM Auckland MC *Re an Application by F* Refused. Applicant, Brunei aged 29, New Zealand citizenship, applied to adopt 16 year old brother, a resident of Brunei. The parents are now 57 and 59 and according to Chinese custom it's the eldest son's duty to bring up children of aged parents. Social Welfare objected- "(a) That the motivation behind the application,..seems to lie outside the policy of the Adoption Act 1955 in that its primary purpose appears to be to facilitate the entry of the child into New Zealand. (b) That the application does not meet the requirements of s11(b) of the Adoption Act 1955 in that the eradication of existing identities and relationships and the creation of a new legal relationship of father and son between full brothers...is unnatural, unnecessary, undesirable in the interests of the child and inappropriate where any identifiable advantage to the child could be procured by means other than adoption." The Magistrate upheld the objections of Social Welfare. Application declining. 14MCD 371 // 1DCR 27

Adoption of Tongans by NZ single aunt

1981 Barker J Auckland HC *Re H* Appeal against DC refusal of interim order. Granted. The adoption of two Tongan boys almost 20 and 18 years of age. They had been with their New Zealand resident aunt 3 years for education. She is a single woman aged 56. It was a 'family arrangement' not unknown in Tonga or Polynesia. "The District Court declined the aunt's application because the total destruction of a natural family relationship was not fundamentally in the boys' best interests, because the proposed adoption was for the aunt's own welfare and not for the creation of a new family and particularly because the boys would become New Zealand citizens under the Citizens Act 1977 s3(2)."...Justice Barker said, "He did not think the boy's relationship with their parents would be destroyed and considered the important question to be was the welfare and interests of the boys being promoted by the adoption, all other things being equal...It was not a disqualifying factor that the aunt would benefit from the arrangement; the boys would themselves also benefit." Final orders granted. (1981) 7NZRL 144

Adoption of abandoned overstayer

1981 Finnigan DCJ. Otahuhu DC. *Re an Application by M.* Granted. Applicants sought to adopt M, aged 19, who arrived in New Zealand at the invitation of a citizen and was then abandoned. After her entry permit expired she was befriended by the applicants who now wished to adopt her. She will be 20 in 7 days, then too late for adoption. The Judge followed Justice Barker, that the prime concern that the Court shall is what is in the best interests of welfare of the person to be adopted. Judge Finnigan concluded, "I am satisfied that the advantages of making the order from the point of view of the welfare of Miss M are to the point where what can be described as a social evil, the avoidance of statutory deportation, drops back to the point where this is a less important consideration. It has less force because the ultimate consideration of the welfare of the girl is paramount." 1DCR 262

Private adoption by Australians

1982 Ross DCJ Dunedin FC *In the Adoption of V* Private adoption of a New Zealand child by an Australian couple. DSW opposed the application on the ground there had been no detailed investigation into the background of

the adopting parents, or consideration of their suitability in relation to the child.

Held The child was placed in care of the adopting mother by the granting of a foster-home license to the home in which she was staying while in New Zealand. Reports from the DSW and from Australia were received and a final order made. 1FLN-96 N38-39

Samoan adoption refusal- immigration

1984 Mahony DCJ Auckland DC *Re an Adoption by L and L // Re an application by Leofo* Denied. A Samoan couple, resident 10 years in New Zealand applied to adopt a 13 year old girl. An entry permit had been denied. She was part of their extended family and had lived with them in Samoa for her first 4 years. The child was in Samoa. The NZ High Commissioner's Office in Apia opposed the adoption because she lived with her natural parents. DSW social worker said, had the child been in New Zea-land, she would have recommended adoption. The Judge was unconvinced a new adoptive family would be formed, the adoption was a device to obtain an entry permit. There was no report on the child's views, and no official consent Form from the previous adoptive parents of the child. Application declined. [*See* Case notes- includes copy of New Zealand Immigration Policy Guidelines.] 1FRNZ 144 // 2FLN 165/N238 // (1984) 10NZRL 382

Samoan adoption refusal- immigration

1986 Sinclair J Auckland HC *L and L v P // Lynch & Lynch v Peach* Appeal against FC declined adoption orders. Dismissed. The applicants were a Samoan husband, age 62, and his wife aged 34. They sought adoption of four Samoan children aged 18, 15, 11 and 8, who were the brother and sisters of the applicant wife. The children came to New Zealand in 1983 on a one month temporary permit. In March 1984 applications to adopt them were filed. DSW objected that the applications were an attempt to circumvent the immigration regulations and that they did not fulfil the requirements of s11(b) of the Adoption Act 1955, 'because the adoption would cause an eradication of existing identities and relationships'. The applicants regarded the adoption 'as the necessary paperwork for immigration purposes.' On the appeal, attempts were made to persuade the Court that the children's welfare was paramount and that factor favoured adoption. Justice Sinclair, found there were others matters to be considered when dealing with children from a foreign country, referring to *L v L* (1984). It would be incongruous in the setup of this family for the 18 year-old to suddenly find that his sister had become his mother. Appeal dismissed. (1986) 4NZFLR 75 // (1986) 12NZRL 293

Case Comment- "There is a curious inconsistency- what is the correct test? Some Courts and Judges are prepared to turn a blind eye to the true reason for an application and strain to find welfare aspects of the application which would justify the making of the orders sought. This does not alter the fact on cases I have mentioned it is apparent that the adoption procedure is no more than a device. Other Courts, as in *Lynch & Lynch v Peach*, set aside or overlook clear welfare aspects because they believe the adoption procedure has been used only as a device which is treated as a disqualification. The effect is undignified and produces the sort of inconsistency which is apparent on a study of the decision." *Adoption and Immigration Aspects Counsel's comment.* (1986) 12NZRL 421-422

Samoan adoption by birth parents

1987 Cartwright DCJ Auckland DC *Re Adoption A132/85* Samoan birth parents seek to adopt their own child. Declined. They sought to bring their 5th child to New Zealand, but were declined because of an alleged false statement in obtaining their citizenship. The child had been in the care of its grandmother in Samoa. The grandmother was in poor health, they sought in the interests of the child to overcome the immigration refusal by means of an adoption order. Judge Cartwright, declined the application to adopt as unnecessary. The adoption by both birth parents was unprecedented, an unnecessary legal fiction. She was strongly of the opinion that immigration be granted, adjourned the case sine die, in order for Internal Affairs to reconsider. She was open to a new application by the applicants if required. 3FRNZ 462

Samoans adopts wife's half sister

1988 Keane DCJ Upper Hutt DC *Re Adoption FP17/87* Samoan couple, New Zealand citizens apply to adopt wife's 18 year old half sister P, living with them. Granted. Social worker report opposed the application on grounds of age of adoptee, and immigration circumvention.

Held "P's age and the immigration issue should not stand in the way of the application succeeding. The application was made to protect, in P's interests, and existing family relationship of considerable strength and it enjoys the support of P's mother. It may have been made because an adoption according to custom would not suffice to enable P to remain in New Zealand and in that sense a short road through the immigration regime. But that does not make it any less genuine. The principle and underlying reason for the application is fully consistent with the considerations set out in s11 Adoption Act 1955. Granted. (1988) 4FRNZ 715

Adoption of nephews from India

1991 Pethig DCJ Wellington FC *Re Application by Nana* Granted. Mrs Nana, a widow applied to adopt three teenage sons of her brother. There was divergence regarding the true nature of adoption. Counsel appointed to assist took a conservative view of s11. Submitting, all the criteria of s11 point to parenting a young child. The older a child the less likely the criteria of s11 will be satisfied, adoption of older children will become rare. Also the aunt would become his mother, his parents his aunt and uncle and his brother his cousin. "Such cases [As this one] have for several years caused the Court great difficulty in determining where to draw the line. There is no provision in the Adoption Act 1955 stating that fact [using adoption for immigration purposes] itself is a bar to an adoption. Indeed it is common knowledge that subject to government policy, overseas children are permitted to be adopted by New Zealand citizens." at 41.

Counsel for the child countered, citing *Re Adoption CA 72/89*. "Except in a singular case, once consent is given or dispensed with the natural status and family relationship will be of little, if any, consequence in the overall assessment of the child's welfare and interests that is needed for the making of an adoption order. In that assessment, the new status and the new family relationship are all important." Hardy-Boys J at 175. The child's Counsel pointed out stepparent adoptions were often older children and non stranger adoption was now the norm. "It is clear that the original purpose of adoption...which has in the past been accepted by the Courts has long since gone." The Judge agreed. Interim order granted.

Held (5) (Obiter dicta) The original purpose of adoption was gravely suspect as a modern exposition of its purpose and certainly was not its practice. The Act was in need of review to accord with modern practice. [1992] NZFLR 37

Adoption of Fijian

1991 Kendall DCJ Auckland DC *Application by Webster // Re Adoption A1-2/90* Granted. New Zealand Fijian residents seeks to adopt 18 year old nephew. Had already adopted the brother of proposed adoptee. The mother of the children died in 1985.

Held (1) Although there were immigration considerations the primary purpose of the application was to establish a family relationship which could not be achieved by other means. (2) When balancing considerations of welfare against considerations of public policy the scales came down in favour of granting the application...

(3) In relation to adoption there are **three policy principles** to be considered.

"*Firstly,* should an adoption order be made if there are other methods available to the Court to give the child a secure and settled family situation? *Secondly,* in relation to adoption by relatives, because adoption extinguishes existing legal family relationships on one side and distorted relationships on the other side, then adoption should not be considered desirable unless the benefits secured by adoption cannot be met by other means. *Thirdly*, if adoption is purely for immigration purposes the adoption should be refused." Final order granted. [1991] NZFLR 537 // 7FRNZ 569

Adoption of Indian

1991 Robinson DCJ Auckland FC *Re Adoption by Patel* Granted. New Zealand residents seek to adopt an 18 year old Indian nephew from Bombay who had been living with them since 1988.

Held (1) Although one of the motives for bringing this application was to enable the child to remain permanently in New Zealand where his economic circumstances would be better, it was not the dominant motive in this case and should not by itself justify the refusal of the application. (2) The evidence satisfied the Court that a relationship in the nature of parent and child had developed between the applicants and the child and that if the adoption did not proceed the child's emotional and educational development could be prejudiced. That evidence satisfied the provisions of [Adoption Act 1955] s11(6). Granted. [1992] NZFLR 512

Tongan adoption by Maori aunt

1992 Boshier DCJ Otahuhu DC *In the Adoption of L* Granted. Maori Aunt applies to adopt 4 year old Tongan nephew, due to be deported to Tonga. Had lived 2 years with Aunt who intends to marry a person with a record of violence and is in prison. DSW report opposed the adoption. The Judge was under pressure, because if he did not take immediate action the child would be deported. After receiving additional evaluations of the risks involved the Judge decided to grant and interim order with special conditions for supervision. [1992] NZFLR 847

Chinese adopted by single woman

1993 Inglis DCJ QC North Shore FC *Application to adopt YT // Re adoption of YT*. Granted. The adoption of an abandoned 18 months old, Chinese child that had already been adopted by a single New Zealand citizen in China. She had now to apply for a New Zealand adoption of the child as the Chinese adoption was not recognised in New Zealand. The applicant has long standing links with China.

Held (3) "Trans-racial adoption by a single woman are factors which need to be considered in the context of the global circumstances and in the end, the issue is whether the welfare and interests of the child will be promoted by the adoption. Generalised theories about trans-racial adoptions or single parent adoptions are helpful only to the extent that they focus attention on the need not to overlook difficulties which these factors have sometimes been known to create, but in the end, the focus must be on the individual circumstances of the case involving *this* child and *this* adoptive parent. (4) The child's welfare and interests would undoubtedly be promoted by the adoption. The special circumstances of this case render it desirable that the child and her adopted family should have the security of a final adoption order." [1993] NZFLR 746 // (1993) 10FRNZ 426

Premium payments- intercountry adoption

1993 Carruthers DCJ Wellington FC *An application by WW // Re Wynne-Williams* Declined. The applicant wished to set up a private agency for intercountry adoptions of children from Brazil. She applied for general consent under the Adoption Act 1955 s25 to allow her to receive payments for making arrangements for adoptions.

Held "(dismissing the application) (1) Having regard to the primary function of a Family Court which is to consider the particular case before it and analyse the evidence and detail of it rather than acting as a general licensing authority, and the singularity of the words used in s25 of the Adoption Act 1955, s25 did not extend to a consent in general and consent in each case had to be the subject of separate applications. (2) In any event, it was not an appropriate function for the Court to license the applicant to carry out a role which was essentially one of a central authority and which was likely to be adopted by the New Zealand Government within a relatively short time. (3) Section 25 included activities leading to adoption whether that adoption took place in New Zealand or elsewhere. It was not limited to adoption taking place in New Zealand

only." at 153. "Ms Ullrich has pointed out...as counsel to assist, that the intent behind the provision is to provide protection for children by preventing persons from being able to traffic in children for monetary gain, without proper consideration for the welfare of the child."at p154 [1993] NZFLR 153 // [1994] 1FRNZ 170

Adoption of Fijian child

1995 Curruthers DCJ Wellington DC (Unreported). 10/3/1995. Surprise private adoption. Granted. Mrs X was visiting Fiji and located a child in a hospital that was available for adoption. She brought the child back to New Zealand on a visitors permit. The first her husband knew about it was when she arrived back with the child. To say he was 'surprised' is surely to understate his position. "It was odd, bizarre and worrying that the adoption should have commenced in this way. There had been no contact through the usual agencies and none of the preliminary work...Nor had there been any assessment of this child's needs and an effort to place her with a family which would reflect and promote her background and culture. DSW opposed the adoption, they were also unable to obtain any social work report from Fiji. Mr X has now come to terms with the adoption and the child is well settled and cared for. There was pressure on the Judge as if he did not make an adoption order the child would have to be returned to Fiji shortly. The child had been with the family now for over six months. She knows them as her parents. Her natural mothers consent was properly obtained by the president of the Fiji Law Society. In the best interests of this child I think the situation now has to viewed from her perspective." Acknowledging the bizarre nature of the application, and bypassing of correct protocols and procedures, the Judge acting the best interests of the child could see no point in delaying the final order. (Unreported)

Some important decisions

1986 Adoption and immigrant inconsistency

Counsel in the *Re:* ***Lynch v Peach*** **Appeal case**, A.G. Stuart, has drawn attention to inconsistencies. "There is ample precedent in New Zealand and elsewhere for adoption orders to be made in circumstances where the applicant's motive is to circumvent immigration requirements. The most glaring examples are those relating to children of near adult age. Disregarding the question of whether the welfare of the children is the paramount consideration or the only consideration in all these cases, orders were ultimately made because the Courts determined that the welfare of the children demanded it. In so doing the Courts rationalised away or disregarded the obvious reason for the applications— the need to circumvent immigration requirements for the child to remain in the country." In the *Peach* case it appears to be conceded, "that the welfare of the children would be promoted by them remaining in New Zealand and that in practical terms the making of adoption orders would not detrimentally affect the childrens' welfare." However, both Courts chose to rationalise away or disregard these aspects in favour of upholding the immigration code.

"There is a curious inconsistency here— what is the correct test? Some Courts and Judges are prepared to turn a blind eye to the true reason for an application and strain to find welfare aspects of the application which would justify the making of the order sought...in these cases adoption procedure is no more than a device. Other Courts, set aside or overlook clear welfare aspects because they believe the adoption procedure has been used only as a device which is treated as a disqualification." The effect is undignified inconsistency. In the final analysis adoption procedure is but a device to promote the welfare of children. It is based on the creation of a legal fiction and it was necessary to create this legal fiction of parenthood in an age where parents' rights vis-a-vis their children were fare less circumscribed than today.

Another inconsistency arises from the mystique— "associated with adoption of the importance of maintaining legal ties with natural parents. Inconsistent applications of this principle abound in decisions dealing with applications to dispense with a parent's consent and it is significant that is in decisions dealing with this area that the notion of the paramountcy of the welfare question is most often applied. There is certainly no statutory basis and I can see no justification in principle for the importance some Courts sometimes attach to the preservation of *legal* ties of parenthood...Justice Barker in *Re H* (Unreported) put the responsibility for immigration law where it correctly lies, with Parliament." Case comment *Adoption and Immigration Aspects Counsel's comment.* (1986) 12NZRL 421-422

Balancing interests of the child v public policy

1982 Justice Hollings "If the Court considers on the evidence and information before it that the true motive of the application is based on a desire to achieve nationality and the right of abode rather than the general welfare of the minor then an adoption order should not be made. If on the other hand part of the motive or it may be at least as much, is to achieve real emotional or psychological social and legal benefit of adoption, then [an] adoption order may be proper notwithstanding that this has the effect of overriding an immigration decision or even an immigration rule. In every case it is a matter of balancing welfare against public policies.." *Re H (a minor)* [1982] All ER 84 at 95.

1984 Judge Mahony DCJ "Where an application is made to adopt a child not domiciled in New Zealand the Court must be satisfied that the child's welfare will be promoted by being a member of a family in New Zealand rather than the advantages that merely flow from residing in New Zealand. An application for adoption involves the creation of a parent/child relationship and is not a substitute for an entry permit into this country." Auckland DC. *Re an Adoption by L and L.* 1FRNZ 144 cited with approval 1986 Sinclair J. Auckland HC. *L and L v P.* (1986) 4NZFLR 78

Public policy principles

1991 Judge Kendall DCJ "In relation to adoption there are **three policy principles** to be considered. "*Firstly,* should an adoption order be made if there are other meth-

ods available to the Court to give the child a secure and settled family situation? *Secondly,* in relation to adoption by relatives, because adoption extinguishes existing legal family relationships on one side and distorted relationships on the other side, then adoption should not be considered desirable unless the benefits secured by adoption cannot be met by other means. *Thirdly,* if adoption is purely for immigration purposes the adoption should be refused." Auckland DC. *Application by Webster.* [1991] NZFLR 537 // *Re Adoption A1-2/90* 7FRNZ 569

Economic consideration re adoption

1991 Judge Robinson DCJ "Considerations of the economic advantages of the adoption are often behind applications for adoption orders. Indeed there is provision in the affidavit to be completed by the applicants for details of their economic circumstances. In many cases consents given by solo mothers are motivated by economic circumstances and the belief that the applicants are able to provide a better home for the child than the natural mother." Auckland. *Re Adoption by Patel.* [1992] NZFLR 512 at 515

Intercountry adoption from Thailand granted

1998 Mill J Wellington FC ***Re NB*** [1998] NZFLR 481-488 // *Re Adoption of NP* 16FRNZ 612-620. 16,20 March 1998

A No.085/14/97 Application to adopt a child born in Thailand but had lived in New Zealand for four years by her older sister and her husband.

Adoption - Application to adopt child born in Thailand - Applicant the older sister of the child - Children and Young Persons Service of the view that child did not meet the inter-country adoption policy - Welfare and interests of the child would be promoted by adoption - Whether reasons for not meeting inter-country adoption policy valid - Whether to make interim or final order - Adoption Act 1955, s 11.

The child was born in Thailand and was now aged 16. She had been living with the applicants, her older sister and brother-in-law in New Zealand since 1994. Her parents had separated. Her father had deserted her mother and ceased all financial support. Her mother suffered from ill-health and was unable to care for her. The child had formed a close emotional bond with her sister whom she looked upon as her mother. Both parents had consented to the adoption. A report prepared by the Children and Young Persons Service approved the applicants as adoptive parents but did not consider that the child met the criteria for the Adoption Service's inter-country adoption policy as both her parents and some of her siblings were living in Thailand. It therefore felt it was unable to support the adoption. at 481

Held (making a final adoption order)

(1) The Court was satisfied in terms of s11 (b) of the Adoption Act 1955 that the welfare and interests of the child would be promoted by the adoption and that her wishes for adoption would be given due consideration.

(2) As the only reasons advanced for saying that the inter-country adoption policy had not been met was because the child's parents and some of her siblings were living in Thailand and given that the actual support that those people could give was minimal, it was by no means clear that the policy had not been fulfilled.

(3) Given that the child had a secure and loving relationship with the applicants which had subsisted over a period of time, a final adoption order would be made. at 481

[[**Held** *Re Adoption of NP* granting a final adoption order: (1) The starting point in a case such as this was whether the Court was satisfied that the child's welfare would be promoted by being a member of a New Zealand family, rather than by simply residing in New Zealand. (p 617 line 39) *Re an Adoption by L and L* (1984) 1FRNZ 144 followed.

(2) The Court must be vigilant to ensure that the adoption is not for some ulterior purpose and that adoption processes were used to confirm the existence of a genuine parent-child relationship. (p 618, line 3) *Re H (a minor)* [1982] 3 All ER 84 followed

(3) Cases such as these must be decided on their own special facts. It is not always useful to compare the facts of other cases. (p 618, line 17)

(4) It could be strongly argued that NP did have a need for home and family life which could not be met by her biological family in her own country. All other aspects of CYPS intercountry adoption policy were fulfilled, and it was difficult to see why that particular part of the policy referred to had not also been fulfilled. (p 619, line 39)

(5) There was overwhelming evidence in favour of -granting the adoption. In particular, in terms of s 11(b) Adoption Act 1955, it would promote NP's welfare and interests, and give due consideration to her wishes. NP had formed a strong emotional bond with her sister and her husband and looked on them as her parents. Adoption would ensure continuation of the love and security found within her present home, without distorting existing family relationships. It would enhance her educational opportunities and future life, as well as allowing her to maintain contact with all of her family. (p 619, line 13)
Re Adoption of NP 16FRNZ at 612-613]]

The decision....I am somewhat surprised by the strong stance taken by the Children and Young Persons Service in respect of this particular application. The Court report concludes by saying that the inter-country adoption policy for New Zealand is quite clear and this application does not meet this criteria. The only reason that has been advanced in support of that statement is that both N's parents and some of her siblings were living in Thailand. The evidence available to the Service and to this Court shows however that the actual support that those people could give is minimal. Accordingly as Mr Maude submitted it is by no means clear that the policy that the Service has not been fulfilled. It can be strongly argued that the child does have a need for home and family life which cannot be met by her biological family in her own country. All the other aspects of the policy are fulfilled and on the evidence available to the Service and to this Court it is difficult to see why that particular part of the policy

referred to has not also been fulfilled. at 488
Re NB [1998] NZFLR 481-488. Same case as *Re Adoption of NP* 16FRNZ 612-620

Intercountry adoption from Sri Lanka declined

1999 Frater J Porirua FC *Adoption by K.* [1999] NZFLR 289-299 // *RE K [adoption]* 18FRNZ 142-151 Application to adopt a nineteen-year-old Sri Lankan by his maternal uncle. 6,7 January 1999 Ad No 9/98

Adoption - Inter-country adoption - Immigration factors - Application to adopt nineteen-year-old Sri Lankan by his maternal uncle - Applicant had previously adopted two sisters of the youth - Immigration to New Zealand a major factor behind the adoption - Change in applicant circumstances since then - Whether adoption in best interests of the child - Adoption Act 1955, ss 7, 11.

The applicant, who had emigrated from Sri Lanka in 1989, applied to adopt his nineteen-year-old nephew (P) who was living in Sri Lanka. He and his former wife had previously adopted two sisters of P in 1996. The applicant and his wife had since separated.

The applicant's motivation for seeking to adopt P was to provide him with greater opportunities than were available to him in Sri Lanka, to have a family life and to gain an education and employment. P had dropped out of school in Sri Lanka and had been unemployed for several years. Concern was also expressed about conflict between P's parents and his unhappiness because of bad treatment by his parents. P was a Hindu like his father whereas his siblings had been raised as Christians. P's only chance of coming to live in New Zealand was if the applicant was able to adopt him.

The applicant was shown to be a fit and proper person to adopt P. However he worked long hours and his financial circumstances were strained.

The Children Young Persons & Their Families Service did not support the application as P did not meet its criteria for inter-country adoption and that adoption would not be in his best interests. It was also noted that P had lived all his life with his parents and brother and sister and the view expressed that he did not need a home in New Zealand.

The applicant uncle applied to adopt his nephew. The applicant and his wife had previously adopted the nephew's two sisters. The nephew was born and lives in Sri Lanka and is almost 20 years old.

[[The application was filed in August 1998. The matter was not ready to proceed on the allocated November date, so it was adjourned by consent to January 1999. The applicant and his wife have since separated but the two sisters continue to live with, avid be supported by, the applicant. The Children, Young Persons and Their Families Service opposed the application on the following grounds:

(1) The applicant's wife did not support the application and does not live in the family home.
(2) There were religious differences between the nephew and his sisters. (3) The applicant's household had reduced earning capacity.
(4) The schooling needs of the nephew would be greater than his sisters' needs were.
(5) This application related to a single parent already supporting two children. 18FRNZ at 142]]

Held (declining the application)
(1) Adoption was not in P's best interests. The evidence did not support the degree of concern expressed about P's life in Sri Lanka. While the situation for P with his family of origin was not ideal, in that he was affected by the disharmony between his parents and his father's excessive drinking, there was no evidence that he was not loved by his parents and siblings or that his emotional and material needs could not be met in Sri Lanka. It was doubtful that P's prospects without qualifications would be markedly better in New Zealand especially with the added burden of language difficulties and religious differences. Further, in view of P's age and his limited prior contact with the applicant, it was unrealistic to believe that the applicant would be able to step into a fatherly role for P.

(2) Whilst immigration was a factor underlying this application and to be considered, other relevant considerations included the religious and financial issues referred to and the nature of P's home life and family relationships in Sri Lanka compared with the life available to him in New Zealand. at 289-290

[[Held, dismissing the application:
(1) The nephew enjoys a reasonable standard of living in Sri Lanka. Both his parents love and care for him. (p149, line 22)
(2) He has not exerted himself at school in Sri Lanka and shows no sign of gaining a qualification. In New Zealand he would have the added burden of language difficulties and religious differences. (p150, line 8; p150, line 25)
(3) A father-son relationship is unlikely to develop between the applicant and his nephew. The family in Sri Lanka do not appear to accept that adoption severs family ties and continue to refer to their family as consisting of five children. (p 150, line 34) 18FRNZ at 142]]

Adoption by K. [1999] NZFLR 289-299 Same case as *RE K [adoption]* 18FRNZ 142-151

Intercountry adoption from Tonga adjourned

1999 Mather J Otahuhu FC *Adoption application by T* [1999] NZFLR 300-311 *// RE T [adoption]* 19FRNZ 7-17 15/12/1998. 19/1/1999. A.O48/44/97 Application to adopt a nineteen-year-old Tongan by his maternal uncle and aunt.

Adoption -Inter-country adoption - Related immigration considerations - Application by maternal uncle and his wife to adopt a nineteen-year-old Tongan - Likelihood that child would have to return to Tonga if adoption order not granted - Whether child's interests and welfare promoted by adoption - Adoption Act 1955, s 11; Guardianship Act 1968.

The child (5), a Tongan, aged nineteen, had been living with the applicants, his maternal uncle and his wife, since June 1997. Previously he had lived with his mother, father and three siblings in Tonga.

The applicants both had severe physical disabilities and were unable to work. Despite this, their financial circumstances were satisfactory. They were considered fit and proper people to adopt S.

S had settled well in New Zealand and was making gains in work skills and the English language. He had developed a relationship with the applicants and had a strong desire to remain in New Zealand. His wish to be adopted by the applicants appeared to be motivated largely by his desire to remain in New Zealand. There was a clear implication that if an adoption order was not made, his visitor's permit would not be renewed and he would be required to return to Tonga.

A report prepared by a Court appointed psychologist had concluded that S's welfare would be promoted if he were able to stay in New Zealand. However the report also noted that a formal adoption whereby the legal ties between S and natural parents were severed was contrary to Tongan culture.

Held (adjourning the application to enable the judgment to be considered by the Immigration Service)

(1) In this case the appointment of the applicants as additional guardians would meet most if not all of the objectives of all involved. It would recognise the continuing relationship between S and his parents and siblings, and wider family, and would be consistent with Tongan cultural practice. It would also recognise the significance of the applicants for S as his de facto parents in New Zealand. S's determination to build a close loving relationship with the applicants would be promoted by such an arrangement. On the other hand, the severing of the legal ties between S and his birth parents and replacing it with a new legal relationship was to a significant degree at odds with Tongan practice and family perception. For those reasons the Court intended to adjourn the application to enable a copy of the judgment to be considered by the Immigration Service with a view to their accepting S as a permanent resident pursuant to a guardianship order under the Guardianship Act 1968, or on some other legal basis short of adoption.

(2) It was impossible in this case to separate the considerations as to whether the intention of the adoption application was purely to secure S's continuing residence in New Zealand, or to create a new parent/child relationship between him and the applicants. at 300-301

[[Held, adjourning the application and requesting the Immigration Service to consider granting permanent residence under a guardianship order:

(1) A consideration of the welfare and interests of a child involves an inquiry going beyond that child's preferences, however strongly and sincerely articulated, and also beyond day-to-day considerations. (p 13, line 24)

(2) It is necessary to ask whether the intention behind an adoption application is purely to continue a child or young person's continuing residence in New Zealand or to create a new parent-child relationship between the child and the adopting parents. Adoption purely for immigration purposes should be refused. Adoption by relatives should not be considered desirable unless the benefits secured by adoption cannot be met by other means. (p15, line 16) *Re Adoption A 1-2190* (1991) 7 FRNZ 569, also reported as *Application by Webster* [19911 NZFLR 537 followed

(3) The appointment of the applicants as additional guardians under the Guardianship Act 1968 would meet nearly all the objectives involved in a case such as this. (p15, line 44) 18FRNZ 7]]

Tongan adoption culture

Ms Mafi gave context to the significance in Tongan culture of an adoption or realignment of family relationships of the kind proposed. Generally Tongan adoptions are less formal than in New Zealand, and it is less common for them to start when the child is an adolescent. There is a tradition of children travelling from outlying districts or islands to larger centres in Tonga where day-to-day care is provided by extended family. Despite such informal adoptions the children never lose their rights or entitlements or obligations in respect of their birth families. The arrangements are voluntary and do not imply a breakdown in the formal legal relationships between children and their parents. This understanding of traditional family relationships was shared by Mr T, with Mrs T having a more conventional parent/child view of the relationship following adoption. In that regard Mrs T even spoke about the prospect of becoming a grandparent if and when S had children.

In some ways, according to Ms Mafi, this adoption Was consistent with Tongan practice in that it was common for children to live with extended family members. Where it departed from Tongan adoption was in the age of the child. In Tongan culture adoption and fostering were seen as more of a continuum than in New Zealand. In Tongan culture birth parents are never replaced, despite a child becoming part of another family for various practical reasons and for various periods, which was relatively common. at 304

Ms Mafi also provided interesting insights in relation to the relevance of blood relationships. In Tonga blood relationship (consanguinity) is more important than in many other places. The rights of other non-family members, which would include Mrs T if she were the adopting mother, are never as important as those of blood relatives for the purposes of ceremony and family obligations. at305 *Adoption application by T* [1999] NZFLR 300-311 Same case as *RE T [adoption]* 19FRNZ 7-17

Intercountry Stepparent adoption Niue- Granted 1999 MacCormick J North Shore FC. *RF- ADOPTION APPLICATIONS 23/99 & 24/99*. 9 November; 8 December 1999

Adoption - Application by relative (birth parent and stepparent) - open adoption - Decision to adopt could affect land rights in Niue through birth father - Weight of wishes of children as factor - Adoption Act 1955, s11.

Mr and Mrs P sought to adopt Mrs P's children, C and J. C was nearly 13 years old and J was 11years 6 months. Both had maintained limited contact with their birth father, A, and his family. Mr and Mrs P also had a 5-year-old child, T, and Mr P had a 6-year-old child, J, with whom

he maintained some contact. Mr and Mrs P stated that they had delayed raising the adoption issue until the children were of an age where they would have a reasonable understanding of it, and that they intended to maintain the same links with A's family as had existed in the past. C and 3 wished the adoption applications to proceed as their bond with A was not strong and they felt he had shown minimal interest in them. A's family also supported the adoption.

Because Mrs P was of Samoan descent and Mr P of Fijian descent, while A's family were Niuean, the Judge appointed counsel to the Court to consider the appropriateness of adoption, as apposed to additional guardianship for Mr P. Counsel for the Court considered that a guardianship order would be more appropriate, given the possible loss to C and J of any Niuean land inheritance rights and the "draconian" legal effects of adoption in severing C and J's relationship with any of A's other children. She queried the weight which should be given to their wishes, in terms of their understanding of the effects of an adoption.

Held, making interim adoption orders for C and J:
(1) The children's wishes were critically important in this case. The statute specifically requires the Court to give due consideration to the children's wishes given their age and understanding. (p645, line 2)

(2) While the emotional value and importance of possible land inheritance could not be denied it may be sufficient in this case for the children to know what part of Niue their ancestors came from. The "draconian" effects of an adoption at law could be mitigated by the more open style of adoption now generally accepted and which Mr and Mrs P intended to sustain. (p644, line 36)

(3) The extent to which the children had contact with any other of A's children was likely to depend more on A's family than on Mr and Mrs P. (p 645, line 18) at 641

Cultural issues: It is the first of Ms Patel's reservations that gives me greatest concern, namely the possible loss of any Niuean land inheritance rights. At the same time Niue is a relatively small island nation with a total land area of only 259 km . Much of the land is unproductive. Far more people of Niuean ethnicity live in New Zealand than continue to live on Niue. The island does not seem able to support a much greater population than its current resident population. Small can, however, be beautiful and in this case it is, speaking of the island as a whole. Yet while I do not decry the emotional value and importance of possible land inheritance it may possibly be sufficient for the children to know what part of the island their ancestors came from, just as it suffices for those of say Irish or Scots or other heritage to know where their ancestors came from and to have a reasonable knowledge of their traditions and cultural history. The "draconian" effects of an adoption at law can be mitigated by the more open style of adoption that is now generally accepted as desirable and which Mr and Mrs P intend to sustain. at 644 18FRNZ 641-646

Intercountry adoption "T No2" Tonga 19 yr old-granted

2000 Mather J Otahuhu Adoption FC *Application by T (No 2)* This was a successful application for an adoption order under s 5 of the Adoption Act 1955. 28 February, 2 March 2000 (A 048/44/97)

Adoption - Application by aunt and uncle - Young person aged 20 - Previous application for permanent residence under the Family Category adjourned until immigration report - Need to balance the welfare of the young person and issues of public policy - Adoption Act 1955, s 5; Immigration Act 1987; Guardianship Act 1968, ss 1IB, 24.

S has lived in New Zealand with his aunt and uncle for the past two and half years. This is an appeal from a previous application which was adjourned so that the question of permanent residence could be resolved before the adoption bearing. New Zealand Immigration Service (NZIS) declined S's application for permanent residence as S's parents lived permanently in Tonga, rather than New Zealand, and S's caregivers in New Zealand were not his adopted parents. As well, there was no satisfactory evidence that S was financially reliable nor were all the questions in his medical certificate completed. The appeal against the NZIS decision was also declined as there were no special circumstances that would allow for an exception to government policy. Furthermore, the Residence Appeal Authority (RAA) noted that the young person was almost 20 years of age and could not have developed a child/parent relationship with the prospective adoptive parents because of the shortness of time. The psychologist did not see the loss of the relationship between the appellant and the applicant as a significant factor. The RAA concluded that the appellant's circumstances could not be described as special. at 481

Held (approving the application)
(1) The Court must consider whether a relationship akin to a parent/child relationship had developed, or was developing. Although the concern held by NZIS that the obtaining of the temporary permit in these circumstances might be a thinly veiled pretext for adoption in circumstances where the intended resident did not qualify for permanent residence under the normal statutory criteria was a public policy consideration to which the Court should have some regard, the Court must, above all, follow the provisions of the Adoption Act.

(2) This adoption application will promote the young person's welfare and interests. The financial position of the, adoptive parents was satisfactory and there was sufficient evidence that S's confidence levels and English ability had improved during his time in New Zealand. As well, although S's natural parents were not unable to provide for him, the Family Assessment report concluded that S would have a better future in New Zealand. at 481-482

Appeal to NZ Immigration Service- Dismissed

Judge D Mather [2000] NZFLR at 482
"The background to this application for an adoption order was set out fully in the interim judgment of the Court

dated 19 January 1999, reported as *Adoption application by T* [1999] NZFLR 300. The application was adjourned at that time to enable the matter to be considered by the New Zealand Immigration Service (NZIS). That has now taken place and, for reasons which will shortly become apparent, the application for an adoption order has been pursued with some urgency. at 482

In a further Judgment on 4 June 1999 the Court noted in some detail the immigration background. The clear alternative to adoption if S were to remain in New Zealand is an additional guardianship order in favour of the applicants and a grant of residence by NZIS. To facilitate the full consideration of that option the Court, by order dated 15 June 1999, appointed the applicants additional guardians of S under the Guardianship Act 1968. at 482

The applicants applied to NZIS for permanent residence under the Family Category on the basis of the guardianship order referred to above. The application was declined by letter dated 18 November 1999, which stated as follows (the application was made in the name of S):

We are writing with regard to your application for residence which was accepted for consideration on 29 July 1999 and in response to your agent's request of 20 October 1999 that we finalise this application on the basis of the information to hand.

We regret to advise that your application for residence in New Zealand under the Family (dependent child) category is not able to be approved. at 482

Principal applicants meet dependent child policy if.

(A) they are:
• aged 17 to 19, with no children of their own, and
• single. That is, they are not legally married or living in a de facto relationship that is in the nature of a marriage, and
• totally or substantially reliant on an adult (whether their parent or not) for financial support, whether they live with them or not, and their parent(s) are lawfully and permanently in New Zealand. 'Lawfully and permanently' in a country means:
(a) (i) they are citizens of that country, or have the right of, or permission to take up, permanent residence in that country, and (ii) actually residing in that country; or
(b) living in a refugee camp in that country with little chance of repatriation.

(B) Principal applicants under dependent child policy must also:
(1) have been born to, or adopted by, their parent(s) before their parent(s) lodged their own residence application and have been declared as dependent children on their parent(s) application; or
(2) have been born to their parent(s) after they lodged their own application for residence, or
(3) have been adopted by their parent(s) after their parent(s) made their own application for residence, by a New Zealand adoption order made under the Adoption Act 1955, or an overseas adoption order which, under section 17 of the Adoption Act 1955, has the same effect as a New Zealand adoption order.

(C) Principal applicants must also meet the health and character requirements. at 483

With regard to our letter dated 01 October 1999. We have not been able to approve your application as your parents live permanently and lawfully in Tonga and are therefore not able to sponsor you. We also note that there is no policy for children to apply on their own merits without reference to the parent(s) to whom they are born or adopted by.

You have lodged your residence application with the sponsorship papers completed by ST who is neither your natural parent nor your adopted parent and therefore does not meet the requirements as specified above in section B.

With reference to the last paragraph on page 13 of the judgment of Judge D G Mather in the Otahuhu Family Court concerning your adoption by Mr and Mrs ST. There is no reference to guardianship as a basis for approving residence under the dependent child category. As stated in section B above, the policy refers only to the parent(s) to whom a child is born or adopted by. at 483

In addition, you have not supplied satisfactory documentary evidence that you are financially reliant in accordance with policy and we have been unable to give you medical clearance. The question in your medical certificate which asks if you have any sign of eye disease or strabismus has not been answered.

As you do not meet the minimum policy requirements under the Family Category, we have been unable to approve your application.

Your application has also been carefully considered under all of the other residence categories. On the basis of the information given in your application, however, you do not meet the requirements for any of them. Your application for residence in New Zealand is therefore, regretfully, declined.

We appreciate that this decision will come as a disappointment to you, but in terms of the guidelines set by the New Zealand Government for residence, it could not be otherwise. at 483

As indicated the application did not fall within the Family Category. The letter goes on to indicate that the application would have been refused under all other residence categories. at 484

Against that decision an appeal was filed with the Residence Appeal Authority on 10 December 1999. The decision of the Authority was given on 16 February 2000. The ground for the appeal was that the applicant's special circumstances were such that an exception to Government residence policy should be considered.

In its decision the Authority confirmed the view of NZIS that the application fell outside the Family Category for residence. It was noted that NZIS must determine an application in accordance with Government residence policy as determined by the Government from time to time. That policy makes no reference to guardianship as the basis for approving residence, and the Authority held that NZIS correctly declined the application. at 484

It then went on to consider whether there were special circumstances such that an exception to Government residence policy should be considered. Pursuant to the Immigration Act 1987 the Authority has the power to make a recommendation that special circumstances exist which warrant consideration by the Minister of Immigration as an exception to policy.

In respect of the existence of special circumstances the material before the Authority comprised the same material before this Court. The Authority said, in the course of its judgment: at 484

The Authority has taken careful note of the comments in Judge Mather's decision as to the evidence that the psychologist gave before that Court as to Tongan culture, in that it was common for children to live with extended family members. The Au-

thority accepts that custom plays an important role in consideration of circumstances in this context, but equally, it is important to ensure that in any particular case the circumstances can be described as special. The difficulty that this Authority has is that in this particular proposed family arrangement, the appellant who is almost 20 years of age, will from that date cease to need a legal guardian and as well, may not have developed, because of the shortness of time that he has been with Mr and Mrs ST a child/parent relationship. That particular aspect was developing but was too soon to be conclusive as indicated in the judgment of Judge Mather.

Equally, the psychologist did not see a loss of relationship between the appellant and Mr and Mrs ST as being a significant factor in the circumstances. As noted the appellant would have extended family available to him in both Tonga and New Zealand if he were to return to Tonga.

The Authority considers that because of the age of the appellant in seeking to develop a child or parent relationship with Mr and Mrs ST it must be viewed as a negative factor in the total circumstances of this appeal. As Judge Mather said in his judgment the age difference between Mrs ST and the appellant, at 13 years, creates an unusual situation. Against that, there is clearly strong motivation for the appellant to continue to live with his uncle and his wife, and for the appellant to develop his own work skills in New Zealand.

When considered cumulatively the Authority does not consider that the appellant's circumstances can properly be described as special. Accordingly the appeal is dismissed. at 484

Accordingly the appeal was dismissed and the Authority indicated that it did not consider that special circumstances existed which would warrant a recommendation to the Minister of Immigration for consideration as an exception to Residence Policy.

As a consequence the applicants for the adoption order returned to this Court nine days before S attained the age of 20. No further evidence as such has been adduced. I was however provided with updated information from both counsel for the applicants and counsel to assist the Court. This was unchallenged and in the circumstances I consider it appropriate to receive that further information and to adopt it for the purposes of this judgement, in reliance upon the ability of the Court to receive as evidence any statement, document, information, or matter that may in its opinion assist it to deal effectually with the app: (Section 24 of the Adoption Act 1955.) at 485

[2000] Application by T (No2) 481-487

Intercountry Adoption Philippines - Granted 2000 Mather J Otahuhu DC *Application to adopt C 22 December 1999; 15 May 2000* An application to adopt the children of the female applicant by an earlier relationship. The children were living in the Philippines and had never been to New Zealand but the applicants were New Zealand citizens. *ANo 048/63/64/99 ,*

Adoption - Inter-country adoption - Application by New Zealander and his wife to adopt the natural children of the wife - Wife a former Philippines resident - Children lived in the Philippines and had never been to New Zealand - Effect of adoption orders made in the Philippines - Application of Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption - Procedures when New Zealanders adopting children from overseas - Whether adoption in best interests of the children - Adoption Act 1955, ss]], 12, 16, 17,. Adoption (Intercountry) Act 1997, ss 4, 25.

The applicants sought to adopt Mrs C's two children by an earlier relationship, aged 19 and 16 when the applications were filed. The two children were the birth children of Mrs C and a former partner to whom she was not married. Mrs C was a Filipino citizen. Mr and Mrs C married in 1987. The children lived for a time in the care of their grandparents in the Philippines and then later with the applicants in the Philippines. Between 1992 and 1999 the applicants moved between New Zealand and the Philippines. The children had never been to New Zealand.

In 1998 the applicants successfully applied to the Courts in the Philippines to adopt the children but further attempts in New Zealand to obtain visas for the two children following the adoption orders in the Philippines were unsuccessful. The applicants were advised by the Adoption Unit to apply for adoption orders in New Zealand to enable the children to come to New Zealand and to obtain citizenship here. The social worker supported the making of final adoption orders.

As the adoption orders in the Philippines took place before the Convention on Protection of Children and Co-operation in respect of Inter-Country Adoption came into force as between New Zealand and the Philippines, s 17 of the Adoption Act 1955 still applied to the Philippines Court adoption orders.

Held (making final adoption orders)
(1) The judgment in the Philippines Court did not expressly address the issue of property rights of the adopted persons arising upon the intestate deaths of their natural parents. While it may be that the rights of the applicants, as adoptive parents, to the property of the children was at least equal under Philippine law to that of the natural parents, the Court was not prepared to make that assumption. Accordingly s 17(1) of the Adoption Act 1955 did not apply to adoption orders made in the Philippines so that those orders were to have effect in New Zealand as if validly made under the 1955 Act.

(2) There were two parallel systems in place whereby New Zealanders could adopt children from overseas:

(a) Where the Hague Convention did not apply, by private arrangement and by application under the Adoption Act 1955,

(b) Where the Hague Convention did apply, in accordance with the procedures set out in the Adoption (Intercountry) Act 1997 through the New Zealand Central Authority. -Where adoption orders have been made in Convention countries but prior to the 1997 Act coming into force, applications would continue to be dealt with under the 1955 Act.

(3) Applying the criteria relevant to all other adoption applications brought under the 1955 Act, there was no doubt that the orders sought would promote the interests and welfare of the children. It was also relevant that the children would acquire New Zealand citizenship as a result of the adoption orders which would be of advantage to them. at 685-686

Two parallel systems of Intercountry Adoption

It is apparent that there are now two parallel systems in place whereby New Zealanders can adopt children from overseas: at 692

(a) Where the Hague Convention does not apply, by private arrangement and by application under the Adoption Act 1955.,

(b) Where The Hague Convention does apply, in accordance with the procedures set out in the Adoption (Intercountry) Act 1997 through the New Zealand Central Authority. *See Trapski's Family Law* Volume V sec L.6.

For some time there may be situations such as have arisen in this case where adoption orders have been made in Convention countries but prior to the 1997 Act coming into force. They will have to continue to be dealt with under the 1955 Act.

The provisions of s 17(2) of the 1955 Act do not sit comfortably with ss11 and 12 of the 1997 [Intercountry] Act. Section 17(2) would be easier to apply if it required overseas adoption orders to have the effect of terminating pre-existing legal parent-child relationships, as required under ss 11 and 12 of the 1997 Act.

Applying the legal provisions referred to the above, the adoption applications filed in this Court required consideration of the same criteria as apply to all other adoptions brought under the 1955 Act. On the basis of the background facts set out I had no difficulty in concluding that the orders sought would promote the welfare and interests of the children. No independent attempt was made in the context of these proceedings to ascertain the wishes of the two children. However both provided affidavits of consent to the adoption applications in the Philippines when they were aged 17 and 14 years respectively, asserting their belief that the adoption orders sought would be to their benefit. A home and children's study report on the applicants and two children was commissioned by the Philippines Court and available to that Court and clearly indicated the consent of the children to the proposed adoptions at that time. There is no reason to believe that the situation has in any way changed since then.

A further relevant consideration is citizenship.

By virtue of the provisions of the Citizenship Act 1977, as amended by the Citizenship Amendment Act 1992, New Zealand citizenship is not automatically acquired by children adopted overseas unless the overseas orders were made before 18 November 1992 or the children were below the age of 14 years when the overseas orders were made. Accordingly these two children will not automatically acquire New Zealand citizenship as a result of the orders of the Philippines Court, whereas children adopted in New Zealand under the 1955 Act are deemed to be New Zealand citizens. Given that the applicants intend to settle permanently in New Zealand, and both are New Zealand citizens, there are obvious advantages to the two children if they also have New Zealand citizenship, and acquire that as of right rather than by having to make further application. at 693

Application to adopt C [2000] NZFLR 685-693

Intercountry adoption from Tonga declined

2000 MacCormick J Auckland FC *Adoption application by V.* [2001] NZFLR 241-250 // *RE F (adoption)* 20FRNZ 10-18 Date 20/10/2000 An application for an inter-country adoption of a child aged 19 yeas of age.

Adoption - Inter-country adoption - Immigration factors - Mother had died - Father still alive in Tonga - Nineteen-year-old sister adopted the day before she turned 20 - Maternal aunt and uncle applied to adopt 19-year-old child five weeks before 20th birthday - Whether an adoption order should be made for the child - Jurisdiction in immigration matters - Adoption Act 1955, ss 10, 16,. Acts Interpretation Act 1924, s 5.

The applicants were the maternal aunt and uncle of the child, who was 19 years old and one of ten brothers and sisters born in Tonga. He would turn 20 within five weeks of the hearing. After he was born, he had lived with the applicants in his maternal grandparents' home. The applicant aunt had been responsible for the upbringing of both the child and her own children. She was the most significant adult in his life, and he called her "Mum". The applicants had a son the same age as the child, and the two boys were brought up as virtual twins until the age of nine, when the applicants moved to New Zealand. The child could not move with them due to immigration reasons. He returned to the care of his birth parents.

The child's mother died in 1994. His father could not afford to support all his children, and in 1999 two of his daughters were adopted by relatives. The adoption order was made the day before one of the daughters turned 20. The younger daughter was five at the time, and looked upon her elder sister as a substitute mother. The social worker recommended that the girls be kept together.

Both before and after the child's mother's death, the applicants kept in touch with him. He had begun to get into trouble, but after being reunited with the applicants and re-establishing his relationship with their son, he was progressing well. The child wished to stay in New Zealand with the applicants in order to further his education and obtain employment that would enable him to provide supplementary financial support to his family in Tonga. The issue was whether or not the Court should make an adoption order. at 241

Held (declining to make the order for adoption)
(1) The provisions of the Adoption Act 1955 were fully met to enable the making of the adoption order. The applicants were entitled to apply, the child was under 20, the birth father's consent had been properly obtained, the applicants are fit and proper persons to adopt, and an adoption would promote the welfare and interests of the child.

(2) The application would not have been made if it were not needed to determine or to assist with immigration issues. The child did not need substitute parents for the remaining five weeks of his minority, and the applicants would continue to be there for him whether or not the adoption order was made.

(3) The Family Court did not have jurisdiction to determine immigration issues. That jurisdiction was vested in

others who had established, in accordance with Government policy, their own guidelines for determining immigration issues. The integrity of the Court was best preserved by declining to make adoption orders where it was perceived that the application would not have been made if it were not for the immigration factors.

(4) (Obiter) The prime purpose of the Adoption Act 1955 is to provide substitute parents when the birth parents are unable or unwilling to fulfil or to continue to fulfil that role. The substitution of the new parents for the birth parents must be considered to promote the welfare and best interests of the child.

(5) (Obiter) The granting of the adoption application for the child's 19-year-old sister was made primarily for the benefit of the youngest sister of the family and was recommended by the social worker. at 241-242

Adoption v immigration issue

To summarise the position, as I see it, however:

(1) 5 does not need substitute parents. The applicants will continue to be there for him whether or not an adoption order is made.

(2) 1 am satisfied that the application would not be being made if it was not needed to determine or to assist with immigration issues.

(3) This Court is not given jurisdiction to determine immigration issues. That jurisdiction is vested in others who have established, in accordance with Government policy, their own guidelines for determining those issues. It is not clear whether those exercising that jurisdiction in fact approve or condone what amounts to a relatively limited back door-type of entry via the Adoption Act i.e. where the conditions of that Act are in fact met, an order is in fact made, but an application for permanent residence would not otherwise be granted because the immigration requirements are not in fact met.

(4) It is my view that the integrity of the Court is best preserved by declining to make adoption orders where it perceives the application would not in fact have been made if it were not for the immigration factors.

(5) If New Zealand immigration law is not currently humane enough or liberal enough to provide for the perceived welfare and needs of a young person in S's position - to permit his prime source of family support to continue to be given in a meaningful way- then that is a policy matter for departmental, ministerial and ultimately government consideration.

In all the circumstances I consider I must decline the application and it is declined accordingly. I make the following supplementary comments.

(1) In arriving at this decision I have also had regard to what 1 perceive to be the prime purpose of the Adoption Act 1955, when its terminology and provisions are read as a whole. It is to provide substitute parents (termed "adoptive parents") when the birth parents are unable or unwilling to fulfil or continue to fulfil that role. In order to assist that process the birth parents are denied ongoing future rights in respect of the child and those rights are conferred on the adoptive parents instead. The substitution of the new parents for the birth parents must be considered to promote the welfare and best interests of the child, the child's own wishes being brought into account having regard to his or her age and understanding.

The Acts Interpretation Act 1924 stated in s 50): Every Act and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

The Acts Interpretation Act 1924 has now been repealed and replaced with effect from 1 November 1999 by the Interpretation Act 1999. Section 5 provides: 5. Ascertaining meaning of legislation - (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose. (2) The matters that may he considered in ascertaining the meaning of an enactment include the indications provided in the enactment. (3) Examples of those indications are preambles, the analysis, a table of contents, headings to parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

If 1 am subsequently held to have taken too narrow an approach, then at a personal level I would be delighted for that to be the end result. The dictates of the heart, however, must not override what one considers to be the correct approach when the wider public issues are brought into account. The integrity of the immigration process is at stake as much as the integrity of this Court.

(2) 1 accept that this decision may seem at odds with those of some of my colleagues. Although the ultimate aim is consistency some measure of difference of opinion is to be expected at times, particularly with issues which are as personally difficult as these. Difference at least promotes debate and debate hopefully leads to ultimately better outcomes. at 249-250

Adoption application by V [2001] NZFLR 241-250 // Same case as above *RE F (adoption)* 20FRNZ 10-18

Intercountry adoption- Thailand - declined

2001 Clarkson J Manukau *FC Re C (adoption)* [2001] NZFLR 577-584 // *Re C [adoption]* 20FRNZ 624-631 This was an application for adoption. 5 April 2001 A048/54/99.

Adoption - Whether applicants are fit and proper people? - Whether child's welfare and interests will be promoted by adoption - High standard or threshold - No lower standard for adoption occurring within a family than for a stranger adoption - Children are deserving of equal scrutiny of family arrangements - Wishes of the child - Adoption Act 1955, ss 8, 11; Guardianship Act 1968, s 23.

The applicant wife moved to New Zealand from Thailand in late 1995 or early 1996. After she had settled in New Zealand, and she had met the applicant husband, she arranged for C, a 15-year-old Thai national, to come to New Zealand on a visitor's permit. The applicants were married in New Zealand in 1996. In October 1999, the

applicants sought to adopt C. Their application was supported by a consent to adoption that was sworn by the person shown as the mother of C on C's birth certificate. The applicants deposed in their supporting affidavit that the applicant wife was the cousin of C. During the course of the social work investigation, the applicant wife confessed that she was the natural mother of C, and that she had falsified C's birth records in Thailand. The applicants also had C mislead the Court by swearing an affidavit that stated "...as long as I can remember I have lived with [the applicant wife] and regard her as my mother, I know no other family". The applicant wife had already completed an adoption of C in Thailand.

The social work investigation also disclosed the applicant husband's criminal convictions and historical gang affiliations. After the applicant husband lost his job as a car salesman, the applicants opened up an escort agency, where they rented out rooms to women and their clients by the hour. The applicants were adamant that C had never been allowed on the premises of the escort agency and that she had no knowledge of their involvement in the business. The escort agency was sold in 1999, and the applicants attempted to re-establish themselves in a licensed restaurant business, but this subsequently failed. At the time of the hearing, the applicants had no income and almost no assets. From the time that C arrived in New Zealand, she lived with the applicants as a member of their family. The applicant husband had formed a positive relationship with C, performing all the normal duties of fatherhood. The social worker investigating the application was prepared to support it. The issue for the Court was whether the applicants were "fit and proper" people in terms of the Adoption Act, and whether C's welfare and interests would be promoted by the adoption.

Held (dismissing the application)
(1) Section 11 of the Adoption Act 1955 imposes a positive obligation on the Court, restricting the making of an adoption order, unless the Court is satisfied as to the matters set out in s 11. The use of the word "and" between subss (a), (b) and (c) of s 11 is a conjunctive use, making it clear that all three subsections must be satisfied before an order is made.

(2) There is a high standard or threshold to be reached in considering the applicants' suitability. The applicants filed deliberately false affidavits and had C also file a misleading affidavit, they were involved in the sex industry, they were in a state of financial instability, and the motivation for the application was influenced by immigration factors. The applicant husband had criminal convictions, which included serious sexual offending as well as multiple alcohol-related offences, and he had historical gang affiliations. The applicants did not satisfy the Court that they were fit and proper people. Nor will C's welfare and interests be promoted by the adoption. Neither of the applicants met the threshold required by s11.

(3) A lower standard should not be applied for an adoption occurring within a family than for a stranger adoption. It is not justified by the wording of the legislation. As a matter of policy, the Court would have grave misgivings about any indication being given by the Courts that children who were in a position of being adopted within an extended family ought to somehow be regarded as less worthy of high standards being imposed by Courts scrutinising their situations, than children being adopted by strangers. The situation is analogous, although further along the scale of permanence (and therefore care in scrutiny), to that being considered by a social worker at the stage of initial placement of a child in need of care and protection. Children are deserving of equal scrutiny of family arrangements as of any other placement.

(4) The wishes of the child are clearly a factor that must be considered under s 11 (b). C was clearly happy in the care of the applicants and was doing relatively well at school. She was loved by them and was secure in their care. C clearly wished to remain living with her mother whom she had always regarded as her primary caregiver. The outcome of this application should not affect her caregiving arrangements, and there was no question of her care being removed from them. at 577-578
Re C Adoption [20001] NZFLR 577-584
Same case as *Re C [adoption]* 20FRNZ 624-631

Intercountry adoption from Burma- Granted

2001 Mill J Wellington FC *Re application by H (adoption)* [2001] NZFLR 817-824 // *RE APPLICATION BY H [adoption]* 21FRNZ 208-215 Application to adopt two children aged 16 and 14 who had been born in Burma and who had lived in Burma until 1999. Date 10,23 April 2001 A085/10/00 & 11/00

Adoption - Intercountry adoption - Application to adopt two boys aged 16 and 14 - Children born in Burma and had lived there until 1999 - Children the nephews of the female applicant - Adoption order made in the Burmese Court in 1994 - Applicants fit and proper persons to adopt - Adoption opposed by Child, Youth and Family Services and the social worker - Immigration and financial reasons for adoption - Whether adoption in the best interests and welfare of the children - Relevant factors to be taken into account - Adoption Act 1955, ss 11, 17.

The applicants sought to adopt two boys aged 16 and 14. The boys were the nephews of the female applicant. They had been born in Burma and their natural mother remained living in Burma. The applicants had adopted the boys according to Burmese law in 1994 and had brought the boys to New Zealand in 1999. The natural mother had financial difficulties and was unable to continue to care for the children. It was accepted that the children had no future in Burma and that New Zealand provided better education and prospects for them. The applicants had financially supported the family since 1994. The boys enjoyed New Zealand and wished to stay. They had a close and loving relationship with the applicants.

The social worker did not support the adoption. The Child, Youth and Family Service was of the view that there were public interest and policy reasons for not using the Adoption Act as a means of achieving an immigration purpose.

Held (making a final adoption order)

(1) Following *Re NB* [19981 NZFLR 48, when considering intercountry adoption applications, the Court had to be vigilant to ensure that the adoption was not for some ulterior motive and had to be careful that the adoption processes were used to confirm the existence of a genuine parent/child relationship.

(2) It was clear that the applicants were fit and proper persons to have custody of the children and of sufficient ability to bring up, maintain and educate the children.
(3) Given that the applicants had genuine well-founded concerns for the future of the children especially should they return to Burma, the fact that the applicants had obtained an adoption order in Burma indicated a commitment similar to that undertaken by adoption parents in New Zealand; and that the applicants had fulfilled the rule of parents since 1994, it was clearly in the children's best interests and welfare to make an adoption order and thus the requirements under s 11(b) of the Adoption Act were satisfied. Whilst some of the reasons for the adoption related to financial and immigration considerations, they were not the sole reasons. at 817-818

Re application by H (adoption) [2001] NZFLR 817-824
RE APPLICATION BY H [adoption] 21FRNZ 208-215

Case- Intercountry adoptive parents v CY&FS

2001 Potter J Auckland HC *P v Department of Child, Youth, and family*. Application for judicial review of the decision of Service [Child Youth and Family Service] not to support the plaintiff's application for intercountry adoption. Date 12,15 March; 5 July 2001 M 329/SW00

Adoption - Intercountry adoption - Defendant refused to support application - Plaintiffs sought judicial review of refusal - Whether decision in breach of law -. Unfairness - Natural justice - Unreasonableness and legitimate expectation - Whether defendants breached New Zealand Bill of Rights - Application for adoption had to be made via service - Best interests of child - Plaintiffs located a child privately - Parents consenting to adoption - Plaintiffs brought child to New Zealand on visitor's permit - Child not available for adoption - Care and protection - Child removed from family unit and culture - Service declined to support further application by plaintiffs - Whether refusal properly made - Whether plaintiffs given adequate opportunity to respond to numerous concerns held by Service as to their suitability - United Nations Convention on the Rights of the Child - Adoption Act 1955, ss 6, 11, 17,. Adoption (Intercountry) Act 1997, New Zealand Bill of Rights Act 1990, s 27,. Children, Young Persons, and Their Families Act 1989, s 15; United Nations Convention on the Rights of the Child, arts 3, 7, 21, 23

Introduction The plaintiffs L and J P, wanted to adopt a child, in particular a Thai child. In August 1996 they made application through the New Plymouth office of Child, Youth and Family Services ("the Service"). In June 1999 they were advised that the Service would not support their application for an intercountry adoption. In December 1999 the plaintiffs filed an application for judicial review of the decisions of the Service relating to their suitability for intercountry adoption. at 725

[2] The plaintiffs claim that the Service has acted:
(a) In breach of law; (b) Unfairly, in breach of the rules of natural justice; (c) Unreasonably.

[3] They seek a declaration that the decision of the Service declining their application to be accepted for intercountry adoption was invalid.

[4] They also seek against the third defendant, the Attorney-General, for and on behalf of the Service:
(a) A declaration that the conduct of the defendants was in breach of the New Zealand Bill of Rights Act 1990 ("NZBORA"); (b) Compensation in the sum of $500,000, together with interest. at 725
Issues

[5] **The issues for the Court to determine are:**
(a) Whether in making the decisions relating to the plaintiffs, suitability for intercountry adoption and in particular the decision of June 1999 not to support their application, the Service acted: (i) In breach of law; (ii) Unfairly in breach of the rules of natural justice; in particular whether the Service failed to provide to the plaintiffs an opportunity to be heard, and acted in respect of the plaintiffs' application with predetermination and bias; (iii) Unreasonably, and in breach of the plaintiffs' legitimate expectation.

(b) Whether the defendants breached the provisions of NZBORA and in particular the provisions of s 27(1) which affirms the right to the observance of the principles of natural justice by any public authority in making a determination in respect of a person's rights, obligations or interests protected or recognised by law.

(c) If so, whether the plaintiffs are entitled to damages. at 725-726

The regulatory regime for intercountry adoptions
[6] Intercountry adoptions occur when adoptive parents from one country adopt a child from another country.

[7] Thus the law governing intercountry adoptions involves the domestic law of the jurisdiction of the adoptive parent and the domestic law of the jurisdiction of the child to be adopted.

[8] In addition there are various international instruments which may have an effect on the interpretation and application of the relevant law. at 726

[This case involves a complex factual background and interaction between the plaintiffs and CY&FS extending over a period of three and half years. Refer to [2001] NZFLR at 730- ??? for the details. I have included only the Judgment and comments by the Judge on International Law and Conventions. KCG]

Held (declaring the third Home Study report invalid)

(1) The necessity to comply with two sets of domestic laws which did not inevitably reconcile rendered the intercountry adoption process between New Zealand and Thailand complex and likely to involve time delays, frustration, disappointment and the risk of non-compliance.

(2) Where both New Zealand and Thailand had ratified

The United Nations Convention on the rights of the Child it was inconceivable that the two jurisdictions should not pay due regard to art 21 requiring that both countries ensure that the best interests of the child were paramount in any adoption, as well as the Hague Convention. Thus the Service and the Adoption Service properly treated the welfare and interests of the child as paramount.

(3) The decision of the Service to commence care and protection proceedings was not unjustified or unreasonable in the circumstances given the necessity to treat the child's welfare and interests as paramount.

(4) Where there is a duty to decide and a decision was made and published it cannot normally be revoked unless there was a mistake of fact. In respect of the second Home Study report the Service had written the report up but then had second thoughts following internal discussions (in respect of the care and protection matters in particular) prior to the promulgation or publication of the report to anyone. This led to a decision that the second report was premature. There was nothing inappropriate in the decision of the service to resile from the report in this manner until the care and protection matter was finalised. The report was still an internal document, capable of discussion and amendment.

(5) The intervention of the National Office in respect of the care and protection matter and its impact on the report was not inappropriate. In fact the National Office had responsibilities for the whole organisation.

(6) In respect of a fresh application following the finalisation of the care and protection matters, and the third Home Study report, it would have been naive of the plaintiffs to suggest that they were unaware of the general concerns of the service in respect of their suitability. However at no stage did the Service fully confront the plaintiffs with the extent of those concerns. The plaintiffs were unaware that the third Home Study visit would be their only opportunity to hear, receive and respond to the numerous criticisms and allegations. These matters would be crucial to the Services decision to approve them as adoptive parents. At the very least the care and protection report ought to have been provided prior to this time and the matters which prompted the care and protection proceedings should have been advised. Thus the third home visit did not provide a fair opportunity to be heard. The third Home Study report was thus unlawful and invalid.

(7) There was no evidence of predetermination or bias. The adverse views of the Service were reached on facts available to them and from inferences reasonably drawn from those facts.

(8) Though there had been a breach of natural justice this was not an appropriate case for compensation. The declaration of invalidity was an adequate remedy in the circumstances. at 723-724

Adoption application by V [2001] NZFLR 727-763?????

INTERCOUNTRY CONVENTIONS

Case Law

2001 Comments by Justice Potter in the case *P v Department of Child, Youth, and Family Services* Auckland HC 12,15/3/2001, 5/7/2001

Adoption law Thailand

[13] The [Thailand] Child Adoption Act 1979 governs adoption of children in Thailand. Section 18 of that Act provides: No person shall take or send any child out of the Kingdom for the purpose of its adoption, directly or indirectly, unless approval of the Minister is granted in accordance with the principles, procedures and conditions stipulated in Ministerial Regulations.

[14] The Ministerial Regulations No 2 (BE 2523 AD 1980) issued pursuant to the Child Adoption Act 1979 provide for persons domiciled in foreign countries which have diplomatic relations with Thailand who desire to take or send children out of Thailand for the purpose of adoption, to submit an application to the Director-General in the prescribed form.

[15] Article 2 requires that the application be submitted through the Governmental Welfare Authority of the country where the applicant is domiciled. In New Zealand the recognised authority is the [CY&FS] Service.

[16] The application submitted through the Service must be accompanied by a statement of approval from the Service that the applicant is a suitable person to adopt a child, an agreement by the Service that it will supervise the pre-adoption placement and report to the Director-General during the probationary placement period of not less than six months, and a Home Study Report by the Service. (The content of the Home Study Report is not defined.)

[17] The principal requirements of the Act and the Regulations are set forth in a brochure issued by the Child Adoption Centre of the Department of Public Welfare in Thailand. The brochure includes the following statements:

Prospective parents must apply through an official government social welfare office or recognised non-government agency in their country of residence.

Children who have no parents or legal guardians or who have been abandoned or committed to the care of the Department of Public Welfare of Thailand may he adopted.

The Department of Public Welfare considers only those applications that are made through an official government social welfare office in the country of residence of the prospective parents, or duly authorised non-government agency of that country.

Private allocation of children is not allowed.

The brochure indicates that about one year from the time the Department of Public Welfare receives the application, the adoptive parents will be invited to visit Thailand to be interviewed by the Child Adoption Board and receive the child into their family for a probationary period of not less than six months.

Adoption (Intercountry) Act 1997

[18] This Act implements in the law of New Zealand the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Convention). The Adoption (Intercountry) Act and the Hague

Convention govern intercountry adoptions between Contracting States. In respect of adoptions governed by the Act, the Act imposes on the Chief Executive of the Service the duties, powers and functions of a Central Authority under the Convention. As Thailand has not signed or acceded to the Hague Convention, the Act does not apply to intercountry adoptions between Thailand and New Zealand.

United Nations Convention on the Rights of the Child ("UNCROC")

[19] UNCROC has been signed and ratified by New Zealand, and in force for New Zealand since 1993. Thailand acceded to UNCROC on 27 March 1992. Ratification and accession both entail a State's formal expression of consent to be bound by a treaty.

[20] Accordingly, pursuant to the Treaty (art 21) both New Zealand and Thailand are required in respect of adoptions to: ... ensure that the best interests of the child shall be the paramount consideration.

[21] Party States must ensure that the adoption of a child is authorised only by competent authorities, and are required to recognise that intercountry adoption may be considered as an alternative means of a child's care if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.

[22] Other more general articles in UNCROC support the fundamentals in respect of adoption set forth in art 21, eg art 3 requires that the best interests of the child shall be the primary consideration in all actions concerning children. Article 7 states that a child has the right as far as possible to know and be cared for by his or her parents. Article 8 requires that States parties respect the right of the child to preserve his/her identity including national and family relations.

[23] Unlike the Hague Convention, UNCROC has not been implemented as part of New Zealand law. Nevertheless its relevance and importance to New Zealand's adoption law has been emphasised in a number of cases (*GM v T* [19961 NZFLR 817, 827; *Adoption Application by JLH* [19941 NZFLR 798, 805; *T v J* [2000] 2 NZLR 236). *In T v J* the Court referred to the commitment made by New Zealand to implement the principles of UNCROC in domestic legislation; and that while Declarations are not binding, they have moral force which requires domestic legislation to be read and interpreted, to the extent it permits, in a manner consistent with New Zealand's international obligations under the Treaty. In that case the Court quoted from the judgment of the Court of Appeal delivered by Keith J in *New Zealand Airline Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269, 289:

We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations ...That presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text.

The Hague Convention

[24] Similarly, the principles of the Hague Convention should be applied by analogy in the application in New Zealand of relevant adoption law when a non-Convention country, such as Thailand, is involved. This was the approach of the High Court in *Jayamohan v Jayamohan* [19951 NZFLR 913 where Blanchard J considered a provision of the Hague Convention incorporated into New Zealand law by s 4 of the Guardianship Act, where the other State concerned was Sri Lanka which had not signed or acceded to the Convention. The Court said the fact that a particular country chooses not to commit itself to an internationally accepted practice should not dictate New Zealand's stance on such matters.

[25] The Hague Convention establishes safeguards to try to ensure that all parties to an intercountry adoption are as informed and protected as possible. The introduction to the Hague Convention states the recognition of the signatory States to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights., that a child should grow up in a family environment, that each state should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin; that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin.

United Nations Declaration on Child Placement

[26] While the Declaration is not a treaty with State parties, New Zealand was a party to the preparation of the Declaration and participated in the drafting process. The moral force of the Declaration was recognised in the Law Commission's 65th report Adoption: Options for Reform, NZLC pp38 (1999) para35, page 8.

[27] It declares that the first priority for a child is to be cared for by his or her own parents; that intercountry adoption may be considered as an alternative means of providing the child with a family when care by the child's own parents is unavailable or inappropriate; that intercountry adoption placements should be made through competent authorities or agencies with application of appropriate safeguards; and that no intercountry adoption should be considered before it has been established that the child is legally free for adoption.

International Covenant on Civil and Political Rights

[281 Article 23 recognises: The right of men and women of marriageable age to marry and to found a family. The plaintiffs contend that the right to found a family recognised by art 23 includes the right to adopt.

New Zealand Government policy on adoption

[29] As published by the Department of Social Welfare in 1989 and amended in 1990 this states: Intercountry adoption is a service for children. It recognises and upholds the rights of children by acknowledging and respecting their needs for attachments in relation to their biological family, culture, religion and country.

Source *P v Department of Child, Youth, and Family Services* Potter J Auckland HC 12,15/3/2001, 5/7/2001 [2001] NZFLR at 727-730

Intercountry Adoption (Russia)

Crown Law Office "Appendix the Legal Framework" attached to Legal opinion sought by CYPF

1 The legal framework within which intercountry adoptions takes place includes international treaties, the United Nations Convention on the Rights of the Child (UNCROC) and the 'Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (the Hague Convention), as well as New Zealand domestic legislation and the adoption law of the foreign State. Adoptions may take place between States that are both parties to the Hague Convention or with non-party States.

2. I set out below the important elements of each of the statutory instruments which are relevant in respect of adoptions in Russia of Russian nationals by New Zealand nationals or residents.

(1) United Nations Convention on the Rights of the Child

3. Under UNCROC, a positive duty is imposed on States parties to provide for the rights of children there recognised, including rights in relation to adoption (Articles 21-23). UNCROC was adopted by the General Assembly of the United Nations on 20 November 1989, was signed by New Zealand 1 October 1990, ratified by New Zealand 6 April 1993 and entered into force in New Zealand 6 May 1999.

4. Article 21 of UNCROC laid the foundation for the best interests of the child to be the paramount consideration in any system of adoption. States parties are required to ensure that adoption is also authorised only by competent authorities and only after obtaining the necessary conceits [Should this be 'consents'? KCG] and counselling. Intercountry adoption may only be considered if a child cannot be placed in a foster or adoptive family or otherwise cared for in the child's country of origin. Under UNCROC, intercountry adoption is treated as a last resort.

5. Intercountry adoptions must be safeguarded by standards equivalent to those which apply to intra-national adoptions.

6. States parties must take all appropriate measures to ensure that intercountry adoptions do not result in improper financial gain for those involved in the arrangements, and to promote the objects of UNCROC through the development of multi-lateral or bilateral agreements that ensure that inter country adoption is carried out by competent authorities. (Article 21).

7. Articles 22 and 23 deal respectively with appropriate measures for children seeking refugee status and for children who are mentally or physically disabled.

(2) Hague Convention

8. Through its incorporation (or more correctly its "transformation [Note1]) in the Adoption (Intercountry) Act 1997, the Hague Convention forms part of the law in New Zealand. New Zealand therefore is legally obliged to conduct intercountry adoptions with other Hague Convention countries (Contracting States) in accordance with the terms of the Hague Convention.

9. As a matter of international customary law, New Zealand is also obligated under the Hague Convention in respect of all intercountry adoptions to which it accords legal recognition. No reservation to the Hague Convention is permitted (Article 40).

Foundation principles

The fundamental principles for intercountry adoption under the Hague Convention include a determination in each adoption is in the best interests of the child, that informed consent has been obtained freely after the birth of the child, and not induced by payment or compensation of any kind (Articles 4-5).

11. The Hague Convention contemplates (but does not require) that an adoption will result in the termination of the legal relationship between a child and his or her natural family (Articles 4(c)(1) and 26(1)(c) and (2)).

12. Other principles affirmed by the Hague Convention include:

> The importance of a family environment;

> priority should be given to a child remaining in the care of his or her family of origin;

> measures are needed to ensure that intercountry adoptions are made in the best interests of the child, with respect for the child's fundamental rights, and "to prevent the abduction, sale of or traffic in children";

> intercountry adoption may offer the advantage of stability for a child for whom a suitable family cannot be found in his or her State of origin.

Operational requirements

13. There are provisions in the Hague Convention requiring a basic level of competent responsibility and authority to be exercised by Contracting States (Articles 6-13).

14. A process of application for inter country adoption is prescribed, including the process for approval and supervision of the implementation of inter country adoptions by contracting States (Articles 14-22).

15. As a means of furthering the objectives of the Hague Convention, there is provision for bodies to be accredited by the designated central authority of a contracting State. Such bodies may only pursue non-profit objectives and must be under the overall supervision and authority of the central authority designated for overseeing the inter country adoption regime (Article 11).

16. The Hague Convention excludes **"payment or compensation of any kind"** as inducement to consent by those whose informed consent is necessary for an adoption to take place (Article 4).

17. The central authority designated by a Contracting State to fulfil the obligations under the Hague Convention must, for example, take all appropriate measures to prevent improper financial or other gain by adoption and to deter such practices (Article 8). These principles are

spelled out in more detail in terms of improper financial gain and permissible remuneration (Article 32).

18. The overall purpose of these operational requirements is to protect children and achieve the objects of the Hague Convention.

"Home Study"

19. One of the main functions carried out by the central authority of a contracting state (or its accredited delegate or delegates) is to prepare for the country from which a child is to be adopted ("the State of origin") a report on prospective adoptive parents (known as a "home-study report") (Articles 15-16). On the basis of reports exchanged between two States, the adoption process is able to proceed.

Citizenship

20. A lawfully concluded adoption certified as having been made in accordance with - the Hague Convention by the State of origin of the child must be recognised at law by other Contracting States. That recognition of an adoption may only be withheld if the adoption is "manifestly contrary to its public policy, taking into account the best interests of the child" (Articles 23-24). The recognition accorded under Article 23 means that an adopted child assumes full citizenship in the country of adoption (Articles 23-26).

(3) Adoption (Intercountry) Act 1997 and Regulations

21. This Act adopts (or "transforms") the Hague Convention into the law of New Zealand and provides for the approval of agencies as "accredited bodies" for the purposes of delegation under the Hague Convention (Long Title and Part 2). The best interests of the child as provided for in both the Hague Convention and UNCROC are thus binding principles under New Zealand law.

22. The Act designates the chief executive of the Department responsible for the administration of the Children, Young Persons and their Families Act 1989 as the "New Zealand Central Authority" for the purposes of the Hague Convention (s 5).

23. Regulation 4 of the Adoption (Intercountry) Regulations 1998 (SR1999/47) specifies the Central Authority as the "competent authority" for the purposes of Articles 4, 5, 12, 23, 29 and 34 of the Hague Convention. The Director-General and the Central Authority have that role in respect of Article 11 and together with any relevant public authority or New Zealand accredited body, for the purposes of Articles 30, 33 and 35 (Reg 5).

24. The chief executive has power to delegate his or her functions for the purposes of the Hague Convention to public authorities or New Zealand accredited bodies (s 6). Despite that power of delegation, however, the chief executive has continuing oversight responsibility for such accredited bodies (ss 15-23). Regulation 3 provides for delegation of the functions set out in Articles 9, 15(1), 18, 19(2) and (3), and 20 of the Hague Convention, subject to the chief executive being responsible for determining the suitability of prospective adoptive parents.

25. The Act (s 7). authorises the chief executive to prepare reports on prospective adoptive parents as to their eligibility and suitability to adopt ("home study" report) at the request of prospective adoptive parents, notwithstanding that the chief executive may have delegated that function under s 6. As s 7(3) states, this function is preserved for the chief executive so as to provide a choice of a government or non-government agency for prospective adoptive parents.

26. While accredited bodies in New Zealand or from other contracting states may be authorised to operate in New Zealand, the final right to approve intercountry adoptions for New Zealand rests solely with the New Zealand Central Authority, that is, the chief executive of the Department (s 10).

27. The Act expressly recognises intercountry adoptions made in accordance with the Hague Convention as legal adoptions under the Adoption Act 1955 (s 11), subject only to Article 24 of the Hague Convention which provides for intercountry adoptions not to be recognised if "manifestly contrary" to public policy). To this end, s 25 amends s 17 of the Adoption Act 1955, so that the tests of s 17 do not apply to adoptions by New Zealand citizens or residents in a contracting State made in accordance with the Hague Convention.

28. A certificate signed by the competent authority of the State of origin that the adoption was made in accordance with the Hague Convention is *prima facie* evidence of compliance of that adoption with the Hague Convention (s 11(2)). However, the Family Court of a Contracting State may refuse to recognise an adoption, relying on the exclusion available under Article 24 of the Hague Convention (s 11(3)). It requires the prior approval of the Attorney-General to activate that sanction (s 11(4)).

(4) Adoption Act 1955

29. This Act, which regulates intra-national adoptions in New Zealand, reflects a number of the principles of the Hague Convention, such as the requirement that adoptions have no commercial element (s 25), that consent be given by the relevant persons before the Court makes any order (s 7), that professional reports on the prospective adoptive parents be provided to the Court and that the Court must be satisfied that the adoption will promote the welfare and interests of the child- (ss 10, 11).

30. Section 17 of that Act provides for the recognition in New Zealand of adoptions effected overseas. I have dealt with the use of this provision in the context of Russian adoptions in the course of my advice, noting in particular the criticism of the Law Commission in this regard. [Note 2]

(5) Russian legislation

31. In March 2000 Russia enacted new adoption legislation which provides for greater control over the adoption of Russian children by foreign nationals. I set out below my understanding of the relevant provisions—which now regulate the matter from the point of view of the Russian Federation

Decree # 268 28 March 2000: Regulations of the activities of foreign agencies and organisations for adoption

of children in the territory of the Russian Federation

32. The Regulations permit adoptions to be arranged within the Russian Federation by foreign adoption agencies which open representative offices authorised by foreign countries for the adoption of children. Permission to open a representative office is only given to a non-commercial foreign organisation with not less than five years experience working with the adoption of children.

33. The documentation required to open a representative office must include proof of the non-commercial status of the agency, a licence issued by an authorised body of the country where the agency is based, and a statement of commitment to control the living conditions and education of adopted children, to submit appropriate reports and information and to ensure registration of the child with the Consulate upon arrival with the child in the country of residence of adoptive parents.

34. There are limitations specified on who can be employed by foreign organisation, including employees of educational, medical or social welfare institutions.

35. An agency, through its representative office, must submit the documentation of prospective parents from the country in which that organisation is based, obtain an order from the parents to select a child, organise the reception and accommodation of the prospective parents and provide assistance with the paper work and otherwise represent the interests of the prospective parents in the Russian Federation in compliance with Russian law.

36. Subsequent to an adoption, the agency through its representative office must submit reports on the living conditions and education of children adopted in Russia by foreign nationals. A competent body of the country of residence must prepare those reports, which in New Zealand is the Department. Those reports must be submitted at six monthly intervals for the first year, on an annual basis for three years, and thereafter as required by an appropriate executive body of the Russian Federation.

37. Representative offices must also provide the Ministry of Education of the Russian Federation with specified reports on their adoption activity within the Russian Federation.

38. The Ministry of Education of the Russian Federation and a number of other government agencies process accreditation of a foreign agency. The Russian Federation may deny accreditation of an applicant *inter alia* if the legislation of the foreign State does not recognise the legality of an adoption in the Russian Federation, or if the foreign State limits the rights and lawful interests of children adopted in the Russian Federation, or if there are unfavourable socioeconomics, political or military situations in the adopting country.

39. Accreditation can be cancelled if an agency has broken its commitment to control the living conditions and education of the adopted children or to submit appropriate reports and ensure registration.

Resolution # 267. Interdepartmental Committee for Adoption of children that are Russian Citizens by Foreign Citizens

40. This Resolution set up an interdepartmental committee to deal with the adoption of Russian children by foreign citizens. Its role is to co-ordinate State policy in this sphere and "to ensure the efficient protection of children's' rights and legitimate interests". This body appears to have responsibility for the activities of representative officers of agencies authorised by foreign countries (as provided for by **Decree #268**).

> The Minister of Education of the Russian Federation is the Chair of this committee, and its decisions are binding on organisations operating within the jurisdiction.

Resolution #275: Rules of Referring Children for Adoption and Exercising Control over their Living conditions and Upbringing(sic)

41. **By Resolution 275** of 29 March 2000 the Government of the Russian Federation approved Rules *inter alia* for the adoption of children who are citizens of the Russian Federation by foreign citizens residing permanently outside the territory of the Russian Federation. The overall scope of the Resolution is to provide for a measure of extraterritorial control over the living conditions and upbringing of Russian children in adoptive families and for their registration with the Russian Federation Consul.

General provisions

42. The rules of **Resolution # 275** provide that adoption is only allowed in respect of minors who have no caregivers or parents. Adoptive parties must be adults, of it "any" gender, but not legally incompetent or with certain specified criminal convictions. There is a specific prohibition on adoption-related intermediary activity including selection and transfer of children for adoption.

Special provisions for adoptions by foreign citizens

43. Intercountry adoption is only permitted if a child cannot be placed with Russian citizens in the Russian Federation or with relatives, with a lag time of three months for abandoned children.

44. The agency authorised by a foreign Government acting through the representative offices in the Russian Federation may represent the interests of prospective foreign parents for the purpose of searching for children, arranging their adoption and other non-commercial activities for the protection of the rights of potential adoptive parents.

45. Documentation required on prospective adoptive parents includes a report on their eligibility and living conditions (the home-study report) from the competent body of the foreign State, that is for New Zealand the Department.

46. Written assurance must be provided from the foreign organisation (ie accredited agency or Department) to register the child at the Russian consulate office in the country where the adopted child will live and to carry out regular inspections of the living conditions and upbringing of the child in the adoptive family.

47. Prospective parents from a foreign State have rights

to information on the child, and an obligation to establish contact with the child and collect the child in person.

48. Adoption must be legalised at the place of the child's residence, ie in the Russian Federation, with a petition filed by the prospective adoptive parents in the District Court under the Code of Civil Procedure. The local body for guardianship. and trusteeship must certify that the adoption is in the best interests of the child and that personal contact has been made with the child by those parents.

NOTES

[1] That is, when the status directly enacts the provisions of the international instrument, which is set out as a schedule to the Act> See discussion in Brownlie, *Principles of Public International Law* 5th ed (1998), p 47.]

[2] See opinion from the Crown Law Office of 9 November 2000, section III, paragraphs 24-31 and references there to the Law Commission Report No 65.

Source Crown Law Office "Appendix the Legal Framework" [Intercountry Adoption (Russia)] attached to Legal opinion sought by CYPF Dated 13/11/2000 as supplied Under the Official Information Act. KCG.

Child Youth and Family Service- acting on Crown Law advice suspends Russian adoptions

Press release Tuesday 22 November 2000.

"N Z Suspends Russian Adoptions

Child, Youth and Family has announced that it has suspended its involvement in adoptions from Russia.

"This is the only responsible option open to us following new legal advice that continuing to Co-operate would clearly place us in breach of our international obligations," says acting national adoptions manager Beth Nelson.

"We recognise that this will disappoint couples wanting to adopt from Russia but we feel we must suspend our co-operation."

Child, Youth and Family is the statutory agency for reporting to overseas authorities on the suitability of New Zealand couples wanting to adopt foreign children.

New Zealand is a signatory to the Hague Convention which sets out best practice for adoption proposals involving children outside New Zealand. This Convention recognises the vulnerability of the parties to an inter-country adoption proposal: the child, the prospective adoptive parents and the birth parents.

Previously the department has helped with adoptions from Russia under a verbal agreement, which was made prior to New Zealand becoming a party to the Hague Convention.

In March this year, Russia changed its adoptions law. In deciding how to respond to the new law, Child, Youth and Family sought a Crown Law opinion on whether the law and the existing verbal arrangement with Russia was compatible with our international obligations under the Hague Convention.

"Crown Law's advice is that the Russian adoption process is currently not compatible with the Hague Convention. For example, it does not contain a provision ensuring that the best interests of the child involved must be addressed," says Ms Nelson.

"Therefore, Crown Law advised that if we continued to co-operate with Russian adoptions, we would breach our international obligations under the Hague Convention.

"Given this advice, we feel obliged to withdraw our co-operation until Russia either ratifies to the convention or we establish a bilateral arrangement that is compatible with the Convention.

"We sympathise with couples who are frustrated by this turn of events and have been talking to those immediately affected - we remain committed to helping with adoptions that follow internationally accepted best practice.

"We will work with the Russian government to develop a Hague-based arrangement for the adoption of Russian children by New Zealand couples as soon as possible," says Ms Nelson."

Source CY&F file released under Official Information Act. KCG.

New Zealand Statutes

Adoption Act 1955 s17 Effect of overseas adoption (1) Where a person has been adopted (whether before or after the commencement of this section) in any place outside New Zealand according to the law of that place, and the adoption is one to which this section applies, then, for the purposes of this Act and all other New Zealand enactments and laws, the adoption shall have the same effect as an adoption order validly made under this Act, and shall have no other effect

(2) Subsection on of this section shall apply to an adoption in any place outside New Zealand, if,-
(a) The adoption is legally valid according to the law of that place; and
(b) In consequence of the adoption, the adoptive parents or any adoptive parent had, or would (if the adopted person had been a young child) have had, immediately following the adoption, according to the law of that place, a right superior to that of any natural parent of the adopted person in respect of the custody of the person; and
(c) Either (i) The adoption order was made by an order of any Court whatsoever of a Commonwealth country or of the United States of America or of any State or territory of the United States of America; or
[Amendment 1965 (i) repealed and substituted by new (i) Adoption Amendment Act 1965 s(6)(1). "(i) The adoption order was made by any Court or judicial or public authority whatsoever of a Commonwealth country, or of the United States of America, or of any State or territory of the United States of America, or of America, or of any other country which the Governor-General, by an Order in Council that is for the time being in force, has directed to be deemed to be referred to in this sub-paragraph; or".]
[Note 1968 As to extension of subs (2)(c)(i) to include Austria, Denmark, Finland, Netherlands, Norway, see SR1967/68]
(ii) In consequence of the adoption, the adoptive parents or any adoptive parent had, immediately following the adoption, according to the law of that place, a right superior to or equal with that of any natural parent in respect of any property of the adopted person which was capable of passing to the parents or any parent of that person in the event of the person dying intestate without other next of kin and domiciled in the place where the adoption was made and a national of the State which had jurisdiction in respect of that place- but not otherwise.
[Amendment: New section 2A inserted by Adoption Amendment Act 1965 s(6)(2). "**(2A)** The production of a document purporting to be the original or a certified copy of an order or record of adoption made by a Court or a judicial or public authority in any place outside New Zealand shall, in the absence of proof to the contrary be sufficient evidence that the adoption was made and that it is legally valid according to the law of the place.]

(3) Nothing in this section shall restrict or alter the effect of any other adoption made in any place outside New Zealand.

(4) In this section the term 'New Zealand' does not include any territory in which this Act is not in force."
[Note: As to registration of adoptions made overseas and to which this section applies, see s21A of the Births and Deaths Registration Act 1951, as inserted by s5 of the Birth and Deaths Registration Amendment Act 1961.]

Intercountry Adoption Legislation
1994 Adoption Amendment Bill and SOP No.10
A Bill to facilitate inter-country adoption and provide private agency participation.
Debate There had been considerable pressure on the Government from pro intercountry adoption groups to pass legislation to privatise and speed up intercountry adoption. An attempt was made to rush this legislation through the House as part of a Law Reform Miscellaneous Provisions Bill No.2 with minimum publicity, minimal consultation and maximum speed. The fast track plan was stalled by vigorous protests. Alec Neil (Nat- Chairman of the Justice and Law Reform Committee). "The Adoption Amendment Bill formerly part of the Law Reform (miscellaneous Provisions) Bill No.2, which was introduced and referred to the Justice and Law Reform Committee on 21 September 1993. The closing date for submissions was 25th February 1994. During the commit-tee's considerations of the Law Reform (Miscellaneous Provisions) Bill (No.2). Supplementary Order Paper 10, which deals with intercountry adoption agreements, was circulated. In conjunction with its consideration of the Bill the committee also considered amendments set out on the supplementary order paper. However, the committee found the proposed amendments were of a potentially controversial nature and warranted greater public input... On the 14th of June 1994, the committee obtained from the House authority to divide the Bill, it then became the Adoption Amendment Bill Supplementary Order Paper No.10...The committee called for public submissions on with closing date 29th July 1994... Received 75 submissions on the supplementary order paper and further 75 letters, 49 which expressed general support for the proposed amendment; 26 were generally opposed...Evidence heard on 15th November 1994." *NZPD* Vol 2/3/1995 p5767

From the evidence brought to the select committee it became clear that any amendment should be in accord with the Hague Convention on Protection of Children and Co-operation in respect to Intercountry Adoption. This Bill did not meet those standards. Therefore the proper action would be to defer the Bill, and await the ratification of the Convention by New Zealand. Then produce a new Bill that would conform to the Hague Convention. This action was agreed to by Cabinet and the House. Debate *NZPD* 2/3/1995 pp5762-5777

1992 Citizenship Amendment Act
A child under 14 years adopted by a New Zealand citizen will not automatically become a New Zealand citizen s3(2). The Act came into force 18/11/1992 and is printed in Statutes section of this book p540. Introducing the Bill, Hon Graeme Lee, (Minister of International Affairs), said, "Section 17 of the Adoption Act 1955 sets down the cri-

teria that the adoption laws of other countries must meet in order for those adoptions to be recognised in New Zealand. Section 3 of the Citizenship Act [1977] provides that, when the adoption laws of another country do meet those criteria, children adopted by New Zealanders in that country automatically acquire New Zealand citizenship by descent....

The particular focus of concern has been the very marked rise in the number of persons acquiring citizenship through adoption since 1984. There is also evidence of a large number of adoptions of children in older age groups, such as over the age of 15 years. In the past financial year, 328 people were identified as being in that category. A further 212 people were aged between 11 and 15 years. I am now talking about approximately 500 people. The first concern is that adoptions under section 17 of the Adoption Act [1955], when coupled with section 3 of the Citizenship Act [1977], avoid the normal child-welfare checking procedures that are carried out by the Department of Social Welfare. The Department has been concerned about the large number of Romanian children adopted in recent times, but of course that concern is not unique to those children...

The Bill...seeks to tighten the current provision in the Citizenship Act relating to citizenship by adoption so that *only children at or under the age of 13 years at the date of their being adopted overseas will automatically become entitled to New Zealand citizenship*. Older children will have to go through normal immigration channels in order to be brought into New Zealand...The Bill preserves the rights of children who are adopted overseas before the date of commencement of the new Act...It prevents obvious abuse of the citizenship legislation by circumvention of the immigration requirements." *NZPD* Vol.527 23/7/1992 pp9972-9973

Hon Roger Maxwell (Minister of Business Development) said, "With regard to adoptions, I think there is sufficient evidence that the integrity of the citizenship law and the immigration law is being bypassed. Figures that I have with me, particularly the greater number of Western Samoan adoptions being applied for, suggest that there has been a drastic increase from the 1984 period, when 92 adoptions were sought, compared with 684 at the end of the past June year. Those adoptions represented more than 80 percent of all adopted persons who came into New Zealand." *NZPD* Vol.527 23/7/1992 p9975.

The cut off age of the child was raised from 13 to 14 years to be consistent with the age definition of 'child' under the Children, Young Persons, and Their Families Act 1989 *NZPD* Vol.530 23/10/1992 p11868

Second reading: Graeme Lee reported, "In some cases, investigations have revealed that the young adults who have been adopted have negligible ongoing relationships with the adopting parents once they enter New Zealand. In effect, the provision has come to operate as an alternative and uncontrolled immigration channel. To date this pattern has been largely restricted to adoptions carried out in one particular country. Over the past 5 years, 2935 people acquired New Zealand citizenship by adoption outside New Zealand." A total of 2935, and 2557, or 87%, were all from Western Samoa; 1183, or 40 percent of the total, were 16 years or older at the time of adoption. He was concerned the practice could spread to other countries. *NZPD* Vol.531 10/11/1992 p12132

Third Reading the Bill was enacted with approval of both sides of the House. *NZPD* Vol.531 12/11/1992 pp12263-4.

PRIVATE ADOPTION ACTS

Most Private Bills seek to create exceptions to Public Acts for the promoter's benefit. The House, in passing private legislation on adoption or marriage exercises a *judicial* and *legislative* function. It is normally required that the promoter has exhausted all other legal process and the matter is outside the jurisdiction of the Courts. Parliament exercises jurisdiction in deciding *if* the petition will be granted, and if so passes legislation enabling the private action to be taken.

Use of private adoption or marriage Acts

Validate overseas adoption

The *Sutton Adoption Act 1948* validated a USA adoption in New Zealand. *See* p302 this book.

Back date final order to date of interim order

The Adoption Act 1955 introduced interim orders with the final order delayed up to 12 months. This caused problems with some wills. If an adoptive parent died and left estate to their 'children', if only an interim order was in effect, that child would not inherit, unless the child was specifically provided for in the will. This is because an interim order "Shall not be deemed to be an adoption order for any purpose" s15(1)(d). One way to bring a child under an interim order within the scope of the inheritance is the passing of a Private Act, back-dating the final order to the date of issue of the interim order. See *Slack 1968, Clark 1969, Foote 1969, Macdonald 1974, Longley 1984,* Private Adoption Acts. pp302-304

Allow marriages within prohibited degrees

Where a couple want to marry within prohibited degrees of consanguinity, they may apply for a Private Act to permit the marriage. Adoption legal fiction brings non-blood persons within prohibited degrees of consanguinity. If an adoptee were to marry his non-blood sister, he would be deemed, by his adoption, to be a relation of blood. One way of overcoming this is a Private Act to discharge the adoption, and thus cut the deemed blood tie and lift the consanguinity restriction. Such requests normally only arise from late teenage adoptions, where the couple only met in their late teens and fell in love with each other. There is little sense of taboo as they have not been brought up together as children. *See Thomson 1958, Thomas 1961, Liddle 1963,* also *Papa 1982* that validated a null and void adoptee marriage, also non-adopted cases of *Blom-field 1973, Stockman 1985.* Since 1985, case law re adoptee marriages within forbidden degrees has been in some confusion. In the case, Gallen J Hamilton HC *Barlow and Hohaia* 19/11/1985 [1986] 2NZLR 60, it was ruled that adoptees not in actual blood relationships are free to marry, without need of Court dispensation or Private Act of Parliament. The 'deemed' adoptive blood relationship does not apply in the case of prohibited relationships. This High Court ruling has implications for adoption incest case law. *See* 'Consanguinity and Marriage of Adopted Relatives' A Horne *Family Law Bulletin* Vol.3 Part 6 April 1992 pp67-70 and Vol.3 Part 7 May 1992 pp80-1. *See also* 'Prohibited Marriages' p266-275 this book.

Adoption orders varied by Private Adoption Acts

An adoption order may be varied by a Private Adoption Act. Private Acts may be used to create exceptions to Public Acts for the promoter's benefit. Parliament, in passing private legislation on adoption exercises both a *judicial* and *legislative* function. It is normally required that the promoter has exhausted all other legal process and the matter is outside the jurisdiction of the Courts. Parliament exercises *jurisdiction* in deciding *if* the petition will be granted, and if so may pass *legislation* enabling the private action to be taken. *See* 'Private Adoption Acts' pp301-305 this book for full details, includes synopses of all Private Adoption Acts that vary an adoption order.

Private Act Procedure

Private Acts of Parliament should not be confused with Private Member's Bills, quite different procedures apply. The promoter of a Private Act is responsible for drafting a private Bill, but the Parliamentary Counsel Office may assist. The Standing Orders of Parliament set out the steps that must be taken. Full details of Private Act procedure are given in *Parliamentary Practice in New Zealand,* David McGee, Deputy Clerk of the House. Government Print 1985 pp290-298

— Advertising

The promoters intention to introduce a Private Bill must be published in the *New Zealand Gazette,* for three consecutive weeks, and advertised in the local daily newspaper. The notice must include, full title of Bill, objective, promoter's name, contact address and place where the Bill is open to public inspection.

— Notices

The promoter must serve notice on any person directly affected by the Bill. Thus a Private Marriage or Adoption Bill requires serving notice on the families directly concerned. The Government Department administering the legislation must also be notified.

— Fees and Printing

A Private Act costs $1,000 as at 1994, including cost of printing and must be paid prior to the Bill's introduction. The fee may be refunded in whole or in part on grounds of hardship. Since 1862 the fees has been paid to the General Assembly Library to purchase books.

— Petition- declarations- endorsement

The promoter must present three documents set out in the schedule to Part XXV of Standing Orders. 1. A petition setting out reasons for the Bill, objects, and a request (prayer) to introduce the Bill. 2. A declaration, that notices to interested parties have been served. 3. A declaration that newspaper and Gazette notices have been fulfilled and file copies. The documents with a copy of the Bill are lodged with the Clerk of the House. If all is in order the petition is endorsed "Standing Orders complied with".

— Introduction- 1st 2nd 3rd readings

The promoter arranges for a member of Parliament to introduce the Bill. Private Bills are dealt with prior to any formal business of the day. The member informs the House of the Bill's content and moves it's introduction. If introduced the first reading is moved immediately without

amendment or debate. About a day later the second reading is moved, open for debate and amendment. If read a second time it's referred to a Committee that reports back to the House. The third and final reading then takes place.

A Private Adoption Act is a very public action

The details are advertised in the local Press, and *New Zealand Gazette*. A copy of the Bill to be made available for public scrutiny, to facilitate submissions by any interested party. The Parliamentary records re Private Acts are published in *Hansard NZPD*. Also in the *Journals of the House*, a day record, plus a detailed procedural record table on Private Acts near the end of the Journal. Note it is the Journal, not to be confused with the more readily available *Appendix to the Journals*.

Private Adoption or Marriage Acts

Sutton Adoption Validation Act 1948

Validates in New Zealand a USA adoption order David Williams now known as David Lennock Sutton of Heriot, Otago, Sheep-farmer, was born in the County of San Luis Obispo, State of California USA 23rd of November 1919. Mrs Matilda Sutton of Otago visited her sister, a Matron of a Childrens Home in California. She formed a deep attachment to young David a child in the Home. An order for David Williams adoption in favour of Matilda Lennock Sutton was made in the Superior Court of California on 15th March 1921. Her husband, Ernest Walter Sutton of Moa Flat, Otago, Sheep-farmer, gave formal consent to the adoption. They returned to New Zealand and ever since regarded David Williams, now named David Lennock Sutton as their lawful adopted son.

Matilda Sutton died, 23rd June 1941, leaving estate to David. It was then discovered that because the adoptive parents were British subjects and the adoption took place in USA it had no validity in New Zealand law. Death duty was assessed and paid at the high stranger-in-blood rate of 17% rather than normal 1% family rate. Ernest also intends to leave his estate to David. The same high death duty will apply unless the adoption is validated in New Zealand. David was granted New Zealand citizenship 20th November 1947, but is now above the maximum age for adoption. The only solution is a Private Act to validate in New Zealand the USA adoption.

There was some debate in the House, mainly because the Right Hon Mr Nash (Minister of Finance) was concerned about financial implications for death duties. Dr Finlay (North Shore)- also reminded the House "This is the third time in recent years that a case of this kind has arisen. One came before a Committee of this House on petition last year, and that Committee brought down a recommendation that adoptions made in accordance with the law of the country where the adopting parents are domiciled at the time of the adoption be recognized for death duty purposes in this country. In discussion on that Committee's report the honourable member for Rodney [Webb T.C.] mentioned a similar case that occurred in a previous year. I wish to remind the Government of that recommendation, and suggest that it would be a fit subject for legislation, instead of dealing with individual cases by private Bill, such as this Bill now before the House." pp1623 *Bill introduced by Mr. William A. Bodkin MP for Central Otago. Adoption validation in New Zealand as from 15th March 1921 enacted 30th September 1948.*

House 2nd Reading 21/71948 *NZPD* Vol.280 pp771-5. cf Legislative Council debate 2nd Reading 19/8/1948 *NZPD* Vol.282 pp.1623-4. Committee Report *JHR* 28/7/1948 p78

Thomson Adoption Discharge Act 1958

Provides for sister and adopted brother to marry by discharge of adoption order. Lucy Thomson and her adopted brother Peter applied to the Supreme Court for permission to marry within prohibited degrees. The Court found it had no jurisdiction as the adoption deemed them to be within consanguineous degrees. They sought a Private Act of Parliament to discharge the adoption. Peter had come to the family in his late teens to work on the farm, and they decided to fully adopt him into their family. An adoption order in favour of David Melville Thomson, of Okoia (Near Wanganui) farmer, and Marjorie Standidge Thomson his wife was made at Rotorua, 24th March 1953. Peter was aged 20. Peter and Lucy are desirous of marriage, but while the adoption order remains in force, the intended marriage is by virtue of the provisions of the Adoption Act 1955 within the degrees of prohibited relationships set out in the Marriage Act 1955. No legal grounds exist for obtaining a discharge of the adoption order pursuant to the provisions of the Adoption Act 1955. Very brief debate. *Bill introduced by Mr Roy E Jack MP for Patea. Adoption discharge enacted 29th August 1958.*

Note. Peter and Lucy married and raised a family. They have discussed with me some of their insights and experience. The publicity and misunderstanding in society and need for reform that don't require Private Acts. 1st Reading 25/7/1958 *NZPD* Vol.317 p868. 2nd Reading 1/8/1958 *NZPD* Vol.317 pp1012 p1335 p2102. Committee Report *JHR* 21/8/1958 p147 *See* Case Haslam J Wellington SC *In re Thom-son and Thomson* [1958] NZLR 580 See p274 this book.

Thomas Adoption Discharge Act 1961

Provides for brother and adopted sister to marry by discharge of adoption order Heather Colleen Thomas, (now a clerk of Hamilton) was legally adopted by Charles Frank Thomas of Havelock North, company director, and Aileen Maud Thomas, his wife at Hastings, 17th December 1953. Heather Colleen Thomas is desirous of marrying Barry Canavan Thomas, of Hamilton, clerk, a son of Charles Frank Thomas and Aileen Maud Thomas. While the adoption order remains in force, the intended marriage is by virtue of the provisions of the Adoption Act 1955 within the degrees of prohibited relationships set out in the Marriage Act 1955. No legal grounds exist for obtaining a discharge of the adoption order pursuant to the provisions of the Adoption Act 1955. No other details are given, but as Heather was adopted in 1953 and was of an age to marry in 1961 points to her adoption as a teenager. Very brief debate. *Bill introduced by Mr Lancelot R Adams-Schneider MP for Hamilton. Adoption discharge enacted 24th November 1961.* 2nd Reading 1/11/1961 *NZPD* Vol.329 p3250. Committee Report *JHR* 15/11/1961 pp443-444

Schedule of Private Adoption & Marriage Bills

Short Title	Sutton Adoption Validation	Thomson Adoption Discharge	Thomas Adoption Discharge	Liddle Adoption Discharge	Slack Adoption	Clarke Adoption
Introduced by	Mr. Bodkin	Mr Jack	A-Schneider	Mr Rata	Dr Finlay	Mr George
Introduction	13/7/1948	23/7/1958	17/10/1961	21/8/1963	15/10/1968	19/8/1969
First Reading	15/7/1948	25/7/1958	19/10/1961	23/8/1963	16/10/1968	21/8/1969
Second Reading	21/7/1948	1/8/1958	1/11/1961	27/8/1963	18/10/1968	26/8/1969
Referred Comittee of selection	21/7/1948	1/8/1958	1/11/1961	27/8/1963	18/10/1968	26/8/1969
Report of Committee of selection	23/7/1948	7/8/1958	10/11/1961	28/8/1963	5/11/1968	28/8/1969
Report of Committee on Bill	28/7/1948	21/8/1958	15/11/1961	5/9/1963	21/11/1968	23/9/1969
Consideration of Report	...	....	17/11/1961	....	....	....
Third Reading and passing	30/7/1948	28/8/1958	22/11/1961	10/9/1963	22/11/1968	24/9/1969
Royal Assent	30/9/1948	29/8/1958	24/11/1961	11/9/1963	25/11/1968	29/9/1969

Short Title	Foote Adoption	Blomfield-Kohi Marriage	Macdonald Adoption	Papa Adoption Discharge	Longley Adoption	Stockman-Howe Marriage
Introduced by	Mr Kirk	Mr Munro	J Marshall	Mr Austin	Mr Banks	K O'Regan
Introduction	9/10/1969	3,18/10/1973	22/10/1974	7/12/1982	2/10/1984	20/11/1984
First Reading	14/10/1969	19/10/1973	23/10/1974	7/12/1982	2/10/1984	20/11/1984
Second Reading	16/10/1969	25/10/1973	25/10/1974	8/12/1982	4/10/1984	22/11/1984
Referred Comittee of selection	16/10/1969	25/10/1973	25/10/1974	8/12/1982	4/10/1984	22/11/1984
Report of Committee of selection	17/10/1969	2/11/1973	30/10/1974	9/12/1982	5/10/1984 +19/12/1984	23/11/1984
Report of Committee on Bill	21/10/1969	28/2/1974	5/11/1974	14/12/1982	16/11/1984 +19/12/1984	14/6/1985
Consideration of Report	21/10/1969	Lapsed	5/11/1974	14/12/1982	16/11/1984	24/6/1985
Third Reading and passing	22/10/1969		6/11/1974	15/12/1982	27/3/1985	29/7/1985
Royal Assent	24/10/1969		8/11/1974	17/12/1982	29/3/1985	8/8/1985

Use this chart to locate information concerning Private Adoption & Marriage Acts in the Journals of the House of Representatives and NZ Parliamentary Debates, by referral to the above dates. **Source** Extracts from Journals of the House of Representatives.

Liddle Adoption Discharge Act 1963

Provides for sister and adopted brother to marry, by discharge of adoption order. Alan Joseph Scott was legally adopted by Lloyd Bishop Liddle, of Kaeo, farmer, and Patricia Eleanore Liddle, his wife at Kaikohe, 20th January 1955. Alan Joseph Scott (by adoption named Scott Alan Liddle) is desirous of marrying Lloyda Helen Liddle, a natural daughter of Lloyd and Patricia. While the adoption order remains in force, the intended marriage is by virtue of the provisions of the Adoption Act 1955 within the degrees of prohibited relationships set out in the Marriage Act 1955. No legal grounds exist for obtaining a discharge of the adoption order pursuant to the provisions of the Adoption Act 1955. No other details are given, but as Alan was adopted in 1955 and was of an age to marry in 1963 points to adoption as a teenager. Very brief debate. *Bill introduced by Mr Matiu Rata MP for Northern Maori, may indicate Maori cultural issues. Adoption discharge enacted 11th September 1963.* 2nd Reading 27/8/1963 *NZPD* Vol.336 p1428 Committee *JHR* 5/9/1963 p144.

Slack Adoption Act 1968

Converted interim order of adoption into final order. Michael William Slack, born 8th August 1965. An interim order of adoption in favour of Terence Richard Slack of Waiwatenui, farmer and Margaret Ann Slack his wife was made at Kaikohe, 4th November 1965. They already had one adopted child, Phillip George Slack, born 28th August 1963. The adoptive father, Terence Richard Slack died in an accident, 19th March 1966. Difficulty arose concerning estate provision and payments under the Workers Compensation Act to his children. An interim order is not an adoption order, and would result in the two children being treated unequally. The Slack Adoption Act backdated the final adoption order to the date of the interim order. This insured their two adopted children shared equally from the estate and provisions. *Bill introduced by Dr A Martyn Finlay MP for Waitakere. Enacted 25th November 1968.* 2nd Reading 18/10/1968 *NZPD* Vol.357 pp2349-2350. Committee Report *JHR* 21/11/1968 p243

Clarke Adoption Act 1969

Converted interim order of adoption into final order. Kevin John Clarke born 6th February 1965. An interim order of adoption in favour of Geoffrey Henry Clarke and Rhoda Merle Clarke his wife was made at Hamilton, 22nd September 1965. The father (Geoffrey) died on 18th November 1965 on 22nd September 1965 at Hamilton. His wife now applies for the Final order to be back-dated to the date of the interim order, so that her husbands name can appear as a parent on the adopted child's birth certificate. Brief Debate. *Bill introduced by Mr John George MP for Otago Central. Enacted 29th September 1969.* 2nd Reading *NZPD* Vol.362 p2234. 26/8/1969. Committee Report *JHR* 23/9/1969 p187

Foote Adoption Act 1969

Converted interim order of adoption into final order. Douglas James Foote born 19th August 1964. An interim order in favour of Leslie David Foote a lecturer at Christchurch teachers' college, and Jean Catherine Leigh Foote his wife, was made at Christchurch, 13th October 1964. Douglas Foote died 17th February 1965. No application could have been made for a final order prior to his death. An application was made by the mother, 13th April 1965 and a final order granted 1st June 1965. It was the wish of all parties that the father's name be entered on the child's birth certificate and the child share in any benefit upon his death. It is requested that the interim order of adoption be deemed for all purposes to be and always to have been a final order. In the debate Mr Kirk explained, 'This Bill would have come forward some years ago, but each time there were discussions concerning the Bill there were also questions as to a complete amendment of the Adoption Act. In the event it has not materialised...we proceed with the Bill.' *Bill introduced by Mr Norman E Kirk MP for Lyttelton. Enacted 24th October 1969.* NZPD Vol.364 p3576. 16/10/1969 *NZPD* Vol.364 pp3733-3734. 22/10/1969. Committee Report. *JHR* 21/10/1969 p240

Blomfield-Kohi Marriage Bill 1973

Application to marry blood niece. Brian Edward Blomfield, aged 35, of Invercargill, smelter employee and Janine Shirley Kohi, aged 20, widow of Invercargill, are desirous of marrying. But Janine is Brian's sister's daughter. On the 4th January 1971 Janine Kohi was a passenger in a car driven by her husband Paul Kohi, and through no fault of their own they were involved in an accident. Paul was killed and Janine sustained very severe injuries including the loss of her unborn child, it's now impossible for her to have any children. Mr Blomfield was divorced with custody of two of his children. Following the accident Janine became housekeeper for Mr Blomfield and his children. She and Brian grew attached to each other and would like to marry. The intended marriage is within the degrees of prohibition contained in the Second Schedule of the Marriage Act 1955. There are no legal grounds for removing the prohibition. '*Clause 2.* Removal of prohibition- It is hereby declared that the degrees of prohibition contained in the Second Schedule to the Marriage Act 1955 are hereby removed in so far as they affect the intended marriage between Brian Edward Blomfield and Janine Shirley Kohi, in the special circumstances peculiar to this case'. The Bill proceeded through the 2nd Reading but the Committee Report to House 'recommended the Bill be not allowed to proceed'. The Report agreed to. No reason stated. *Bill introduced by Mr John B Munro MP for Invercargill. Lapsed 28th February 1974.* 2nd Reading 25/101973 *NZPD* Vol.387 p4625

Macdonald Adoption Act 1974

Converted interim order of into final order. Donald Alan Macdonald, born 8/7/1970. An interim order in favour of Andrew Macdonald, carpenter, Wellington and Grace Jones Macdonald his wife was made at Wellington 24/5/1972. Andrew the father, died 13/5/1972, no application for a final order could have been lodged prior to his death. The mother applied 7/3/1973 and a final order made in favour of the mother only. The mother desires the fathers name be entered on the adoptees new birth certificate. This can only be effected by an Act of Parliament declaring that the interim order shall for all purposes be deemed always to have operated as a final order of adoption. In the debate, Dr Finlay (Minister of Justice) said, 'I regard it as rather unfortunate that the whole machinery of Parliament has to be brought to bear on a problem of this kind, and the affairs of a private individual to some extent ventilated in this Chamber. I think it would be appropriate for me to give an undertaking to the honourable member that I shall look into the possibility of having some more informal approach adopted to resolve what is a very real difficulty.' *Bill introduced by Right Hon John Marshall MP for Karori. Enacted 8th November 1974. NZPD* Vol.395 p5290. 25/10/1974. Committee Report *JHR* 2nd Reading 5/11/1974.

Papa Adoption Discharge 1982

Discharge adoption to restore null and void marriage. Kevin Aroihi Timoko Papa, was adopted at Hamilton, 23/2/1966 by Terehia Puru Papa formerly of Pakanae, widow, now deceased. Terehia also had a natural daughter that gave birth to a child named Vianney. Kevin the adopted son married his sisters daughter, Vianney Clifton Tuinman of Opononi, solo parent, on 23/7/1982 at Kaiko-he. Vianney was a grand-daughter of Terehia Puru Papa and by virtue of the Adoption Act 1955 the marriage is deemed to be within the forbidden consanguineous degrees of the Marriage Act 1955 and is accordingly null and void, and will remain so as long as the adoption order remains in force. Discharged adoption *Bill introduced by Mr Howard Neil Austin MP for Bay of Islands. Enacted 17th December 1982. NZPD* Vol.449 p5323. 2nd Reading 8/121982. Committee *JHR* 19/12/1982 p504.

Longley Adoption Act 1984

Converted interim order of adoption into final order. Ralph Arthur Longley and Emily Waimunga Longley married at Whangarei, 20/1/1968. Emily already had two children, Lorraine and Lean, she wished to adopt them into her new marriage. An interim order was made at Whang-arei 19/8/1970. However the solicitors failed to apply for a final order. The error was discovered in 1983, the marriage had been dissolved, but their relationship was good. The children asked that the adoption be completed. Because the

interim order had lapsed a new application to adopt must be lodged, but as they were no longer legally married they could not do so because of s3-4 of the Adoption Act 1955. A new application to adopt was made at Auckland Family Court, but Judge Mahony, while sympathetic, ruled he had no jurisdiction. A Private Act was sought to restore the childrens relationship and names to the lapsed interim order. The first Committee Report was not in favour of the Bill proceeding. The Evening Post, reported- 20/1/1984- "Under private business, the house was told that the Longley Adoption Bill should not proceed as the relevant questions of inheritance and name could be solved under existing legislation." The House referred the Bill back to the Committee. *Bill introduced by Mr John A Banks MP for Whangarei.* Enacted 29th March 1985. 2nd Reading 4/10/1984 *NZPD* Vol.458 p825. Committee Report *JHR* 16/11/1984 pp186-187

Note The Longley Adoption Act 1984, was twice referred to in the debate on the Adult Adoption Information Bill. Some opponents of that Bill claimed it was retrospective and should be rejected on that ground. During the Second Reading debate on the Adult Adoption Information 1984-85 Bill, *Noel Scott (Tongariro Lab)* said, "I found myself being congratulated by the member [John Banks] for backing his side in the Longley Adoption Bill." Banks replied "What a sanctimonious twit". *NZPD* Vol.465. 7/8/1985 p6144. Later in the same debate *Bill Dillon (Hamilton East Lab)* said, "The member for Whangarei [John Banks] knows of the retrospectivity in the private Bill he promoted- the Longley Adoption Bill. That is a perfect example of this concept of retrospectivity against which he spoke so eloquently in relation to the Bill tonight." *NZPD* Vol.465. 7/8/1985 p6156. The Adult Adoption Information Bill was not retrospective legislation, it was retroactive legislation, it only changed the effect of previous legislation as from the *present* date. Retrospective legislation backdates the legislation to take effect from a *previous* date. Hence members attacking the legislation, (a) misleadingly called it retrospective, and (b) had themselves already supported retrospective adoption legislation in the past, the Longley Adoption Bill.

Stockman-Howe Marriage Act 1985

Provides for an uncle to marry his niece. Thomas George Stockman of Aria, superannuate, and Rosalina Terewai Howe of Aria, housewife, wish to marry. Thomas is Rosalina's half brother, and thus within the prohibited degrees of the 2nd Schedule of the Marriage Act 1955. They have been living together as man and wife for many years, and have produced four children. They seek a Private Act to enable them to legally marry. *Bill introduce by Katherine O'Regan MP for Waipa. Enacted 8th July 1985.* 1st Reading 20/11/1984. 2nd Reading 22/11/1984 *NZPD* Vol.459 p1946. Committee 14/61985 *NZPD* Vol.463 p4874

Petition to Parliament

Sometimes used instead Private Bill. *See* Petition of Mrs Gladys Martha Dowse, Wellington seeking amendment of law on consents and adoption orders. Result- No recommendation. *Petition presented by Mr Peter Fraser MP for Wellington Central. NZPD* Vol.208 29/9/1925 p290.

Search of the House Journals

1919>1993. Revealed two additional Private Marriage Acts, unrelated to adoption. (1) Mildred Elane Smyth Divorce Act. Legislative Council. 1st Reading 17/8/1926. Third reading 3/9/1926. Also see previous introduction 10/9/1925. Husband was in jail. (2) Morris Divorce and Marriage Validation Act. 1st reading, 2nd reading, Committee stage, Report and third reading all 25th August 1943. Royal Assent 26/8/1943.

Lapsed interim order child now adult no jurisdiction

1994 Frater DCJ Wellington DC *Application by H* A solicitor failed to file an application for a final adoption order. The supposed adopted person at 23 applied for a birth certificate, the error was discovered. The applicants applied for a final order but were refused, the Court now had no jurisdiction. Judge Frater pointed out the only way to obtain a final order would be by a Private Adoption Act. [1994] NZFLR 143 see p180 this book for case detail.