ASPECTS OF DOMESTIC AND INTERNATIONAL LAW AND PRACTICE IN ADOPTIONS

The Hon. Justice P. L. G. Brereton, AM RFD

Peter Nygh Memorial Lecture

delivered at the 16th National Family Law Conference

Sydney, New South Wales, 8 October 2014

It is now a decade since the first of these lectures commemorating the life and work of Dr Peter Edward Nygh, AM, was presented by the Honourable John Fogarty, at the 2004 conference on the Gold Coast. Fogarty J, who sat with Peter often in the Full Court, delivered an eloquent tribute to his life and work.[1] As was then intended, the event has now fittingly become an established fixture at this biennial conference. Subsequent Nygh lecturers have included, in 2006, Kirby J – whose account of his contributions included an examination of the influence of his judgments and scholarship upon the High Court[2] – and, in 2012, the Honourable Chief Justice Robert French AC. I am deeply honoured to be asked to follow such distinguished predecessors, and to add my own tribute to the accomplishments of one whose interests in private international law and in family law I have come to share.

Peter Nygh achieved excellence and eminence in law as a scholar and as a judge. His life and career had a distinctly international flavour, befitting one who was to become the leading Australian private international lawyer of his generation. Born in Germany, he received his

[1] Fogarty J, 'Peter Edward Nygh, A.M.: His Work and Times' (National Family Law Conference: Beyond the Horizon: Conference Handbook, Gold Coast, Queensland, 26-30 September 2004) 315.

[2] Kirby MD, 'Peter Nygh, Family Law, Conflicts of Law and Same-Sex Relations' (Peter Nygh Memorial Lecture delivered at the 12th National Family Law Conference, Perth, Western Australia, 23 October 2006).

primary and secondary education in the Netherlands, his tertiary education in Australia at the University of Sydney Law School (graduating with the degree of Master of Law, for a thesis on "International Recognition of Change of Status", and his postgraduate education in the United States at the University of Michigan, which he attended on a Fulbright Scholarship (graduating SJD). He commenced his academic career as a lecturer at the University of Tasmania in 1960, moving to the University of Sydney Law School in 1965 as a lecturer and being appointed to a chair in 1969. In 1971 he spent a year in Germany, on a Von Humboldt scholarship, at the University of Köln. In 1973 he was appointed Founding Head and Professor of Law at Macquarie University Law School, where he remained until 1979. Later, in 1987, by which time he was well into his judicial career, he was to be awarded a second doctorate, by the University of Sydney – the rarely awarded degree of Doctor of Laws – principally in recognition of the contribution to learning made by his work, *Conflict of Laws in Australia*.

In 1979, he was appointed a judge of the Family Court of Australia, and in 1983 designated as a judge of the Appeal Division. While a judge, he chaired the Family Law Council between 1986 and 1989 and, from 1989 to 1992, was a part-time Commissioner of the Australian Law Reform Commission.

I appeared before him often, both at first instance and in the Full Court, from my earliest days in practice, when he used to sit in Court 9 in the backblocks of the La Salle building behind Temple Court. He was deft in the conduct of proceedings, incisive and decisive, and his knowledge of the law extensive. While much of his judicial legacy is contained in the reserved Full Court judgments to be found in the law reports, he brought to his many ex tempore judgments those same qualities that characterised him as a teacher of law, as attested by David Bennett in his obituary in the Australian Law Journal, who described him as a "gifted teacher with a rare ability of being able to explain complex concepts in simple terms and of engaging his students".[3] He was invariably fair and judicial in demeanour, and courteous to counsel, parties and witnesses. As a first instance judge, counsel and parties left his court comfortable that they had received a fair hearing, even if unsuccessful. As Kirby J said in his 2006 lecture, he brought lustre to the bench of the Family Court of Australia, and to family law.

[3] Bennett DM, 'Peter Edward Nygh' (2002) 76 *Australian Law Journal* 595.

After retiring from the court after 14 years of judicial service, Peter served as Principal Member of the Refugee Review Tribunal, and as a Visiting Professor at Bond University and the University of New South Wales. He appeared in several significant cases in the High Court, led by Malcolm Broun QC, the leading counsel in this jurisdiction of the last half century, whose passing earlier this year I should also like in this forum to acknowledge. And he continued to produce scholarly works. It was a deep disappointment to him that his final illness prevented him from delivering the lectures for the General International Law Course at the Academy of International Law in the Hague in 2002, which he considered to be the summit of his career.

Peter's association with the Hague Conference on Private International Law began with his membership of Australia's first delegation in 1975, and continued for over a quarter of a century. He helped draft the Convention on the Celebration and Recognition of the Validity of Marriages and the Convention on the Law Applicable to Matrimonial Property Regimes, and he represented Australia in the negotiations that led to the Convention on the Protection of Children. He was one of two *rapporteurs* for the Hague Conference's arduous efforts to produce an international convention on recognition and enforcement of judgments. He was honoured by the Australian Government for his outstanding contribution to private international law, and in particular his representation of Australia at the Hague Conference, by the award of a Centenary Medal in 2001 and appointment as a Member of the Order of Australia in 2002.

What was planned as a *Festschrift* to honour Peter on his 70th birthday, which would have been in March 2003, was eventually published in 2004 as a *Gedächtnisschrift*, containing essays contributed by 30 scholars from 15 different countries, and covering many different areas, reflecting Peter's wide range of interests and expertise – a fitting tribute to the breadth of his international reputation.[4] As the foreword observed, he was "a great internationalist", and "one of the very few scholars with excellent knowledge of both the common law and civil law legal systems, a deep understanding of their differences and similarities and, no less important, had linguistic access to all primary sources of these systems".

[4] Einhorn T and Siehr K (eds), *Intercontinental Cooperation Through Private International Law: Essays in Memory of Peter E. Nygh* (T.M.C Asser Press, 2004).

The World Congress on Family Law & Children's Rights, which he served with great dedication as Director of Studies, has, like this conference, honoured him through the establishment of a memorial lecture in his name. In an article entitled "Outstanding Australian Judges",[5] which featured Windeyer J of the High Court, Glass JA of the New South Wales Court of Appeal, and Wells J of the Supreme Court of South Australia – Heydon J mentioned Nygh J of the Family Court in a "list of glittering examples" of candidates for similar treatment, along with such jurists as Sir Nigel Bowen, Sir Francis Burt, Bray CJ and King J of South Australia, Hutley, Hope and Samuels JJA of the New South Wales Court of Appeal, Sir Harry Gibbs, and Blackburn CJ of the Australian Capital Territory – eminent company indeed. That doyen of private international lawyers, Sir Peter North – of Cheshire, North and Fawcett – has referred to his "major contributions to [the Hague Conference]".[6]

Peter's seminal work *Conflict of Laws in Australia* – the first six editions of which he wrote alone – became the leading Australian text on Private International Law. The seventh edition, co-authored by Martin Davies, was published not long before his death in 2002, and its successors – the 8th edition in 2010 and 9th this year – manifest Peter's ongoing influence.

Peter took a particular interest in issues at the intersection of his two main areas of specialisation – family law and private international law – including the challenges posed by the differing attitudes of systems of law to social changes such as same-sex marriage and civil unions, and assisted reproductive techniques. It is in that tradition that I have chosen my topic today as aspects of law and practice in adoption, including two areas in particular which reflect the contributions of Peter Nygh. To the extent that some aspects may be a little New South Wales centric, I trust that their general application will become apparent.

[5] Heydon JD, 'Outstanding Australian Judges' (2005) 7 *The Judicial Review* 255, 257.

[6] North P, 'Challenges of Law Reform' (Lecture delivered at Queensland University of Technology, 2 August 2006).

ADOPTION - A SHORT HISTORY[7]

Adoption is a process by which a child's legal relationship with its natural parents is extinguished and replaced with a similar relationship with another adult or adults. It was described by the Royal Commission on Human Relationships as "a process by which society provides a substitute family for a child whose natural parents are unable to or unwilling to care for the child".[8] Although primarily a construct to imitate nature in respect of the rearing of a child, it also alters legal kin relationship, in particular for the purpose of the law of succession, and in some jurisdictions has been used on occasion primarily for that purpose.[9] This has happened in at least one Australian case where adoption was utilized to enable the adult children of a wife to come within the scope of her second husband's family trust.[10]

Although there is evidence that adoption was known in Babylon at least 2250 BC,[11] and was a familiar and well-regulated concept in Roman law,[12] adoption was unknown to the common law of England.[13] Thus in common law jurisdictions, adoption is entirely a creature of statute.

The first adoption statute in the common law world was enacted in the State of Massachusetts, in 1851,[14] in response to what had become the virtual pirating of neglected children from city slums and their placement with rural farming families, often as a means of cheap labour but for the stated purpose of giving them a better life.[15] Its mere eight sections contain provisions that are seminal to current adoption law: the natural parents were required to give written consent to the

---

[7] This section draws heavily on Dickey A, *Family Law* (Law Book Co of Australasia, 3rd ed, 1997) 423-4; and *Re Susan* [2009] NSWSC 592, [54]-[69] (Palmer J).

[8] Royal Commission on Human Relationships, *Final Report* (1977), vol 4, 98 [2].

[9] *In the matter of Adoption of Adult Anonymous*, 435 NYS 2d 527 (1981); see also *In re Adoption of Adult Anonymous II*, 452 NYS 2d 198 (1982); *Bedinger v Graybill's Executor and Trustee*, 302 SW 2d 594 (1957); cf *Re A (an Infant)* [1963] 1 WLR 231.

[10] *Re K and the Adoption of Children Act 1965* (1988) 12 Fam LR 263.

[11] *Code of Hammurabi*, secs 185-193.

[12] Gaius, *Institutes of Roman Law*, Book I, §§ 97-107; Corpus Juris Civilis, *Institutes of Justinian*, Book I, Title XI Adoptions.

[13] *Humphrys v Polak* [1901] 2 KB 385; Halsbury (4th Ed) Reissue 5(2) par 1021.

[14] 'An Act to provide for the Adoption of Children', General Court of Massachusetts, ch 324 (1851).

[15] Kahan M, 'Put up on Platforms: A History of Twentieth Century Adoption Policy in the United States' (2006) 33 *Journal of Sociology & Social Welfare* 51.

adoption; if the child was fourteen years old or more, his or her consent was required; the application was to be made to a Judge who had to be satisfied that the applicants were fit and proper to act as parents and were able to provide sufficiently for the child; and an adoption order had the effect of placing the child in the same position as if he or she had been born in wedlock to the adopting parents. Adoption was irrevocable, except for fraud.

Outside the United States of America, adoption legislation was first enacted in New Zealand, in 1881.[16] It substantially repeated the provisions of the Massachusetts Act, though it permitted a discharge of an order within three months. Each Australian jurisdiction then enacted adoption legislation: Western Australia in 1896, Tasmania in 1920, New South Wales in 1923, South Australia in 1925, Victoria in 1928, Queensland and the Northern Territory in 1935, and the Australian Capital Territory in 1938. In New South Wales the provisions were contained in Pt XIV of the *Child Welfare Act* 1923, which contained only seven sections and embodied in substance the provisions of the Massachusetts Act and the New Zealand Act.

Adoption remained unrecognised in the United Kingdom until the passing of the *Adoption of Children Act* in 1926, following a White Paper on child adoption presented to the United Kingdom Parliament in 1925 by a committee headed by Mr Justice Tomlin which found only one reason to support the introduction of a statutory law of adoption, namely:[17]

> *"… we think that there is a measure of genuine apprehension on the part of those who have in fact adopted and are bringing up other people's children, based on the possibility of interference at some future time by the natural parent. It may be that this apprehension has but a slight basis in fact notwithstanding the incapacity of the legal parent to divest himself of his parental rights and duties. The Courts have long recognised that any application by the natural parent to recover the custody of his child will be determined by reference to the child's welfare and by that consideration alone. The apprehension, therefore, in most cases has a theoretical rather than a practical basis. There is also a sentiment which deserves sympathy and respect that the relation between adopter and adopted should be given some recognition by the community. We think, therefore, that a case is made for an alteration in the law whereby it should be possible under proper safeguards for a parent to transfer to another his parental rights and duties, or some of them."*

The Committee further observed:[18]

---

[16] (NZ) *Adoption of Children Act* 1881.

[17] Royal Commission on Human Relationships, *Final Report* (1977), vol 4, p 98 [9].

[18] Ibid [26].

> *"Another matter of importance is the question whether an adoption once sanctioned is to be capable of revocation. In our opinion the notion of revocation is inconsistent with the notion of adoption."*

As a result of the work of the Standing Committee of Attorneys-General of the Commonwealth and the States in 1963 and 1964, the States and Territories in 1965 enacted reasonably uniform legislation, based on a model Adoption Bill agreed amongst the Commonwealth and the States. The New South Wales version was the *Adoption of Children Act* 1965, which came into effect in 1967, and provided the first comprehensive treatment of adoption law in this State.

Since 1965, each jurisdiction has revised its legislation to address perceived abuses of the past, and to adjust to changes in social attitudes. The current legislation was enacted over the period 1988 to 2009.[19] Differences in the approaches of the jurisdictions have significantly reduced the degree of uniformity achieved in 1965.

THE NEW SOUTH WALES REFORMS

The Law Reform Commission Report

In 1992, the Attorney-General for New South Wales referred the *Adoption of Children Act* 1965 to the Law Reform Commission for review. After widespread consultation, the Commission reported in 1997.[20] The chairman of the Commission was Michael Adams QC, now a Judge of the Supreme Court; the responsible commissioner was Chisholm J of the Family Court. The report contains a comprehensive and authoritative review of adoption law and practice. It recognised that there had been extensive social changes since 1965, particularly in areas of family law, anti-discrimination, and reproduction technology; and the development of international trends in children's rights. It recommended a new Act, under which adoption would be characterized by openness and no longer shrouded in secrecy, and adoption practices would conform with Australia's international obligations and align with other areas of child law,

[19] (Vic) *Adoption Act* 1984 ('(Vic) *Adoption Act*'); (SA) *Adoption Act* 1988 ('(SA) *Adoption Act*'); (Tas) *Adoption Act* 1988 ('(Tas) *Adoption Act*'); (ACT) *Adoption Act* 1993 ('(ACT) *Adoption Act*'); (WA) *Adoption Act* 1994 ('(WA) *Adoption Act*'); (NT) *Adoption of Children Act* 1994 ('(NT) *Adoption Act*'); (NSW) *Adoption Act* 2000 ('(NSW) *Adoption Act*'); (Qld) *Adoption Act* 2009 ('(Qld) *Adoption Act*').

[20] New South Wales Law Reform Commission, Report No 81, *Review of the Adoption of Children Act 1965 (NSW)*, (1997).

prevailing community expectations and attitudes, and reflect contemporary approaches to adoption and the status of children as individuals with their own rights.

The recommendations included that:

- The welfare and interests of the child, expressed in the internationally accepted phrase "best interests", continue to be the paramount consideration in adoption, and the legislation include guidelines to assist in its application;

- An adoption order should only be made where it makes better provision for the best interests of the child than a parenting order under the (Cth) *Family Law Act* 1975 or any other order for the care of the child;

- The child should have a greater voice in proceedings, and respect for the child's viewpoint should underpin the language and application of the legislation;

- There should be much stronger safeguards to ensure that a consent was informed and voluntary;

- Particular provision should be made to ensure, so far as practicable, that any adoption of Aboriginals or Torres Strait Islanders was culturally appropriate;

- There is a need for openness from the start of the adoption process and during the course of childhood. The legislation should encourage parties to negotiate a voluntary plan making arrangements for contact and information exchange between the adoptive and birth families. The 1994 Western Australian legislation was highly influential in this;

- The legislation should permit an adoption order to be made in favour of either a couple (whether married, de facto, heterosexual or homosexual) or a single person;

- Rather than parental fault-based grounds contained in the earlier legislation, the court should be able to dispense with a birth parent's consent only if (1) after reasonable inquiry the parent cannot be found or identified, (2) the parent is physically or mentally incapable of properly considering the question, or (3) it is necessary to override the wishes of the parent in order to give effect to the best interests of the child;

- With Australia poised to ratify the *Hague Convention on Protection of Children and International Co-operation in respect of Intercountry Adoption*, the legislation should ensure that adoption practice conformed with Australia's international obligations.

The Parliamentary Debate

Three years later, in 2000, the bill for what became the (NSW) *Adoption Act* 2000 was introduced. It very largely reflected the recommendations of the Law Reform Commission, but the Government of the day did not accept the recommendation that same-sex couples should be able to adopt.[21] Robust debate ensued. There was widespread support for many aspects of the new Act - including the "best interests" principle, the more stringent requirements for consent, the protection of the interests of children in intercountry adoptions, the particular protection of the interests of Aboriginals and Torres Strait Islanders, the more restricted grounds for dispensing with consent, being child-focussed rather than based on parental fault; and - generally - for the move from secrecy to openness, although some expressed concerns that it might deter adopters, or unreasonably interfere with their parental rights, to insist on birth parent contact. Some also argued that adoption was not only a service to the child but also to adopters, who were often childless couples seeking a child, and that insufficient recognition was given to their interests. The most controversial areas were whether same-sex couples, or single persons, should be eligible to adopt. There was also debate as to whether the jurisdiction should be given to the Family Court. An amendment was successfully moved, by the Greens, to restrict still further the ground for dispensing with consent to give effect to the best interests of the child, by providing that that could be done only where there was serious concern for the welfare of the child.

The inquiries

More or less contemporaneously with the genesis of the Act, the Legislative Council's Standing Committee on Social Issues conducted an inquiry into adoption practices between 1950 and

[21] Provision to that effect would not be introduced until 2010: *Adoption Amendment (Same Sex Couples) Act 2010*, Assented to 15.9.2010

1998.[22] In its final report,[23] it acknowledged that in certain cases past adoption practices were misguided, and that, on occasion, unethical and unlawful practices had occurred:

> Many past adoption practices have entrenched a pattern of disadvantage and suffering for many parents, mostly mothers, who relinquished a child for adoption particularly in the 1950s, 1960s and 1970s. The purpose of this report has been to describe and explain the past, with a view to recommending changes for the present and for the future. The report is an acknowledgment that many mothers who gave up their children to adoption were denied their rights, and did not uncaringly give away their children.

A decade or so later, the Senate's Community Affairs References Committee addressed similar issues, on a national basis, and acknowledged the harm suffered by many parents whose children were forcibly removed and by the children who were separated from their parents, resulting in the formal apology delivered by Prime Minister Gillard for the actions and policies that had supported in forced adoption..

The (NSW) *Adoption Act* 2000

In many ways, the Act implemented substantial reforms to adoption law and practice. What had originated as 7 sections in the 1923 Act became an Act of 229 sections. But as one who has to grapple with it on a regular basis, it must be said that it is not the Parliamentary counsel's greatest triumph. It contains a number of inconsistencies.

In making the best interests of the child the paramount consideration in decision-making about adoption,[24] the Act reflects the law in all Australian jurisdictions.[25] The application of this principle to the law of adoption has not been without controversy.[26] It has been argued that where the issue is severance of a parent-child relationship, the interests of a parent ought not

---

[22] A similar inquiry, covering the period 1958-1988, was conducted by a Joint Select Committee of the Parliament of Tasmania

[23] New South Wales, *Releasing the Past: Adoption Practices 1950-1998: Final Report*, 8 December 2000

[24] (NSW) *Adoption Act*, s 8(1)(a).

[25] (Vic) *Adoption Act*, s 9; (SA) *Adoption Act*, s 7; (Qld) *Adoption Act*, s 6(1); (Tas) *Adoption Act*, s 8; (WA) *Adoption Act*, s 3; (ACT) *Adoption Act*, s 5; (NT) *Adoption Act*, s 8(1).

[26] Hambly D, 'Adoption of Children: An Appraisal of the Uniform Acts' (1968) 8 *University of Western Australia Law Review* 281, 317-8; Hambly D, 'Balancing the Interests of the Child, Parents and Adopters: A Review of Australian Adoption Law' in Picton C (ed) *Proceedings of First Australian Conference on Adoption* (Committee of the First Australian Conference on Adoption, Melbourne 1976) 75, 76-8, 95-7.

necessarily be subordinated to that of the child.[27] In 1955 the High Court observed that in the ordinary case a mother's moral right to insist that her child remain her child was too deeply grounded in human feeling to be set aside by reason only of an opinion formed by others that a change is likely to be for the greater benefit of the child.[28] Nonetheless, the principle is now firmly entrenched in the law of adoption, although the restrictions on the circumstances in which consent can be dispensed with, coupled with an approach that recognises that it is ordinarily in a child's interest that he or she be raised by birth parents, and that dispensing with consent is a most serious step, gives some weight to the interests of birth parents. However, where the child's best interests and the interests of the birth parents are inconsistent, the former must prevail.

In conformity with the recommendation of the Law Reform Commission, the Act provides additional guidance as to the application of the best interests principle. In making decisions about adoption, the court must apply the following principles:[29]

> (a) the best interests of the child, both in childhood and in later life, must be the paramount consideration;
>
> (b) adoption is to be regarded as a service for the child;
>
> (c) no adult has a right to adopt the child;
>
> (d) if the child is able to form his or her own views on a matter concerning his or her adoption, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child and the circumstances;
>
> (e) the child's given name or names, identity, language and cultural and religious ties should, as far as possible, be identified and preserved;

[27] Dickey, above n 7, 456.

[28] *Mace v Murray* (1955) 92 CLR 370, 385.

[29] (NSW) *Adoption Act*, s 8(1).

(e1) undue delay in making a decision in relation to the adoption of a child is likely to prejudice the child's welfare.

In speaking of adoption being a "service to the child", the Act requires decisions in connection with adoption to be made on the basis that the prime consideration is benefit to the child, as distinct from providing a service to people who wish to adopt a child. However, that does not mean that no service is provided to a child by adoption just because his or her needs are already being adequately met.

The Court may not make an adoption order unless it considers that the making of the order would be clearly preferable in the best interests of the child than any other action that could be taken by law in relation to the care of the child.[30] This requires something more than a slight preponderance of considerations in favour of adoption over the alternatives. While not amounting to a requirement for satisfaction "beyond reasonable doubt",[31] the requirement that the Court consider that an adoption order be "clearly preferable" is one that adoption be obviously, plainly or manifestly preferable to any other action that could be taken by law.[32]

The answer to the question whether adoption is "clearly preferable" is informed by various other considerations, referred to in s 8(2), which may generally be summarised as follows:

- The child's physical, emotional and educational needs, including sense of personal, family and cultural identity, and any disabilities; wishes, and other relevant characteristics including age, maturity, level of understanding, gender, background, and family relationships;

- The birth parents' wishes; the nature of the child's relationship with them; their parenting capacity; and their attitude to the child and to the responsibilities of parenthood; and

- The proposed adoptive parents' suitability and capacity to provide for the child's needs; their attitude to the child and to the responsibilities of parenthood; and the nature and quality of the child's relationship with them.

[30] (NSW) *Adoption Act*, s 90(3).

[31] *Application of A; re D* [2006] NSWSC 1056, [53].

[32] *Director-General, Dept of Community Services v D and Ors* [2007] NSWSC 762; (2007) 37 Fam LR 595, [25].

In addition, all these are informed by the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or being present while a third person is subjected or exposed to, ill-treatment, violence or other behaviour; and the alternatives to adoption, in the light of the short and long term effects of adoption.

Consideration of whether adoption would promote the child's best interests, and whether it is clearly preferable to any other order that could be made, involves identification of the likely effects of adoption and the various available alternatives, and examining their respective benefits and detriments from the perspective of the best interests of the child, so as to conclude whether adoption is, or is not, clearly preferable to all the others. The alternatives typically include:

- restoring the child to the care of a birth parent;
- maintaining the status quo, with the Minister having parental responsibility and the child in foster care;
- allocating parental responsibility in favour of the applicants; and
- deferring determination of the question until the child is older, either maintaining the status quo or making a parental responsibility order in the meantime.

STATISTICS AND TRENDS IN ADOPTION IN AUSTRALIA[33]

The report of the New South Wales Standing Committee observed that, in New South Wales, adoptions peaked in 1972 at 4,564; this had fallen to 1,889 by 1975, 741 in 1984, and only 178 (including intercountry adoptions) in 1999.

Nationally, the number of adoptions has fallen from 1,501 in 1988-89 to 502 by 2003-04 and only 339 in 2012-13 – a 77% decline since 1988-89 and a 32% decline over the last decade. The 2012-13 figure is slightly higher than the 2011-12 figure of 333 adoptions, which was the lowest

[33] Australian Institute of Health and Welfare, 'Adoptions Australia 2012-13' (Child Welfare Series No 57, 2013).

annual number of adoptions recorded since national data have been collated. The Australian trend aligns with experience in similar nations. The number of adoptions has generally been falling in England and Wales – by 71% between 1974 and 1990, from 22,502 to 6,533,[34] and while there were some fluctuations between 1990 and 2012, overall there was a further decrease of 23%. However, this trend has been reversed in recent years, with an increase of 5% in 2011 and 6% in 2012. There has also been a decline – albeit more gradual – in Ireland, Scotland, Norway and Switzerland.[35]

The number of adoptions of Australian (as distinct from foreign) children fell from 1,106 in 1988-89 to 440 in 1996-97 to 132 in 2003-04, but subsequently increased to 190 in 2009-10 and 210 in 2012-13. The increase since 2003-04 was predominantly due to increases in New South Wales (from 49 to 121), and less so Queensland (from 16 to 23) and Western Australia (from 15 to 32); numbers decreased or remained fairly stable in the other states and territories. One of the topics to which I shall come is the increase in New South Wales.

Causes of the decrease in the number of adoptions of Australian children include:

(a) increased social acceptance of raising children outside marriage, and increased levels of support for sole parents, reducing the pressure to relinquish children for adoption;

(b) broader social trends, such as declining fertility rates, the wider availability of effective birth control and the emergence of family planning centres; and

(c) legislative and policy changes that encourage a greater use of alternative legal solutions that do not involve a complete legal severance of parentage.

Despite the general trend, the number of adoptions by carers such as foster parents increased notably over the last 10 years – from 25 in 2003-04 to 81 in 2012-13 (the highest number of carer adoptions on record). Coupled with the decrease in the overall number of adoptions, this meant that the proportion of adoptions by carers increased from 5% of all adoptions in 2003-04

[34] Ibid 49.

[35] Ibid. Despite having about 4 to 5 times the population of each of Scotland, Norway and Ireland, the number of annual adoptions in Australia is not necessarily larger.

to 24% in 2012-13. This increase can be attributed almost exclusively to New South Wales – from 11 carer adoptions in 2003-04 to 78 in 2012-13. Again, I will return to this.

While the long-term fall is more notable for the number of Australian children adopted (an 81% decline from 1,106 in 1988-89 to 210 in 2012-13), the 129 intercountry adoptions finalised in 2012-13 continued an 8-year decline in intercountry adoptions, resulting in an overall decline of 67% from the 394 such adoptions in 1988-89. Since 2011-12, there have been more adoptions of Australian children finalised than children from overseas, a phenomenon not seen since 1998-99. Over that period, the source countries for intercountry adoptions have fluctuated. Between 2003-04 and 2008-09, the main countries of origin were China and South Korea; from 2008-09 to 2011-12, the Philippines, Ethiopia, China and South Korea; and in 2012-13, Taiwan and the Philippines.

Again, this appears consistent with international trends: it has been estimated that the global number of intercountry adoptions grew by around 18% between 1998 and 2007, with a global peak of 45,288 in 2004; [36] since the peak in 2004, numbers have declined by 36% between 2004 and 2010.[37]

OUT-OF-HOME CARE ADOPTIONS IN NEW SOUTH WALES

In 2012-13, the highest proportion of known child adoptions was by carers such as foster parents, the majority of which (78 of the 81 carer adoptions nationally) occurred in New South Wales. This reflects policies in New South Wales which promote adoption as a means of achieving stability for children under the long-term care of state child protection services when restoration is not considered appropriate. In this section I consider the theory that informs this policy. One reason for doing this is that while every case is different and, in our system of justice, each must be decided on its own facts and evidence, consistency in decision-making is likely to be

[36] Selman P, 'The Rise and Fall of Intercountry Adoption in the 21st Century' (2009) 52(5) *International Social Work* 575, 576.

[37] Selman P, 'The Global Decline of Intercountry Adoption: What Lies Ahead?' (2012) 11 Social Policy and Security 381, 390.

enhanced, and the prospect of relevant issues being addressed by the evidence increased, if some general principles that inform decision-making are understood.

The starting point in these cases is that there is already in place an order of the Children's Court allocating parental responsibility to the Minister until the child attains 18 years of age. Implicit in that order is a conclusion that the child cannot be satisfactorily cared for by the birth parents, and that restoration to a birth parent is improbable – though it remains possible for a birth parent to make application for restoration (by way of rescission of the care order) in the event of a change of circumstances, notwithstanding that a final order allocating parental responsibility to the Minister until 18 is in place.[38] Typically, the child is one whose earliest years have been disrupted, but who has been in a stable placement for some years, often the child's longest period of stability to date. As restoration would involve a move from the residence, the family, the school, the connections and the environment in which the child is established, and would disrupt extant stable, secure and supportive arrangements, and move the child to an untried and uncertain alternative – often further jeopardising the child's already compromised ability to form and establish secure attachments – it rarely provides a realistic or attractive alternative.

Even though an adoption order may not effect any immediate or overt improvement in respect of the arrangements for a child's residence, education, and care, that does not mean that it is without beneficial impact.

First, an adoption order may provide certainty and permanence for the child, both directly and indirectly, through the additional certainty it will afford the adoptive parents. The possibility of further changes, disruptions and separations will be minimised. Aspirations to restoration expressed by birth parents, however improbable as an outcome, will be foreclosed. An adoption order is also likely to minimise any remaining temptation for birth parents to make comments or suggestions that the child may be returning to their care.

In these ways, and others, adoption can contribute to providing for a child an additional measure of stability, security and certainty. Security and stability are important life foundations for children, all the more so against an early background of instability. If during his or her earliest

[38] (NSW) *Children and Young Persons (Care and Protection) Act* 1998, s 90.

years a child has been deprived of the opportunity to develop secure attachments, he or she is at high risk of tenuous interpersonal relationships and fragile emotional health, and this is a strong indicator for providing every possible support for stability and security to enable development of secure attachments while the opportunity remains to do so. The ages of two to seven years are the most important from that perspective.

Secondly, the child is raised in a legally recognised family, rather than remaining a State ward; and ceases to be in "out-of-home" care, in favour of "in-home" care. The need for departmental intervention, and departmental approval for significant decisions of the caregivers, is removed, as is the stigma potentially associated with being a State ward.

Thirdly, the child's legal status is brought into conformity with reality. Psychologically and residentially, the child is already a member of the proposed adoptive family. An adoption order brings the legal position into line with this. Membership of the family that the child already regards as his or her own is perfected, providing a sense of security and permanent belonging in that family. That membership is not only during childhood, but for life.

Fourthly, the child's legal name corresponds with that of the family with which he or she lives and identifies, and the child is enabled to choose for himself or herself whom to tell of his or her status, without it being self-evident from the name. This correspondence of name is frequently referred to by children as, for them, the most significant aspect of adoption.

While an adoption order legally severs the parental relationship between the child and the birth parents, they are often relationships which, in reality, have been practically devoid of parental responsibility. Often, it is argued that adoption is contrary to a child's need to identify with its family of origin. A clear sense of identity is an important life foundation for children, particularly against an early background of ambiguity or instability, and one important aspect of a child's identity needs is the need to know his or her origins. Children who do not live with their birth parents may well embark on a search or inquiry in respect of birth family, and lack of satisfactory answers may result in a sense of being "abandoned" or "unwanted". Such children therefore have a need for knowledge of their origins, of their birth parents, and of the reasons why they are not in their care. That said, a child's origins comprise only one aspect of the child's identity, and where the child has been placed with proposed adoptive parents for a period

that represents by far the longest period of continuous stability of the child's life experience, he or she is likely to identify the proposed adoptive parents as his or her psychological parents, and given their respective roles in the child's life to date, the adoptive family is likely to provide a far greater component of the child's identity than his or her origins.

While adoption carries a risk that the child may feel unwanted or abandoned, this risk is incidental more to the circumstance that the child does not reside with the birth parents, than to an adoption order *per se*: whether in foster care, or under a parental responsibility order, or adopted, there is the same potential for the question, "why do I not live with my birth parents?". Thus, declining to make an adoption order in favour of some other solution, short of restoration, does not remove that risk. However, the risk is mitigated if the child knows the birth parents, has an understanding of their situations, and will continue to have some relationship with them. While the legal relationship with the birth parents is severed, they do not cease to be the birth parents; the relationship with them can be maintained through contact, while legal parenthood resides with those who are discharging the responsibilities of parenthood. An adoption order can provide a more secure foundation for an ongoing relationship with the birth parents through contact, with the adopters better able to support and facilitate it when relieved of the insecurity or doubt that might attend it if some prospect of restoration remains open.

There is significant support in the social science literature for this approach.

Children who have experienced childhood neglect or abuse are at increased risk of poor adjustment in adulthood. According to the study of Vinnerljung, Hjeern and Lindblad (2006),[39] former child protection clients are a high risk group for future suicidal behaviour and severe psychiatric morbidity, being four to five times more likely than peers in the general population to have been hospitalised for serious psychiatric disorders in their teens and four to six times more likely in young adulthood.

Adopted children generally do better than long term foster care children. Bohman and Sigvardsson (1980) studied children adopted in the 1950s in Sweden, with the result that at all

[39] Winnerljung B, Hjern A, and Lindblad F, 'Suicide Attempts and Severe Psychiatric Morbidity Amount Former Child Welfare Clients – A National Cohort Study' (2006) 47(7) *Journal of Child Psychology and Psychiatry* 723-33.

stages the adopted children did better than their fostered peers.[40] Vinnerljung, Hjern and Lindblad found that long term foster children tended consistently to have the most dismal risk ratios, while the adoptee comparison group tended to have more favourable outcomes than the child protection clients, suggesting that adoption offered a form of long-term substitute care that had stronger compensatory potential than what was offered to foster children.[41] In a later study, Vinnerljung and Hjern (2011) compared outcomes of long term foster care and adoption for children who came into the child welfare system at an early age and concluded that, while the crude outcomes for both groups were substantially weaker than for majority population peers, the foster children fell clearly short of adoptees on all outcomes – including school performance at 15, cognitive competence at 18, educational achievement and self-support capability in young adult years, and also after adjustments for birth parent related confounders and age placement in substitute care.[42]

A study in the United States by Lloyd and Barth (2011)[43] used a sample of 353 children who were less than 13 months of age when investigated by child welfare services, and followed their progress over 66 months. The results indicated that remaining in foster care was less developmentally advantageous than having a more permanent arrangement of either adoption or return to birth family.

Two studies by Triseliotis in 1983[44] and 2002[45] are often referred to in this context. The first showed that adoptees generally had a more problem free life as adults and tended to have a better education, less self-support problems and better self-esteem than long term foster children. The second was a review article, which examined the research literature and contrasted six variables. The findings were that placement breakdowns amongst the adoption group were significantly

[40] Bohman M and Sigvardsson S, 'Outcome in Adoption: Lessons from Longitudinal Studies' in *The Psychology of Adoption* (eds Brodzinsky DM and Schechter MD), Oxford University Press, New York (1990).

[41] Winnerljung, Hjern and Lindblad, above n 39, 727.

[42] Winnerljung B and Hjern A, 'Cognitive, Educational and Self-Support Outcomes of Long-Term Foster Care versus Adoption. A Swedish National Cohort Study' (2011) 33(10) *Children and Youth Services Review* 1902

[43] Lloyd EC and Barth RP, 'Developmental Outcomes After Five Years For Foster Children Returned Home, Remaining in Care, or Adopted (2011) 33(8) *Children and Youth Services Review* 1383.

[44] Triseliotis J, 'Identity and Security in Long-Term Fostering and Adoption' (1983) 7(1) *Adoption and Fostering* 22.

[45] Triseliotis J, 'Long-Term Fostering and Adoption' (2002) 7(1) *Child and Family Social Work* 23.

lower compared with the fostered group; that even when long term fostering survived, the children felt less secure and had a weaker sense of belonging compared with those who were adopted; that adoptees perceived themselves to be doing significantly better than did those in foster care; and that the weight of evidence suggested that adoption conferred significant advantages on children who could not return to their birth families, especially in terms of emotional security and sense of belonging. Thus adoption provided higher levels of emotional security, a stronger sense of belonging, and a more enduring psycho-social base in life for those who could not live with their birth families, than did long term fostering.

A child psychologist who has given expert evidence in a number of these cases, Ms Therese Lindfield, has drawn on these studies and her own experience to expressed the opinions that adopting parents tend to persevere more than foster parents when difficulties arise, and that adopted children experience an increased sense of belonging and family ownership, which in turn enhances their security and self-esteem; and that in these dual ways the permanence of adoption improves the security – or, as I would put it, the commitment – of the foster parents, and the security of the child; which together contribute to the development of stronger bonds of attachment between them.

I absolutely accept that these are not conclusions to be applied willy-nilly to every case. But they provide a useful basis for supposing that, where the choice is between adoption and long term foster care, in general adoption may be regarded as offering positive advantages for a child over long term foster care. The quality of the relationship with the birth parents, and the impact on relations with birth siblings, are important considerations, but it seems to me that how the child identifies himself or herself will be highly influential.

While it is not unknown for one or even both birth parents to consent to an application for adoption by carers, where they recognise that the child is in a stable environment and receiving quality care, it is common for at least one – usually the mother – to decline to do so. Sometimes this will be on the basis that, while recognising the benefits for the child and not resolutely opposing adoption, she feels unable affirmatively to consent. Other times, it manifests opposition to adoption. In either case, adoption can proceed only if the birth parent's consent is dispensed with. Prior to 2006, the grounds for a consent dispense order, as the Act calls them,

were limited to cases in which the birth parent was unable to be identified or found, or was incapable, or there was serious cause for concern for the child's welfare. In 2006, in order to facilitate out-of-home-care adoptions, the ground provided by s 67(1)(d) was introduced, permitting consent to be dispensed with where a child has been in the long-term care of authorised carers and has established a stable relationship with them, and the interests and welfare of the child would be promoted by adoption by those carers. This was explained, in the second reading speech,[46] as enabling consent to be dispensed with where adoption would enhance the child's sense of belonging and permanence in the carers' family notwithstanding that there is no concern about the child's current welfare (as distinct from the child's welfare at the beginning of the placement). Essentially, this reflects a policy decision that once a child has been removed from his or parents and placed in long-term out-of-home care, the rule that the legal parental relationship is not to be severed without the consent of the parents is displaced, if the court is satisfied that the best interests of the child will be served by adoption.

The New South Wales approach can be contrasted with Victoria, where since 1992 permanent care orders have provided an alternative to adoption, in overcoming the uncertainty often associated with placing children on guardianship or custody orders by allocating permanent guardianship and custody of a child to a third party. Unlike adoption orders, permanent care orders do not change the legal status of the child; they expire when the child turns 18 or marries; and there is also provision for an application to be made to revoke or amend a permanent care order. The aim of placing a child on a permanent care order is to provide an opportunity for the child to develop a stable caring relationship with nurturing caregivers, without severing the tie with the biological family. A total of 3,384 permanent care orders have been granted by the Department of Human Services (DHS) in Victoria since 1992; in 2012–13, 267 orders were granted.

[46] New South Wales, Hansard, Legislative Council, 25 October 2006.

OPEN ADOPTION AND BIRTH PARENT CONTACT

It was a fundamental tenet of the 2000 Act that birth parent contact should be encouraged, and I have referred to the important role of birth parent contact in addressing the identity needs of adopted children. Until relatively recent times, it was assumed that adoption involved a complete severance of the relationship between the child and its birth parents. The rationale was that this enabled the adoptive parents to raise the child as their own, with neither interference by the birth parents, nor reminder of their existence; and commensurately enabled the child to grow up knowing just one set of parents without any risk of confusion or division of loyalties through familiarity with the birth parents.[47] In that context, it was also seen as an interference with the parental rights of the adoptive parents to impose on them an access order against their will.[48] Barblett J said, in 1982, that it was basic to the concept of adoption that there be no access by a birth parent as the child grows up.[49] Thus it was the rule that a birth parent would be granted an order for contact with an adopted child only in exceptional circumstances.[50]

However, courts did from time to time make orders for contact where it was considered to be of benefit to the child.[51] In *Adoption Application A83/6507* [1984] 2 NSWLR 590, Waddell J, as the later Chief Judge then was, observed that the Court may take judicial notice of the views now held by many professional people engaged in child welfare and adoption work that there are circumstances in which the interests of the child concerned may best be promoted by providing for adoption by the persons who have become the psychological parents, and also providing for continued contact with the natural parent. His Honour said that an order for adoption would be refused in the absence of any agreement between the natural parents of the child concerned as to access, because while the adoption order would have important advantages for the child, these

[47] Dickey, above n 7, 464.

[48] *Re S (a Minor)* [1976] Fam 1, 6; *Re M (a Minor)* [1986] 1 Fam LR (Eng) 51, 58-9.

[49] *In the Marriage of N and H* (1982) FLC 91-267.

[50] *Re B (MF) (an infant)* [1972] 1 WLR 102, 104; *Re El-G (Minors)* (1982) 4 Fam LR (Eng) 421, 433; *Re C (a minor)* [1989] AC 1, 17.

[51] *Re J* [1973] Fam 106; *Re S (a Minor)* [1976] Fam 1; *Re G (a Minor)* (1979) 1 Fam LR (Eng) 109.

did not justify the exclusion of the natural parent from the life of the child in the way that adoption would be likely to bring about.[52]

In 1987, the Full Family Court held that there was no rule discouraging an order for birth parent contact with an adopted child, and that as the welfare of the child was the paramount consideration, adoption was simply a factor to be taken into account when deciding what would best serve the child's welfare. The leading judgment was that of Nygh J, who said: "There is no rule that this court should not as a matter of principle, or perhaps only in exceptional circumstances, make any orders which in any way detract from the effect of the adoption order".[53]

The practice of "open adoption", involving birth parent contact, is now widespread.

In New South Wales, birth parents participate in the choice of the adoptive family for their child. While it is accepted that a variety of relationships may exist between a child's adoptive and birth families, birth parent contact is strongly supported, unless it is not sought or not safe. The attitude of proposed adoptive parents to birth parent contact, and their ability to support it, is usually a very important consideration, especially in contested out-of-home care cases.

In most local adoptions, an adoption plan, providing for contact and/or the exchange of information, is presented to the court at the time an adoption order is sought. If the parties to the adoption have agreed to an adoption plan, the Court may not make an adoption order unless it is satisfied that the arrangements proposed in the plan are in the child's best interests and are proper in the circumstances.[54] An adoption plan does not of itself create legally enforceable obligations, but as I will explain, can be made enforceable.

Other jurisdictions also provide for open adoption and birth parent contact. The Western Australian legislation, which was pioneering in this respect and powerfully influenced the New South Wales Law Reform Commission, treats all adoptions as open. Adoption plans are required,

---

[52] *Adoption Application A83/6507* [1984] 2 NSWLR 590, 595; see also *Re Adoption Application No 6671/83* (1985) 10 Fam LR 624, 626, 629.

[53] *In the Marriage of Newling and Mole* (1987) 11 Fam LR 974, 978

[54] (NSW) *Adoption Act*, s 90(2).

and must specify whether and to what extent there will be contact. The contact can be varied by agreement, with the approval of the Family Court of Western Australia.

In the Australian Capital Territory, provision is made for conditional orders that provide for contact and other arrangements. Since the 1993 adoption legislation, all adoptions are regarded as open, in that some form of contact or information exchange is encouraged. Conditional orders are now routinely recommended to the court.

In Victoria, an adoption order can include conditions regarding information exchange and/or access between the parties. After signing the consent, birth parents may express their wishes concerning contact and information exchange, which are considered when placement decisions are made. When the arrangements form part of the adoption order, there is a legally binding way to resolve any disputes that may arise.

Under the Queensland Act, where prospective adoptive parents and birth parents wish there to be contact after the adoption order is made, an adoption plan is compulsory, and must be in place before a final adoption order can be made. In South Australia, open arrangements involving information exchange and/or contact may be agreed between the parties, but are not legally binding. In Tasmania, the parties may express wishes in respect of contact and information exchange at the time of the adoption, but the arrangements are not legally binding.

In the Northern Territory, relinquishing parents may request an open adoption and an arrangement may be made with adoptive parents, but is not legally binding.

While the view has been taken in many jurisdictions – and was accepted by the NSW Law Reform Commission – that arrangements for birth parent contact should be voluntary and unenforceable, I tend to disagree. In particular, one of the greatest fears of birth parents who oppose adoption though recognising that the child is receiving superior care is that of losing contact with their child, and the promise of voluntary cooperation by the adopters is often not an adequate response; a legally enforceable obligation is usually more acceptable. Similarly, adopters often agree to support whatever contact the child wants, but that does not adequately reflect the obligation of the adoptive parents proactively to support contact in the best interests of the child. The theory of voluntariness is that adopters should not have birth parent contact foist

on them against their will, but to my mind if the long-term interests of the child are that there be birth parent contact, the adopters must be prepared to accept and support it. Insofar as there is a concern that birth parent contact may be confusing to a child, I suspect we have all seen sufficient of blended families to accept that children have little difficulty in adapting to environments in which they have more than two parents.

Although the Law Reform Commission recommended voluntary arrangements, the legislation provides that the parties to an adoption who have agreed to an adoption plan may apply to the Court for registration of the plan. Before registering a plan the Court must be satisfied that it does not contravene the adoption principles, that the parties to the adoption understand its provisions and freely enter into it, and that the provisions are in the child's best interests and proper in the circumstances. An adoption plan that is registered has effect on the making of the relevant adoption order as if it were part of the order.[55] While registration was, until recently, uncommon, I have promoted it, particularly in out-of-home care cases, as it provides additional comfort and assurance to the birth parents that their ongoing contact with the child is not solely dependent on the support of the adoptive parents, but is underpinned by a plan that has effect as an order of the Court.

One difficulty has been that only those parties to an adoption who have agreed to an adoption plan may apply to the court for registration of the plan. The parties to an adoption include the Director-General, the adopting parents and any consenting birth parent, but not a non-consenting birth parent.[56] However, recent amendments now have the effect that a birth parent who has not consented to the adoption of a child is, as far as possible, to be given the opportunity to participate in the development of, and agree to, an adoption plan in relation to the child, and a non-consenting birth parent who agrees to an adoption plan is, for the purposes of the provisions relating to adoption plans, to be treated as if the non-consenting birth parent were a party to the adoption of the child.

Moreover, as a registered adoption plan has effect on the making of the relevant adoption order as if it were part of the order, and thus confers on the contents of the plan the effect of a court

[55] (NSW) *Adoption Act*, s 50.

[56] (NSW) *Adoption Act*, s 46(2A), (2B), inserted by (NSW) *Child Protection Legislation Amendment Bill 2014*.

order,[57] a non-consenting birth parent, as a person having the benefit of a deemed order, has standing to apply for its enforcement,[58] although they would not have standing to apply for a review of the plan under s 51.

In addition, even where the adoption legislation does not provide for enforceable contact arrangements, there is jurisdiction under the *Family Law Act* to make a "spend time with" order in respect of an adopted child who, once an adoption order is made, is a child of the adoptive parents. In *Adoption Application A83/6507*, Waddell J said that whereas, but for the *Family Law Act*, the Supreme Court would have had power in its inherent jurisdiction when making an adoption order to provide for access to the child concerned, that had been overtaken by the *Family Law Act*, pursuant to which access to a child of a marriage – as an adopted child became on making an adoption order – was a matrimonial cause within the then exclusive jurisdiction of the Family Court. The jurisdiction of the Family Court to make an order for contact in respect of an adopted child at the suit of one of the natural parents was confirmed by the Full Court of that Court in *Newling and Mole* (1987) 11 Fam LR 974, 978, in which the Court said that a concession made by counsel for the adoptive mother that it could not be argued that it lacked jurisdiction to deal with an application by the natural father for access to the adopted child was correctly made. Since those cases were decided, the (Cth) *Jurisdiction of Courts (Cross-Vesting) Act* 1987 has vested in the Supreme Court all the relevant jurisdiction of the Family Court, so that it is now open to the Supreme Court, in its cross-vested jurisdiction, to make such an order under the *Family Law Act* contemporaneously with making an adoption order, and thereby avoiding the necessity for two sets of proceedings in different courts. This jurisdiction also enables a birth parent to seek a review of contact arrangements.[59] An argument that *Family Law Act*, s 69ZK, excludes power to make such an order has been rejected, on the basis that that section was not intended to address the situation after – as distinct from before – an adoption order is made.[60]

---

[57] *Director-General, NSW Department of Family and Community Services Re JS* [2013] NSWSC 306.

[58] *Director-General, NSW Department of Family and Community Services Re JS*, [12].

[59] *Director-General, Department of Family and Community Services; Re TVK* [2012] NSWSC 1629.

[60] *Director-General, Department of Family & Community Services; Re TVK* [2012] NSWSC 1629.

Birth parent contact is a significant element in meeting the identity needs of a child who does not reside with his or her birth family. As Waddell J illustrated in 1984, the arrangements for birth parent contact are relevant to whether an adoption order should be made because they bear on whether the child's identity needs will be adequately addressed, and thus whether adoption is in the child's best interests.

However, contact for this purpose is different from contact with a non-residence parent following separation, where there is an established relationship between the child and the parent, who remains a legal parent. Contact often involves significant emotional stresses for any or all of the child, the birth parents and the adoptive parents. Stressful contact hinders development and makes it less likely that the child will want to explore his or her roots with confidence when older; and enforced participation in contact that children find stressful is usually counterproductive in the longer term. In this context, contact may be as little as twice a year, though that is minimalist, and has rarely exceeded eight times a year; it has been suggested – or at least speculated, in the absence of any solid evidence - that it may be difficult to sustain more than quarterly contact.[61] Moreover, where a child's ability to develop secure attachments has been jeopardised by early disruption, it is vital that the bonds established with the adoptive parents be now afforded maximum protection and security. This means that an adoptive parent is usually present during contact, although this may change – as may the duration of contact - as children become more confident and secure.

While, in theory, proposals that contact be reviewed after a period seem attractive, once an adoption order is made the adoptive parents are in control, and another occasion for independent review of the contact arrangements will not readily present itself, as it can often be foreseen that the birth parents are unlikely to have the requisite resources and support to bring the matter back to the court. For that reason, it is preferable to make orders in conjunction with the adoption order, based on the best judgment one can make as to the probable course of events, leaving to those who may wish to argue that when the time arrives an increase in contact is no longer appropriate the burden of bringing the matter back to the court.

[61] Macaskill C, *Safe Contact? Children in Permanent Placement and Contact with their Birth Relatives* (Russell House Publishing, 2002).

INTERCOUNTRY ADOPTIONS

Intercountry adoptions fall into several categories, including:

- Adoptions in Australia from convention countries
- Recognition in Australia of adoptions in convention countries
- Recognition in Australia of adoptions in non-convention countries
- Adoptions in Australia from non-convention countries
- Recognition in Australia of adoptions in countries with whom Australia has bilateral arrangements.

Various restrictions apply to the adoption of a foreign child who is present within the jurisdiction at the relevant time. The Queensland, Victorian, and Tasmanian statutes provide that no order for the adoption of a non-citizen child shall be made unless the child has been in the care of the adopters, under the supervision of the Director-General or an authorised agency, for the preceding 12 months, or (but not in Queensland) the adoptive parents were approved as suitable to adopt a non-citizen child before the child was placed in their care.[62] In addition, in Queensland, an adoption order can be made only if the competent authority of the foreign country has advised the chief executive that arrangements for the adoption have been made under the law of that country, and (if the country is a convention country) under the Hague Convention on Intercountry Adoption; and the competent authority for the foreign country has agreed to the adoption.[63] In New South Wales, the Court must not make an adoption order in relation to a non-citizen child unless arrangements for adoption of the child have been made by the Director-General or an accredited adoption service provider that may provide intercountry adoption services, or the Director-General applies for the order on the basis that the proposed adoptive

[62] (Vic) *Adoption Act*, s 51(1)(b); (Tas) *Adoption Act*, s 46(1); (Qld) *Adoption Act*, s 199.

[63] (Qld) *Adoption Act*, s 200(c), (d).

parent has intercountry parental responsibility for the child,[64] and the provisions of the Act and regulations relating to inter-country adoptions, and any other relevant law, have been complied with.[65] For this purpose, "other relevant law" at least arguably includes the laws of the foreign country.[66] In the Australian Capital Territory, an adoption order can be made for a non-citizen child only if the provisions of Part 4A (Intercountry and Overseas Adoptions) have been complied with, the more precise wording of which appears to have the effect that such an order can be made only where the requirements of the Hague Convention on Intercountry Adoption, or any applicable bi-lateral arrangements, have been satisfied.[67] It is also provided that an order for adoption is not to be made if sought primarily as a means of evading immigration law.[68] In Western Australia, an adoption order cannot be made in respect of a child habitually resident in a convention country unless the Court is satisfied that arrangements for the adoption have been made in accordance with the Convention and with the laws of the country concerned.[69]

Adoptions in Australia from Convention countries

Australia ratified the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993* (the Convention) with effect from 1 December 1998. Peter Nygh represented Australia in the negotiations that led to it. Countries that are party to the Convention are listed in Sch 2 to the *Hague Convention on Intercountry Adoption Regulations*.[70] The

[64] A person has intercountry parental responsibility for a child if the child is from a country other than a Convention country or a prescribed overseas jurisdiction and the person, after being resident in that country for 12 months or more or being domiciled in that country, was given parental responsibility for the child under the law of that country: s 31(2)

[65] (NSW) *Adoption Act*, s 31, s 90(1)(g).

[66] *Re S and the Adoption Act 2000 (NSW) (No 2)* [2006] NSWSC 1438; (2006) 68 NSWLR 467, 479 [42].

[67] (ACT) *Adoption Act*, s 39H, 57B, 57J.

[68] (ACT) *Adoption* Act, s 12.

[69] (WA) *Adoption Act*, s 68(1)(g).

[70] At the time of writing, the Convention countries other than Australia were: Albania, Andorra, Austria, Azerbaijan, Belarus, Belgium, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Canada (in relation only to the following provinces and territories: Alberta, British Columbia, Manitoba, New Brunswick, Prince Edward Island, Saskatchewan and the Yukon Territory, Northwest Territories, Nova Scotia, Nunavut, Ontario), Chile, China, Colombia, Costa Rica, Cyprus, Czech Republic, Denmark (other than Faroe Islands and Greenland), Ecuador, El Salvador, Estonia, Finland, France (other than the overseas territories), Georgia, Germany, Guatemala, Guinea, Hungary, Iceland, India, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Moldova, Monaco, Mongolia, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland (extended to the Isle of Man), Uruguay and Venezuela.

Philippines, Thailand and China are common sources of intercountry adoptions to which the Convention applies. However, other common source countries – including South Korea, Taiwan and Ethiopia – are not.

The Convention establishes a co-operative procedure for inter-country adoptions between countries party to it. Each party must establish a Central Authority or, in the case of federal states such as Australia, a Central Authority for each of the units making up the federation.[71] Persons habitually resident in a Convention country, who wish to adopt a child habitually resident in another contracting country, must apply to the Central Authority in the country (or federal unit) of their habitual residence.[72] If that Central Authority considers the applicants to be eligible and suitable, it transmits a report to the Central Authority of the child's state of origin[73], which then considers whether the child is adoptable and transmits a report back to the receiving country's Central Authority.[74] The adoption proceeds if (but only if) the Central Authorities of both countries agree that it may do so.[75]

The Convention has been implemented by the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* (Cth) ("the Hague Convention Regulations") made pursuant to (CTH) *Family Law Act 1975*, s 111C. Regulation 15 makes provision for applications for the adoption in Australia of a child from a Convention country, if arrangements for the adoption have been made in accordance with the Convention, the laws of the Commonwealth and the state of habitual residence of the proposed adopters, and the laws of the Convention country concerned. The Court may make an adoption order only if satisfied that both relevant Central Authorities have agreed to the adoption, and that the child is allowed to reside permanently in Australia. Although (NSW) *Adoption Act*, s 107, purports to make provision for the adoption of children from Convention countries, it would have the effect of requiring compliance with other provisions of the Act that are not identical to or comparable with those of reg 15, and accordingly an adoption application made in Australia in respect of a child who until placed with

[71] Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (entered into force 1 May 1995) ('Hague Convention on Intercountry Adoption Regulations') art 6.

[72] Ibid art 14.

[73] Ibid art 15.

[74] Ibid art 16.

[75] Ibid art 17(c).

proposed adoptive parents was habitually resident in a convention country should proceed under reg 15 of the Commonwealth regulations, not s 107 of the New South Wales Act.[76]

The application must be in the form prescribed by reg 15(2A), and the evidence must address the requirements of reg 15, by establishing the following matters.[77]

- *First,* that for the purposes of the Regulation, the child was habitually resident in a Convention country when the Convention was invoked (leading to permission being given for the child to leave his or her State of origin and to enter and reside permanently in the receiving State) [Reg 15(1)].

- *Secondly,* that the prospective adoptive parents are persons who are habitually resident in Australia [reg 15(1)].

- *Thirdly,* that the arrangements for the adoption were made in accordance with the Convention [reg 15(1)(a)]. Relevantly, that requires that the receiving (NSW) Central Authority prepare and supply to the Central Authority of the State of Origin the report required by Article 15 of the Convention; and that the Central Authority of the State of Origin prepare and transmit to the receiving Central Authority a report in conformity with Article 16 of the Convention. The requirement for evidence of this is often overlooked.

- *Fourthly,* that the arrangements for the adoption were made in accordance with the laws of the receiving jurisdiction so far as they relate to the adoption of children from a Convention country [reg 15(1)(b)].

- *Fifthly,* that the arrangements for adoption were made in accordance with the laws of the State of Origin [reg 15(1)(c)]. This may be established by evidence of a ministerial or judicial act of the foreign jurisdiction that has the effect of authorising the placement of the child for adoption.

- *Sixthly,* that notice of the application has been given to the receiving (NSW) Central

[76] *Re S and the Adoption Act 2000 (NSW) (No 2)* [2006] NSWSC 1438; (2006) 68 NSWLR 467; *Application of MGO and AAO; re LDC* [2011] NSWSC 951.

[77] *Re S,* [74]-[79].

Authority [reg 15(2B)].

- *Seventhly*, that the Central Authority of the State of origin, has agreed to the adoption of the child [reg 15(3)(a)].
- *Eighthly*, that the receiving (NSW) Central Authority has agreed to the adoption of the child [reg 15(3)(b)].
- *Ninthly*, that the child is allowed to reside permanently in Australia [reg 15(3)(c)].
- *Tenthly*, that the child is in Australia [reg 15(4)].

If those matters are established, the Court may make an adoption order, and usually does so, without further inquiry into the merits.

Recognition in Australia of foreign adoptions

The adoption legislation defines the circumstances in which an interstate or foreign adoption will be recognised, and the extent to which such an adoption will be given effect for the purposes of applying the local law. So far as recognition is concerned, distinctions are drawn between adoptions effected (a) in other Australian jurisdictions; (b) in Convention countries; (c) in countries with which Australia has a bilateral agreement on inter-country adoption; and (d) in countries not covered by any of the above.

Adoptions in other Australian jurisdictions

In relation to Australian adoptions, in each jurisdiction provision is made to the effect that for the purposes of the laws of the enacting State or Territory, the adoption of a person in another State or Territory, in accordance with the law of that State or Territory has, so long as it has not been rescinded under the law in force in that State or Territory, the same effect as an adoption order made in the enacting State or Territory, and has no other effect.[78] Thus an interstate adoption that is valid under the law of the state or territory where it was made is entitled to recognition in

[78] (Vic) *Adoption Act*, s 66; (SA) *Adoption Act*, s 20; (Tas) *Adoption Act*, s 59(2); (ACT) *Adoption Act*, s 53; (WA) *Adoption Act*, s 136; (NT) *Adoption Act*, s 49; (NSW) *Adoption Act*, s 102; (Qld) *Adoption Act*, s 291 (also applies to New Zealand).

the forum. The forum cannot deny recognition on the ground that the parties were not domiciled in the other state or territory, or that the order had been made in circumstances which amounted to a denial of natural justice or which would render it contrary to the public policy of the forum to recognise the adoption. Only if the order is a nullity under the law of the place where it was made can it be denied recognition in the forum. If, under the law of the place of adoption, there exist grounds for rescission for reasons such as fraud, the party seeking to upset the order must seek a remedy in the court where the order was made; until and unless it is rescinded, the order must be recognised as effective in the forum.

The provision defines the effect of the interstate adoption for the purpose of applying the law of the forum. A child adopted in another state or territory after the date on which the legislation came into operation in the forum is to be recognised for the purposes of the law of the forum as if he or she had been adopted under the adoption legislation of the forum. Thus, if such a child were to claim that he or she was entitled to inherit under a will or intestacy which was governed by the law of the forum as a 'child' or 'issue' of his or her adoptive parents, the claim would stand on exactly the same footing as if the child had been adopted under the law of the forum.

Countries party to the Hague Convention on Intercountry Adoption

All Convention countries are required to recognise adoptions made in accordance with the provisions of the Convention.[79] Accordingly, adoptions effected in Convention countries are afforded the same recognition as adoptions effected in other Australian states.[80] Under the Hague Convention Regulations, an adoption by a person who is habitually resident in Australia of a child who is habitually resident in another convention country, granted in accordance with the law of that country, which is certified by an adoption compliance certificate issued by a competent authority of that country, is recognised and effective for the laws of the Commonwealth and each state and territory on and from the day the certificate became effective.[81] Recognition means that, under the laws of the Commonwealth and each state and

[79] Ibid art 23.

[80] (Vic) *Adoption Act*, s 69D-69F; (SA) *Adoption Act*, s 21(a1), 21(1); (Tas) *Adoption Act*, s 59; (ACT) *Adoption Act*, s 57D-57F; (WA) *Adoption Act*, ss 136A, 136B; (NT) *Adoption Act*, s 50; (NSW) *Adoption Act*, s 108, 109; (Qld) *Adoption Act*, s 292.

[81] Hague Convention on Intercountry Adoption Regulations, reg 16.

territory (a) the relationship between the child and each of the child's adoptive parents is the relationship of child and parent; (b) each adoptive parent of the child has parental responsibility for the child; (c) if the law of the country granting the adoption so provides, the adoption of the child ends the legal relationship between the child and the individuals who were, immediately before the adoption, the child's parents; and (d) the child has the same rights as a child who is adopted under the laws of a state or territory.[82]

The states and territories are permitted to enact their own implementing legislation in the same or comparable terms.[83] Tasmania implemented the recognition of Hague Convention adoptions simply by adding reference to Hague Convention countries to its statutory provisions recognising interstate adoptions.[84] New South Wales, Victoria, Western Australia and Queensland make recognition of an adoption in a Hague Convention country contingent upon the existence of an adoption compliance certificate issued by the Central Authority of that country.[85]

The validity of an adoption from a Convention country is to be determined according to whether compliance with the requirements of the Convention has been properly certified in accordance with the Convention, and not according to the provisions of domestic law.[86] Where the relevant overseas authority has issued such a certificate, the adoption is valid in the forum without any requirement for an order or declaration of validity in a court of the forum.[87]

Other countries

In each jurisdiction, the legislation confers upon the Supreme Court (including the County Court in Victoria[88] and the Youth Court in South Australia)[89] and the Family Court of Western

[82] Ibid reg 18.

[83] Ibid reg 34(1).

[84] (Tas) *Adoption Act*, s 59.

[85] (Vic) *Adoption Act*, s 69D(1), s 69E; (WA) *Adoption Act*, s 136A(1), s 136C; (NSW) *Adoption Act*, s 108(1)(b); (Qld) *Adoption Act*, s 37A.

[86] *Re C and the Adoption Act 2000 (NSW)* [2007] NSWSC 768, [30] (Palmer J).

[87] *Re C and the Adoption Act*, [18]–[19] (Palmer J).

[88] (Vic) *Adoption Act*, s 6(1)(b).

[89] (SA) *Adoption Act*, s 4(1).

Australia,[90] jurisdiction to make a declaration of validity of an adoption effected in a country outside the Commonwealth and its territories.[91] In New South Wales, this procedure is not available in respect of an adoption order made in a Convention country.[92] Application may be made by the adopted child, the adoptive parent or either or both of the adoptive parents, or a person claiming a relationship by virtue of the adoption through or to the adopted child.[93]

A declaration of validity is in effect a declaration that the overseas adoption is one that complies with the requirements for recognition, and thus is recognised and effective under the law of the forum; the test is that of compliance with the statutory requirements for recognition, referred to below, as applicable to the relevant state or territory.[94]

The conditions that must be met before a foreign adoption, in a country other than a Convention country or one with which there is a bilateral adoption agreement, will be recognised deal with both jurisdiction and substantive effect under the foreign law. Although there are some variations between jurisdictions, they follow a generally uniform pattern, and are as follows:

That the adoption is in accordance with and has not been rescinded under the law of the overseas country.[95] This requirement, which is found in all jurisdictions, repeats the requirement that exists in relation to Australian adoptions; namely, that the adoption must be valid — that is, not void *ab initio* — under the law of the place where it was made.[96]

---

[90] (WA) *Adoption Act*, s 4.

[91] (Vic) *Adoption Act*, s 69(1); (SA) *Adoption Act*, s 21(2); (Tas) *Adoption Act*, s 61(2); (ACT) *Adoption Act*, s 57M(1); (WA) *Adoption Act*, s 138(3); (NT) *Adoption Act*, s 52(1); (NSW) *Adoption Act*, s 117(1); (Qld) *Adoption Act*, s 299(1).

[92] (NSW) *Adoption* Act, ss 116(1), 117(1); *Re C and the Adoption Act 2000 (NSW)* [2007] NSWSC 768.

[93] (Vic) *Adoption Act*, s 69(2); (SA) *Adoption Act*, s 21(2) (gives that right to 'an interested person'); (Tas) *Adoption Act*, s 61(4); (ACT) *Adoption Act*, s 57M(1); (WA) *Adoption Act*, s 138(3) ('any of the parties to an adoption'); (NT) *Adoption Act*, s 52(1); (NSW) *Adoption Act*, s 117(1) ('any of the parties to an adoption'); (Qld) *Adoption* Act, s 299(2).

[94] (Vic) *Adoption Act*, s 69(1); (SA) *Adoption Act*, s 21(2); (Tas) *Adoption Act*, s 61(2); (ACT) *Adoption Act*, s 54(1); (WA) *Adoption Act*, s 138(3); (NT) *Adoption Act*, s 52(1); (NSW) *Adoption Act*, s 117(1); (Qld) *Adoption* Act, s 299(1).

[95] (Vic) *Adoption Act*, (SA) *Adoption Act*, s 21(1)(a); s 67(1), 67(2)(a); (Tas) *Adoption Act*, s 60(1), 60(2)(a); (ACT) *Adoption Act*, s 57L(2)(a); (WA) *Adoption Act*, s 138(1)(a); (NT) *Adoption Act*, s 50(1)(a); (NSW) *Adoption Act*, s 116(2)(a); (Qld) *Adoption Act*, s 293(1)(a).

[96] See, for example, *Re an Adoption* (1995) 14 SR (WA) 387 (adoption must be by order to be recognised; adoption by deed not recognised).

That the overseas country was the usual place of abode of the adopting parent or parents for a continuous period of at least 12 months immediately before the commencement of the legal proceeding which resulted in the adoption.[97] This requirement is found in the Adoption Acts of all states and territories. It extends by a considerable margin the range of recognition afforded to foreign adoptions at common law. The common law rules were never exactly defined. In *Re an Infant*,[98] Davidson J said that in order to give full international effect to a change of status effected by an adoption order, both the child and the adopter(s) should be domiciled in the country where it was made. This view may have been unduly restrictive, and the domicile of the adopting parent(s) and the residence of the child within the foreign jurisdiction might have sufficed.[99]

That in consequence of the adoption, the adopter or adopters had, or would (if the adopted person had been a young child) have had, immediately following the adoption, according to the law of that country, a right superior to that of any natural parent of the adopted person in respect of the custody of the adopted person,[100] and that under the law of that country the adopter or adopters were, by virtue of the adoption placed generally in relation to the adopted person in the position of a parent or parents.[101] These two clauses are found in all jurisdictions except South Australia, where it is required that 'the circumstances in which the order was made, would if they had existed in this State, have constituted a sufficient basis for making an adoption order under this Act',[102] which appears to be an attempt to summarise the same concept more concisely; that is, that it must be an adoption as the forum understands that institution. The

[97] (Vic) *Adoption Act*, s 67(2)(aa) (or prior approval of Director-General or approved agency); (SA) *Adoption Act*, s 21(1)(b) (domicile an alternative); (Tas) *Adoption Act*, s 60(2)(b) (residence only); (ACT) *Adoption Act*, s 57L(1) (domicile an alternative); (NT) *Adoption Ac*t, s 50(1)(d) (or prior approval of Minister); (NSW) *Adoption Act*, s 116(1)(b) (domicile an alternative); (Qld) *Adoption Act*, s 293(1)(b) (domicile an alternative).

[98] *In re an Infant* (1934) 34 SR (NSW) 349, 357.

[99] *Re Valentine's Settlement* [1965] 1 Ch 831, 842–3 (Lord Denning MR); see also Fawcett J, Carruthers J, North P, *Private International Law* (Oxford University Press, 2008) 1174–5, who would no longer insist upon the residence of the child in the country of adoption; Lord Collins of Maplesbury (ed), *Dicey, Morris and Collins, Conflict of Laws* (Thomson Reuters, 2012) 1254–5; Graveson RH, *Conflict of Laws* (Sweet & Maxwell, 7th edn, 1974) 387.

[100] (Vic) *Adoption Act*, s 67(2)(b); (Tas) *Adoption Act*, s 60(2)(c); (ACT) *Adoption Act*, s 57L(2)(b); (WA) *Adoption Act*, s 138(d)(i); (NT) *Adoption Act*, s 50(1)(b); (NSW*) Adoption Act*, s 116(2)(b); (Qld) *Adoption Act*, s 293(1).

[101] (Vic) *Adoption Act*, s 67(2)(c); (Tas) *Adoption Act*, s 60(2)(d); (ACT) *Adoption Act*, s 57L(2)(c); (WA) *Adoption Act*, s 138(1)(d)(ii); (NT) *Adoption Act*, s 50(1)(c); (NSW) *Adoption Act*, s 116(2)(c); (Qld) *Adoption Act*, s 293(1).

[102] (SA) *Adoption Act*, s 21(1)(c).

equivalence need only be of a general kind, and it is not necessary to ascertain whether the rights of inheritance and custody under the foreign law coincide with those under the law of the forum. Thus, recognition has been refused where the adoption under the foreign law did not affect the relationship between the child and its natural parents and did not confer rights of inheritance as against the adoptive parent(s).[103] In *Re M and the Adoption of Children Act* (1989) 13 Fam LR 333, Young J, as the later Chief Judge in Equity and Judge of Appeal then was, held that although s 46(2)(d) did not require that every incident of the parent-child relationship be present, it did require the adopters to have greater rights with respect to the child than a mere right of custody, and that because (on the evidence before him) Thai law neither severed the former bond between natural parent and child, nor gave a right of inheritance in respect of Thai immovables to the child in respect of the adoptive parents, it could not be said that for the purposes of s 46(2)(d) the child was placed generally in the position of a child of the adopters.

On the other hand, the retention of some rights of inheritance in the estate of the natural parent does not bar recognition.[104] In *Bouton v Labiche* (1994) 33 NSWLR 225, Kirby P described *Re M* as "a sensible and accurate decision", but agreed with the primary judge (Powell J, as he then was) that it could be distinguished in the case a Mauritian adoption under which the adoption order created rights between the child and the adopters that went beyond a guardianship order that had previously been made, although the child did not lose her rights of succession from her natural father in Mauritius. Kirby P explained that the term "placed *generally"* was used to permit the court to make a judgment concerning the post-adoption relationship and the ordinary relationship of parents to children, in recognition of the wide variety in the particular incidents of the adoption relationship under the laws of other countries.

In *Public Trustee v Kehagias* [2009] NSWSC 972, McLaughlin AsJ declined to give recognition to a Greek adoption, under which the adoptee gained the right to use the surname of his adoptive parents (being his aunt and uncle), as well as his existing surname, and the rights of a child in terms of inheritance from his adoptive parents; but the adoptive parents gained no right to inherit

[103] *In re M and the Adoption of Children Act* (1989) 13 Fam LR 333.

[104] *Bouton v Noyaux* (Supreme Court (NSW), Powell J, 2 August 1993, unrep); reversed but without affecting this point in *Bouton v Labiche* (1994) 33 NSWLR 225.

from him, and the adoption created no family relationship between him and relatives of his adoptive parents, nor between the adoptive parents and the adoptee's relatives. His Honour said:

> Where, as in the instant case, in consequence of the adoption of the Deceased, the rights and obligations of the family relationship between the Deceased and his natural family remained unchanged (Article 1583 of the Greek Civil Code) and where the adoptive parents have no right of inheritance in relation to the Deceased and there are no inheritance rights between the relatives of the adoptive parents and the Deceased, it does not seem to me that under the law of Greece the adoptive parents were, by virtue of the adoption, "placed generally in relation to [the Deceased] in the position of a parent or parents", and thus the adoption does not have "the same effect as if it were an order for adoption" under the *Adoption of Children Act*. In consequence, therefore, the Defendant retains the relationship of brother to the Deceased.

This issue arises in connection with recognition of "adoptions" from some Islamic states, in most of which adoption as understand in our system of law is impossible. Any process that purports to alter family genealogy, to change the authentic identity of an individual and potentially disadvantage 'legitimate' children is generally frowned upon in Muslin culture. Adoption is anathema, as it involves the permanent and absolute transfer of parental rights to adoptive parents, a denial of ancestry and falsifying of bloodlines.[105] The laws of the UAE, being founded on shariah law, do not provide for adoption. However, whereas - until relatively recently - fostering arrangements in the UAE were made outside formal government guidelines, in 2010 the UAE implemented legislation to formalise foster family status, and provide formally for fostering abandoned or orphaned children, so as to guarantee their rights and protect their interests.[106] The relevant documentation appears to imply that the UAE agency retains some legal rights as guardian, at least until relevant orders are made in Australia, and that the child might not yet be "for all legal purposes" the child of the applicants; it appears to effect a transfer of rights of custody, guardianship and parental responsibility; but not to extinguish prior parenthood (indeed, it would have been inconsistent with shariah law for it to do so). While, under the law of the UAE, these arrangements establish a relationship under which adoptive applicants have full parental responsibility for the child, they do not seem to make them the

[105] Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law, Policy and Practice* (Springer, 2nd edn, 2009).

[106] David E Miller, *UAE Comes to Aid of Growing Numbers of Parentless Children* (4 November 2010) The Medias Line <http://www.themedialine.org/news/print_news_detail.asp?NewsID=30457>; Ministry of Social Affairs, *Completed Initiatives 2008-2010*, Government of the United Arab Emirates <http://www.msa.gov.ae/MSA/EN/Pages/Initiatives20082010.aspx?eqs=vuDaVZRpwRO7ElPUaRhsDw==>.

parents of, the child. If that view be correct, such an adoption would not be entitled to recognition under s 116(2)(c).

In New South Wales, s 116 applies to an *order* for the adoption of a person, and s 117 (1) confers standing to seek a declaration of validity on any of the parties to an adoption *under an order* made outside Australia. Section 116 differs from its predecessor – (NSW) *Adoption of Children Act* 1965, s 46 – which referred to "the adoption of a person", rather than to "an order for the adoption" or an "adoption under an order", and thus was not limited to adoptions effected or sanctioned by order of a court, tribunal or similar authority. In my view, the proper construction of the current section requires that it be read as limited to adoptions effected or sanctioned by some judicial or administrative order – not necessarily of a court, but nonetheless a formal authoritative pronouncement. An agreement by which one guardian hands over guardianship to another does not satisfy that criteria.

In all jurisdictions other than South Australia, the onus of proving that the preconditions laid down in the legislation have not been satisfied lies upon the party resisting the recognition of the adoption. For it is provided that, once an adoption is shown to exist,[107] it shall be presumed that the adoption complies with the preconditions set out above and has not been rescinded.[108] In New South Wales, s 116(5) apparently creates a rebuttable presumption that an order for the adoption of a person made in a country outside Australia that is not a Convention country or a prescribed overseas jurisdiction complies with subsection (1), but although one doers not readily construe legislation on the basis that it is mistaken, in my view the legislative history – including the predecessor section in *Adoption of Children Act*, s 46 – the context provided by the equivalent legislation in the other states, and the absence of any indication of legislative intent to depart from that history and context, makes tolerably clear that this was intended to be a reference only to subsection (2) (which refers to the subsistence and effect of the foreign adoption order), not subsection (1) (which contains the requirement for domicile or residence in

[107] As to the method of proving a foreign adoption, see (Vic) *Adoption Ac*t, s 67(5); (Tas) *Adoption Act*, ss 60(3), 96; (ACT) *Adoption Act*, s 116; (WA) *Adoption Act*, s 138(7); (NT) *Adoption Act*, s 82; (NSW) *Adoption Act*, s 126; (Qld) *Adoption Act*, s 293(5); and the discussion in *Re an Adoption Application* [1981] 2 NSWLR 645.

[108] (Vic) *Adoption Act*, s 67(7); (Tas) *Adoption Act*, s 60(5); (ACT) *Adoption Act*, s 57L(5); (WA) *Adoption Act*, s 138(2); (NT) *Adoption Act*, s 50(2)(a); (NSW) *Adoption Act*, s 116(5); (Qld) *Adoption Act*, s 293(3). Also see, for example, *Miles v Miles* [2006] NSWSC 918, [27]–[29].

the foreign jurisdiction).

In each jurisdiction, the legislation is premised on the notion that the forum is entitled to assume that questions relating to the welfare of the child had been adequately considered by the foreign court, tribunal or official. However, as a necessary safeguard, legislation in each jurisdiction contains provisions to the effect that the forum 'may refuse to recognise an adoption … if it appears to the court that the procedure followed, or the law applied, in connection with the adoption involved a denial of natural justice or did not comply with the requirements of substantial justice'.[109]

The relevant requirements of natural justice are those of procedural fairness. The express reference to the requirements of 'substantial justice' is of interest. This is a notion developed by the English courts in recent years whereby they have assumed a wide discretion to apply their own concepts of justice and morality, having regard not merely to the procedure of the foreign court, but also to whether those proceedings were abused to disadvantage a resident of the forum. Thus, an adoption effected abroad in perfectly regular proceedings, but with the ulterior motive of obtaining a financial advantage, might be denied recognition in Australia. Equally, recognition could be refused if the foreign proceedings were tainted by fraud or other unconscionable conduct, even though the fraud did not go to the merits of the application, but to the jurisdiction of the foreign court or tribunal and did not render the adoption ineffective under the foreign law.[110]

In Victoria and the Northern Territory, the Governor or Minister respectively may proclaim an overseas country for the purpose of recognising its adoption processes.[111] In Victoria, upon proclamation an adoption in such a country will be conclusively presumed to be an adoption order made in accordance with the requirements referred to in the preceding paragraph. In the

[109] (Vic) *Adoption Act*, s 67(6); (SA) *Adoption Act*, s 21(1)(d); (Tas) *Adoption Act*, s 60(4); (ACT) *Adoption Act*, s 57L(3); (WA) *Adoption Act*, s 138(1)(c); (NT) *Adoption Act*, s 50(2)(b); (NSW) *Adoption Act*, s 116(3); (Qld) *Adoption Act*, s 293(4).

[110] *Middleton v Middleton* [1967] P 62, followed by the New South Wales Court of Appeal in *Bouton v Labiche* (1994) 33 NSWLR 225 (claim by child for a grant of letters of administration of her late birth father's estate held to have been wrongly dismissed, as adoption order from Mauritius should be refused recognition because it was based on fraudulent and false evidence and failed to comply with requirements of substantive and natural justice, in that the adoptive parents knew who the 14-year-old's birth father was and lied about it).

[111] (Vic) *Adoption Act*, s 67(3); (NT) *Adoption Act*, s 51.

Northern Territory, adoption orders made in proclaimed countries are given the same effect as adoptions made in the Territory.

Similar to the provision for interstate recognition, the adoption legislation in each state and territory provides for the recognition of overseas adoptions effected in non-Convention (and/or non-bilateral agreement) countries by giving an adoption effected in an overseas country the same effect as an adoption order made under the local law presently in force, so long as that adoption has not been rescinded in the country of origin.[112] In the Australian Capital Territory, it is further provided that upon adoption the child takes the domicile of its adoptive parent(s) as if it were its domicile of origin.[113] A foreign person who is a permanent resident of Australia and is adopted under the law of an Australian jurisdiction by a parent who is, or by parents, at least one of whom is, an Australian citizen, will acquire Australian citizenship.[114] A person may also apply for citizenship if adopted by an Australian citizen in a Convention country.[115]

This statutory equivalence to a local adoption order solves a vexed problem which existed at common law: having regard to the fact that the inheritance rights of adopted children vary greatly in different countries and frequently were less than those of natural children, what effect should be given to foreign adoptions for the purpose of applying the law of the forum? Should a child adopted abroad be regarded as a natural child of the adopter, or as a child adopted under the law of the forum, or should the law of the country of adoption determine its inheritance rights?

Some judges, particularly in England, considered the problem so difficult that they refused to give any effect to a foreign adoption for the purpose of English law.[116] Most Australian judges solved the problem by giving the child the inheritance rights that it enjoyed under the law

---

[112] (Vic) *Adoption Act*, s 67(1); (SA) *Adoption Act*, s 21(1), (4); (Tas) *Adoption Act*, s 60(1); (ACT) *Adoption Act*, s 57L(1), 57L(2)(a); (WA) *Adoption Act*, s 138(1); (NT) *Adoption Act*, s 50(1)(a); (NSW) *Adoption Act*, s 116(1)–(2); (Qld) *Adoption Act*, s 293(1)(e), 293(2); .

[113] (ACT) *Adoption Act*, s 46(1).

[114] (Cth) *Australian Citizenship Act* 2007, s 13 ('*Australian Citizenship Act*').

[115] *Australian Citizenship* Act, ss 19B–19F.

[116] *Re Wilson* [1954] 1 Ch 733; *Bairstow v Queensland Industries Pty Ltd* [1955] St R Qd 335; *Re Wilby* [1956] P 174. This approach was rejected by all members of the Court of Appeal in *Re Valentine's Settlement* [1965] 1 Ch 831.

governing its adoption.[117] But, as was pointed out by the Court of Appeal in *Re Valentine's Settlement*,[118] this approach is inconsistent with the fundamental rule in the law of conflicts that matters of succession are governed by the law of the deceased's last domicile in the case of movables and by the *lex situs* in the case of immovables.[119]

This left basically two options: one was to see whether under the foreign law the child was placed by adoption in a position, both as regards property rights and status, substantially equivalent to that of a natural child of the adopter(s), and if so, then give the child such rights as a natural child would have under the law of the forum.[120] Alternatively, the forum could recognise the separate status of an adopted child and give the child adopted abroad the same position as a child adopted under the law of the forum. This view was favoured by the majority of the Court of Appeal in *Re Valentine's Settlement*.[121]

The Australian legislation has steered a middle course. It effectively requires that the child adopted abroad be placed by the law of the foreign country in a position substantially equivalent to that of a natural child of the adopter(s), if it is to be recognised. But it then goes on to provide that, once recognised, the effect of the foreign adoption for the purpose of applying the law of the forum is to be the same as that of an adoption effected under the law of the forum. It should be stressed that this only applies where the law governing the question before the court is that of an Australian jurisdiction; for example, an estate of a deceased who died domiciled in New South Wales. If the question before the court is governed by foreign law – for example, the law of England – the effect to be given to the foreign adoption, or for that matter an Australian adoption, will be a matter for that law.

---

[117] *Re Pearson* [1946] VLR 356; *L v L* [1959] VR 213; *In the Estate of Searle* [1963] SASR 303; *Re Pratt* [1964] NSWR 105; *Re Estate McLaren (decd)* [2001] SASC 103, [31] (Williams J).

[118] [1965] 1 Ch 831, 844 (Lord Denning MR), 847 (Danckwerts LJ). See also Gerber P, 'Some Aspects of Adoptions in the Conflict of Laws' (1965) 38(9) *Australian Law Journal* 309.

[119] See the remarks of Lush J in *Heron v National Trustees Executors and Agency Co of Australasia Ltd* [1976] VR 733, 738.

[120] *Re Marshall* [1957] Ch 507, 523; *Re Estate McLaren (decd)* [2001] SASC 103, [31] (Williams J).

[121] See also *Kohut v Fedyna* [1964] 2 OR 296. This is now the position in England: Fawcett, Carruthers and North, above n 99, 1174–5.

Adoption in Australia from non-convention countries

In many cases of intercountry adoption under Australia's programs, the adoptive parents travel to the foreign country (for a few days only), obtain an adoption order under the law of that country, and return to Australia with the child. In the case of non-convention countries such as South Korea, Taiwan and Ethiopia, it is not open to proceed by way of recognizing the foreign adoption under *Adoption Act*, s 108. Nor (until recently) were those countries a prescribed overseas jurisdiction under the (CTH) *Family Law (Bilateral Arrangements - Inter-Country Adoption) Regulations* 1998, so it was not open to recognise the Ethiopian adoption under *Adoption Act*, s 113. Recognition under *Adoption Act*, s 116, was not available, as the applicants were not resident in the foreign jurisdiction for twelve months, nor were domiciled there, when the adoption application in that country was instituted.

In the Australian Capital Territory, Victoria, Queensland and Western Australia, the legislation explicitly provides that adoptions outside Australia have no legal effect in the forum, except in so far as they satisfy the statutory requirements for recognition.[122] Accordingly, overseas adoptions in other countries will only be recognised when they comply with the requirements of the local legislation, and the common law rules of private international law relating to the recognition of foreign adoptions are excluded. While the legislation of the other states does not expressly address this point, it can be inferred that the conditions specified for the recognition of adoptions are intended to be exclusive, and therefore also exclude automatic recognition. Thus in New South Wales, adoptions effected in accordance with the laws of South Korea, Taiwan or Ethiopia of children brought to Australia under Australia's intercountry adoption programs, are not entitled to recognition, and the adoption process must proceed afresh in accordance with the law of the forum.[123]

Accordingly, notwithstanding that they had obtained, apparently regularly, an adoption order in the foreign jurisdiction, it was necessary to apply afresh in New South Wales, which entailed

[122] (Vic) *Adoption Act*, s 67(8); (Tas) *Adoption Act*, s 60(6); (ACT) *Adoption Act*, s 54(1); (Qld) *Adoption Act*, s 293(6).

[123] *Re JGP* [2011] NSWSC 151; *Application of MSC and CJC; re HES* [2011] NSWSC 950; *Application GOC & GC; re WJS* [2013] NSWSC 563; *Application MKL & MJL; re YSL* [2013] NSWSC 564; *Application ADC & AMC; re HAC* [2013] NSWSC 565.

compliance with all the formal requirements of a local adoption – including the consent of the birth parents. While the court has been inclined to dispense with consent relatively readily when it appears that the birth parents could not easily be identified or found,[124] it is difficult to do so when the application contains evidence that a birth parent is known, or that there is contact with the birth parent, and in such cases, the court's inability to make an order has no doubt come as a surprise to the adoptive applicants and occasioned considerable distress.

Countries with which Australia has a bilateral agreement on intercountry adoption

As well as ratifying the Hague Convention, Australia may enter into bilateral agreements with non-Convention countries to implement similar cooperative schemes for inter-country adoption.[125] Provision is made in the (Cth) *Family Law (Bilateral Arrangements – Intercountry Adoptions) Regulations* 1998, regs 5 and 6, in similar terms to those made in regs 16 and 18 of the Hague Convention on Intercountry Adoption Regulations described above. Again, provision is made for compliant state legislation.[126] In accordance therewith, the Australian Capital Territory, New South Wales and Victoria have made provision for recognition of adoptions made in 'prescribed overseas jurisdictions' (being those with which Australia has such bilateral arrangements) if the adoption is granted in accordance with the laws of that jurisdiction and if a designated authority (the equivalent of a Hague Convention Central Authority) in that jurisdiction has issued an adoption compliance certificate stating that the adoption complied with the laws of that jurisdiction.[127] Tasmania has implemented recognition of adoptions effected in bilateral agreement countries simply by adding reference to 'agreement countries' to its statutory provisions recognising interstate adoptions.[128]

---

[124] As White J has explained in *Re K & The Adoption Act* [2005] NSWSC 858, what amounts to 'reasonable inquiry' is to be evaluated from the perspective both of the applicants and of the person whose consent is otherwise required. See also *Re JSK and Adoption Act 2000* [2006] NSWSC 1188; *Application MKL & MJL; re YSL (No 2)* [2013] NSWSC 2019.

[125] (Cth) *Family Law Act* 1975, s 111C(3) ("*Family Law Act*"); and (Cth) *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations* 1998 ("*Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations*").

[126] *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998* (Cth) reg 8.

[127] (Vic) *Adoption Act*, s 69U; (ACT) *Adoption Act*, s 57J, s 57K; (NSW) *Adoption Act*, s 113.

[128] See (Tas) *Adoption Act*, s 59. 'Agreement countries' are defined as being prescribed overseas jurisdictions within the meaning of the *Family Law (Bilateral Agreements – Intercountry Adoption) Regulations*, as amended from time to time: (Tas) *Adoption Act*, s 3.

Countries with which Australia has bilateral inter-country adoption agreements are listed in Sch 1 to the *Family Law (Bilateral Arrangements – Intercountry Adoptions) Regulations*. Until recently, only the People's Republic of China was so listed. As China has since ratified the Hague Convention on Intercountry Adoption, the Bilateral Agreements Regulations were rather a dead letter.

However, this year the Commonwealth Government has expressed a commitment to delivering reform on intercountry adoption, including streamlining adoption processes. From 4 March 2014, the intercountry adoptions of children from Taiwan, South Korea and Ethiopia are automatically recognised under Commonwealth, state and territory laws, removing the need for families to finalise their adoptions through a state or territory court.

A subsequent amendment of the *Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 1998* (the Principal Regulations) clarifies that adoptions of children through Australia's intercountry adoption programs with Taiwan, the Republic of Korea (South Korea) and the Federal Democratic Republic of Ethiopia (Ethiopia) are recognised for the purpose of Commonwealth, state and territory laws whether the adoption took effect in the overseas jurisdiction before or after the overseas jurisdiction was prescribed. The Regulation clarifies that adoptions recognised under the Principal Regulations include those that took place in an overseas jurisdiction before and after the overseas jurisdiction was prescribed, provided that all of the requirements outlined in subregulation 5(1) are met; and in addition that the adoption has not been already recognised by an Australian court.

ADOPTION BY SAME-SEX COUPLES

In Australia, currently only the Australian Capital Territory, Western Australia and New South Wales afford same-sex couples the same rights as heterosexual couples in relation to adoption.[129] In the Northern Territory, Queensland, South Australia and Victoria, same-sex couples cannot legally adopt a child under their adoption legislation.[130] In Tasmania, a couple in a 'significant

[129] (ACT) *Adoption Act*, s 14(b); (WA) *Adoption Act*, ss 38(2), 39(1)(e); (NSW) *Adoption Act*, s 23(1), s 26.

[130] (Vic) *Adoption Act*, s 11; (SA) *Adoption Act*, s 12; (NT) *Adoption Act*, s 13; (Qld) *Adoption Act*, s 76;

relationship' may adopt if a party to the relationship is the natural or adoptive parent of the child proposed to be adopted or either party to the relationship is a relative of the child proposed to be adopted.[131] Most jurisdictions also contain provisions that allow for a single person to adopt a child, usually if special or exceptional circumstances are established, and these could enable a homosexual man or woman to adopt.

The *Marriage Legislation Amendment Bill 2004* (Cth) would have amended the *Marriage Act 1961* (Cth) and the *Family Law Act 1975* (Cth) by excluding the recognition of foreign marriages and adoptions by same-sex couples under the Hague Convention on Intercountry Adoption. However, it lapsed after failing to pass the Senate when Parliament was prorogued on 31 August 2004. The subsequent legislation, which applied restrictions to the recognition of same-sex marriages, was silent on the issue of same-sex adoption.[132]

The Hague Convention on Intercountry Adoption does not specify criteria for who may adopt. While the issue of whether de facto couples, same-sex couples and gay individuals should be able to adopt was discussed in negotiations between states before the creation of the Convention, it was found to be too controversial a topic on which to reach a consensus and accordingly this issue was left to each individual state to determine.[133]

As, under the Convention, both the receiving state's Central Authority (under Art 15), and the state of origin's Central Authority (under Art 16), must prepare reports as to whether prospective parents are appropriate candidates to adopt a child, if either state regards prospective parents as unsuitable, the adoption cannot occur;[134] in order for a same-sex couple, or single gay person, to be able to adopt, it would have to be permissible under the law in both states.

Only a relatively small number of countries allow adoption by same-sex couples. Same-sex couples have equal adoption rights with heterosexual couples in Andorra, Belgium, Guam, Iceland, Israel, Norway, Spain, Sweden, South Africa and the United Kingdom. In the

[131] (Tas) *Adoption Act*, s 20(2A)(a), (b).

[132] See (Cth) *Marriage Amendment Act* 2004.

[133] Bojorge C, 'Intercountry Adoptions: In the Best Interests of the Child?' (2002) 2 *Queensland University of Technology Law and Justice Journal* 266, 277–8.

[134] Fawcett, Carruthers and North, above n 97, 1170-1171.

Netherlands, adoption by same-sex couples is limited to Dutch children, and in Germany and Denmark it is limited to step-parent adoptions. Adoptions by same-sex couples is legal in several provinces and territories of Canada, and in several states in the United States of America.[135]

SOME CONCLUDING OBSERVATIONS

The multiple inquiries into past adoption practices, and their reports, reveal that adoption has sometimes been causative of long term trauma for birth mothers, and also for some of their children. While this is most markedly so in the case of so-called "forced adoptions", it is not limited to them: decisions made to consent to adoption for what appear to be sound reasons at the time can be productive of lifelong regret. Modern practices that insist on informed consent, allow a "cooling off" period during which it can be revoked, and limit the scope for dispensing with consent, reduce but will never remove the risk in this area.

It is perhaps surprising that, in the wake of those inquiries, there have not been more applications, albeit decades after the event, for discharge or annulment of the adoption order on the grounds of fraud or duress.[136] The court may require the Director-General to investigate such an application.[137] In New South Wales we have seen only one, brought by an adoptee in his early fifties. The birth mother nominally supported it but the evidence did not approach establishing fraud or duress, although it proved possible to discharge the order on the alternative ground of "exceptional circumstances" arising after the order was made, being the practical repudiation of the responsibilities of parenthood by the adoptive parents during his childhood. It was manifest that this brought enormous relief and a significant measure of closure to the applicant, and suggests that, notwithstanding the passage of decades, there may be benefit in the annulment of adoptions that were improperly procured.

Against that, it is also to be observed that adoption has brought enormous satisfaction and joy to

[135] Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Adoption By Same-Sex Couples* (2009) 21.

[136] *Adoption Act*, s 93(4).

[137] *Adoption Act*, s 94.

innumerable adoptive parents and children, and enabled many to grow in an environment of stability and security that would not otherwise have been available to them. And in the present environment, there is good reason to suppose that it offers advantages over long-term foster care for children who cannot reside with their birth parents. This is an area ripe for further research, looking at the Australian experience. In particular, a comparative study of outcomes for adoption (under the New South Wales approach) and permanent care orders (under the Victorian arrangements) would be of great interest.

Finally, I have referred to the diminishing level of uniformity among the Australian jurisdictions, despite the earlier success in 1965. Perhaps it is time to revisit this. As a great internationalist, and a law reformer, I suspect Peter Nygh would have been an advocate for a uniform Australian approach to adoption law.

-o0o-