

COMMENT

THE ADOPTION OF CHILDREN ACT 1968

A Summary and Critique

The Tasmanian Adoption of Children Act 1968 which was assented to on 24 July 1968 is likely to be proclaimed towards the end of 1968 after amendments have been made to the Registration of Births and Deaths Act 1935, to complement the provisions of the former Act.

There have been conferences between the Attorneys-General of the Commonwealth and States since 1961 on the question of a uniform Act governing adoptions. The Tasmanian Act is the last one to be passed amongst the States. Although called a 'uniform Act' there are important differences between the various States. For example, in Queensland there is no judicial process. The Director of the State Children Department himself makes adoption orders and alone has authority to arrange adoptions. The Acts are however uniform in conferring jurisdiction based on domicile or residence and in providing for recognition of interstate and foreign adoption orders.

The Act appears to have reduced the rights of both natural and adopting parents in a clear attempt to make the welfare of the child prominent (See s. 11). In so doing it has created a number of unsatisfactory features which are mentioned in this note. The main purpose of the Act is to provide for all adoptions to be arranged by the Director of Social Welfare or charitable organisations approved by the Minister (the Chief Secretary) under the Act. It prohibits citizens from arranging their own adoptions (s. 44). By the above measure and others—to be later set out in this note—it also provides for precluding natural and adopting parents from ascertaining each other's identity. Some other developments of importance are also noted below.

A. CONSENTS

As under previous legislation the consent of the natural parents is required. Several changes have been effected however. In conformity with the policy favouring retention of anonymity, all consents are to be signed without mentioning the name of the adopting parents except where the adopting parents are close relatives of the child (s. 22). The responsibility is placed on the Director of Social Welfare or the principal officer of a charitable organisation to choose the adopting parents.

There is a strictly limited time for contemplation by the natural parents of the result of the execution of a consent because within

thirty days of consent being given or after the date of the adoption order, whichever is the earlier, the consent can no longer be revoked. There is no provision for the Court to permit the natural parents to revoke their consent after thirty days have expired. The only provisions providing any further safeguard is that in the case of a mother who gives consent within seven days of the birth of her child it must be shown that she was in a fit condition to give such consent (s. 26 (3)). Under the previous Act (1920) the consent could be revoked prior to the order being made. Unless and until an adoption order is made the Director of Social Welfare has guardianship of the child and his consent is necessary to allow the child to return to the natural parents. After the thirty days have elapsed, there appears to be no machinery whereby the child can be re-vested in the full control of the parents. Once this period has expired all contact between child and parent is lost.

Once the consent is signed no notice is given to the natural parents of the date of the hearing. Therefore, although it is possible that the Court will permit natural parents to be heard prior to the order being made on the ground that it would reflect on the child's welfare to hear their submissions, this power is unlikely to be used. When the parents are heard, they are not (unless the court orders) permitted to read the Social Welfare Officer's report (s. 59) nor learn of the identity of the applicants, thus precluding any possibility of cross-examination of the applicants or the preparation of submissions to the court regarding the suitability of the applicants.

The Act clearly intends to attain one object above all others: to keep natural and adoptive parents apart. The fact that a large proportion of British adoptions are arranged privately provides an interesting contrast. The British Act merely requires the governmental authority to be advised that the child's control is passing from natural to adoptive parents with a view to adoption (Adoption Act (Eng.), ss. 3 (2), 12 (1) (b)). Further, s. 29 provides that if the application is refused the Court may make an order for the care and control of the child including an order placing the child in the care of the Director of Social Welfare. No provision is made for natural parents to be informed of the failure of the attempted adoption and they are not given an opportunity after such failure to reconsider. If the child proves impossible to adopt out for any reason (such as health) there is no requirement that they be advised.

The Act makes no clear provision for entitlement of persons interested in the child's welfare to appear. The Director is entitled to appear under s. 61 but apart from that the only provision relevant is s. 17 which gives the Court a discretion to permit persons to be joined as parties to proceedings for the purpose of opposing an application or for opposing an application to dispense with the consent of the person. Notice of the hearing must be given to persons

whose consent is required but whose consent is not being given and to any person with whom the child resides or who has the care or custody of the child (S. 16). This provision is unsatisfactory as it is not clear with whom a child would reside amongst a numerous family.

Additionally it is hard to understand why service should be contemplated on persons who refuse to allow a child to be adopted when such persons have the complete say as to whether the child will be adopted and without their consent the proceedings cannot be successful. To the argument that the provision is meant to cover notice to persons with whose consent the court is being asked to dispense, it appears likely that it was never intended to serve such persons by reason of s. 27 (2) which permits a court to dispense with the consent of a person even before an application for an adoption order has been made. Regulations will be awaited with interest however as there is power by virtue of s. 67 (f) to regulate the 'forms and mode of procedure to be used in exercising the jurisdiction conferred on a Court by the Act.'

As under the previous Act, the father of an illegitimate child is not entitled to refuse to permit the adoption of the child. In many cases this would be appropriate but it would seem desirable that the Court should be required to enquire into his identity and give notice to him of the application to give him an opportunity to be heard.

The Court has power to dispense with the consent of a person if his whereabouts are unknown, or he is not in a physical or mental condition as to be capable of properly considering the question whether he should give his consent, or where he has abandoned, deserted or persistently neglected or ill-treated the child, or has failed for a period of one year or more without reasonable cause to discharge the obligations of the parent or guardian or where there are other special circumstances by reason of which the consent should in the opinion of the Court be properly dispensed with (s. 27). There will no doubt be some difficulty in interpreting these provisions especially the words 'special circumstances' particularly in view of s. 11 which provides that for all purposes the welfare and interest of the child concerned shall be regarded as the paramount consideration. May the parent be disqualified by reason of deficiencies for which he or she is not morally blameworthy in the interests of the child's welfare?

B. THE ADOPTION MARKET

S. 44 prevents (by the creation of an offence) negotiations or arrangements with other persons for the transfer of possession of a child with a view to adoption unless the child is related to such person or unless under the purview of the Director of Social Welfare or an approved charitable organisation. It is believed that there will be at least two such private adoption agencies approved in Tasmania.

The policy of the Act is to prevent adoptions from being arranged except by expert social workers. There is a fear that privately arranged adoptions have been liable to failure owing to the lack of any attempt to 'match' the child to the adoptive parent or to keep the identity of natural and adoptive parents confidential from the other. There is also a desire that natural parents be counselled as to the serious step which they take when consent to adoption is given.

The Act goes so far as to require all applications for adoption to be signed by the Director of Social Welfare or a principal officer of an approved adoption agency. There is no way in which a private citizen can apply for an adoption unless he is a close relation of the child to be adopted. This is a serious defect in the Act. One can readily imagine many occasions which will arise where foster children in the custody of an applicant for many years become the subject of adoption proceedings.

Not all adoptions of foster children are planned (in contravention of s. 44) from the moment that control passes from natural to foster parents. Additionally there will still be cases where placement of the child in infringement of s. 44 occurs where the foster parents may wish to adopt the child and close ties have developed between adoptive parents and child. The offence when it occurs will not affect the development of human affection. What is to happen to persons who hear of an unwanted child of friends when they are anxious to assist by adoption? The Act's provision that the Director report on every adoption application to the Court (s. 15) would appear sufficient to catch any infringement of s. 44. To protect the child the Act has made little recognition of a right in persons to adopt children. If the Director or welfare agency forms preconceived ideas about the suitability of the adoptive parents to adopt the child there is no opportunity for such persons ever to adopt a child. The social worker's zeal for the process of matching a child's characteristics to the adoptive parents is well known, a process which would seem of subsidiary importance to the existence of enthusiastic guardians.

I think—I am afraid—one may be pretentious in presuming to set up potentially well-matched families. When I look at natural families I can only say God is pretty unskilled at this matching business. Siblings are often very unlike each other, and different again from the parents . . . so what are we emulating?—Mills, 'Who is the unadoptable child?'; 20 *Australian Journal of Social Work*, at 18-19.

There is every reason to believe that in order to guide officers interviewing applicants artificial tests are likely to be adopted. In the U.S.A. such tests are well known and sometimes involve automatic rejection of divorcees, parents with different religious beliefs, families with more than an artificially determined number of existing adopted

children, employed wives, aliens, parents with unusual age differences or over a certain age or with criminal records. The Act makes no provision for an appeal to a Court or tribunal by persons who are rejected as prospective adoptive parents either by the Department of Social Welfare or approved charitable organisations.

C. NO APPEAL

There is no right of appeal to a superior court from the police magistrate who hears the application. The sorrowful prospect of prerogative writs remain with us unabated by this legislation. Writs of *mandamus*, prohibition and *certiorari* are inadequate in scope and technical in procedure and quite inappropriate.

D. THE COURT'S DISCRETION

The Court's powers on the hearing of an application and the grounds upon which the Court agrees or refuses to make an adoption order are very similar to those in previous legislation. By the time the application reaches the Court in nearly every case the die has been cast. The court will act no doubt merely as a tribunal of review from the Director of Social Welfare's opinions as a check on administrative abuses in the adoption process.

E. EFFECT OF ORDER

Unlike the previous Tasmanian Act all relationship in the eyes of the law between the child and natural parents is severed except for the purposes of sexual offences (s. 30). However no provision has been made for the retention of liability of a putative father under an affiliation order when an illegitimate child is adopted by its mother.

In summary the Act, although an improvement on its predecessor, may not pass the test of time. It is marked by a rigidity unlikely to commend itself to malleable human relationships.

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