

Adoption Law:
The case for reform

A report by
the Law Society's Law Reform Committee

April 2000

CONTENTS

Executive Summary	?
Summary of Recommendations	?
Section 1: Access to Birth Information and Post-Adoption Contact	?
1. Right to Information	?
2. Information Veto Register	?
3. Voluntary Contact Register	?
4. Counselling	?
5. Retention of Records	?
6. Appeals Mechanism	?
7. Tracing and Reunion Services	?
Section 2: Intercountry Adoption	?
1. Adoption Acts 1991 and 1998	?
2. Conclusions	?
3. Recommendations	?
Section 3: Miscellaneous	?
1. Post-Adoption Services	?
2. Eligibility to Adopt	?
3. Eligibility for Adoption	?
4. Birth Parent Adoption	?
5. Civil Legal Aid	?
6. Role of Adoption Board	?
7. Open Adoption	?
8. Consolidation	?
Bibliography	?

EXECUTIVE SUMMARY

The Law Reform Committee of the Law Society of Ireland was established in November 1997 in order to identify and focus upon specific areas of the law in need of update and reform. It aims to contribute towards improving the quality, fairness and effectiveness of Irish legislation in a number of selected areas. It also seeks to represent the views of the Society's members in relation to a number of legislative initiatives and to enhance the Society's contribution to the development of Irish law. More generally, it aims to build relationships between the Law Society and others involved in the review of law and policy, including senior policy-makers and the voluntary sector.

After having surveyed all members of the Society and a wide selection of groups in the voluntary sector, the Committee has identified a number of priority areas for law reform, including that of adoption. Representatives of the Committee have already established contacts with officials within the Department of Health and Children who are involved in framing policy in this area and the Committee is aware that new legislation is currently being considered.

It is in this context that the Committee has undertaken an examination of current Irish legislation on adoption, of judicial deliberation on the application of this legislation, and of the work of the Department of Health and Children, the Law Reform Commission and numerous interested groups, on reform of Irish adoption law. In November 1999, the Law Reform Committee hosted a seminar on this topic at which a number of interested parties made presentations and submissions as to the reforms that they would advocate. The Law Society of Ireland would like to thank all those who contributed to this seminar and those who otherwise contributed to the work of the Committee on this complex and emotive subject.

The Committee's analysis and recommendations are divided into three sections: Section 1 deals with the difficult issues of access to birth information and post-adoption contact; Section 2 is concerned with intercountry adoption; and Section 3 deals with a range of miscellaneous anomalies and issues impacting upon the fairness of adoption legislation.

This report has been submitted to the Department of Health and Children and the Department of Justice, Equality and Law Reform and will be circulated to members of the Judiciary and of the Oireachtas and to voluntary bodies with an involvement in the area of adoption. It is hoped that its findings and recommendations will lead to concrete improvements in the law relating to adoption and will help to ensure fair and balanced treatment for those affected by adoption arrangements.

Adoption Law: The case for reform

The members of the Law Reform Committee are:

Anne Colley, Chairman

John Costello, Vice-Chairman

Brian Gallagher

Rosemary Horgan

Anne Leech

James MacGuill

Eamonn O'Connor

Kevin O'Higgins

Mark Ryan

Owen McIntyre, Secretary (Parliamentary and Law Reform
Executive, Law Society of Ireland)

SUMMARY OF RECOMMENDATIONS

ACCESS TO BIRTH INFORMATION AND POST-ADOPTION CONTACT:

1

That adult adopted persons, their adult siblings and birth parents should be granted, by means of legislation, a qualified right to adoption information subject to the exercise of a veto relating to identifying information. Applications for such information should initially be made to the Adoption Board

2

That adult adopted persons and birth parents should be granted an absolute right to available non-identifying information relating both to the adoption and to the current welfare of the subject of the enquiry

3

That adopted people, and where appropriate adoptive parents, should have an absolute right to available information to be prescribed by statute to include, as a minimum, information relating to health and medical history

4

That an information veto register be established and administered by the Adoption Board whereby adult adopted persons and birth parents can prevent the disclosure of identifying information

5

That a voluntary contact register be established and administered by the Adoption Board

6

That optional counselling be made available by the State both prior to the initial grant of adoption information and prior to initial contact. Optional post-contact counselling should also be made available by the State

7

That rigorous record retention requirements be introduced by legislation and underpinned by criminal sanctions in relation to all adoption records

8

That appeals against any decision of the Adoption Board regarding disclosure of information should be heard by the High Court in the absence of Regional Family Courts and should be legally-aided

9

That detailed guidelines or a code of conduct be developed in relation to tracing and reunion services and that such services be funded by the State where necessary

INTERCOUNTRY ADOPTION:

1

That measures be introduced requiring adoptive parents of children adopted abroad prior to 1991 to apply to the Adoption Board for recognition of the foreign adoption order

2

That measures be introduced to the effect that the Declaration of Eligibility to adopt be limited to specific foreign jurisdictions, to include Convention countries and countries whose adoption laws have been established by the Adoption Board to be compatible with Irish law

3

That post-adoption services, as recommended in this report, be extended to support the adoptive parents of children adopted abroad and be funded by the State

MISCELLANEOUS:

1

*That a comprehensive programme of post-adoption services
be devised and provided by the Adoption Board*

2

*That the exclusion of unmarried couples from adopting,
as opposed to married couples and single or widowed
persons, be removed*

3

*That the general prohibition on the adoption of
marital children be removed so as to permit, in appropriate
circumstances, adoption of marital children in long-term
care or fostering arrangements and of marital children
where one parent is deceased and the surviving parent
has remarried*

4(a)

*That measures be introduced to allow the Adoption Board
to process adoption applications on behalf of the birth
mother's husband, not being the natural father, while
retaining the birth mother's parental rights and without the
birth mother being required to go through the adoption
process*

4(b)

That measures be introduced to empower the Adoption Board to attach conditions, where appropriate, in the case of adoption by a spouse of a birth mother, not being the natural father, to ensure that the natural father's relationship with his child will be recognised in law

5

That measures be introduced to provide for legally-aided representation for all parties to adoption disputes

6

That a system of Regional Family Courts be established with jurisdiction to determine all appeals from the Adoption Board

7

That measures be introduced to facilitate and encourage the use of appropriate open adoption practices

8

That current adoption legislation be consolidated into a single comprehensive Adoption Act at the earliest opportunity

INTRODUCTION

Despite the enactment of six pieces of amending legislation,¹ the Adoption Act, 1952 remains the principal source of Irish adoption law. This legislation inevitably “reflected the attitudes, social circumstances and prejudices of Irish society in the 1950s ... and fails to embrace today’s understanding of the rights of the child, of adopted persons, and of birth parents, both mothers and fathers”.² A number of particular shortcomings have been highlighted by events and developments in recent years. For example, the Supreme Court has recently ruled that the right to know the identity of one’s natural mother is a basic constitutional right, though not an absolute or unqualified right as its exercise could be restricted by the constitutional rights of others and by the requirements of the common good.³ This decision, though it concerned the rights of children who were adopted informally before legislation on adoption was introduced, could have obvious implications for Irish adoption law and practice.

Similarly, the nature of the institution of adoption is changing fundamentally with fewer and fewer Irish children now being placed for adoption. In 1997, the Adoption Board received 108 applications for domestic adoption orders in respect of children placed by registered adoption societies and health boards, compared to 127 in 1996 and 143 in 1995.⁴ In 1998, this figure had fallen to 93. The majority of Irish adoptions now taking place are ‘family adoptions’⁵ with approximately 60 per cent of orders being made in favour of relatives of the child. The board received a total of 368 applications for adoption of Irish children in 1998 of which 241 were in respect of family adoptions. In 1997, the outgoing Adoption Board reported that a total of four registered adoption societies had deregistered during its lifetime as a consequence of the declining numbers of children being placed for adoption by birth mothers.⁶ Meanwhile, interest in overseas adoption continues to grow. In 1997, the Board recognised 148 foreign adoption orders compared to 117 in 1996. In 1998, this figure increased to 259. There were 152 applications for declarations of eligibility and suitability to adopt a child from overseas in 1997, up from 97 in 1996. The Board made 206 declarations of eligibility and suitability to adopt abroad in 1998 compared to 176 in 1997. During 1997, the Board received over 3,500 telephone enquiries and 96 written enquiries from persons expressing an interest in adopting overseas.

Footnotes:

1 Adoption Act, 1964; Adoption Act, 1974; Adoption Act, 1976; Adoption Act, 1988; Adoption Act 1991; Adoption Act 1998.
2 A. Shatter, *Family Law*, (4th Ed.) (Butterworths, 1997) at 516. However, the issue of natural fathers’ rights has been recently addressed under the

Adoption Act 1998.
3 *I O’T v. B* (Supreme Court, Unreported Judgment), 3 April 1998.
4 See generally, Reports of an Bord Uchtála, 1998, 1997 and 1996.
5 A ‘family adoption’ is one where a mother has a child outside marriage and then applies with her husband, who

is not the father of the child, to adopt the child. Such an application is made by a birth mother and her spouse in order that her spouse can establish some legal rights over the child. See, Report of an Bord Uchtála, 1998, at 7.
6 Report of an Bord Uchtála, 1997, at 4.

Adoption Law: The case for reform

The number of people seeking information, either adoptees wishing to trace their birth parents or *vice versa*, is steadily increasing with the Board receiving a total of 711 tracing enquiries during 1997 and 1,049 during 1998. The Board notes the increasing demand from tracers for access to birth records and points out that it has been calling for the establishment of a National Contact Register for the last number of years. It also states that agencies and adoption societies have reported increased demand for a comprehensive tracing service. Interestingly, it notes that, though one registered adoption society deregistered and two others decided to cease placing children for adoption in 1996 alone, all three societies continue to provide a tracing service for their clients. The issue of adoptees, birth mothers and siblings seeking access to birth or adoption records or seeking to make contact is fraught with difficulties and conflicting interests. Generally, the outgoing Adoption Board concluded in 1997 that

“In the five years of its existence this board has witnessed dramatic changes in adoption practice and trends, changes which are reflective of the rapid pace of developments in Irish social life over the period. Despite these changes, the Board is obliged to continue to operate within a legislative framework which is ill-equipped to cater for current adoption needs.”⁷

Also, despite the enactment of legislation in 1991 and amending legislation in 1998, the legal position in relation to intercountry adoption, and to the recognition of foreign adoptions in particular, is far from clear. However, in legislating to implement the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, the Government has an opportunity to re-examine this area and to remedy the deficiencies and anomalies therein.

Similarly, the procedures set down under current legislation on domestic adoption create a number of specific anomalies which have led to distress and injustice for those involved or seeking to become involved in adoption arrangements. Any reform of adoption law should seek to remove these from the adoption code.

Also, there is ready agreement on the need for consolidation of the current legislation on adoption.⁸ Since enactment of the Adoption Act 1998, current adoption law consists of seven separate pieces of legislation and this would increase to eight on enactment of the proposed Adoption Contact Register Bill. This proliferation of legislative measures can only lead to confusion and renders the law inaccessible to many. It would be desirable if reform of the law on adoption were to be accompanied by its consolidation into a single, comprehensive and up to date Adoption Act.

Footnotes:

⁷ *Ibid.*

⁸ See, for example, Shatter, *op. cit.* at

516 and Reports of An Bord Uchtála, 1994, at 5, 1995, at 6 and 1997, at 4.

SECTION 1:

ACCESS TO BIRTH INFORMATION AND POST- ADOPTION CONTACT

Probably the single greatest deficiency in current Irish adoption law is the lack of any legislative provision dealing with access to birth and adoption information. Despite the fact that there has been a substantial increase in the number of adopted persons seeking information about their birth parents and in the number of birth parents seeking to trace children given up for adoption, neither enjoy any statutory right of access to the relevant information. It must be remembered that the tendency towards secrecy in the adoption process cannot be attributed to any specific statutory provision but rather to established practice among adoption agencies and other professionals.⁹ However, section 22(5) of the Adoption Act 1952 provides that the adoption index “shall not be open to public inspection” and that no information from it “shall be given to any person” except by order of a court or An Bórd Uchtála. Section 8 of the Adoption (Amendment) Act 1976 prohibits a court from requiring that any such information be given to any person unless the court is satisfied that it is “in the best interests of the child” concerned to do so. In the Government’s current Legislative Programme, reference is made to an Adoption Contact Register Bill for which Heads are currently being prepared in the wake of a comprehensive consultation process commenced by the Department of Health and Children in March 1999. Obviously, any change in the law relating to access to information raises a number of sensitive issues.

First of all, those involved in the practice of adoption have traditionally regarded the preservation of anonymity and confidentiality as a priority and both adoptive and birth parents have always been given assurances that their anonymity will be protected. In particular, adoption agencies have given assurances that the identity of birth parents will not be revealed to an adopted child nor the identity of adopters revealed to birth parents. Of course, many birth mothers who gave children up for adoption as well as many adult adoptees will not wish to be traced under any circumstances.

Footnotes:

⁹ See K. O’Halloran, *Adoption Law and Practice*, (Butterworths, 1992), at 143. See also, C. Noctor, “Adoption, Consent and the Constitution”, 18

Dublin University Law Journal [1996], 50-78, where the author notes that “[T]he legislation is general in content and as a result the regulation of these

bodies [adoption societies], for the greater part, has developed in practice”, at 60.

Adoption Law: The case for reform

Section 1: Access to birth information and post-adoption contract

This may help to explain the well documented reluctance of some adoption agencies to assist adopted persons seeking access to their original birth records.¹⁰ The frustration of adopted persons who, in the absence of any statutory right to such information, depend on the co-operation of adoption agencies is equally well documented. Therefore, the question arises whether a right to information should only be conferred in respect of future adoption arrangements.

Examination of comparable neighbouring jurisdictions suggests that there can be little justification for denying a right of access to birth information to adoptees under existing adoption arrangements.¹¹ In Scotland, adopted persons attaining 17 years of age have always, since the introduction of legal adoption in 1930, enjoyed a right of full access to their original birth records. Since November 1976, adopted persons in England and Wales attaining 18 years of age have enjoyed the same right. However, those adopted prior to the enactment of the relevant legislation¹² are first required to undergo a counselling process. Similarly, though the same right was extended to adult adoptees in Northern Ireland in 1987, those adopted prior to enactment of the relevant legislation¹³ are required to undergo counselling before being granted access to their original birth records. In Canada, where adoption legislation comes under provincial jurisdiction, the general trend has also been towards establishing an individual right of access to birth information.¹⁴ Since 1994, the Ontario government's Standing Committee on Social Development has proposed new legislation permitting disclosure of information to adoptees and natural parents seeking reunion. In Alberta, the government amended the Child Welfare Act in 1995 making it easier for people adopted at birth to search for their birth parents. However, the new provisions still do not permit birth parents to initiate an active search. Saskatchewan began to provide adult adoptees with non-identifying background information in the early 1980s and made arrangements to facilitate applicants' search and reunion efforts. Adult adoptees between the ages of 18 and 20 had required the written consent of their adoptive parents to request a search but now active searches for birth parents are made at the request of adult adoptees without the requirement of such consent. It is interesting to note that, in 1991, a passive registry was created for adoptive parents and birth parents who wish to establish contact prior to the adoptee reaching majority. Both parties must register before contact is facilitated and no search is made on behalf of either party. In British Columbia, the Adoption Act was amended in 1988 to permit creation of a passive registry and again in 1991 to create an active registry, run by a private agency with government funding. The registry acts as

Footnotes:

10 See for example, Report of the Review Committee on Adoption Services (DoH, May 1984) at 86, para. 12.4.

11 *Ibid.*, at 87, para. 12.8. See also, Shatter, *op. cit.* at 526.

12 Children Act, 1975.

13 Adoption (Northern Ireland) Order, 1987, entered into force 18th December 1987.

14 For an overview of the relevant provisions in Canadian adoption legislation, see R Sullivan, Report on

the Evaluation of the Adoption Reunion Registry (School of Social Work, University of British Columbia, June 1995), at 5-6.

Adoption Law: The case for reform

Section 1: Access to birth information and post-adoption contract

an intermediary and searches on behalf of both adoptees and birth parents and facilitates reunions between consenting parties. In July 1994, the Adoption Legislation Review Committee, established in January 1993 by the Minister of Social Services to conduct a review of all aspects of the Adoption Act, recommended that all adoption records be made available to adult adoptees after 1st January 2000.

The Black Committee, which in 1982 prepared the report recommending that restrictions on the disclosure of birth records in Northern Ireland should be lifted, was deeply divided on the question of retrospective application of a legislative right of access.¹⁵ The Irish Review Committee on Adoption Services was similarly divided in 1984. It acknowledged that retrospective grant of a right of access could create hazards for a natural mother's subsequent family relationships and fears among adoptive parents that any resulting contact might lead to divided loyalties and confusion for their children. The Committee recognised that such a move would be regarded by many natural and adoptive parents as a breach of faith. It did concede however that "[T]he same considerations do not necessarily apply to future adoptions" where "[T]here is now more tolerance" and "a greater openness about children born out of wedlock".¹⁶ A majority of the Review Committee recommended that all future adoptees should have an absolute right of access to their original birth certificates on reaching the age of eighteen, that they should receive counselling before exercising that right, and that natural parents should be informed at the time of placement for adoption that their child would have such a right.¹⁷ However, a majority opposed the lifting of restrictions on the disclosure of birth records in respect of adoptions that have already taken place.¹⁸

Shatter points out that since the publication of the Report of the Review Committee in 1984 there has been a substantial increase in the number of persons seeking information about their birth parents and in the number of birth parents attempting to trace children given up for adoption.¹⁹ It seems reasonable to assume that the trend towards greater tolerance and openness referred to by the Review Committee has continued and has helped to foster the change in attitude behind the trend to seek birth or adoption information. This undermines the argument for continued secrecy in respect of past adoptions. Also, O'Halloran notes that the aura of strict secrecy which has traditionally shrouded the adoption process has begun to loosen up in recent practice. To illustrate, O'Halloran refers to the practice of the Adoption Board in recent years of encouraging and

Footnotes:

15 Children and Young Persons Review Group, *Adoption of Children in Northern Ireland*, ("Black Report, June 1982). See 1984 Report of the Review

Committee on Adoption Services, *op. cit.*, at 87, para. 12.8.

16 *Ibid.*, at 88, paras. 12.11 and 12.12.

17 At 88-89, para. 12.14.

18 At 89-90, para. 12.16.

19 See the number of reviews and studies cited in Shatter, *op. cit.*, fn. 385, at 527.

Adoption Law: The case for reform

Section 1: Access to birth information and post-adoption contract

facilitating both natural parents and adoption agency staff to engage in tracing and to the practice of some adoption agencies to arrange for a natural parent to meet the prospective adopters at some stage in the process.²⁰

In a case relating to persons informally adopted, the Supreme Court has recently declared that the right of a child to know the identity of his or her natural mother is an unenumerated constitutional right which flows from the natural and special relationship existing between a mother and her child. However, it held that this is not an absolute or unqualified right but one the exercise of which may be restricted by the constitutional rights of others or by the requirement of the common good.²¹ The conflicting constitutional right of relevance in the context of adoption is the right to privacy and confidentiality of the natural mother.

The courts appear to have been moving towards recognition of a child's constitutional right to know the identity of his or her natural mother for some time. Judge Esmond Smyth, in the Circuit Court proceedings of the this case, relied on the Supreme Court judgment in *G v. An Bórd Uchtála*²² and the High Court judgment in the case of *GN (a minor) v. KK*²³ in reaching his mistaken conclusion that this was one of the unenumerated rights which had actually been ascertained and declared to exist by the Superior Courts.²⁴ Similarly, in *CR v. An Bórd Uchtála*, Morris J. refused to allow the Adoption Board to impose an absolute rule that information held by it might never be released.²⁵ It is worth noting that the concept of a right to one's identity or to knowledge of one's origins has been gaining currency in international law. Article 8 of the 1989 United Nations Convention on the Rights of the Child, the most widely ratified human rights instrument in history and one to which Ireland is a party, requires the State to "respect the right of the child to preserve his or her identity"²⁶ and Shatter concludes that "[I]n order to comply with this obligation, it is clear that legislation is required ... giving adult adoptees a right of access to their birth records".²⁷

The existence of an individual's right to privacy under the constitution has been acknowledged by the courts in a number of contexts.²⁸ In the present case, having regard to the definition of the right

Footnotes:

20 *Op. cit.*, at 145-146.

21 *I O'T v. B*, *op. cit.*, per Hamilton CJ, at 51, Barron, J., at 5. Keane J. was not satisfied that an unenumerated constitutional right exists for a child to know his or her parentage, at 36.

22 [1980] IR 32, in particular, per O'Higgins CJ at 55-56 and Walsh J. at 67.

23 (High Court, Unreported Judgment) 21 December 1993, per Budd J.

24 See *I O'T v. B*, *op. cit.*, per Hamilton

CJ, at 43-44.

25 1994 1 ILRM 217, see *I O'T v. B*, *op. cit.*, per Barron J., at 4.

26 The full text of Article 8 reads: States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.

Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide

appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

27 *Op. cit.*, at 527.

28 See *McGee v. Attorney General* [1974] IR 284; *Norris v. Attorney General* [1982] IR 241; *Madigan v. Attorney General*, 1986 ILRM 136; *AttorneyGeneral (SPUC Ireland Ltd.) v. Open-Door Counselling Ltd*, 1987 ILRM 477; *Kennedy & Another v. Ireland* [1987] IR 1.

Adoption Law: The case for reform

Section 1: Access to birth information and post-adoption contract

provided by Henchy J. in *Norris v. Attorney General*,²⁹ Keane J. found it “difficult to imagine an aspect of human experience which falls more clearly into the constitutional area of privacy, as thus defined, than the circumstances of the natural mothers in the present case.” Comparing the competing rights, he states that, unlike the right to know the identity of one’s natural mother asserted by the Applicants, the right to privacy “has at least a secure anchorage in our law” having regard to the relevant decisions.³⁰ Hamilton CJ, referring to his own judgment in *Kennedy v. Ireland*, acknowledges the right to privacy as “one of the fundamental personal rights of the citizen” but one which is not unqualified and the exercise of which “may be restricted by the constitutional rights of others”.³¹

Therefore, while Hamilton CJ’s majority judgement is prepared to declare the existence of an informally adopted person’s qualified constitutional right to birth information, that right may be restricted by a natural mother’s qualified right to privacy. As any determination will inevitably involve a balancing of these conflicting rights, Hamilton CJ helpfully provides an instructive, non-exhaustive list of criteria which the Circuit Court judge in the present case is entitled to consider:

- (i) the circumstances giving rise to the natural mother relinquishing custody of her child;
- (ii) the present circumstances of the natural mother and the effect thereon (if any) of the disclosure of her identity to her child;
- (iii) the attitude of the natural mother to the disclosure of her identity to her natural child, and the reasons therefor;
- (iv) the respective ages of the natural mother and her child;
- (v) the reasons for the natural child’s wish to know the identity of her natural mother and to meet her;
- (vi) the present circumstances of the natural child; and
- (vii) the views of the foster parents, if alive.³²

However, it is obvious from elsewhere in the judgment that the Chief Justice views the natural mother’s wishes as the paramount consideration. For example, he emphasises the fact that, in the present case, the natural mothers relinquished their rights and duties as parents “on the understanding that their identities would be kept confidential and that their identities would not be disclosed without their express consent”.³³ He further states flatly that whether the applicants are restricted in the exercise of their constitutional right to know the identity of their respective natural mothers “depends on the circumstances of the case and whether they [the natural parents] ... wish

Footnotes:

29 *Op. cit.* Henchy J.’s full definition is provided in Keane J.’s judgment, *op. cit.*, at 31-32.

30 At 33.

31 At 50.

32 At 65-66.

33 At 49-50.

Adoption Law: The case for reform

Section 1: Access to birth information and post-adoption contract

to exercise this right to privacy”.³⁴ Similarly, Barron J. states that secrecy “has always been a paramount consideration in adoption law” and though “the public attitude to absolute secrecy has been weakened” ... “there does not appear to have been any cases where communication has taken place against the wishes of the mother”.³⁵ It would appear therefore that the Supreme Court has within its contemplation some mechanism, such as an ‘Information Veto System’ whereby the consent or refusal of the natural mother can be sought and recorded.

It is of great concern that the former Chief Justice appears to take the view that lawfully adopted children will not, under any circumstances, be able to assert the right to know the identity of their birth mothers. He points out that

“[I]ts exercise is restricted in the case of children who have been lawfully adopted in accordance with the provisions of the Adoption Act 1952 as the effect of an adoption order is that all parental rights and duties of the natural parents are ended, while the child becomes a member of the family of the adoptive parents as if he or she had been their natural child”.³⁶

He appears to take a very strict and legalistic view of formal adoption, holding that no familial relationship can survive between a legally adopted person and his or her natural mother. This view is quite out of step with developments in comparable jurisdictions. It seems anomalous that children informally adopted prior to 1952, as were the applicants in this case, should enjoy substantially greater rights in this regard than those adopted under the 1952 legislation. In relation to formal adoption, it must be remembered that the complete severance of the legal ties between the adopted child and the birth parent is a statutory requirement and that rules introduced by statute can be altered by statute.³⁷ Also, though natural parents relinquished all parental rights and duties under the adoption legislation, the unenumerated right declared in the present case would vest in the adopted person who could not have consciously relinquished such a right.

On a practical level, Keane J. points out that the issue of a right to birth information will not arise

“where, through an intermediary such as An Bórd Uchtála, or an Adoption Society, communication is established between a natural mother and her child and a reunion is voluntarily effected between the two. It can only arise, where, as here, the possibility exists that the mother may not be willing to effect a reunion with the child”.³⁸

Footnotes:

34 At 51-52. See also Keane J. , at 30, where he states that “... the existence of the right [to know the identity of one’s mother] will depend on the opinions of individual judges as to whether, in the circumstances with which they are confronted, it would be just or unjust to

deny the existence of the right. The relevance of that approach in the present case is, of course, that it immediately brings into the equation the right to privacy of the natural mothers”.
35 At 4.
36 At 51.

37 For example, section 8 of the Adoption Act, 1976 makes the availability of identifying information subject only to the “best interests of the child concerned” and makes no mention at all of the right to privacy of the birth mother.
38 At 29.

Adoption Law: The case for reform

Section 1: Access to birth information and post-adoption contract

Therefore, restriction of the right of formally adopted persons to know the identity of their natural mothers amounts, in practice, to recognition of the right of their natural mothers to veto access to this information. It would appear therefore that, in striking a balance between the right to know the identity of one's mother, to the extent that such a right is enjoyed by formally adopted persons, and the right to privacy of natural mothers, the former is outweighed by the latter.

Barron J. advocates a slightly different approach stating that, "[I]n striking a balance it is not so much the rights themselves which must be considered but the effect on the respective parties in the event of the vindication of one right rather than of the other".³⁹ He felt that in the present case in would be necessary to balance the emotional effect of either a grant or refusal of access to the mother's identity, on both the daughter and the mother. If this approach were to have been adopted by the majority, the child's right to know the identity of his or her mother might generally have been expected to take precedence over the mother's right to privacy. For example, in a 1973 study carried out into the experience of a group of 70 adoptees in Scotland who availed of their right to birth information two-thirds of those concerned had the immediate reaction that it was helpful.⁴⁰ Though one-third were upset by what they learned, when questioned again four months later, nine out of ten had no regrets about having taken steps to find out about their origins. Also, a recent study of the experience of almost 1,300 people of the search and reunion process in British Columbia indicated that the vast majority of both search subjects and search applicants were glad to have gone through the process.⁴¹ 99 per cent of adoptee applicants and 92 per cent of adoptee subjects were happy to have gone through with reunion while 99 per cent of birth parent applicants and 95 per cent of birth parent subjects expressed satisfaction.⁴²

Therefore, the Supreme Court decision in *I O'T v. B* appears to establish that an informally adopted person enjoys an unenumerated constitutional right to know the identity of his or her natural mother which is qualified by the mother's right to privacy. This right to privacy would generally take precedence over the former right. Also, since the right to know the identity of one's natural mother flows from the special relationship which exists between a mother and her child, its exercise is restricted in the case of children who have been lawfully adopted in accordance with the provisions of the Adoption Act 1952, as this special relationship will have ceased to exist. However, the right of adopted persons to such birth information has been restricted by means of legislation. Therefore, legislation may be enacted to recognise the survival of the special relationship between a natural

Footnotes:

39 At 8.

40 J. Triseliotis, *In Search of Origins – the Experience of Adopted Persons* (Routledge, 1973), see Report of the

Review Committee on Adoption Services, *op. cit.*, at 87.

41 R Sullivan, Report on the Evaluation of the Adoption Reunion Registry (School

of Social Work, University of British Columbia, June 1995).

42 *Ibid.*, at 20.

Adoption Law: The case for reform

Section 1: Access to birth information and post-adoption contract

mother and an adopted child and thus to restore this right. The exercise by an adopted person of this right would however remain qualified by the natural mother's right to privacy.

RIGHT TO INFORMATION

Recommendations:

- ***That adult adopted persons, their adult siblings and birth parents should be granted, by means of legislation, a qualified right to adoption information subject to the exercise of a veto relating to identifying information. Applications for such information should initially be made to the Adoption Board.***
- ***That adult adopted persons and birth parents should be granted an absolute right to available non-identifying information relating both to the adoption and to the current welfare of the subject of the enquiry.***
- ***That adopted people, and where appropriate adoptive parents, should have an absolute right to available prescribed information to be prescribed by statute to include, as a minimum, information relating to health and medical history.***

The Supreme Court has identified a qualified constitutional right to information in respect of the (informally) adopted person alone. Indeed, in stating the majority view, the Chief Justice found that “the effect of an adoption order is that all parental rights and duties of the natural parents are ended”.⁴³ This would appear to deny the possibility of such a right vesting in natural mothers. However, the judgement does not preclude the creation of a qualified right under legislation and, in view of the increasing numbers seeking information and the general trend towards greater openness, it seems appropriate that such a right should be created. For the same reasons, it would be appropriate to grant a similar right to adult siblings of the adopted person. This would be particularly appropriate where the natural mother is deceased. Generally, the right of access to

Footnotes:

⁴³ At 51.

Adoption Law: The case for reform

Section 1: Access to birth information and post-adoption contract

information should survive where it is found that the birth mother or adoptee is deceased. Of course, as with adoptees, the exercise of any right granted to a natural mother or siblings should be restricted by an adopted person's corresponding right to privacy, asserted by means of an information or contact veto register.

In common with other jurisdictions, the constitutional right to identifying information should only vest in adopted persons on reaching the age of majority, when they are in a position to make a mature decision as to whether or not to proceed to establish contact having regard to the sensitivities of all concerned. Of course, the majority of adopted people should be informed of the fact of their adoption at a much earlier age.⁴⁴ Similarly, only adult siblings should be granted any right and it should only vest in birth parents once the adopted person has reached majority. Obviously, any statutory right to birth information conferred upon adopted people should also be conferred upon those informally adopted.

Where a right to information can be asserted, it seems appropriate that an adopted person should have access, at a minimum, to the names and addresses of both birth parents, if available, and to information on the existence of any siblings. Even where there is a veto in operation they should be entitled to a copy of their birth and adoption certificates, though some identifying information might be required to be 'blacked out' or otherwise concealed. Birth parents should have access to the name and address of an adopted person. Ideally, applicants would want to have access to all available personal information on the subject of their application, such as age, marital status, occupation, health and well-being, but subjects should have discretion as to what personal information to lodge on a register. Also, where available, photographs and correspondence should be disclosed. There can be no reason why applicants should be denied an automatic right of access to non-identifying information, even where the subject has lodged a veto. Such information could include age, occupation, region, health and well-being and, most importantly, any information relating to health or inherited illness that might be required by insurers or employers. All prospective subjects, including those lodging a veto, should be encouraged to leave such information with the holder of the register.

Footnotes:

44 For example, the Review Committee on Adoption Services recommended that "All adopted children should be told that they are adopted" and further

stated "We would urge adoption agencies, if they need any urging, to emphasise to adoptive parents the importance of telling their children at

an early age that they have been adopted and to offer help in doing it". See Report of the Review Committee on Adoption Services, *op. cit.*, at 85.

INFORMATION VETO REGISTER

Recommendation:

- ***That an information veto register be established and administered by the Adoption Board whereby adult adopted persons and birth parents can prevent the disclosure of identifying information.***

The majority Supreme Court judgment in *I O'T v. B* implies the need for some kind of mechanism whereby the natural mother's consent or refusal to have her identity revealed (and / or to be contacted) can be sought and recorded. Such a mechanism could similarly record the wishes of adopted persons in relation to the provision of personal information to natural parents or siblings. There does not appear to be any good reason to grant adoptive parents any automatic right to identifying information on natural parents as adopted persons could exercise their right on reaching the age of majority. Adoptive parents might be tempted to disclose such information to minor adoptees or to adult adoptees despite the stated desire of natural parents for confidentiality. However, there exist certain, exceptional categories of information which should be recorded and automatically disclosed to adoptive parents, such as information relating to inherited illness. Adopted people, and where appropriate adoptive parents, should have a statutory right to "prescribed information" where it is available from adoption records. This information would be confined to non-identifying information where a veto has been lodged and would include, as a minimum, information relating to health and medical history. Also, it should be remembered that adoptive parents enjoy a right to privacy and so should be protected against unnecessary disclosure of personal information, such as information of a financial or social nature.

As the conflicting rights identified by the Supreme Court only vest in the adopted person and the natural mother, there is no requirement to establish information rights for siblings of the adopted person in legislation. Where the adopted person lodges a veto on the release of information, that veto should apply equally to siblings. Similarly, where adult children are aware of the existence of an adopted sibling, they should be bound by their mother's right to privacy and confidentiality if

Adoption Law: The case for reform

Section 1: Access to birth information and post-adoption contract

she asserts that right. Any attempt to trace the adoptee could compromise her confidentiality. However, where no veto has been lodged, there can be no objective reason to deny siblings such information. Where the natural mother or adoptee is deceased, any veto lodged by the deceased on the release of information should lapse.

An information veto register could only be managed effectively by a central State agency, ideally the Adoption Board, where officials should be trained to deal with applicants and subjects in a skilful and sensitive manner. These officials would have responsibility for encouraging those lodging a veto to supply appropriate non-identifying information. Legislation must require officials to deal with vetoed information with absolute discretion and any breach of confidentiality should carry an appropriate disciplinary, civil and / or criminal sanction. The introduction of a veto system should be preceded by an extensive media campaign to publicise its existence and operation. This is particularly important as not registering a veto would imply a willingness to be traced. Also, a media campaign could encourage provision of non-identifying information. The media campaign run by New South Wales in relation to that State's veto system, which proved to be very effective, might provide a suitable model.

Someone applying to lodge a veto should be able to do so by post to a single, central registry office. It might be appropriate if the prescribed forms were to be generally available through outlets such as post offices, Garda stations, County Council offices and health boards. Postal applications should be followed up by a discrete visit by (or meeting with) a qualified official who could explain the operation of the veto system and discuss non-identifying information which may still be made available. The applicants would effectively lodge an indication of intent to lodge a veto by post and would then confirm the lodgement after having been visited by someone qualified to go through the issues involved. For people living in very remote areas or in isolated conditions who fail to make an application, the authorities might actively but discretely seek to identify their wishes. Once registered, a veto should be valid for a period of five years after which time the registry would contact the subject to enquire whether they wished to renew the veto. Although this would involve a heavy administrative burden and could pose a small risk to the subject's privacy, it is important that people are given the opportunity to reconsider a decision to veto information on a regular basis. A subject should be entitled to lodge or revoke a veto at any time. If possible, a mechanism should be established whereby one party could be informed of attempts by the other party to access records or make contact as this may have a bearing on any decision to lodge or revoke a veto.

Adoption Law: The case for reform

Section 1: Access to birth information and post-adoption contract

Ideally, the Law Reform Committee would favour a general and absolute right of access to birth information for adopted persons with a veto system in respect of contact only. Also, it would favour a qualified right of access to identifying adoption information for birth parents, itself subject to a veto by the relevant adopted persons. However, the Supreme Court judgment in *I O'T v. B* would appear to preclude such a solution. A veto with regard to contact would be easily enforceable as breach would ultimately result in commission of an offence of “stalking” under the Non-Fatal Offences Against the Person Act, 1997. At any rate, there is no requirement to introduce a new statutory offence where an adopted person or birth parent gains access to birth or adoption information despite the operation of a veto and proceeds to establish unwanted contact as such behaviour would be covered by the 1997 Act.

VOLUNTARY CONTACT REGISTER

Recommendation:

- ***That a voluntary contact register be established and administered by the Adoption Board.***

It must be assumed that any person who, aware of the existence of an information veto system, neglects to lodge a veto is willing to be traced and contacted. However, an active voluntary contact register would greatly assist those wishing to make contact by providing a structured mechanism to facilitate such contact. Birth parents, adult adoptees, adoptive parents and siblings of adopted people should all be entitled to enter contact information. The voluntary contact register should be administered by the Adoption Board which could assist in mediating contact and with the provision of counselling for both parties before contact is made.

Groups such as the Adoptive Parents Association of Ireland (APAI) strongly advocate the inclusion of an information veto though they also support the establishment of a passive contact register. According to the APAI, “it would be most important for adult adopted people and birth mothers to register their intentions one way the other. Failure to do so can lead to frustration on the part of people hoping for information or contact”.⁴⁵

Footnotes:

⁴⁵ Adoptive Parents Association of Ireland, *Adoption Handbook* (1998), at 95.

COUNSELLING

Recommendation:

- ***That optional counselling be made available by the State both prior to the initial grant of adoption information and prior to initial contact. Optional post-contact counselling should also be made available by the State.***

As applicants might gain access to information of a distressing nature, it would seem reasonable that all applicants should be encouraged to attend at least one counselling or advice session before information is disclosed. Prior counselling has been a mandatory requirement in England and Wales since 1976 and in Northern Ireland since 1987, when a right of access to original birth records was first granted to adoptees in each jurisdiction. In addition to optional counselling before access is granted to adoption information, counselling facilities should be provided where applicants proceed to establish contact. As a minimum, one pre-contact counselling session should be provided and further provision should be made for post-contact counselling where it is requested. In relation to his 1995 survey conducted in British Columbia of 1142 birth parents, adopted persons and adoptive parents, Sullivan notes that where “the demand for initial reunion services has diminished and levelled off over time ... the demand for follow-up services has increased as affected persons have come to terms with the implications of reunion in their lives and the lives of their families”.⁴⁶

These services should be provided by the health boards or by professionals approved by the health boards for this purpose. Though many adoption agencies would possess suitably qualified people to act as counsellors, many adopted people and birth parents may be reluctant to trust these agencies. At any rate, the cost of this service should be borne by public sector. Having regard to possible resource constraints, the number of free post-counselling sessions available to any individual applicant could be limited. Should such counselling not be universally available, priority should be given to adopted people.

Footnotes:

46 T. Richard Sullivan, “Openness in Adoption: Considerations for Law

Reform” (unpublished paper prepared for the Law Society’s Law Reform

Committee, December 1999), at 1.

RETENTION OF RECORDS

Recommendation:

- ***That rigorous record retention requirements be introduced by legislation and underpinned by criminal sanctions in relation to all adoption records.***

In order to facilitate the qualified right of adopted people to know the identity of their natural mothers as well as to enable access to important non-identifying information, it is vital that minimum record retention requirements for all adoption and institutional care records be set down in legislation. These requirements would apply to all bodies which have had an involvement in the adoption process, including adoption agencies and health boards. Legislation should require that all original adoption records be produced to the Adoption Board and that a copy of all such records be lodged with the Board. Legislation should make it an offence to destroy a record or to fail to make it available to the relevant Adoption Board when requested. Legislation should confer upon adopted people and, where appropriate, adoptive parents a right, exercisable against all adoption bodies, to “prescribed information” where it is available from adoption records.

APPEALS MECHANISM

Recommendation:

- ***That appeals against any decision of the Adoption Board regarding disclosure of information should be heard by the High Court in the absence of Regional Family Courts and should be legally-aided.***

Where a party wishes to appeal any decision of the Adoption Board regarding disclosure of information, for example in relation to access to non-identifying “prescribed information”, the High Court would be the most appropriate forum under the current court structure as it would facilitate the development of a coherent jurisprudence in the area. However, were a system of Regional Family Courts to be established, this would be the preferred forum. In either case, an accessible system of civil legal aid would be necessary. A limitations period of six months to the taking of appeals would be adequate.

TRACING AND REUNION SERVICES

Recommendation:

- ***That detailed guidelines or a code of conduct be developed in relation to tracing and reunion services and that such services be funded by the State where necessary.***

Though State bodies should be permitted to contract out tracing services, tracing practices should be standardised and subjected to detailed guidelines or a code of conduct prepared by the Adoption Board or Department of Health and Children. Reunions should be mediated by counsellors approved by the Health Boards or other appropriate State agencies. Though many adoption agencies would possess suitably qualified people to act as mediators, many adopted people and birth parents may be reluctant to trust these agencies. The costs involved in the provision of these services should be funded by the State from central funds.

SECTION 2:

INTERCOUNTRY ADOPTION

Intercountry adoption is a complex and sometimes controversial socio-legal topic. There are both practical procedural problems as well as legal problems associated with intercountry adoption. In the first place, it has to be established unequivocally that the child is available for adoption in the sending country, and that the necessary consents by parents, legal guardian or other authorised persons or authority have been obtained. Not all children are available for adoption, even though they may be orphans or abandoned. In India for example, only Hindu children may be adopted by Hindu people. Guardianship of other children is available, and children may be legally removed from India on that basis with a view to adoption abroad.⁴⁷ Even where a child is adoptable in the sending country, difficulties can arise if the receiving country does not also agree that the child is 'adoptable'. An example, of such willingness to accept the designation of 'orphan status through abandonment' of the sending State can be seen, in the case of, *T.M and A.M v An Bord Uchtala*⁴⁸ although in that case the Supreme Court ultimately concluded that the child was 'abandoned' and could therefore be adopted in Irish law.

There is a lack of consensus on the issue of abandonment and 'orphan status' in many of the sending and receiving countries, neither one affording comity to the other. When children are allowed to leave their own country for adoption abroad, there is a risk for the child that the adoption may not in fact proceed in the country to which they are going. Similarly, in the case of children adopted abroad and returned to the country of the adoptive parents, difficulties can arise if the adoption decree is not recognised in the receiving country. A further difficulty arises with regard to what is meant by 'adoption'. In many countries there are less complete forms of 'adoption' where the child retains some element of the legal link with the birth parents, and may for example retain succession rights in the estate of his or her natural parents and adoptive parents⁴⁹. Some jurisdictions have both 'full' and 'simple' adoptions, and indeed some countries have introduced a more 'open

Footnotes:

47 A.J Jungalwalla, "Adoption Policies and Experiences in India", in R.A.C. Hoksbergen, *Adoption in Worldwide Perspective* (Swets & Zeitlinger and

R.A.C Hoksbergen: 1986), at .93.

48 [1993] ILRM (SC), at.577.

49 See G. H. Jones, "Adoption in the Conflict of Laws", 5 *International &*

Comparative Law Quarterly, (1956) 207.

Adoption Law: The case for reform

Section 2: Intercountry adoption

adoption' in addition to the closed model.⁵⁰ Muslim countries only recognise Kafala which is a type of fostering arrangement whereby the child is secured of day to day care and attention but retains his identity and links with the birth family. In some countries only children may be adopted, while in others there is no age limit. In an Intercountry adoption there is the problem of determining the incidents and effects of the foreign order. Should the order have the same effects as a domestic order, or the effects which it has in the country which made it?⁵¹

Private International law rules developed threshold requirements over the years to cope with instances where foreign adoption orders came before the domestic courts for consideration as to their validity and effect. Different jurisdictions have, needless to say, developed very different strategies for dealing with this situation. Some jurisdictions take the view that unless they have a similar concept of adoption to the one coming before them for consideration, they will refuse to recognise the status conferred by the foreign order. Ireland took this approach in the case of *In re Tamburrini*.⁵² Other jurisdictions favour an approach based on the 'reciprocity principle' whereby adoption orders are recognised if granted in circumstances equivalent to which they could have been granted domestically.⁵³ Domestic courts should recognise a jurisdiction which *mutatis mutandis* they claim for themselves. Some jurisdictions favour an approach based either exclusively or at least partially on domicile. English law considers that an adoption order alters the status of both the child and the adoptive parents and so reference must be made to both jurisdictions.⁵⁴ In general, civil law systems usually favour residence as an appropriate connecting factor. Irish law favours 'ordinary residence' so that Irish residents, temporarily working or living abroad may still adopt in Ireland.⁵⁵

In 1984, the Review Committee on Adoption Services addressed some issues relating to conflicts of law problems.⁵⁶ It suggested that the Minister for Health should be empowered to designate countries whose adoption orders would be recognised in Ireland. The effect of the recognition would be to accord to such foreign orders the same incidents and effects as domestic orders.⁵⁷ Orders made in non-designated countries, could also be dealt with by rules drawn up by the Minister.⁵⁸ The Report clearly disapproved of the notion of individuals travelling abroad in order

Footnotes:

50 See generally, Triseliotis J, in Mullender A (ed.), *Open adoption* (British Agency for Adoption and Fostering).

51 See W. Binchy, *Irish Conflicts of Law* (Butterworths (Ireland) Ltd., 1988), 374-375 for a comprehensive discussion on the Effects of Adoption. [1944] I.R. 508 (HC).

52 See Kennedy, "Reciprocity in the Recognition of Foreign Judgments" 32

Can. Bar Rev., (1954) 359 at 370-372; O'Connell, "Recognition and Effects of Foreign Adoption Orders", 33 *Can. Bar Rev.*, (1955) 635 at 642; and Kennedy, "Adoption in the Conflict of Laws" 34 *Can. Bar Rev.*, (1956) 507 at 523-525.

54 See G. H. Jones, *op. cit.*, at 209. In support of this approach are the cases of *Re Wilby* [1956] 2 W.L.R 262, and *Re Wilson* [1954] Ch.733.

55 Section 5(2) Adoption Act, 1964.

56 Report of Review Committee on Adoption Services, *op. cit.*, para.3.13.

57 Para. 13.17 which is similar to the approach favoured in Britain in Section 4(3) of The Adoption Act, 1968 and Schedule 1 of the Children Act, 1975.

58 The position of such orders in Britain is that they are subject to the discretion of the Court under Section 6, of the 1976 Act.

Adoption Law: The case for reform

Section 2: Intercountry adoption

to adopt a child, which it put on a par with the “trafficking in children from foreign countries for adoption purposes”⁵⁹ It considered that all applications for the adoption of a foreign child, which could be justified in particular circumstances, should be made only through a registered adoption society or health board.⁶⁰

In 1989, a Law Reform Commission Report⁶¹, also examined the basis of recognition of foreign adoption orders which it considered to be unsatisfactory as the rules for recognition of such orders was not clearly defined by case law or by statute.⁶² It made recommendations for changes in the law to eliminate existing anomalies and uncertainties. This report also recommended the ‘designated countries’ approach, with the orders from such countries having the same incidents and effects as domestic orders. It also recommended that specific recognition rules be enacted to cover non- designated countries. The report acknowledged that its recommendations were not going to assist persons who travelled abroad specifically with the purpose of adopting children and returning them to this country to live. Such persons had neither domicile nor ordinary residence in the country of the child and so the order could not be recognised as it failed to meet the normally acceptable threshold requirements for the recognition of foreign adoption decrees. The Law Reform Commission noted that such adoptions were likely to increase with the decreasing number of children available for adoption in the State and the continuing rise in the population of Third World countries. It took the view, however, that this problem could only be tackled at international level and noted that the 17th session of the Hague Conference on Private International Law in 1993 was to be devoted to the issue of ‘The Adoption of Children Coming from Abroad’. In those circumstances the Commission considered that it would be premature to embark on an examination of that particular topic.⁶³

However, legal developments were overtaken by events on the ground and, from 1990, a steady stream of Irish couples went in ever larger numbers to post revolutionary Romania, moved by compassion and an innate desire to nurture, having seen television pictures of children abandoned in orphanages in appalling conditions. The personal response of some individual people in Ireland and in First World countries generally, was to travel to Romania to adopt abandoned children. However, the situation in Romania quickly altered. Soon the greatest demand was not for the children of orphanages and other institutions but for new born babies. The Irish Association of Social Workers at their Annual Conference in 1991 clearly spoke out about the dangers involved in

Footnotes:

59 Para.3.13

60 Para 3.14.

61 *Report on the Recognition of Foreign Adoption Decrees*, Law Reform Commission (L.R.C 29-1989 Ireland).

62 *Ibid.*, at 12.

63 *Ibid.*, at 2 paragraph 5.

64 Annual Conference in Mullingar where Minister of State Chris Flood said that his officials were aware that some Irish

people had brought Romanian children into Ireland “in situations where money had changed hands”.

Adoption Law: The case for reform

Section 2: Intercountry adoption

the situation.⁶⁴ Speaking at Trinity College, Dublin on 8th May 1991, Mr Hans Van Loon, of the Hague Conference on Private International Law, said that there were well established Romanian “Mafia Networks” of adoption black marketers. He said that 80% of children brought into Ireland from Romania were obtained directly from their parents rather than from orphanages.⁶⁵ Parents who undertook the daunting task of adopting abroad faced many difficulties.⁶⁶ Self-help groups of parents were formed. The Irish Romanian Adoption Group was formed spontaneously by parents who had already surmounted those difficulties abroad and returned to Ireland with one or more children only to find that the Romanian adoption order was not recognised in Irish law.

The Recognition of Foreign Adoptions Bill, 1990 was introduced as a Private Member’s Bill on the 30th December, 1990. Ultimately the Bill was referred for improvement to a Special All-Party Committee of the House. Some two months later it emerged from the Committee in its amended form. The Bill was passed, with minor drafting amendments by the Senate on the 15th May, 1991.

THE ADOPTION ACTS OF 1991 AND 1998:

The definition of a ‘Foreign Adoption’

The 1991 Act defines the type of foreign adoptions which will be recognised in Irish law. In essence, the intercountry adoption must have been made in accordance with the laws of the State concerned. Section 1 defines “foreign Adoption” as the adoption of a child under the age of 21 (pre the Act) or under 18 (post the Act) which was effected outside the State by a person or persons under and in accordance with the law of the place where it was effected and in relation to which the following conditions are satisfied :

- a) the consent to the adoption of all persons necessary under the foreign law was obtained or dispensed with;
- b) the adoption has essentially the same legal effect as respects the termination and creation of parental rights and duties in the foreign country as in Ireland;
- c) the foreign law requires an enquiry to be carried out, as far as practicable, into the adopters, the child and the parents or guardian;
- d) the foreign jurisdiction requires its court or other authority or person to give due consideration to the interests and welfare of the child before deciding on the adoption;

Footnotes:

65 Article by Kieran McGrath law graduate, and senior social worker in a Dublin children’s hospital and vice president of the Irish Association of

Social Workers, Irish Times, 20 May 1991.
66 Up to 33 different documents may be required to complete an Intercountry

adoption (without any adoption agency help) see The Intercountry Adoption Process, Report of Committee 4, International Bar Association at page 8.

Adoption Law: The case for reform

Section 2: Intercountry adoption

- e) the adopters have not received, made or given or caused to be made or given any payment or other reward for the adoption, other than any payment reasonably and properly made in connection with the making of arrangements for the adoption.

The first requirement for recognition is that of consent to the adoption of all persons necessary under the foreign law either being obtained or dispensed with. The Constitutional support for the family based on marriage has inhibited the consensual adoption of the children of married parents. Since 1988, adoption orders may be made in limited circumstances in respect of marital children notwithstanding the lack of parental consent. The 1991 Act neatly side-steps the need to consider the issue of adequacy of consent in a foreign adoption, by accepting the competence of the foreign jurisdiction to determine the consent requirement. The European Convention on the Adoption of Children, 1967, is quite specific on the nature of the consent required for adoption and on the question of the dispensation with that consent on exceptional grounds.⁶⁷ The Act provides a ‘public policy’ escape clause in the case of adoptions effected abroad by persons ordinarily resident in Ireland.⁶⁸

The Second requirement outlined under the definition of a ‘foreign adoption’ is that the ‘adoption’ made in the foreign jurisdiction is essentially the same as a domestic adoption. Some jurisdictions have quite different concepts of adoption to our own. Some jurisdictions recognise ‘simple adoptions’ which do not sever the legal links between the birth family and the child. As a matter of policy the 1991 Act required that only adoptions which accord to our own definition of adoption should be recognised in Irish law. The reason for this restriction, was that the incidents and effects of foreign and domestic orders should be the same. Irish children and children adopted from abroad should be entitled to the same status as a result of their adoption. In addition to domestic policy considerations, the European Convention specified the incidents and effects of adoption in terms of a full adoption.⁶⁹ The Adoption Board also examined the adoption codes of foreign countries to ensure that the foreign adoption code was ‘essentially the same’ as the Irish adoption code. The impact of the amended definition of ‘foreign adoption’ introduced by the 1998 Act on this policy consideration will be explored more fully later. In order to quantify the nature and extent of any resulting shift in policy, the position under the 1991 Act is explored in detail first of all.

The third policy consideration is that the foreign jurisdiction should undertake enquiries into the adopters, the child and the parents or guardians. At the very least this policy requirement ensures

Footnotes:

- 67 The European Convention, European Treaty Series, No. 58, Article 5. 68 Section 5 (1).
69 See Articles ,10, 16 and 24.

Adoption Law: The case for reform

Section 2: Intercountry adoption

that some rudimentary enquiries are made in both jurisdictions. The adopters would of necessity have to produce some 'home study' report in advance of the adoption being made. The foreign jurisdiction would have to make enquiries into the position of the child and the birth family or legal guardians. The European Convention is quite precise as to the nature of the enquiries to be carried out by a competent authority in advance of an adoption being made. It is also prescriptive as to the qualification of the persons entrusted to carry out the enquiry.⁷⁰

The fourth policy requirement is that the court or other authority or person by whom the adoption was effected in the foreign jurisdiction, had given due consideration to the interests and welfare of the child, before making the adoption order. Due consideration is not defined in the Act. The European Convention requires the competent authority to refrain from making an adoption order, *unless it is satisfied* that the adoption will be in the interests of the child. The U.N Convention on the Rights of the Child (1989) also requires State Parties to ensure, as a paramount consideration, that the adoption is in the child's best interests.⁷¹ This policy consideration will also be examined in the light of amendments introduced under the 1998 Act.

The final policy requirement is that no money should have changed hands in relation to the adoption. This is a central policy consideration in both the domestic adoption code and under the European Convention on the Adoption of Children. It does not prevent however, payments made in connection with the adoption process, for translations, travel requirements, medical fees, payments to lawyers etc. In reality only the pool of adopters who can afford to discharge these costs, which can be substantial, can afford to adopt a child from abroad.⁷²

Only foreign adoptions which satisfied all of these policy considerations were recognised under the 1991 Act. As was pointed out in the Senate debate on the Bill, much reliance must be placed on the authorities in the foreign jurisdiction. In countries afflicted by war and famine it is not always possible to ensure standards set out on paper are adhered to in practice.⁷³

Footnotes:

70 See Articles, 7-9.

71 United Nations Convention on the Rights of the Child, adopted by the General Assembly on 20 November, 1989, Article 21.

72 The Statistical information provided by the Adoption Board in their annual reports, does not provide a classification of intercountry adopters according to their socio-economic group. See Abramson, H.J., *Issues in Adoption in Ireland* (E.R.S.I : Dublin) 1984, at 35-45. Abramson, notes the categories of classification as

including; (a) agricultural; (b) working class (labourers, industrial workers, tradesmen and transport); (c)white collar (professional, commercial and technical, public administration and defence). He also notes a developing 'white collar bias'. In 1984, the categories of grouping changed providing twelve categories of classification of adopters up to 1995, and fourteen categories for 1996 and 1997. In general however it can be seen from the Reports that the broad trend showing a 'white collar bias' has

continued even though the numbers of adoption orders made in favour of non-relatives has decreased dramatically. It must be noted however, that the domestic figures for this period may be somewhat distorted because of the number of children coming from abroad being adopted under the domestic code, due to non-recognition of the 'foreign orders'.

73 Dail Debates February 1991. Contribution by Dr Upton, cols.1935-1938.

Adoption Law: The case for reform

Section 2: Intercountry adoption

The Adoption Board have compiled a list of countries from which adoption orders will be recognised. This list was compiled by the Board on the basis of the compatibility of the foreign law of adoption with the Irish law. Some jurisdictions have only simple adoptions which do not necessarily provide for a full and complete transfer of parental rights and responsibilities from the birth to the adoptive parents. Some jurisdictions have both simple and full adoptions. Some jurisdictions provide for a permanent transfer of parental rights and responsibilities but allow for the termination or revocation of the adoption in certain exceptional circumstances.

In the case of *B. and B. v. An Bord Uchtala*, the plaintiff and three other couples applied through International Orphan Aid to the Adoption Board for an assurance that in the event of an adoption being lawfully made or obtained in the People's Republic of China, it would be recognised as a "foreign adoption" within the meaning of the 1991 Act. The Chinese authorities would not make an adoption order in favour of any of the couples concerned until it was full satisfied that the Chinese Order would be recognised as a 'foreign adoption' in Irish Law. All three couples were married and otherwise complied with the eligibility provisions of Section 10 of the Adoption Act, 1991. All of the couples in this case had undergone a lengthy and thorough assessment procedure. The Adoption Board was satisfied in respect of each of them that they were of good moral character and had sufficient means to support a child, and were suitable persons to have parental rights and duties in respect thereof.

The Adoption Board considered that there were fundamental differences in the nature and effect of an adoption order made in Ireland and in China. They could not therefore register an adoption order which differed so fundamentally in the Register of Foreign adoptions maintained under Section 6 of the 1991 Act. The High Court considered however that the legal effect of adoption was essentially the same in both jurisdictions. This decision was appealed to the Supreme Court by the Adoption Board. The Supreme Court upheld the decision of the High Court and pointed out that the essential effect of an adoption order was the same in both jurisdictions and indeed that the wording of the statutes were uncannily similar:

“The termination of such rights is comprehensive and unequivocal. Accordingly it seems to me, first, that adoption in China does constitute an 'adoption' as that term is generally understood, and secondly, that the proposed Chinese adoptions would meet the conditions specified in s.1 of the 1991 Act and in particular paragraph (b) thereof.”⁷⁴

Footnotes:

⁷⁴ [1997] ILRM, at.27.

Adoption Law: The case for reform

Section 2: Intercountry adoption

In the case of children who are adopted abroad in countries favouring ‘simple adoption’ the parents must obtain the consent of the natural parents to the termination of their rights over the child before the ‘foreign adoption’ will be recognised. As ‘simple adoptions’ do not terminate the original parental relationship, they cannot be recognised under Section 1(b) of the Adoption Act, 1991 and must therefore be converted into a full adoption by obtaining the full and complete consent to termination of all parental rights and responsibilities by the birth parents. If this full adoption is not available in the foreign jurisdiction, then the parents may have to go through a domestic adoption under the 1952 Act, having returned to Ireland with the child. In such cases the Adoption Board must appoint a representative in the foreign jurisdiction to ensure that the consent procedure has been thoroughly adhered to. In some cases parents who cannot establish such a complete surrender of parental rights must apply to the High Court under the Adoption Act, 1988 to ‘re-adopt’ the child on the grounds that the natural parents have abandoned their parental rights over the child.

The Adoption Act, 1998 altered the definition of a ‘foreign adoption’. The Explanatory Memorandum explained this secondary purpose as follows:

“This is intended to facilitate the recognition under Irish law of adoptions effected in countries whose laws permit the termination of adoptions in particular circumstances.”⁷⁵

Parents of Paraguayan children were most anxious to secure such an amendment in order to gain recognition for ‘simple adoptions’ effected in Paraguay, which had been refused recognition as ‘foreign adoptions’ by the Adoption Board. The amendment designed to achieve recognition for such ‘simple adoptions’ was rejected on legal advice received from two Attorneys General. Such rejection was based on the constitutional rights of natural parents and because it was intended to ratify the 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption.⁷⁶ It was felt that simple adoptions were best dealt with under the auspices of the Hague Convention procedure. When discussing the interpretation of the new section, Mr Frank Fahey, the Minister for Health and Children said:

“Section 10 of the Adoption (No.2) Bill provides that the concept of guardianship is the yardstick used to measure the compatibility of an adoption effected abroad with an adoption order. Paraguayan ordinary adoptions differ in a number of ways from Irish adoptions. Most significantly the legal parent relationship is not completely severed. For this reason it is unlikely that the Paraguayan ordinary adoption would be recognised by an Irish Court under

Footnotes:

75 Adoption (No.2) Bill, 1996 Explanatory Memorandum, at 3.

76 Signed by Ireland on 29 May 1993.

Adoption Law: The case for reform

Section 2: Intercountry adoption

Section 10. Additionally, the court would be likely to take into account the constitutional rights of the birth mother. In giving up her child for a simple adoption, the birth mother does not consent to complete severing of the legal relationship with the child. To recognise a Paraguayan adoption in Ireland would be to convert the adoption into something significantly different from that to which the mother has given consent. Therefore, to amend Section 10 in order to recognise Paraguayan adoptions could result in the section being found unconstitutional on the grounds that it failed adequately to respect the rights of the birth parents.”⁷⁷

Section 10 of the 1998 Act substitutes a new paragraph (a):

- “(a) the consent to the adoption of every person whose consent to the adoption was, under the law of the place, where the adoption was effected, required to be obtained or dispensed with was obtained or dispensed with under that law either-
- (i) at the time the adoption was effected, or
 - (ii) at a subsequent time when, if the adoption which was initially granted did not have the effect in that place of terminating a pre-existing legal parent-child relationship, it was converted into an adoption having that effect by virtue of such consent being obtained or dispensed with under that law (the date on which the adoption was initially granted being construed for the purposes of this Act as at the time the adoption was effected)”.

Paragraph (b) of the 1991 Act has also been substituted by the 1998 Act, as follows:

- “(b) the adoption has, for so long as it is in force, substantially the same legal effect as respects the guardianship of the child in the place where it was effected as an adoption effected by an adoption order,”

This new section is substantially different from the previous one which read:

- “(b) the adoption has essentially the same legal effects as respects the termination and creation of parental rights and duties with respect to the child in the place where it was effected as an adoption effected by an adoption order”.

It is clear from the Parliamentary Debates that the purpose of this amendment was to facilitate the recognition of adoption orders made in jurisdictions like China, where adoptions may be terminated in certain defined circumstances. The Adoption Board thought that the Chinese adoptions should be defined as ‘simple adoptions’ because of the provisions in the Chinese adoption code making them

Footnotes:

⁷⁷ Parliamentary Report, 13 March, 1998, vol. 488, col. 970 (Report and Final Stages of Bill).

Adoption Law: The case for reform

Section 2: Intercountry adoption

revocable in certain circumstances. The line between the categories of ‘full’ and ‘simple’ adoptions may, however, sometimes become quite blurred. In the case of *B and B. v. An Bord Uchtala*⁷⁸ the Supreme Court highlighted that adoptions traditionally viewed as ‘simple’ adoptions might, because of their particular characteristics, be equated with full adoptions. By substituting ‘guardianship’ for the termination and creation of parental rights, it may be argued that ‘simple’ adoptions may well now be recognised under the terms of the 1991 legislation as amended by the 1998 Act. A simple adoption may well have the same guardianship effects as an adoption order. For example, when a natural mother and her husband who is not the father of her child both adopt that child the husband acquires guardianship rights of the child jointly with the mother of the child. Guardianship is not necessarily an exclusive status, nor does it imply an inherent right to custody or access, simply by virtue of such guardianship. The rights to custody or access are determined in accordance with the paramountcy principle, namely that the welfare of the child should be determinative of such a contest.

By completely removing any reference to the termination and creation of parental rights, the exclusivity aspect of an Irish adoption order is removed as a yard stick for measuring the compatibility of foreign adoption codes. The Report of the Law Reform Commission on the implementation of the Hague Convention⁷⁹ noted that:

“The Permeability of the two primary categories of adoption is also apparent in the redefinition of a recognisable adoption in the Adoption Act, 1998. The 1991 Act, which until this year governed the recognition of simple adoptions, set out strict criteria for the recognition of foreign adoptions, requiring that, in order to be recognised here, an adoption must have essentially the same legal effect as an Irish adoption, in terminating the parental rights of the birth parents. The 1998 Act modifies this somewhat, providing that the adoption must have ‘for so long as it is in force, substantially the same legal effect as respects the guardianship of the child.’ as an Irish adoption. This allows for the recognition of some simple adoptions in Irish Law, but it is by no means clear that it will allow for the recognition of all simple adoptions.”

The conflict of laws position with regard to the recognition of an adoption order which is not necessarily available in the domestic adoption code is complicated. In the case of orders obtained abroad by persons who have no connecting factor with the foreign jurisdiction, the position is

Footnotes:

78 *Op. cit.*

79 Report of the Law Reform Commission on the Implementation of

the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, 1993(LRC

58-1998)(LRC: Ireland) June, 1998, at 42.

Adoption Law: The case for reform

Section 2: Intercountry adoption

regulated by the provisions of the 1991 Act, as amended, and by the issue of ‘public policy’. The State has undertaken to implement the provisions of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and, by so doing, will be incorporating procedures for the recognition of ‘simple adoptions’ provided, of course, that all parties go through the Convention procedure. Non-recognition is envisaged only in cases where it becomes clear that there has been a serious abuse. Under Article 24 of the Convention, recognition of an adoption may be refused by a Contracting State where the adoption is manifestly contrary to its public policy. In general however, non-recognition is not in the best interests of the child, since it results in continuing uncertainty as to the child’s status with his or her adoptive family.⁸⁰ In the case of Convention adoptions however the child is protected by the process and procedures inherent in such adoptions. The situation is not so assured outside of a Convention adoption however. The Law Reform Commission noted that:

“It must be acknowledged that there is a need for additional caution in relation to existing and non-Convention adoptions, since the adoption process in such cases will not have been subject to the same standards and regulation as an adoption effected under the Convention. Regulation of adoption from non-Convention countries should not become so lax as to undermine the Convention, by deterring prospective adopters from adopting through the carefully regulated Convention procedure. Nevertheless, and especially in relation to the retrospective recognition of adoptions which are already in place, it is not desirable, from the point of view of the welfare of the child, to leave such adoptions unrecognised, where recognition can be effected without undermining the rights of birth parents.”⁸¹

The Commission went on to recommend that the Conversion procedure under Article 27 of the Convention be available to existing ‘simple adoptions’ subject to the appropriate consents of the birth parents being obtained. It also recommended that Convention ‘simple adoptions’ which cannot be converted to full adoptions, should have the same effect in Ireland as they have in the country where the adoption was effected. However in the case of a simple adoption effected by persons in a third country, (Ireland being neither the sending nor the receiving country), the adoption should have the same effect as it would be entitled to in the receiving country. In the case of foreign (non-Convention) adoptions by non-Irish residents, the Commission recommended that the restrictive interpretation under the 1991 Act, as amended, should not be applied to adoptions under Sections 2,3 & 4 of that Act, and that adoptions should be entitled to recognition except where such

Footnotes:

⁸⁰ Report of the Law Reform Commission on the Implementation of the Hague Convention, *op. cit.*, at 42.

⁸¹ *Ibid.*, at 47-48.

Adoption Law: The case for reform

Section 2: Intercountry adoption

recognition would be manifestly contrary to public policy⁸². In the case of the recognition of non-Convention simple adoptions however it was not so generous, noting that :

“We have considered the possibility of allowing for the recognition of simple adoptions, made outside the Convention process, as having the effects which they had in the State of origin. However, without the protection of the Convention safeguards and procedures, this would not be warranted. It would entail lengthy and difficult investigation into the laws and procedures of the State of origin, in situations where there might be no well established channels of communication between the Irish and the sending State authorities. It would also be difficult to guarantee that adequate standards had been applied in the adoption process. Since the object of the Hague Convention, and Ireland’s ratification of it, is to raise standards in intercountry adoption, it would be unfortunate to risk undermining these standards by relaxing the requirements for recognition of non-Convention adoptions to the extent that the Convention system would simply become redundant.”⁸³

The incident and effects of non-Convention simple adoptions are therefore unclear. It is not in the interests of the children concerned that there should be a doubt as to their status and legal position in Irish law ⁸⁴. The courts, in determining the incidents and effects to be attributable to such adoptions may well apply Convention procedures and standards outside the strict scope of the Convention. As outlined, central to the ethos of the Convention is the premise that non-recognition should not be used as a sanction. It would seem however, that as a matter of public policy and in accordance with international obligations, there is an onus on the State to put measures in place to ensure that all simple adoptions must go through the Convention process. This could be assured by insisting that persons who wish to adopt from abroad are approved only for Convention countries, or countries whose laws have been established to be compatible by the Adoption Board. The Declaration of Eligibility could be limited to a specific foreign jurisdiction. As the Entry Permit is intrinsically linked to this document, this would effectively inhibit most adopters from bringing children into the country from non-approved or non-Convention countries.

The original Section 1 of the 1991 Act, is further amended by a substitution of welfare criterion in subsection (d). The original provision read:

“(d) the law of the place where the adoption was effected required the court or other authority or person by whom the adoption was effected, before doing so, to give due consideration to the

Footnotes:

82 *Ibid.*, at 48-49.

83 *Ibid.*, p.48.

84 For example, their rights to citizenship,

nationality, succession rights to their adoptive parents, etc.

Adoption Law: The case for reform

Section 2: Intercountry adoption

interests and welfare of the child.”

In contrast the new Section 1 (d) substituted by Section 10 (a)(iii) of the 1998 Act reads:

“(d) the adoption was affected for the purpose of promoting the interests and welfare of the child,”

The original sections appear to have been directed towards ensuring that the foreign jurisdiction went through some formal determination that the child was suitable for adoption abroad. The welfare of the child was required to be considered in advance of the decision to place the child for adoption abroad. This of course accorded with the provisions of the European Convention on the Adoption of Children, 1967,⁸⁵ with the United Nations Convention on the Rights of the Child, 1989⁸⁶ and with the Recommendations of the United Nations Report on Adoption and Foster Placement of Children, 1980.⁸⁷ The substituted section is, without question, a lesser standard. Such a standard could be achieved by asserting that the adoption was in fact carried out to promote the interests and welfare of the child, even if the foreign jurisdiction did not have a procedure in place in their laws to ensure that the welfare of the child was considered in advance of an adoption order being made. The Amending Section 10 also alters the definition of “place” in the original Section 1 of the 1991 Act.

It can be seen that the legislative intention ‘as a matter of policy’ appears to be to make the recognition of adoptions effected abroad easier, from the point of view of the adoptive parents. It may well be argued that this also protects the interests of the children involved as it is better that their status under the foreign order be clarified by the recognition of the foreign orders and their entry on the Register of Foreign Adoption orders. The Law Reform Commission cogently make this argument in favour of recognition. They also recommend that as a matter of policy, Ireland should not use the veto under Article 17 to prevent the entrustment of the child to the adoptive parents, simply because only a simple adoption can be assured by the Convention process. They are clearly opposed to automatic recognition of non-Convention simple adoptions however. The history of the intercountry adoption code, under the 1991 and 1998 Acts, is very clearly ‘consumer driven’. Whether it can be reeled back from this focus and redirected will depend upon how the amending legislation for implementing the 1993 Hague Convention is framed, and on how well the legislators can withstand the pressure from special interest groups.

Footnotes:

85 Articles 8 and 9.

86 Article 21.

87 Recommendations 19-23.

ADOPTIONS EFFECTED BY IRISH PARENTS DOMICILED ABROAD

Section 2 of the 1991 Act gives statutory effect to the common law rule and recognises, in Irish law, foreign adoption decrees of countries where one or both of the adopting parents were domiciled at the time of the making of the adoption decree. Such adoption decrees were to be deemed always to have been recognised whether effected before or after the commencement of the Act. This gave effect to one of the recommendations of the Law Reform Commission Report.⁸⁸

The common law rules with regard to the recognition of adoption orders made abroad were considered in *M.F. v An Bord Uchtala*⁸⁹. This High Court case arose out of a Case Stated by An Bord Uchtala on the question of the recognition of an English Adoption Order. The Court noted that there was no statutory provisions contained in the Adoption Acts 1952 to 1976 dealing with the recognition of foreign adoptions. The common law rules on recognition were held to apply, and an adoption made in another jurisdiction and valid according to the laws of that jurisdiction was deemed to be recognised if at the time of the adoption, the adopter was domiciled in the foreign jurisdiction. Therefore it was possible for the Adoption Board to make an adoption order in favour of M.F. and her husband.

Section 2, therefore, merely gives statutory recognition to the common law rule, already acknowledged in this case. The Law Reform Commission argues for the removal of sections 2, 3 and 4 of the 1991 Act and that such adoptions should be entitled to recognition except where recognition would be manifestly contrary to public policy, taking into account the best wishes of the child. In such cases where the adoption does not have the effect of terminating the pre-existing legal relationship between the child and the birth family, the effects of the adoption should be the same as they were in the country where the adoption was effected. In other cases it should have the same effect as an Irish adoption⁹⁰

Footnotes:

88 *Op. cit.*, at 32, Recommendation 4.

89 [1991] ILRM 399

90 *Op. cit.*, at 49.

ADOPTIONS EFFECTED IN THE PLACE OF HABITUAL RESIDENCE OF THE ADOPTERS

Section 3, provides for the recognition in Ireland of foreign adoption decrees of countries where one or both of the adopting parents were habitually resident at the time of the making of the decree. In the case of such adoptions, however, recognition of adoption decrees already granted only takes effect as and from the coming into force of the Act. This provision also gave effect to one of the recommendations of the Law Reform Commission Report.⁹¹

ADOPTIONS EFFECTED IN THE PLACE WHERE THE ADOPTERS ARE ORDINARILY RESIDENT

Section 4, provides for the recognition in Ireland of foreign adoption decrees of countries where one or both of the adopting parents were ordinarily resident for a period of not less than one year at the time of the making of the decree. In the case of such adoptions, however, recognition of adoption decrees already granted would only take effect as and from the coming into force of the Act. Section 12, of the 1998 Act amends this section by the insertion of the following section after section 4:

“4A A foreign adoption (whether effected before or after the commencement of this section) effected in a place in which neither of the adopters was domiciled, habitually resident or ordinarily resident on the date on which the adoption was effected, but not recognised under the law of the place in which either of the adopters were on that date domiciled, habitually resident or ordinarily resident, as the case may be, solely because the law of that place did not provide for the recognition of adoptions effected outside that place, shall be deemed, unless such deeming would be contrary to public policy, to have been effected by a valid adoption order made on that date or on such commencement, whichever is the later.”

Therefore, the grounds of recognition of a foreign adoption are further extended to include adoptions by persons living abroad in third countries. This would for example provide for the recognition of an adoption order made in a third country in favour of Irish nationals living in an Islamic country which does not accept adoption.

Footnotes:

⁹¹ *Ibid.*, at 30 & 32, Recommendation 5.

ADOPTIONS WHERE THE ADOPTERS ARE ORDINARILY RESIDENT IN IRELAND

Section 5, provides for the recognition of a foreign adoption decree where the adopters are ordinarily resident in the State provided that such recognition is not deemed contrary to public policy and only if:

- 1) the adopters are persons coming within the classes of persons in whose favour an adoption order can be made under section 10 of the 1991 act (they are eligible under the Act); and
- 2) the adopters were ordinarily resident in the State on the date on which the adoption was effected; and
- 3) in the case of pre 1st April, 1991 cases, the Adoption Board declares in writing that it is satisfied that the adopters are persons in whose favour an adoption order may be made by virtue of section 10. Sub section four goes on to say that a person who adopted prior to the commencement of the Act and who was not a widow or the mother or father or a relative of the adopted child shall be deemed to be a person in whose favour an adoption order might have been made on the date when the foreign adoption order was made.⁹²
- 4) In cases where the foreign adoption order was made after 1st April, 1991 the Adoption Board must declare in writing before the date on which the foreign adoption order is made:
 - (a) that the prospective adopters qualify as eligible persons under section 10 of the 1991 Act and
 - (b) that the prospective adopters are suitable persons as certified in a report by a Health Board or Registered Adoption society on assessment under section 13 of the 1952 Act.

Therefore, the Act takes a practical stand on foreign adoptions made prior to the 1st April, 1991.⁹³ Such persons only have to establish that they qualify under section 10, subject to the amelioration in section 5(4) concerning the category of persons eligible to adopt a child in Irish law. Subsection (2) provides for the *inter regnum* between 1st April, 1991 and the 1st July 1991. Prior to the introduction of statutory regulation the prospective adopters had to receive an assurance in writing from the Minister for Justice confirming that the child would be admitted to the State following the adoption. This subsection extends recognition to this category of adopters but only if:

- I. the Minister gave such an assurance;
- II. the adopters are eligible under section 10;
- III. the adopters were ordinarily resident in the State on the date when the adoption was effected; and

Adoption Law: The case for reform

Section 2: Intercountry adoption

IV. the Adoption Board declares in writing that it is satisfied that the adopters are within the class of persons set out in section 10.

Section 13 of the 1998 Act extends by twelve months the deadlines set out in Sections 5 (1)(iii)(I), and (II), and in Section 5 (2). Irish residents who had not completed the pre-adoption assessment procedure within the time limits set out in the 1991 Act may apply for recognition of the orders made in their favour provided that the adoption orders were effected on or after 1st April, 1991 or before 1st July, 1992 subject to the conditions set out in Section 5(2)(I)(II)(III) & (IV) as set out above. Subsection (3)(a) provides locus standi for the adopters, the adopted child or any person having an interest in the matter to apply to the Board for a declaration. After those specified dates however the requirements are more stringent. Eligibility to adopt must be augmented by a report from a health board or adoption society, based on an assessment as to suitability based on moral character as well as their ability to support the child.⁹⁴

The Board must be satisfied and declare as to both eligibility and suitability in advance of the foreign adoption order being obtained. All applicants who can establish eligibility to adopt under Section 10 are entitled to an assessment by a health board social worker. The assessment is sent to the Adoption Board who decide whether or not to make the declaration as to suitability or otherwise. A copy of the declaration or refusal is sent to the social worker who carried out the assessment who then informs the prospective adopters. There is no appeal procedure at present apart from an application to the Court by way of judicial review of administrative action⁹⁵. In practice the number of applicants declared unsuitable is small. However there is concern that the Health Boards have imposed 'age limitations' on persons who wish to adopt a child from abroad and have refused to perform the eligibility and suitability test for older would be adopters.

There would appear however to be an inherent weakness in the procedures for Declarations of Eligibility and Suitability as already outlined. The Adoption Board has determined that the adoption

Footnotes:

92 This section was necessary to deal with the reality of what had occurred in early post revolutionary Romanian adoption trail, when individuals could approach children's homes or hospitals armed with private home study reports and adopt a child in Romanian law, when they would not have been eligible to adopt a child under Irish law as they did not come within the authorised eligible categories of adoptive parent. In 1991, the Romanian Government established an Adoption Committee which compiled a register of children available for adoption,

made direct approaches illegal and also made the giving of payment or rewards for adoption illegal. See guidance on Law and Procedure to adopting Romanian Children issued by Home Office, Immigration and Nationality Department (London), March 1991. Between August and July, 1991, over 10,000 Romanian children were adopted by foreign nationals. See further, Dr Alexandra Zugravescu, "Quelques considerations sur la pratique de l'adoption internationale dans les pays de l'Europe de l'est et centrale, in Jaap Doek, Hans Van Loon

and Paul Vlaardingerbroek, (Eds.), *Children on the Move* (1990).

93 The Act itself came into force on 30th May, 1991.

94 See LRC Consultation paper on Implementation of Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993, September 1993 at 17.

95 Note however that the LRC Report, *op. cit.*, recommends an appeal structure in Convention Cases, from decisions by the Adoption Board acting as Central Authority, at 30.

Adoption Law: The case for reform

Section 2: Intercountry adoption

laws in Guatemala are not compatible with Irish adoption laws. That notwithstanding, Ireland currently has one of the highest rates of foreign adoptions made in this jurisdiction according to Guatemalan statistics. It would seem that Ireland ranks 8th in the world out of 28 countries which adopt Guatemalan children.⁹⁶

According to the Adopted Persons Association there is a “very significant” Guatemalan trade in buying or stealing children for adoption for sale to wealthy foreigners. They have accordingly asked the Government to study the recent figures released by the Guatemalan Government. They allege that the international trade in children there grew exponentially in 1994, the year that neighbouring Honduras cracked down on such traffic. They say that the adoption laws in Guatemala are among the weakest in Central America. *Casa Alianza* a group best known for its campaign against the shooting of street children has also been reported as saying that the adoption system in Guatemala is flawed, and warned that innocent Irish adoptive parents may pay for a baby which has been stolen from its mother⁹⁷.

The Adoption Board has pointed out that the consent of the birth mother must be given to a Court in Guatemala and that the Irish adopting couple must go through the assessment procedure in Ireland in advance. There is no question of Irish parents ‘buying’ children. The Irish Consul in Guatemala oversees the adequacy of the consent procedure which is the normal two staged process which prevails in domestic adoption. The Adoption Board has also pointed out that the number of Guatemalan children coming to Ireland is likely to decrease because the Romanian Government now allows the adoption of children to foreign citizens again after stopping the practice in 1997. It also points out that:

“The sudden stop in Romanian adoptions in 1997 meant that Irish couples looked to Guatemala, but Romania has come back on stream in 1998. We are confident that every precaution has been taken to ensure that all Guatemalan adoptions are taken legitimately.”⁹⁸

Although such adoptions are not recognised under the 1991 legislation, adoptive parents who adopt such children in Guatemala and return with them to Ireland can apply under the 1952 Act, on proof of the consent of the natural mother, in a direct placement situation. Application can also be made under the 1988 Act in certain circumstances where the consent cannot be obtained, as in the case

Footnotes:

96 S. O’Driscoll, “Ireland tops Guatemalan adoption rates”, *The Sunday Tribune*, 6 September, 1998, at 5., indicating that figures released by the Chief Curator’s Children’s Office

in Guatemala City show that Irish people adopted 72 Guatemalan children in a 28 month period up to May, 1998.

97 *Ibid.*, it is pointed out however that

there is no allegation or suggestion being made by the organisation that there is anything improper about any of the existing adoptions by Irish people.

98 *Ibid.*

Adoption Law: The case for reform

Section 2: Intercountry adoption

of a foundling . It must be noted however that other jurisdictions have expressed grave concern over the procedures in Guatemala. The British Government followed the Canadian Government in March, 1998 in requiring obligatory DNA testing of babies adopted from Guatemala where there is suspicion of the authenticity of the mother. In relation to DNA testing, the Adopted Peoples Association noted that :

“Given the nature of the trade, and the high number of Irish people adopting from Guatemala, it’s the only way to guarantee that the baby hasn’t been stolen. It would be naïve to expect that Ireland can escape from the clutches of what has become a very serious problem.”⁹⁹

The health board may only refer ‘would-be adopters’ to State agencies such as those in China ,Thailand and Romania who have a State controlled system which can be recommended. Those who wish to adopt from other jurisdictions may act independently or through a foreign or domestic agency specialising in intercountry adoption. Such agencies are not at present regulated by the Adoption Board, although the Report of the Law Reform Commission recommend that such agencies be accredited to act in intercountry adoptions subject to the regulation and control of the Adoption Board acting as Central Authority under the Hague Convention, 1993.¹⁰⁰

THE REGISTER OF FOREIGN ADOPTIONS

Section 6 provides for a Register of Foreign Adoptions and Section 7 provides for obtaining directions of the High Court in relation to entries in the Register of Foreign Adoptions. All foreign adoptions recognised under Sections 2 and 5 of the 1991 Act must be entered on the Register of Foreign Adoptions which the Adoption Board must maintain. A copy of the entry on the register in respect of an adoption is deemed proof that the adoption is one validly effected.

Section 14 of the 1998 Act, amends Section 6 in a technical sense by including a reference to the widened categories of orders recognised under the act, but it also deletes the original subsection (6) which provided for the removal from the Register of Foreign Adoptions of entries of foreign adoptions where such orders had been set aside, annulled or otherwise rendered void under and in accordance with the law of the place where it was effected or if the Court so directed in accordance

Footnotes:

⁹⁹ *Ibid.*, quoting Kevin Cooney of the Adopted Peoples Association.

¹⁰⁰ *Op. cit.*, at.53.

Adoption Law: The case for reform

Section 2: Intercountry adoption

with Section 7. Therefore, in the event of the annulment or revocation of the foreign order in the country where the order was made, there would be no automatic removal from the Register of Foreign Adoptions. In accordance with the amended Section 7, application could be made to the court to consider the matter on the basis of public policy or the welfare of the child.

While the Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption, 1964 provided for the international validity of decrees for the annulment and revocation of adoptions,¹⁰¹ the 1993 Hague Convention is silent on the question. The focus of the latter Convention is to establish a system of co-operation between Receiving States and States of Origin for the purpose of minimising abuse, ensuring that the interests of the child come uppermost in the adoption process, and guaranteeing the recognition of adoptions made under the Convention. In the event of serious abuse in the case of a simple adoption, action taken to quash the order in the State of Origin of the child could have very serious consequences for the child and the adoptive parents also. This amendment ensures however, that the order could not be removed from the Register without judicial intervention in Ireland.

ASSESSMENT BY THE HEALTH BOARD OF THE SUITABILITY OF PROSPECTIVE ADOPTERS

Section 8, provides for assessments by Health Boards or registered adoption agencies of persons who want to adopt a foreign child. Such assessment must be undertaken “as soon as practicable”. The practical problems associated with providing assessments “as soon as practicable” were considered in the case of *McC. and McD. v. Eastern Health Board*.¹⁰² The High Court held that there was no constitutional right to decide to adopt a child and to have that decision executed within any particular period of time. Even if such a right existed, the court would also have to have regard to the constitutional rights of the child whose future was determined by the adoption process. The Court also held that the applicants had not established as a matter of probability that the health board was in breach of its statutory duty to process the application as soon as practicable. The applicants appealed this decision to the Supreme Court which found that the phrase “as soon as practicable” did not mean as soon as possible. The Health Board had to consider all of its statutory obligations. The assessment procedure should not be prolonged beyond a period that was

Footnotes:

101 See, Article 7 of Convention (which was not signed or ratified by Ireland). See also J. Unger, “Hague Conference

on Private International Law: Draft Convention on Adoption”, 28 *Modern Law Review*, July, 1965, 465. 102 [1997] 1 ILRM 349.

Adoption Law: The case for reform

Section 2: Intercountry adoption

reasonably required to ensure that the interest and welfare of the child to be adopted were fully protected. Whether this was so depended on the circumstances in the particular health board area involved. In the instant case the Eastern Health Board was found to be doing its best in the circumstances .

Section 9, sets the standard of proof required of adoptions effected outside the State, in order that they be presumed to have been effected in accordance with the law of that place unless the contrary can be shown. An authenticated copy of the adoption order will be accepted as a true copy and will be admissible in evidence of the adoption. This Section has also been amended by the 1998 Act, by the insertion of an additional subsection dealing with the annulment of Ministerial regulations made under the section.

Section 10, deals with the question of eligibility to adopt. This section extends the category of persons who may adopt generally and repeals section 5 of the 1964 Act and section 5 of the 1974 Act. Subject to subsection (2) an adoption order shall not be made unless:

- a) the applicants are a married couple living together, or
- b) the applicant is the mother or father of the infant, or
- c) the applicant is a widow or widower.

Subsection (2) provides that where the Board is satisfied, that in the particular circumstances of the case, it is desirable, an adoption order may be made in favour of a person not in the above category. It is only in the case of a married couple living together that an adoption order may be made in favour of more than one person. The order cannot be made in favour of a married person without the consent of the spouse unless the spouses are living apart under a divorce *a mensa et thoro*, decree of judicial separation, deed of separation, or the spouse has been deserted. The adopters must be 21 years or over, unless the applicants are a married couple and one of them is the mother or father or a relative of the child and either of them has attained 21. The adoption order cannot be made unless the applicant or applicants are ordinarily resident in the State during the year ending on the date of the order. Under the 1952 Act, the Adoption Board must also be satisfied that the applicant(s) are suitable to adopt, in that they are of 'good moral character', have sufficient means to support a child, and are suitable person(s) to have parental rights and duties in respect of the child.¹⁰³

Footnotes:

103 Section 13(1) of 1952 Act, see also Abramson's observations in Issues in Adoption in Ireland, on the class

background of Irish adopters and possible ' class bias' on the part of untrained adoption workers who

undertake assessments, *op. cit.*, at 43.

CONCLUSIONS

Recommendations:

- *That measures be introduced requiring adoptive parents of children adopted abroad prior to 1991 to apply to the Adoption Board for recognition of the foreign adoption order.*
- *That measures be introduced to the effect that the Declaration of Eligibility to adopt be limited to specific foreign jurisdictions, to include Convention countries and countries whose adoption laws have been established by the Adoption Board to be compatible with Irish law.*
- *That post-adoption services, as recommended in this report, be extended to support the adoptive parents of children adopted abroad and be funded by the State.*

It is practically impossible to regulate international adoptions unilaterally. Many adopters do not see the complex legal and practical problems associated with intercountry adoptions. In such circumstances it behoves the State to take a principled and measured approach to the issue of standards and safeguards which protect all parties involved in the process.

The 1991 Act, and the 1998 act are primarily directed towards recognition rather than towards regulation. The regulatory element of the legislation, which introduced an important safeguard in intercountry adoption, was the requirement to establish ‘eligibility and suitability’ to adopt in advance of embarking on an intercountry adoption.¹⁰⁴ This requirement may have resulted in an administrative nightmare for health boards, but it introduced an important safeguard into the intercountry adoption process for the children concerned.

Footnotes:

104 Section 5 of the 1991 Act.

Adoption Law: The case for reform

Section 2: Intercountry adoption

The 1991 Act broadened the categories of person eligible to adopt and also introduced a time controlled exception to the requirement for a prior Declaration of Eligibility. The purpose of these concessions was to afford recognition to adoptions which had already been effected prior to the Act. It was intended that after 1st July, 1991 everyone adopting from abroad would have to comply with the requirements set out in Section 5. The 1998 Act has extended this period by a further year in order to afford recognition to adoptions which did not meet the original deadline. Adoptive parents of children adopted prior to 1991 should be obliged to apply for recognition of the foreign order.

A notable lacuna in the procedure however is that that Declaration of Eligibility is not linked into a specific jurisdiction which is either approved by the Adoption Board or a Convention country. This should be addressed immediately. Adoptive parents should only be able to source a child from an approved jurisdiction.

The adoption code should not facilitate parents who simply ignore the advice of the Adoption Board not to adopt a child from countries whose laws do not accord with our own, and rely on public pressure to change the law to accommodate them. The 1998 Act, in particular has significantly changed the goal posts by re-defining a foreign adoption in terms of 'guardianship'. By amending the law to suit such parents, the rights of the children involved in the Intercountry 'simple' adoptions are only seen in terms of their status in the country of their adoptive parents.

The legislation is silent on the issue of post-adoption services. Adoptive parenthood is not the same as ordinary parenthood. In the case of adopted children coming from a different racial or ethnic background, such services can be very helpful during the teenage years of the adopted child. They can also support the parents who must help their children deal with the question of 'identity' and 'origin'. Currently this important function is left to support groups formed by adoptive parents themselves.

Intercountry adoption is still seen as essentially a private matter. While the State now screens prospective adoptive parents for suitability and eligibility, it then abandons the prospective parents to locate the children to be adopted. Many parents rely on organisations and individuals to locate a 'suitable child'. Sending countries may lack regulations and procedures for ensuring that intercountry adoption is in fact, the best option for the child concerned.

Adoption Law: The case for reform

Section 2: Intercountry adoption

Bilateral regulation (Romania) and multi lateral regulation of the intercountry adoption process through the incorporation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, 1993 is essential to the protection of the interests of all three parties in the adoption triangle of interests.

SECTION 3:

MISCELLANEOUS

POST-ADOPTION SERVICES

Recommendation:

- *That a programme of post-adoption services be devised and provided by the Adoption Board.*

The Adoption Board has consistently called for the adequate provision or improvement of post-adoption services, including appropriate professional counselling for those seeking access to birth records or contact, the establishment of a National Contact Register, and post-placement support for children adopted from abroad.¹⁰⁵ Several interested groups, including the Adopted Peoples Association, point out that there are currently 18 bodies (nine voluntary adoption agencies, eight Health Boards and the Adoption Board), operating under different codes of practice, involved in the provision of post-adoption services.¹⁰⁶ Conscious of this situation, the Adopted Peoples Association and groups such as the Natural Parents Network of Ireland have called for the establishment of a Post Adoption Services Board which would operate under statutory guidelines and have responsibility for services including tracing services, mediating contact, and providing pre-contact and post-contact counselling.¹⁰⁷

The Law Reform Committee recognises the need for the comprehensive and co-ordinated provision of post-adoption services but believes that the Adoption Board would be the most appropriate agency to devise and provide any programme of such services. The Committee is concerned that the establishment of a Post Adoption Services Board would unnecessarily create an additional layer of administration and bureaucracy.

Footnotes:

105 See Report of An Bord Uchtála 1996 at 5 and 1997 at 5.

106 Adopted Peoples Association, Presentation to the Joint Committee on Health and Children on Post Adoption

Information and Services (July 1998), at 7.

107 See, Adopted Peoples Association, Submission to the Law Society of Ireland (November 1999) and Natural

Parents Association of Ireland, Submission to the Law Society of Ireland (November 1999).

ELIGIBILITY TO ADOPT (ADOPTERS)

Recommendation:

- ***That the exclusion of unmarried couples from adopting, as opposed to married couples and single or widowed persons, be removed.***

The 1952 Adoption Act clearly discriminated against unmarried applicants and this situation continues with the amendments introduced under the Adoption Act 1991. Section 11(1)(a) of the 1952 Act explicitly provided that, where an applicant is not the mother or natural father or a relative of the child, “an adoption order shall not be made unless the applicants are a married couple who are living together”. Section 11(2) further provides that, except in the case of such a married couple, an adoption order may not be made for the adoption of a child by more than one person. It appears unduly conservative and restrictive that this blanket ban on unmarried adopters should be restated in sections 10 (1)(a) and 10(3) of the Adoption Act, 1991. O’Halloran states that this rule must now be read subject to the Adoption Board’s new discretionary power under section 10(2) of the 1991 Act to make an order, notwithstanding the status of the applicant, where “in the particular circumstances of the case it is desirable”.¹⁰⁸ However, upon close inspection, this section does not give the Adoption Board discretion to grant an order to an unmarried couple. It is anomalous that the 1991 Act allows for single persons unrelated to the child,¹⁰⁹ for one partner of a married but separated couple,¹¹⁰ and for widowed persons¹¹¹ to adopt but excludes unmarried couples in stable habitation from eligibility. Of course, an application for adoption can be made by one of the couple but the other partner would not automatically obtain parental responsibility.

Footnotes:

108 O’Halloran, *Adoption Law and Practice*, at 18. See also, V. Darling, “The Changing Face of Adoption”,

[1999] 4 *Irish Journal of Family Law*, at 4.
109 Subject to section 10(2).

110 See section 10(4).

111 Section 10(1)(c).

ELIGIBILITY FOR ADOPTION (MARITAL CHILDREN)

Recommendation:

- ***That the general prohibition on the adoption of marital children be removed so as to permit, in appropriate circumstances, adoption of marital children in long-term care or fostering arrangements and of marital children where one parent is deceased and the surviving parent has remarried.***

Section 10(c) of the 1952 Act provides that, in order to be eligible for adoption, a child must either be “illegitimate or an orphan”. However, section 3 of the 1988 Adoption Act introduced a limited exception whereby adoption of marital children can be permitted in certain restricted circumstances where the parents have failed in their parental duties towards them. Therefore, children born within marriage are not normally eligible for adoption. Vivienne Darling, referring to her experience as a member of the Adoption Board, points out that this rule can run counter to the best interests of the child, for example, where deeply committed foster parents are prevented from adopting.¹¹² It must be remembered that there is a sizeable reservoir of Irish children in long-term care or fostering arrangements who would benefit from living in the environment provided by a permanent family. Conscious of the numbers of children in long-term care, the British Agencies for Adoption and Fostering have long advocated the ‘concept of permanency planning’, *i.e.* a stable home whether with birth or adopted family.¹¹³ Contrasting the positions in Northern Ireland and in the Republic, O’Halloran points out that in the Republic:

“The constitutional bar on the adoption of legitimate children has led to adopters looking overseas for available children. The difference between the two jurisdictions in the numbers of foreign adoptions completed in recent years is very marked. It is estimated that in the

Footnotes:

112 V. Darling, *op. cit.*, at 4-5. Section 5 of the 1976 Adoption Act incorporates the ‘best interests of the child’ test while section 6 of the 1976 Act refers to section 3 of the 1964 Guardianship of

Infants Act which employs the concept that the welfare of the child is the first and paramount consideration. Section 24 of the 1991 Child Care Act also incorporates the welfare concept. See

O’Halloran, *op. cit.*, at 16.

113 See further, R. White, “Adoption on Trial”, *New Law Journal*, 10th March, 2000, at 364.

Adoption Law: The case for reform

Section 3: Miscellaneous

south, such adoptions may have exceeded 3-4,000 in the past five years whereas in the north the comparable figure would be less than 50.”¹¹⁴

The general ineligibility of marital children for adoption can be even more inappropriate where fostered marital children are of an age when they could themselves be consulted.

This rule can give rise to another unfair anomaly. Where a married parent is widowed and remarries, the new spouse will be unable to adopt his or her step-child as that child would have been born within marriage. Not alone can this situation be hurtful for the step-parent but it can also have implications for the child, for example, in relation to the child’s succession rights.

Clearly, constitutional difficulties in permitting the adoption of marital children can arise under Articles 41 and 42 and the inalienable and imprescriptible rights of the family recognised therein. According to O’Halloran:

“it may be said that in this jurisdiction the admission criteria set for a child to enter the statutory adoption process initially rested exclusively on evidence that his or her current legal status placed that child outside the definition of a subsisting family unit based on marriage as enshrined in the Constitution”.¹¹⁵

However, the constitutionality of the limited exception contained in the 1988 Act was upheld by the Supreme Court before the legislation was signed.¹¹⁶ The Court dismissed the argument that the Bill amounted to an attack on the inalienable and imprescriptible rights of the original family, saying:

“The Court rejects the submission that the nature of the family as a unit group possessing inalienable and imprescriptible rights makes it constitutionally impermissible for a statute to restore to any member of an individual family constitutional rights of which he has been deprived by a method which disturbs or alters the constitution of that family if that method is necessary to achieve that purpose. The guarantees afforded to the institution of the family by the Constitution, with their consequent benefit to the children of a family, should not be construed so that upon the failure of that benefit it cannot be replaced where the circumstances demand it, by incorporation of the child into an alternative family”.¹¹⁷

Footnotes:

114 K. O’Halloran, “The Family and the Law in a Divided Land” [19997] 19 *Dublin University Law Journal*, at 84-85. See also, K. O’Halloran, *Adoption in the Two Jurisdictions of Ireland*, (Aldershot, Avebury, 1994).

115 *Ibid.*

116 *In re Article 26 and the Adoption (No. 2) Bill 1987*, [1989] IR 656; [1989] ILRM 266. See G. Hogan and G. White, *The Irish Constitution* (J. M. Kelly) (3rd Ed.) (Butterworths, 1994),

at 1029-1032. See also, “Adoption” in R. Byrne and W. Binchy, *Annual Review of Irish Law 1988*, (Round Hall Press, 1989), 246-252.
117 At 663; 272.

Adoption Law: The case for reform

Section 3: Miscellaneous

The Court justified this decision on the basis of a liberal construction of Article 42.5, permitting the State to intervene to supply, not only the parental duty to educate, but also the duty to cater for the other personal rights of the child, and on the State's obligations under Article 40.3.¹¹⁸ The Court emphasised that the State was obliged to have due regard for the natural and imprescriptible rights of the child. Also, to safeguard the integrity of the natural family, the Court noted approvingly the stringent requirements for the making of an order under the Act, requiring a total failure of duty by parents towards children, and held these to be "essential proofs".

This decision was only concerned with situations involving abandonment of parental rights and failure of parental duties and the vindication of the rights of many hundreds of abandoned children in long-term care or fostering arrangements by making them eligible for adoption. However, it effectively confirmed the *dicta* of Walsh J. in *G. v. An Bord Uchtála*, where he saw no objection in principle "to a child's passing out of one family and becoming a member of another family in particular circumstances".¹¹⁹

Also, the Court emphasised that an order could be made under the 1988 Act where the court was satisfied that such would be in the best interests of the child. It stated that, while the judge must have due regard for the rights of the "persons concerned",¹²⁰ such obligation is "firmly enjoined in the context of ascertaining the best interests of the child".¹²¹ Therefore, there can be no apparent justification for prohibiting adoption of a marital child who has lost one parent by that child's step-parent. The "persons concerned" would normally be expected to approve of such an arrangement and it could easily be argued to be in the best interests of the child. The Adoption Board reports that it has received a number of enquiries in connection with the proposed adoption of marital children where one parent is deceased and the other parent has remarried, and that it is aware of calls for legislative reform to allow a widow or widower who remarries to adopt the child of their previous marriage with their new spouse.¹²² The Board goes on to call on the Minister to explore the possibility of introducing appropriate amending legislation.

Footnotes:

118 Article 40.3.1 provides:

"The State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen".

See also, *G. v. An Bord Uchtála* [1980] IR 32, where Walsh J. distinguished between constitutional rights which are

"absolutely inalienable" and those which are "relatively inalienable".

119 *Op. cit.* See P. A. O'Connor, "Adoption Bill Reference – A Victory for Children's Rights" *Irish Law Times*, December 1988, 271 at 272.

120 According to the Supreme Court, the "persons concerned" mean all those

who in the opinion of the High Court judge have an interest in or are likely to be affected by the application. See Hogan and Whyte, *op. cit.*, at 1032.

121 See O'Connor, *ibid.*

122 Report of an Bord Uchtála 1998, at 8.

BIRTH PARENT ADOPTION

Recommendations:

- ***That measures be introduced to allow the Adoption Board to process adoption applications on behalf of the birth mother's husband, not being the natural father, while retaining the birth mother's parental rights and without the birth mother being required to go through the adoption process.***
- ***That measures be introduced to empower the Adoption Board to attach conditions, where appropriate, in the case of adoption by a spouse of a birth mother, not being the natural father, to ensure that the natural father's relationship with his child will be recognised in law.***

A steadily increasing number of adoption orders are being made in favour of birth mothers and their husbands, where the latter is not the natural father of the child adopted. Shatter points out that by 1995 a majority (56.4 per cent) of the adoption orders made by the Adoption Board were in favour of natural mothers and their husbands.¹²³ This figure rose to 61.14 per cent in 1998.¹²⁴ The current, anomalous position requires a birth mother to apply along with her spouse in order that the spouse can establish some legal rights over the child. Under the current procedure, the mother has to relinquish her sole parental rights and duties in respect of the child and take on joint parental rights and duties with her husband on the making of the adoption order. Many find this to be offensive and unnecessary and the Adoption Board reports that it has "continued to receive complaints during 1998 from birth mothers who apply to adopt their own child".¹²⁵ The Board has consistently called upon the Minister to explore the possibility of introducing amending legislation which would recognise the continuing relationship between the birth mother and her child.¹²⁶

The Adoption Board also calls on the Minister to explore the possibility of introducing amending legislation which would empower it to attach conditions, where appropriate, to the making of an

Adoption Law: The case for reform

Section 3: Miscellaneous

adoption order to ensure that the birth father's relationship with his child will be recognised in law following adoption by the birth mother and / or her husband.¹²⁷ At present, the relationship between the birth father and his child is ended by the adoption and this may not always be in the best interests of the child.

The Board further considers that adoption may not be appropriate in all such cases and that legislation should be introduced to allow for a mother to retain her guardianship of the child while at the same time allowing her husband to acquire parental responsibility over the child.¹²⁸

Footnotes:

- 123 56.4 per cent. See Shatter, *op. cit.*, at 518. at 17. 519.
124 See Report of An Bord Uchtála 1998, 125 *Ibid.*, at 7. 127 *Ibid.*
126 *Ibid.* See also, Shatter, *op. cit.*, at 518- 128 *Ibid.*

CIVIL LEGAL AID

Recommendation:

- ***That measures be introduced to provide for legally-aided representation for all parties to adoption disputes.***

In the mid-1970s, the Attorney General's Legal Aid Scheme, which had covered criminal and some civil matters, was extended to cover adoption-related applications made by birth mothers. Some time later, the scheme was extended to cover adopters. However, it only ever covered individuals and so adoption agencies could not benefit. This scheme ceased to be of relevance in the late 1980s with the introduction of Civil Legal Aid. However, as eligibility under this scheme is means-tested, adopters will rarely qualify whereas birth mothers will very often be eligible. Also, adoption agencies, as institutions, will again be excluded. According to practitioners with experience in the area, this situation often results in vexatious litigation where adoption would clearly be in the best interests of the child. Such litigation tends to prove very expensive for adopters and, occasionally, charitable adoption agencies.

Practitioners advise that a straightforward application to dispense with a birth mother's consent, under section 3 of the Adoption Act, 1974, would involve a minimum cost of £12-15,000. The application can only be heard in the High Court and must actually go to court (it cannot be settled before the hearing). Also, the use of expert witnesses will contribute to costs. However, applications would usually involve a 2-5 day hearing and will often involve an appeal to the Supreme Court before the case is returned to the High Court for determination. In such cases, costs may amount to as much as £100,000. Reflecting on the current situation, O'Halloran concludes "[I]t may be that in some instances a right of access is negated or restricted by an inadequate free legal aid scheme".¹²⁹

Footnotes:

129 O'Halloran, *op. cit.*, at 172.

ROLE OF ADOPTION BOARD

Recommendation:

- ***That a system of Regional Family Courts be established with jurisdiction to determine all appeals from the Adoption Board.***

In its 1984 Report, the Review Committee on Adoption Services expressed concern that a non-judicial body “should be given power involving such a fundamental issue as the legal and permanent transfer of parental rights” and recommended that the Adoption Board be replaced by a specialist Adoption Court.¹³⁰ The Review Committee recommended that this Court should have High Court status, nation-wide jurisdiction and sufficient autonomy within the legal system to develop its own special style and procedures. It was proposed that it would not only make adoption orders but should also determine all contested court proceedings arising out of the adoption process. Shatter, however, believes that this proposal is misconceived and points out that the Adoption Board, in its current form, “has developed considerable expertise in the adoption area and can make adoption orders without undue formality or the necessity for adopters to incur the expense of legal representation”.¹³¹ He suggests that “the better approach is to reserve to the Adoption Board its current functions whilst vesting in the Circuit Regional Family Court jurisdiction to determine adoption disputes as recommended by the Law Reform Commission in its report on family courts”.¹³² Also, as the Adoption Board is to become the Central Authority under the Hague Convention on Intercountry Adoption, it seems appropriate that its role should be enhanced to enable it to act as the central co-ordinating body for all activities connected with adoption, foreign and domestic.

The Adoption Board has made a total of 40,998 adoption orders in respect of children placed for adoption in the State since the introduction of adoption legislation in January 1953¹³³ and has been an outspoken commentator on adoption and a progressive force for change. It performs a number of very important roles, including the registration and deregistration of adoption societies, the compilation of detailed adoption statistics and monitoring of ever-changing trends in adoption

Footnotes:

130 See Report of the Review Committee on Adoption Services (May 1984), at 67-72.

131 *Op. cit.*, at 523.

132 *Ibid.*

133 Report of An Bord Uchtála 1998, at 6.

Adoption Law: The case for reform

Section 3: Miscellaneous

practice, the provision of advice and guidelines to registered societies and health boards, and the monitoring of individual placements. In 1998 alone, the Board received 1,049 tracing enquires. It has experienced administrative staff and a complement of qualified and experienced welfare officers. However, the operation of every aspect of the adoption process could be improved by the establishment of Regional Family Courts.¹³⁴ The Law Society has consistently called for the establishment of Regional Family Courts to which lawyers with considerable experience of family law could be appointed as judges. Similar recommendations have been made by the Law Reform Commission¹³⁵ and by the Working Group on a Courts Commission.¹³⁶ Indeed, the Minister for Justice, Equality and Law Reform recently told a conference at which Women's Aid presented research on domestic violence that he would soon be considering such a system of Regional Family Courts.¹³⁷

Footnotes:

134 The Law Reform Committee has already called for the establishment of a system of regional family courts in the context of reform of the law relating to domestic violence. See, *Domestic Violence: The Case for Reform* (Law Society of Ireland, May 1999), at 27.

135 A Law Reform Commission Report on Family Courts, Law Reform Commission (1996). The Report states, as its first recommendation (at

127):

“There should be established a system of Regional Family Courts located in approximately fifteen regional centres. The Regional Family Courts should operate as a division of the Circuit Court and in the context of a full range of family support, information and advice services. The Regional Family Courts should have a unified family law jurisdiction, wider than that of the present Circuit Family Court. The

Regional Family Courts should be presided over by judges nominated to serve for a period of at least one year and assigned on the basis of their suitability to deal with family law matters.”

136 Sixth Report of the Working Group on a Courts Commission, (April 1999), at 78.

137 See “Minister to consider regional family courts”, *Irish Times*, 22nd April, 1999.

OPEN ADOPTION

Recommendation:

- ***That measures be introduced to facilitate and encourage the use of appropriate open adoption practices.***

The terms ‘open adoption’, ‘semi-open adoption’ and ‘adoption with contact’ have been used interchangeably and sometimes misleadingly. Triseliotis attempts a broad definition of each term, based on practice in a number of jurisdictions.¹³⁸ He explains that ‘open adoption’ “refers mostly to the adoption of infants, with the birth parent being actively involved in hearing about and choosing from a number of would-be adopters”. The most widely used model operates in New Zealand, where the birth parent selects adopters from written profiles and, after the birth, meets the couple she has chosen. ‘Semi-open adoption’ refers to a practice whereby an adoption agency provides full, but non-identifying, information to the birth parents and would-be adopters about each other but does not arrange face-to-face meetings. The birth parents will have a role in choosing the couple to bring up the child but will not meet them in person. Senoff, on the other hand, dealing with open adoption in Ontario concedes that “open adoption ... may be defined in myriad different ways ... partly because the law itself provides no real guidance in outlining the scope of open adoptions”.¹³⁹ She goes on to provide a broad definition of the concept:

“Generally, open adoption refers to the creation of some kind of relationship between the adoptee, the adoptive parents and the birth parents. More specifically, open adoption may refer simply to the identification of the parties; or, more elaborately, it may lead to the creation of some kind of ongoing relationship among the parties.”¹⁴⁰

Advocates of open adoption promote the practice on the grounds that it is better for all the parties involved, particularly for the child and for the birth parents. This position would appear to be supported by empirical evidence. For example, a 1991 survey, involving 1396 adoptions in California, found that children in open adoptions had significantly better behaviour scores than

Footnotes:

138 J. Triseliotis, “Open Adoption”, in A. Mullender (Ed.), *Open Adoption: The Philosophy and the Practice*, (British Agencies for Adoption and Fostering,

1991), 17-35.
139 S. K. Senoff, “Open Adoption in Ontario and the Need for Legislative Reform”, [1998] 15 *Canadian Journal*

of Family Law, at 187.

140 *Ibid.*

Adoption Law: The case for reform

Section 3: Miscellaneous

children in adoptions with no access to birth parents.¹⁴¹ In a later reprise of her original study, Berry *et al* found that 73 per cent of adoptive parents in open adoptions reported high levels of satisfaction with contact.¹⁴² A separate study of 1,274 adoptive parents in 743 adoptive homes in New York State found that a substantial majority of adoptive parents favoured a change in the direction of more openness.¹⁴³ Furthermore, the experience of open adoption in New Zealand suggests that there would be no shortage of adoptive parents prepared to take on adoption with continuing contact.¹⁴⁴ Also, the 1998 study by Berry *et al* found that contact with birth parents did not tend to be frequent and that, when contact was terminated, it was more often terminated by birth parents.

As traditional, closed adoption practices require that birth parents totally relinquish any involvement with the adopted child, they provide a strong disincentive for birth parents to place children for adoption. It seems likely that the use of open systems of adoption would encourage more birth parents to place a child for adoption where this would be in the best interests of the child. If this might be expected to result in more children enjoying the benefits of a secure upbringing within a stable family environment the encouragement of open adoption practices should be seriously considered.

If open adoption arrangements were available, these might prove more appropriate in the case of marital children and so might result in large numbers of such children making the transition from long-term care or fostering arrangements to an adoptive family. Similarly, such arrangements might be more suitable in the case of adoption by a spouse of a birth mother, not being the natural father, where the natural father wishes to have a continuing involvement in his child's upbringing.

Footnotes:

141 M. Berry, "The Effects of Open Adoption on Biological and Adoptive Parents and the Children: The Arguments and the Evidence" (1991) *Child Welfare*, LXX, ^, 637-651, cited in T. Richard Sullivan, "Openness in Adoption: Considerations for Law Reform" (unpublished paper prepared for the Law Society's Law Reform Committee, December 1999), at 3.

142 M. Berry, D. Cavazos Dylla, R. P.

Barth and B. Needell, "The Role of Open Adoption in the Adjustment of Adopted Children and their Families" (1998) *Children and Youth Services Review*, Vol. 20, Nos. 1 & 2, 151-171, cited in Sullivan, *ibid.*, at 4.

143 R. J. Avery, "Information Disclosure and Openness in Adoption: State Policy and Empirical Evidence" (1998) *Children and Youth Services Review*, Vol. 20, Nos. 1 & 2, 57-85, cited in

Sullivan, *ibid.*, at 4.

144 C. Dominick, "Early contact in adoption: contact between birth mothers and adoptive parents at the time of and after the adoption" (Research Series No. 10, Department of Social Welfare, Wellington, 1988), cited in J. Triseliotis, *op. cit.*, at 27.

CONSOLIDATION

Recommendation:

- ***That current adoption legislation be consolidated into a single comprehensive Adoption Act at the earliest opportunity.***

The Adoption Board has consistently expressed concern that any new legislation be enacted as part of a programme of consolidation of the adoption code. The need for consolidation of Irish adoption legislation is universally recognised. According to Shatter, “it should be unequivocally acknowledged that there is a need not only to reform various aspects of adoption law but also to incorporate adoption legislation into one consolidated Act.¹⁴⁵ The last Adoption Board, with its accumulated practical experience of applying adoption legislation, made an even stronger case for consolidation in its final report:

“The Board calls for the modernisation of adoption legislation and an amalgamation of the adoption code. It notes that current law consists of six separate pieces of legislation and ... considers that there is an urgent need to consolidate the adoption code into one comprehensive piece of legislation to bring adoption law into the 21st century.”¹⁴⁶

The enactment of the Adoption Act 1998 which, *inter alia*, addresses the rights of natural fathers having regard to the judgment of the European Court of Human Rights in *Keegan v. Ireland*¹⁴⁷ and provides for certain amendments in relation to the recognition of adoptions effected outside the State, as well as the introduction and enactment of the proposed Adoption Contact Register Bill can only exacerbate the present unsatisfactory situation.

Footnotes:

¹⁴⁵ Shatter, *op. cit.* at 516. See also Reports of An Bord Uchtála, 1994, at 5 and 1995, at 6.

¹⁴⁶ Report of An Bord Uchtála, 1997, at 4. Note that since enactment of the Adoption Act 1998, current adoption

law consists of seven separate pieces of legislation.
¹⁴⁷ (1994) 18 EHRR 342.

BIBLIOGRAPHY

Books

- H. J. Abramson, *Issues in Adoption in Ireland*, (The Economic and Social Research Institute, July 1984).
- W. Binchy, *Irish Conflicts of Law* (Butterworths (Ireland) Ltd., 1988).
- R. Byrne and W. Binchy, *Annual Review of Irish Law 1988*, (Round Hall Press, 1989), 246-252.
- S. M. Cretney and J. M. Masson, *Principles of Family Law*, (6th ed.) (London, Sweet & Maxwell, 1997).
- B. Hale *et al* (eds.), *Clarke Hall & Morrison on Children* (London, Butterworths, 1999).
- G. Hogan and G. Whyte, (J. M. Kelly) *The Irish Constitution*, (3rd ed.) (Butterworths, 1994).
- R. A. C. Hoksbergen , *Adoption in Worldwide Perspective* (Swets & Weitlinger and R.A.C Hoksberben, 1986).
- M. Milotte, *Banished Babies: The Secret History of Ireland's Baby Export Business*, (Dublin, New Island Books, 1997).
- A. Mullender, *Open Adoption: The Philosophy and the Practice*, (London, British Agencies for Adoption and Fostering, 1991).
- K. O'Halloran, *Adoption: Law and Practice* (Butterworths, 1992).
- K. O' Halloran, *Adoption in the Two Jurisdictions of Ireland*, (Aldershot, Avebury, 1994).
- A. Shatter, *Family Law*, (4th ed.) (Butterworths, 1997).
- J. H. White, *Church and State in Modern Ireland 1923-1979* (Gill and Macmillan, 1980).

Reports

- Law Reform Commission, *Report on the Recognition of Foreign Adoption Decrees* (June 1989).
- Law Reform Commission, *Consultation Paper on the Implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 1993 (September 1997).
- Law Reform Commission, *Report on the Implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 1993 (June 1998).
- International Bar Association, *The Intercountry Adoption Process* (Report of Committee 4).
- Report of the Review Committee on Adoption Services, 1984.
- Reports of An Bord Uchtala, 1995-1998.
- V. O'Brien and V. Richardson, *Towards a Standardised Framework for Inter-Country Adoption Assessment Procedures: A Study of Assessment Procedures in Inter-Country Adoption*, (Department of Health and Children, 19 April 1999).

Adoption Law: The case for reform

Section 3: Miscellaneous

Articles

- E. Farrelly Conway, "Search and Reunion in the Adoption Triangle: Towards a Framework for Agency Service to the Adoption Triad", (University of Dublin, Trinity College, Department of Social Studies Occasional Paper No. 3, 1993).
- V. Darling, "Adoption in Ireland" (CARE Discussion Paper, 1974).
- V. Darling "The Changing Face of Adoption" [1999] 4 *Irish Journal of Family Law*, 2-6.
- G. H. Jones, "Adoption in the Conflict of Laws", 5 *International & Comparative Law Quarterly*, (1956) 207.
- Kennedy, "Reciprocity in the Recognition of Foreign Judgments" 32 *Canadian Bar Review*, (1954) 359.
- Kennedy, "Adoption in the Conflict of Laws" 34 *Canadian Bar Review*, (1956) 507.
- C. Noctor, "Adoption, Consent and the Constitution" [1996] 18 *Dublin University Law Journal*, 50-78.
- O'Connell, "Recognition and Effects of Foreign Adoption Orders", 33 *Canadian Bar Review*, (1955) 635.
- P. A. O'Connor, "Adoption Bill Reference – A Victory for Children's Rights" *Irish Law Times*, December 1988, 271-273.
- H. O' Driscoll, "Rights of Unmarried Fathers" [1999] 2 *Irish Journal of Family Law*, 18-23.
- K. O'Halloran, "The Family and the Law in a Divided Land" [1997] 19 *Dublin University Law Journal*, 77-86.
- R. Pillay, "Implementation of the Hague Convention on Intercountry Adoption: The Law Reform Commission Report" [1999] 1 *Irish Journal of Family Law*, 19-21.
- S. K. Senoff, "Open Adoption in Ontario and the Need for Legislative Reform", [1998] 15 *Canadian Journal of Family Law*.
- T. Richard Sullivan, "Openness in Adoption: Considerations for Law Reform" (unpublished paper prepared for the Law Society's Law Reform Committee, December 1999).
- J. Unger, "Hague Conference on Private International Law: Draft Convention on Adoption", 28 *Modern Law Review*, July, 1965, 465.
- R. White, "Adoption on Trial", *New Law Journal*, 10th March, 2000, 364.

Submissions

- Adopted Peoples Association, Submission to the Law Society of Ireland (November 1999).
- Adopted Peoples Association, Presentation to the Joint Committee on Health and Children on Post Adoption Information and Services (July 1998).
- Adoptive Parents Association of Ireland, Adoption Handbook (1998).

Adoption Law: The case for reform

Section 3: Miscellaneous

International Adoption Association, Submission Regarding the Implementation in Ireland of the Hague Convention on Intercountry Adoption (1999).

Natural Parents Association of Ireland, Submission to the Law Society of Ireland (November 1999).

Natural parents Association of Ireland, Press Release (March 1999)