Step-Parent Adoption

FAMILY LAW COUNCIL

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The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,

On 2 January 1998 you forwarded to me a copy of a letter from the Hon Justice Richard Chisholm raising concerns about the operation of the *Family Law Act 1975* in relation to step-parent adoptions and asked for Council's advice, by 30 June 1998, on the matters raised by Justice Chisholm. Council has considered this matter and its advice is set out below.

The material taken into account by Council in addition to the correspondence between you and Justice Chisholm included:

- Chisholm, Richard and Jessep, Owen, 1992, "Step-parent adoptions and the Family Law Act", *Australian Journal of Family Law*, pages 179-187.
- Chisholm, The Hon Justice Richard, 1997, "Review of the Adoption of Children Act 1965 (NSW)", *Australian Journal of Family Law*, pages 131-132.
- *Re LSH; Ex parte RTF & Anor* (1987) FLC 91-843.
- *Fogwell and Ashton* 17 Fam LR 94.
- *In Re T (Minors) (Adopted Children: Contact)* [1996] AC 34.
- *Gould v Brown* [1998] 72 ALJR 375 on Cross Vesting.

The matters raised in Justice Chisholm's letter and accompanying material has been closely examined by Council and the advice below examines those matters under the following headings:

- The background to the current Family Law Act provisions.
- The basis of the current policy in relation to step-parent adoptions.
- The constitutional limits on the Commonwealth's powers.

Council has also examined the available statistics on step-parent adoptions, which are collected by the Australian Institute of Health and Welfare. Those statistics are set out in the table below.

Table 1: Step-parent adoptions 1993-94, 1994-95 and 1995-96

Year	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	Total
1993-94	n/a	10	100	46	45	6	2	5	214
1994-95	48(a)	19	95	89	57	2	3	0	313
1995-96	32(a)	15	87	17(b)	9	1	6	0	167

n/a not available

(a) NSW cannot separate step-parent and other adoptions by relatives.

(b) A requirement for a departmental report in all step-parent adoptions was introduced by the Adoption Act 1994 and this has caused delay in the finalisation of applications. However, Council is advised that the level of applications has "remained fairly steady".

The Family Court is not able to provide statistics on the number of applications for leave under section 60G it receives each year. However, it is understood the number is quite small.

The legislative basis for the current Family Law Act provisions

The present system for dealing with step-parent adoptions was initially introduced by the Family Law Amendment Act 1991 (Act No 37 of 1991), which came into effect from 24 April 1991. Following passage of the Family Law Reform Act 1995 (Act No 167 of 1995), which came into operation from 11 June 1996, the definition provisions inserted in 1991 were re-numbered (the definitions in section 60 were repealed and inserted in section 60D(1)), but were otherwise unchanged. Section 60F, which sets out the procedure in relation to step-parent adoptions, replaced former section 60A. Section 60G replaced former section 60AA with the addition of a new subsection 60G(2).

The main provisions in the present legislation of relevance to step-parent adoptions are:

SECTION 60D(1) [DEFINITIONS]

"step-parent", in relation to a child, means a person who:

(a) is not a parent of the child; and
(b) is, or has been married to a parent of the child; and
(c) treats, or at any time during the marriage treated, the child as a member of the family formed with the parent.

"prescribed adopting parent", in relation to a child, means:
(a) a parent of the child; or
(b) the spouse of, or a person in a de facto relationship with, a parent of the child; or
(c) a parent of the child and either his or her spouse or a person in a de facto relationship with the parent.

SECTION 60F [CERTAIN CHILDREN ARE CHILDREN OF MARRIAGE ETC.]
60F(1) [Child of a marriage] A reference in this Act to a child of a marriage includes, subject to sub-section (3), a reference to each of the following:

(a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
(b) a child of the husband and wife born before the marriage;
(c) a child who is, under subsection 60H(1)*, the child of the husband and wife.

60F(2) [Child of dissolved, annulled or terminated marriage] A reference in this Act to a child of a marriage includes a reference to a child of:
(a) a marriage that has been dissolved or annulled, in Australia or elsewhere; or
(b) a marriage that has been terminated by the death of one party to the marriage.

60F(3) [Effect of adoption by a person who is not a prescribed adopting parent] A child of a marriage who is adopted by a person who, before the adoption, is not a prescribed adopting parent ceases to be a child of that marriage for the purposes of this Act.

60F(4) [Effect of adoption by a person who is a prescribed adopting parent] The following provisions apply in relation to a child of a marriage who is adopted by a prescribed adopting parent:

(a) if a court granted leave under section 60 G for the adoption proceedings to be commenced - the child ceases to be a child of the marriage for the purposes of this Act;
(b) in any other case - the child continues to be a child of the marriage for the purposes of this Act.

SECTION 60G [FAMILY COURT MAY GRANT LEAVE FOR ADOPTION PROCEEDINGS BY PRESCRIBED ADOPTING PARENTS]
60G(1) [Grant of leave for adoption proceedings to commence] Subject to subsection (2), the Family Court, the Supreme Court of the Northern Territory or the Family Court of State may grant leave for proceedings to be commenced for the adoption of a child by a prescribed adopting parent.

60G(2) [Child's best interests] In proceedings for leave under subsection (1), the court must consider whether granting leave would be in the child's best interests, having regard to the effects of paragraph 60F(4)(a) and of sections 61E* and 65J*.

* Section 60H relates to children born as a result of artificial conception procedures. Section 61E refers to the effect of adoption on parental responsibility. Section 65J refers to the effects of adoption on parenting orders.

Standing Committee of Attorneys-General

The question of step-parent adoptions was raised by the Northern Territory in the Standing Committee of Attorneys-General in March 1997. The NT Attorney-General was of the view that section 60G of the Family Law Act should be repealed. However, following the Commonwealth's explanation of the policy behind section 60G the Northern Territory did not proceed further with the matter. At officer level a number of jurisdictions, notably NSW, Victoria and Tasmania, expressed support for the policy reflected in the Family Law Act.

The basis of the current policy in relation to step-parent adoptions

There is a considerable body of opinion that step-parent adoptions should be discouraged because of the effects on the child of severing pre-existing family relationships. For example, the National Minimum Principles in Adoption have, since 1993, provided:

- 11.2 Adoption is not considered to be in the best interests of, or appropriate for children in step-families or living with relatives unless it can be clearly demonstrated that a guardianship order would not serve their needs.

In South Australia, Victoria, ACT, Queensland and Tasmania the concerns associated with step-parent adoptions have led to changes in legislation so as to require step-parents to seek parental responsibility through parenting orders, unless adoption can be shown to be more appropriate and in the best interests of the child. Council understands that similar legislation is proposed in NSW and WA.
In his letter Justice Chisholm says:

- We do not have direct knowledge of the purposes of these provisions but we believe that they arise from agreement between Commonwealth and State Attorneys-General. We also assume that they are intended to ensure that step-parent adoption orders are only made in appropriate cases.

  In our view, however, these provisions do not have this desired affect. First, they do not in our view in any way guide individuals or courts as to the circumstances in which it is appropriate to seek or make an adoption order. Next, to the extent that the scheme is followed, it involves two proceedings instead of one ... In addition it imposes additional costs on the applicants for whom an adoption application itself is expensive, and leads to complex legal arrangements...

Put simply, these provisions were inserted in the legislation to prevent the adoption process being used to defeat the capacity of biological parents, under the Family Law Act, to have continuing contact with their children and to exercise their responsibilities for the care, welfare and development of those children. The purpose of the amendments introduced by the Family Law Amendment Bill 1990 (which became the Family Law Amendment Act 1991) was explained in the Explanatory Memorandum to the Bill as follows:

- to clarify the effects which a step-parent adoption of a child has on the custody, guardianship or access rights of the child's natural parents under the Family Law Act ...

The Second Reading Speech on the Bill elaborated further:

- ... For many years the formation of step-families usually resulted from the death of a parent. Today, however, many step-families are formed following the breakdown of previous marriages. In these cases both natural parents are still alive and usually maintain continuing relationships with their children.

  It has long been an accepted principle that continuing contact with both natural parents is usually desirable in the interests of the long-term development of a child...

  However in recent years a small number of parents have tried to use adoption to establish a new family unit consisting of the children, one natural parent and a new spouse - the step-parent. One reason a parent may have for seeking to adopt in these cases is that adoption may put an end to any rights the other natural parent may have to custody, guardianship or access to the child...

  The Bill will amend the Family Law Act to make it clear that a step-parent adoption does not put an

> end to existing custody, guardianship or access rights under the Act unless the Family Court decides that the step-parent adoption is in the best interests of the child...

In its report Patterns of Parenting After Separation (April 1992) Council also stressed the importance of a continuing relationship between children and their natural parents. Chapter 2 of that report surveyed research studies and inquiries in this area and concluded:

- (a) Most children want and need contact with both parents. Their long term development, education, capacity to adjust and self esteem can be detrimentally affected by the long term or permanent absence of a parent from their lives. The wellbeing of children is generally advanced by their maintaining links with both parents as much as possible.

  (b) Many separated parents who are not the primary caretakers of their children have less and less contact over time with their children...

  (e) There remain, however, individual cases in which ongoing contact with a parent cannot be seen to advance the wellbeing of the child; particularly in cases where abuse of the child has occurred or where serious family violence exists.

Council notes that Justice Chisholm also suggests that step-parent adoptions are "usually in circumstances where the other parent of the child has died or ceased to be involved with the child". Where the other parent has died, it would not be necessary for the remaining parent to go to the Family Court as the ongoing involvement of the other parent with the child would not exist. Where the other parent has "ceased to be involved with the child", it may sometimes not be necessary for leave to be obtained from the Family Court, but this would depend on the individual circumstances of the case.

An important factor, in Council's view, however, relates to the changes made by the Family Law Reform Act 1995. That Act replaced the custody/access regime with the concept of parental responsibility under which both separating parents have all the powers, duties, responsibilities and authority which, by law, parents have in relation to children (section 61C).

In Council's view, the ongoing parental responsibility of both parents makes it even more important that the position of the contact parent should be given due consideration by the courts when the question of adoption is raised.

In view of the circumstances of the High Court decision in Re LSH; Ex parte RTF (1987) 75 ALR 469 (which is further discussed below) Council also considers that the position of contact parents who are excluded from contact with their child by a residence parent (as occurred in Re LSH; Ex parte RTF) should be given special consideration when the issue of adoption arises. The resident parent is required to show, under section 60G, that continuing contact with the other natural parent would not be in the child's best interests

In these cases, an approach to the Family Court is primarily necessary or desirable where the other parent has, or wants to have, an ongoing relationship with the child and the involvement of that parent with the child is an issue. Hence, Justice Chisholm's arguments that the provisions require two proceedings and additional cost would not apply in many of the cases to which he refers.

It is also not entirely correct to suggest, as Justice Chisholm does, that the policy is "clearly intended to discourage" applicants from seeking "adoption orders without obtaining leave of

the Family Court". As already indicated above, such an application is mainly desirable where the other parent has, or wishes to have, an ongoing involvement with the child in question, but it is not necessary where, for example, the other parent has died.

Council considers that the policy behind the provisions in question is soundly based. Council also notes that while Justice Chisholm's submission gives consideration to the position of the residence parent and his or her new partner, it does not give due consideration to the position of the contact parent, who, under the Family Law Act since 11 June 1996, has similar parental responsibilities to those of the residence parent.

The constitutional limits on the Commonwealth's powers

In his 1992 article in the Australian Journal of Family Law, Justice Chisholm examines the question of the Constitutional validity of the provisions relating to step-parent adoptions. In that article Justice Chisholm quotes from Mason CJ's reasoning in Re LSH; Ex parte RTF (1987) 75 ALR 469 as follows:

- If Parliament intended that the Family Court had jurisdiction to determine whether a child should remain subject to the regime of custody and access under the Family Law Act or be liable to adoption under State law, one would expect the Family Law Act to evince a clear intention to that effect. After all in Australia guardianship, custody and access on the one hand and adoption on the other hand traditionally have been separate and independent regimes, in which the regime of adoption has been immune from interference by courts exercising jurisdiction on matters of guardianship, custody and access. In the absence of specific statutory provision pointing in a contrary direction, the Family Law Act should be read in accordance with its language as continuing that tradition.

In Re LSH; Ex parte RTF the father in question had been granted access to the child by the Family Court, but he had not had access for some time. When the mother and her new partner applied for adoption at the State Supreme Court she also applied for, and was granted, an order dispensing with the need to obtain the father's consent to the adoption. The High Court granted the mother and her new partner a writ of prohibition and certiorari preventing the Family Court from issuing an injunction preventing them from proceeding with their adoption application.
The provisions in the 1991 Amending Act were developed with the High Court's 1987 decision in mind. The wording of the Act does not in any way affect a person's right to make an adoption application to a State court. It simply says that if an application is made to a State court without first seeking clarification of the position of the other parent from the Family Court, and the State court authorises the adoption, the adoption does not extinguish the other parent's right of contact with the child.

In Council's view the 1991 provisions fully recognise and acknowledge the distinct roles of the Commonwealth (residence and contact) and State (adoption) legislation and the Commonwealth legislation does not affect the power of the State courts to grant adoptions. In the circumstances, Council considers that the High Court's decision has assisted with the drafting of the 1991 provisions by making the situation much clearer than it otherwise may have been.

I trust that this advice will be of assistance to you.

Yours sincerely,

(Jennifer Boland)
Chairperson