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STEP-PARENT AND INTRA-FAMILY ADOPTION UNDER THE ADOPTION ACT 1955

IN NEED OF REFORM?

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ABSTRACT

Adoption in New Zealand, and overseas, has undergone a significant transformation in recent years. While this has occurred on many fronts, the transformation that is of particular importance to this research paper is the proportionate increase in step-parent and intra-family adoption and the challenge this poses to traditional conceptions of adoption.

In this research paper I have attempted to outline the current legal treatment of step-parent and intra-family adoption in New Zealand, contrasting or comparing it to the situation in overseas jurisdictions where appropriate. This has required a broad analysis of adoption in general, in order to place step-parent and intra-family adoption within a wider social, legal and philosophical framework.

A recurring theme in this paper is the inadequacy of our current legislation to address the concerns of parties to step-parent and intra-family adoption. This is inevitable, given that the proportionate increase in step-parent and intra-family adoption is relatively recent, while the Adoption Act was passed almost 40 years ago. As a consequence, it is contended by many professionals involved in the adoption process that guardianship under the Guardianship Act 1968 is generally a more appropriate legal response to step-parent and intra-family adoption applications. I have taken a different approach to this dilemma. Instead of accepting the two exclusive options of guardianship or adoption, I have sought to create a form of adoption that would meet the applicants' manifest demand for step-parent and intra-family adoption orders while simultaneously acknowledging concerns that vitiate against adoption in these situations. In particular, there is the concern that the child may be isolated from his or her family members or cultural heritage. In searching for an alternative adoption paradigm, I have relied upon recent and forthcoming developments to adoption law, and childcare law in general, in the United Kingdom, namely the Children Act 1989 and the White Paper 1993.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 16600 words.

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I INTRODUCTION

In 1881 New Zealand became the first Commonwealth country to enact adoption legislation, with the passing of the Adoption of Children Act.[1] The Act sought to address the colony's problem of orphaned and illegitimate children by providing them with a permanent home. It aimed "to give care-givers greater security of tenure over children in their care and thus encourage people to take orphans, deserted and neglected children into their homes so that the children would cease to be a community responsibility and a charge on public funds".[2]

By the 1940s social objectives had changed, and adoption came to be used for the dual purpose of providing infertile married couples with children to bring up as their own, and for solving the "problem" of unmarried mothers. Adopted children were provided with a permanent substitute family, and the fact of adoption was shrouded in secrecy. The secretive nature of adoption emanated from the stigma of both the child's illegitimacy and the adoptive parents' infertility. It was also greatly influenced by the desire to conform to society's "ideal" nuclear family prototype, under which parenthood is deemed to be an exclusive status.[3]

However, the use of adoption throughout the Western world has undergone a radical transformation since its inception, and the current Adoption Act 1955 is having to deal with issues that were not even contemplated when it was enacted. The most significant change to the practice of adoption is the "open" adoption movement, which acknowledges that it is often beneficial to maintain some degree of contact between the parties to adoption. This is of particular significance in light of the fact that, although the Adoption Act 1955 was framed with the traditional notion of "closed stranger" adoption in mind, since 1974 stranger adoptions have accounted for less than half of all adoptions.[4] Instead, adoptions are occurring between children and adults who have had some kind of relationship before the

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1 Jenny Rockel and Murray Ryburn point out in *Adoption Today: Change and Choice in New Zealand* (Heinemann Reed, Auckland, 1988) that the history of adoption in New Zealand actually originates with the Maori tradition of *tamaiti whangai*, the sharing of the care of children among members of the wider family.

2 *Re Application by Nana* [1992] NZFLR 37, 41 per Judge Pethig.

3 See Candace M Zierdt "Make New Parents But Keep the Old" (1993) 69 Nth Dakota LR 497, 503.

4 Anne Else *A Question of Adoption: Closed Stranger Adoption in New Zealand 1944 - 1974* (Bridget Williams Books Ltd, Wellington, 1991) xi.

adoption order is granted, and for whom "closed stranger" adoption is peculiarly unsuited. Step-parent and intra-family adoption are two such situations.

In this paper I will examine the increased incidence of step-parent and intra-family adoptions, and the challenge they pose to the traditional paradigm of adoption as encapsulated in the Adoption Act 1955. I will outline why New Zealand and overseas jurisdictions are reluctant to uphold them as legitimate uses of the adoption process, and how the judiciary and legislature have sought to hamper their use. Finally, I will analyze the various reforms undertaken in overseas jurisdictions that have attempted to address concerns that arise in the context of step-parent and intra-family adoption, and highlight their relative merit or otherwise in the New Zealand context.

II THE TRANSFORMATION OF ADOPTION

Adoption today is a very different phenomenon to what it was when the notion of adoption was first introduced into Western legal systems. Firstly, there has been a dramatic decline in the incidence of adoption. In New Zealand in 1971 the number of children placed for adoption peaked at 3967. In 1991 a mere 806 adoptions took place.[5] Similar trends are apparent in overseas jurisdictions. For instance, in the United Kingdom in 1989 7044 adoption orders were made, as compared to 22502 in 1974.[6] The decline in the incidence of adoption is directly related to the decrease in the number of babies available for adoption. This is attributable to an increased number of legal abortions,[7] a decrease in the birth-rate,[8] more use of contraception, the availability of economic support for unmarried mothers since 1973 from the Domestic Purposes Benefit, and greater social and legal[9] tolerance of

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5 *All About Women in New Zealand* (Department of Statistics, Wellington, 1993) 47.

6 "Inter-Departmental Review of Adoption Law: The Adoption Process" (Department of Health, Heywood, 1990) 6.

7 See *Demographic Trends 1993* (Department of Statistics, Wellington, 1994) 103, where Table 7.1 shows that the abortion ratio per 1000 live births occurring six months later was 71.2 in 1979, 137.0 in 1985 and 195.9 in 1992.

8 Above n7, 33 Table 2.2 shows that the average number of births a woman would have during her reproductive life in 1962 was 4.19, compared to 2.12 in 1992.

9 1969 saw the enactment of the Status of Children Act, which removed legal discrimination to children born out of wedlock.

unmarried motherhood.

In response to the fall in the number of babies available for adoption, the characteristics of adopted children have changed. Adopted children now tend to be older or have "special needs", often with a history of foster care. Inter-racial adoption was for a while utilised as an alternative source of adoptable children. However, widespread judicial and social condemnation has curtailed this practice.[10] Inter-country adoption has become increasingly popular as another means of addressing childlessness and infertility.[11]

While these changes have been taking place, the nature of adoption has been undergoing a significant transformation. The notion of adoption as a "statutory guillotine"[12] has become increasingly obsolete, and in its place is an almost universal recognition of the merits of a more "open" form of adoption.[13] This open philosophy draws upon the findings of research undertaken in the 1960s and 1970s that examined the adoptee's need for genealogical information.[14] The expression "genealogical bewilderment" was introduced to convey the distress displayed by people ignorant or confused about their origins.[15] Several prominent researchers believed that *all* adopted people experience a deep psychological need to know about their origins.[16] Such knowledge is often necessary so as not to handicap them in

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10 For an example of the concerns expressed about inter-racial adoption see Martin Mears "Adoption, Bigotry and Race" (1990) 140 New LJ 564; or Kim Forde-Mazrin "Black Identity and Child Placement: The Best Interests of Black and Biracial Children" (1994) 92 Michigan LR 925. In contrast, see *New Zealand Adoption Council Newsletter* Issue 5, May/June 1994 (received from Mark Duke 25 August 1994, publisher and place of publication unknown) 1, outlining recent moves in the United Kingdom and the United States to remove race as a determining consideration in adoption placements.

11 For an example of recent legal commentary on the issue see Jennifer Horne-Roberts "Intercountry Adoption" (1992) 142 New LJ 286; or Holly C Kennard "Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions" (1994) 14 Uni of Pennsylvania J of International Business L 623.

12 *Re B(a minor)(adoption: jurisdiction)* [1975] 2 AllER 449, 462 per Cumming-Bruce J.

13 For a discussion of the possible disadvantages of open adoption placements, see Ruth G McRoy, Harold D Grotevant and Kerry L White *Openness in Adoption: New Practices, New Issues* (Praeger, New York, 1988) 15 - 22. The authors point out that longitudinal research is required to determine and compare the outcomes of differing adoption practices.

14 For instance, see John Triseliotis *In Search of Origins: The Experience of Adopted People* (Routledge & Kegan Paul Ltd, London, 1973).

15 John Triseliotis "Identity and Genealogy in Adopted People" in Euthymia D Hibbs (ed) *Adoption: International Perspectives* (International Universities Press, Madison, 1991) 35, 40.

16 Above n15, 38.

developing essential parts of their identity.[17]

> Those who reduce the adoptee's compelling need for his true identity to a mere 'curiosity' or a search for another and better mother, are cruelly unaware of this basic human need to be attached to one's true place in history. *Obscuring the true identity of a person leaves him anonymous and unattached, no matter how many new names he may acquire.* There is a profound psychological isolation in being unrelated to any other person who has ever lived and to be a stranger who never belongs wherever he may be.

The concept of "social identity" has also been examined, with the underlying premise that adopted people have an intense need to know where they stand in relation to society.[18] Lack of genealogical knowledge has been directly linked to the frequent claim of adopted people, that they feel as if pieces are missing which interfere with their feeling complete or whole.[19] Although early research in this field suggested that adopted people's need to know their genealogy was directly linked to unhappy adoptive relationships, more recent research has indicated that genealogical bewilderment is experienced by adopted people in many different stages of personal development.[20] In particular, it can arise when adopted children retain some family connections, as often happens in step-parent and intra-family adoptions. "It is never a matter of mere biology, or mere history, but of the universal need to symbolise one's biology in one's constellation of past heritage and future life."[21]

In response to the open adoption movement the Adult Adoption Information Act 1985 was

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17 K C Griffith "Adoption: Procedure, Documentation, Statistics: New Zealand 1881 - 1981, and Adult Adoptee Access to Information" (Wellington, 1981) 61, from paper presented by Dr Margaret M Lawrence to Annual Meeting, American Psychological Association, Washington DC, 1976. See also John Caldwell and Ken Daniels "Assisted Reproduction and the Law: Implications for Social Policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 256, 261 where the authors point out that the experience of adopted children under the Adult Adoption Information Act 1985 is relevant to children born of assisted reproductive techniques.

18 Michael and Heather Humphrey *Families with a Difference* (Routledge, London, 1988) 76.

19 Above n17, 64. This may account for the name given to the international organisation involved in assisting adopted people and birth parents in tracing their kin - JIGSAW.

20 Jillian Gay Kennard "Adoption Information: The Repossession of Identity" (thesis for MA (Applied) in Social Work, Victoria University of Wellington, 1991) 24 - 25.

21 Above n17, 64.

enacted in New Zealand.[22] This statute allows adoptees aged twenty years or over and birth parents access to their adoption records held by Social Welfare. Social work practice has also been influenced, and social workers who participate in adoption placements now tend to adopt an informal open approach.[23] However, the Adoption Act 1955 has not been amended to recognise this philosophical shift, and open adoption in New Zealand remains beyond the purview of the law. In contrast, many overseas jurisdictions that previously shared the notion of adoption as involving the complete severance of relationships have since amended their relevant legislation to encompass a more open philosophy.[24]

III PRINCIPLES UNDERLYING THE ADOPTION ACT 1955

A LEGAL FICTION

> Adoption involves the substitution of new parents for the existing parents of a child. This substitution is total: the existing parents cease in law to be parents of a child while the adoptees become his parents for all purposes, the child being deemed to have been born to them in lawful wedlock.[25]

Traditionally, adoption has involved the fiction of pretending that an adopted child is no different from a biological child.[26] This fictional quality stemmed from the premise of the nuclear family, and the idea of parenthood as an exclusive status.[27] Given that only a third

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22 See Ann Corcoran "Opening of Adoption Records in New Zealand" in Euthymia D Hibbs (ed) *Adoption: International Perspectives* (International Universities Press, Madison, 1991) 223.

23 Above n1, 162.

24 Most of the Australian states have enacted open adoption legislation. Victoria was the first state to do so. Under the Adoption Act 1984 (Vic) adult adoptees are entitled to copies of their birth certificates as well as access to information contained in their adoption records, ss 92, 93. Natural parents, relatives and adoptive parents are also entitled to information in certain circumstances, ss95 - 98.

25 Butterworths *Family Law Service* Christine O'Brien (ed) 1994, p 7003, para 6.701.

26 See s16(2)(a), (b) and (c) of the Adoption Act 1955. It is interesting to observe, however, that the complete substitution of relationships is not carried to its logical conclusion, because under s16(2)(b) an exception is made with regard to incest or forbidden marriages, and under s16(2)(d) an exception is made with regard to any relevant deed, instrument, will or intestacy predating the adoption. For an opinion on intestacy rights with regard to step-parent adoptions, see Timothy Hughes "Intestate Succession and Step-parent Adoptions: Should Inheritance Rights of an Adopted Child be Determined by Blood or by Law?" [1988] Wisc LR 321.

27 Above n3, 503.

of households in New Zealand in 1991 were two-parent,[28] it is apparent that this premise is now faulty, and our conception of parenthood needs re-examining.

The legal fiction that adoption entails has been cited as the reason why adoption is inappropriate in step-parent and intra-family situations.[29] Certainly it is arguable that the legal fiction of adoption requires particular scrutiny in the context of step-parent and intra-family adoption, given that it may ignore the lives of the children involved, who may have experienced the breakup of their parents' marriage, or a parent's death, or may have spent some time living with only one parent or in an extended family situation. Alternatively, it may be argued that adoption recognises the social reality of these children's lives, that they now live in a reconstituted family with a new parent. In so far as step-parent adoptions are concerned, the almost immediate[30] acquisition of parental status that an adoption order entails is particularly inappropriate, given that step-parent roles are "achieved" rather than "ascribed", and evolve gradually through negotiation in the settling down period of step-families.[31] However, as Mark Henaghan points out, arguments about the fictional nature of adoption "are not a one-way street",[32] and can be used in support of some step-parent adoption applications. Also, it is salient to keep in mind that all adoptions are based on a fiction. "Either we abandon adoption because of its fictional nature, or we accept the fiction is necessary for the security of a child in particular situations".[33]

B SECRECY

The secret nature of adoption proceedings is apparent in the legal consequences of adoption, which ensure that the child's identity is exclusively linked to the adoptive parents. Under

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28 Above n5, 39.

29 See Adoption Practices Review Committee "Report to the Minister of Social Welfare" (Wellington, 1990) 62 and 64.

30 Under s5 of the Adoption Act interim orders are in most circumstances made in the first instance, if the Court considers that the application should be granted. Section 13(2) specifies a 6 month period as the norm.

31 Gay Ochiltree *Children in Stepfamilies* (Prentice Hall, Victoria, 1990) 145.

32 Mark Henaghan "Legally Rearranging Families" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 83, 147.

33 Mark Henaghan and Pauline Tapp "Legally Defining the Family" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 1, 21.

Section 16(1) of the Adoption Act the adopted child is conferred the surname of the adoptive parents. Section 21(3)(b) of the Births and Deaths Registration Act 1951 provides for the re-registration of the birth, which under Section 21(3)(c) does not describe the adoptive parents as such. Sections 21(7), 21(8) and 21(9) prevent access to the original birth certificate, though this is lessened somewhat by the Adult Adoption Information Act 1985.

Access to the original birth certificate of adoptees was initially restricted in New Zealand to protect the adoptees from the stigma of illegitimacy. In the 1960s a member of the English judiciary described the policy as such:[34]

> In general, it is the policy of the law to make the veil between past and present lives of adopted persons as opaque and impenetrable as possible, like the veil which God has placed between the living and the dead.

Social and legal convention no longer rests upon notions of illegitimacy, and secrecy can no longer be argued for under this heading.

Following the trend in overseas jurisdictions, some members of the New Zealand judiciary and professionals involved in the adoption process have shown favour for moving away from a secretive regime, and instead enacting an open adoption process.[35] In 1990 the Adoption Practices Review Committee reported to the Minister of Social Welfare that endorsement of open adoption was "overwhelming", and that "legislative reform in this area is urgent".[36] The reasons given for this endorsement are varied. Firstly, open adoption is consistent with Maori and Pacific Island attitudes to adoption.[37] Secondly, open adoption does appear to

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[34] Above n17, 46.

[35] See *W v Director-General of Social Welfare* (1991) 8 FRNZ 450, 469 per Judge MacCormick; see also above n25, p 7003, para 6.701. The decision of the Court of Appeal in *In the Guardianship of J* (1983) 2 NZFLR 314 directly broached the issue of open adoption. Although Cooke J commented that "[t]he open adoption solution is somewhat novel in this country and has its dangers" he thought that the child would benefit more from being adopted in an open setting than from remaining in the grandparents' custody.

[36] Above n22, 40 - 41.

[37] See above n13, 23, where it is pointed out that, in the United States, despite the fact that the traditional practice of adoption in old Hawaii, *hanai*, provides a role model for open placements, *hanai* is in fact "so remote from the United States adoption experience, where the emphasis is on individual responsibility and achievement, that the concept is not directly transferable to United States adoption

benefit all parties to the relationship more than a closed, secretive regime. It benefits the adopted child in that it avoids the many complications of a secretive and confidential adoption, among them the nurturing of unhealthy fantasies, the creation of stress, anxiety, fears and obsessions, and the inducement of guilt.[38] It may also assist the child to form a positive mental image of his or her birth parents, though likewise it may make problematic situations more difficult to convey to the child, for instance incest or prostitution.[39] Most importantly, adopted children benefit because they are not denied knowledge of their biological heritage, and, for those children who are older and have already formed relationships with family members who will be excluded by the adoption order, because they will be able to retain these relationships. Continued contact also helps birth mothers in coping with the grief of losing a child, openness giving tangibility to the loss of the child so that it can be grieved for and the loss resolved.[40] Openness also reassures birth parents by allowing them the opportunity to offer the child something, in particular information about his or her origins, and by knowing about their child's life and wellbeing.[41] Research has shown that adoptive parents benefit too, due to the fact that successful adoptions require adoptive parents to accept the difference between parenting adoptive and biological children.[42] Fears that adoptive parents may have about losing their child appear to be unwarranted, given that the adoptive parents remain the child's only pschological parents.[43] In recognition of the advantages children can gain from an open adoption regime, the United Nations Convention on the Rights of the Child enshrines an open philosophy.[44]

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practice". This same observation may be applicable in New Zealand with regards to traditional Maori adoption.

38 Above n17, 50. See also Nancy Verrier *The Primal Wound: Understanding the Adopted Child* (Gateway Press, Baltimore, 1993), wherein Verrier asserts that adopted children will always suffer from the experience of being separated from their birth mother, irrespective of the type of adoption that occurs thereafter.

39 Above n13, 115.

40 See David Howe, Phillida Sawbridge and Diana Hinings *Half A Million Women: Mothers Who Lose Their Children by Adoption* (Penguin Group, London, 1992) which examines, from the birth mother's point of view, all the experiences of giving up a child for adoption; see also Maureen A Sweeney "Between Sorrow and Happy Endings: A New Paradigm of Adoption" (1990) 2 Yale J of Law and Feminism 329.

41 Above n1, 163 - 164.

42 Jennifer Horne-Roberts "The Adoption Law Review" (1991) 141 New LJ 1657.

43 Above n1, 164.

44 Article 7 of the Convention says that the child shall have the right to know and be cared for by his or her parents, and Article 9 provides that if a child is separated from his or her natural parents, the child has the right to maintain personal relations and direct contact on a personal basis. Article 21 directly

C PERMANENCE

Once an adoption order has been granted it is practically irreversible. Variation or discharge under Section 27 require the prior approval of the Attorney-General, and that the adoption was made by a mistake as to a material fact or representation. Given that the fundamental aim of adoption is to provide children with a permanent home,[45] it is only fitting that the court's powers to vary or discharge an adoption order are very limited.

Care, however, must be taken not to constrain the worthy notion of permanency. Of particular relevance here is Goldstein, Freud and Solnit's notorious book *Beyond the Best Interests of the Child*, published in 1973. The authors found that children's ability to develop strong emotional attachments does not rely on biological relationships. The adult who "on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfils the child's psychological needs for a parent, as well as the child's physical needs" was called the "psychological parent".[46] When the child's custody was at issue, the perceived risk of the child being harmed by conflicting parental loyalties, and thereby undermining the child's sense of stability, led to the practice of terminating parent/child relationships and granting sole control over the child to only one psychological parent.[47] In cases of step-parent and intra-family adoption, the child's day-to-day caretaker (perhaps a step-parent, or grandparent) was likely to have an adoption order granted in his or her favour, while the child's noncustodial biological parent was likely to have his or her legal relationship with the child terminated. This practice stands in stark contrast to current notions of open adoption. The "psychological parent" principle, however, can be used to support the continuation of parent/child relationships, if it is accepted that continuity of relationships need not undermine,

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addresses adoption; it mandates that the best interests of the child shall be the paramount consideration, that adoption must be authorized by competent authorities, and that persons concerned must have given their informed consent. See Graeme Austin "The United Nations Convention on the Rights of the Child - and Domestic Law" (1994) 1 Butterworths Fam LJ 63 and 87.

45 See above n42, 1657, where the author points out that adoption law in Australia, New Zealand, Canada and the United Kingdom is based on the same concept of adoption, "ie the provision of a permanent home for the child".

46 Joseph Goldstein, Anna Freud and Albert J Solnit *Beyond the Best Interests of the Child* (The Free Press, New York, 1973) 98.

47 Above n3, 501 - 502.

and indeed may well enhance, the provision of permanent, stable homes for children.

D INFLEXIBLE

Adoption has been described as a "package deal", in that "[a]ll of the legal consequences... flow automatically from it without any room for adjustment to meet the particular wishes or needs of the parties in individual cases".[48] This defect of the law gains heightened significance in the context of step-parent and intra-family adoption, where legal consequences designed for infant adoption by strangers are unlikely to always be appropriate.

E CHILD'S WELFARE AND INTERESTS

Under Section 11 the Court must be satisfied that several conditions have been met before granting an adoption order, and one of these is that the welfare and interests of the child will be promoted by the adoption.[49] It is apparent that those who framed the 1955 Act did not intend the interests of the child to supersede parental rights, given that legislation in existence before the 1955 Act expressed this principle to be paramount.[50] However, since the decision of the Court of Appeal in *Director-General of Social Welfare v L*[51] in 1990 it has been established that once a ground exists for the Court to dispense with the parent's consent the guiding principle in the exercise of the Court's discretion is the interests and welfare of the child. Richardson J went further than this to suggest that, because adoption necessarily involves issues of guardianship and custody, and because the child's welfare is the paramount principle of the Guardianship Act 1968,[52] then it should also be the paramount consideration in an adoption order.[53] This view is supported by Article 21 of the United Nations Convention on the Rights of the Child, which mandates that the best interests of the child

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48 Iain Johnston "Is Adoption Outmoded?" (1985) 6 Otago LR 15, 23.

49 Section 11(b).

50 See above n48, 18 - one such statute was the Infants Act 1908 as amended by the Guardianship of Infants Act 1926.

51 [1990] NZFLR 125.

52 Section 23(1) of the Guardianship Act 1968.

53 Above n51, 129 per Richardson J. See also Mark Henaghan "Welfare and Interests of the Child: Adoption Proceedings" (1990) 2 Family L Bulletin 86.

shall be the paramount consideration in adoption.[54]

Whether or not an adoption order will be in the child's welfare and interests will depend upon the individual facts of the case. However, infrequently ideological concerns will permeate the substance of a judicial decision or adoption policy.[55] The question of whether or not the institution of adoption itself is advantageous to children tends to be a matter of anecdote and conjecture.[56] In New Zealand a team of researchers headed by Professor Fergusson have been involved in this country's only longitudinal empirical study of adopted children. This research has involved, among other things, a comparison of the home environment, cognitive and social adjustment of children placed respectively in two parent, single parent and adoptive families. The conclusions drawn after 12 years of the study, in preparation for the Adoption Practices Review Committee report of 1990, was that children placed for adoption were the most advantaged group in terms of quality of home environment, while those placed in single parent families were the most disadvantaged.[57] It was also concluded that, although only single parent children fared significantly less well on measures of cognitive ability and achievement, both single parent and adoptive children fared significantly less well than two parent children on measures of conduct disorder and attention deficits.[58] When environmental factors were taken into account statistically, adopted children fared less well than children in single parent families with regards to conduct disorder and attention deficits. Furthermore, the scores of adopted children on measures of cognitive ability and adjustment were slightly poorer than those children in two parent families.[59] Despite these seemingly adverse results, however, the general conclusion was that for the children in this study, adoption was more advantageous than disadvantageous.[60] While specifying that the findings

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54 See also above n10, 4, wherein it is pointed out that the reference to "the protection of children" in the formal title of the Hague Convention suggests that the international community has determined that the primary purpose of adoption in the current era is to be child-focused.

55 Compare current concerns on inter-racial adoption, above n10, with a proposed amendment to the law of adoption in the United Kingdom in the White Paper, below n229, p9 para 4.32, which emphasises that ethnicity and culture should not necessarily be any more influential than other considerations.

56 For instance, see "Call to Ban 'Cruel' Adoptions" *Sunday Star-Times* Auckland, New Zealand, 25 June 1994, 5.

57 D M Fergusson "The Outcomes of Adoption: A 12 Year Longitudinal Study" (Christchurch Child Development Study Paper, Prepared for the Adoption Review Committee, 1990).

58 Above n57, 12.

59 Above n57, 15.

60 Above n57, 19.

of the study were not intended "as a basis for sweeping generalisations about the desirability or undesirability of adoption", the report points out that "adoption has a place as a means of protecting the interests of the child".[61] This view is reflected in the statement of Dr John Triseliotis at the International Conference on Adoption in 1991:[62]

> There are strong pressures here and in other countries to see the abolition of adoption for the wrong reasons. This should be resisted. Adoption will phase itself out when every child can live with its own family, and in its own country, thus maintaining continuity and stability. This provision has not yet been reached. Its discouragement could prove detrimental to many children who would be condemned to a life of rootlessness for ideological reasons.

Despite judicial emphasis on the welfare and interests of the child, the adult-centred approach of adoption law is continually criticised, particularly in light of the increasing incidence of orders granting adoptions to step-parents and family members.[63] Anne Else points out that, "[d]espite repeated claims that it centres on the needs and welfare of children, adoption is really about adult beliefs and desires and dilemmas".[64]

IV STEP-PARENT AND INTRA-FAMILY ADOPTION: JEOPARDISING THE CHILD'S WELFARE AND INTERESTS?

Step-parent and intra-family adoption are suggestive of a trend away from the "total transplant" concept of adoption.[65] Because in these situations it is often thought to be in the child's best interests to maintain some form of contact with the biological parent and family members, these adoptions pose a challenge to the current legal framework which facilitates complete severance and transference of relationships. The general consensus of academics,

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61 Above n57, 20.

62 Above n10, 2.

63 Caroline Bridge "Changing the Nature of Adoption: Law Reform in England and New Zealand" (1993) 13 Legal Studies 81, 82. Both of the lawyers that I interviewed, Vicky Hammond on 5 September 1994 and Tony Walsh on 8 August 1994, were concerned, from their own experiences, that step-parent and intra-family adoptions tend to be motivated by adults' interests.

64 Above n4, xiii.

65 "Inter-Departmental Review of Adoption Law: The Nature and Effect of Adoption" (Department of Health, Heywood, 1990) 5.

lawyers, and other professionals working in the adoption arena, is that adoption is often inappropriate in step-parent and intra-family situations.[66]

It is important to keep in mind that, despite this reluctance to encourage step-parent and intra-family adoptions, they are a common phenomenon. It is also important to keep in mind that very little writing or research has looked into the parties' attitudes and experiences, thereby substantiating these adverse assumptions.[67] Given the fact that the historic disapproval of step-parent and intra-family adoption has little empirical basis, goes against public demand, and has never benefitted from informed public debate, it is not unreasonable to assume that some form of social engineering underlies the issue. Mary Ann Glendon presupposes this likelihood when she says that "[m]uch of family law is no more - and no less - than the symbolic expression of certain cultural ideals".[68]

A STEP-PARENT ADOPTION

Step-parent adoptions as a proportion of all adoptions have increased markedly in recent years. They usually involve the mother and step-father applying to adopt the mother's natural child. In 1963, of the 1258 adoptions handled by the Department of Social Welfare 16.28 per cent were by one parent and spouse,[69] while in 1992, of the 694 cases handled by Social Welfare 40.3 per cent were by one parent and spouse.[70] Step-parent adoption is assuming similar significance in overseas jurisdictions. For instance, in the United Kingdom in 1983

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66 For instance, of my conversations with five professionals involved in the adoption process, the unanimous opinion was that *generally* step-parent and intra-family adoption is inappropriate.

67 See "Inter-Departmental Review of Adoption Law: Review of Research Relating to Adoption" (Department of Health, Heywood, 1990) 76, where the author says that, given the large proportion of step-parent and relative adoption applications, "there is remarkably little written on the subject". See also above n65, 26, where it is pointed out that the Houghton Committee that in 1972 looked into adoption in the United Kingdom was criticised for basing its recommendations on step-parent adoption on anecdotal evidence.

68 Mary Ann Glendon *Abortion and Divorce in Western Law: American Failures, European Challenges* (Harvard University Press, Massachusetts, 1987) 10.

69 "Adoption Act 1955: A Review by an Interdepartmental Working Party" (Department of Justice and Department of Social Welfare, Wellington, 1987) 11.

70 *New Zealand Official Yearbook 1994* (97ed, Department of Statistics, Wellington, 1994) 155. In fact, in 1992 there were 794 final adoption orders made, but only 694 of these were handled by or reported to the Children and Young Persons Service.

step-parent adoptions constituted 31.8 per cent of all adoptions.[71] In New Zealand these adoptions are provided for under Section 3 of the Adoption Act 1955, which says that an adoption order may be made in respect of the adoption of a child by a parent of the child jointly with his or her spouse. Interestingly enough, despite the controversy surrounding step-parent adoptions, under Section 10 of the Act they are exempt from the usual requirement of a social worker's report.[72]

In 1990 the Adoption Practices Review Committee suggested various motives for step-parent adoptions.[73] These included a genuine attempt to formalise a de facto situation; that the natural parent may be dead, unknown or disappeared, and adoption gives the child a legal parent while severing the link to the other parent; or that adoption may express the step-parents full acceptance of the child as part of a newly-constructed family. Another motive that has been found to be influential is the fact that the child's surname changes upon being adopted, with adoption applications often coinciding with the child's school enrolment.[74] Step-parent adoptions may also result from applicants fixing upon adoption as "the thing to do", and wanting to make the family feel like a "proper family", often with very little idea of the consequences or implications.[75] A necessary corollary to most of these motives is the fact that it is often the biological mother who is (assumed to be) the moving force behind step-parent adoptions.[76] Due recognition must therefore be paid to the social pressures unique to a patriarchal society that underlie step-parent adoptions. Susan Maidment believes that women who have just remarried are under great pressure to weigh the balance in favour of their new family, which involves changing the child's surname and adopting the child with the step-father.[77] In the context of surname change, the underlying dynamics of patriarchy

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71 Above n65, 16.

72 For criticism of this statutory provision (or lack thereof) see *W v S* (1987) 4 NZFLR 659 per Judge Pethig.

73 Above n22, 62.

74 David L Chambers "Step-parents, Biologic Parents, and the Law's Perceptions of 'Family' after Divorce" in Stephen D Sugarman and Herma Hill Kay (eds) *Divorce Reform at the Crossroads* (Yale University Press, New Haven, 1990) 102, 120.

75 Above n65, 17.

76 Judith Masson "Step-parent Adoptions" in Philip Bean (ed) *Adoption: Essays in Social Policy, Law, and Sociology* (Tavistock Publications, New York, 1984) 146, 147.

77 Susan Maidment "Step-parents and Step-children: Legal Relationships in Serial Unions" in John M Eekelaar and Sanford N Katz (eds) *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* (Butterworths, Toronto, 1980) 420, 434.

are patently obvious, as has been pointed out by one learned Judge:[78]

> If a woman, on marriage, adopts for herself her first husband's name, and for herself and for her children, the names of subsequent husbands, both legal and *de facto*, she is voluntarily perpetuating the patriarchal society to which objection is taken.

Despite the fact that distressingly little is known about step-parent adoptions, commentators tend to consider step-parent adoptions inappropriate. Adoption has been described as an "inaccurate expression" in the step-parent context, given that the child infrequently acquires an *additional* rather than a *substitute* parent.[79] It is thought that step-parent adoptions are frequently made to satisfy adults' own needs and insecurities.[80] A number of malevolent motives for step-parent adoptions have been proposed, for instance step-parent adoption may be used as a trade-off in the winding up of a marriage.[81]

> [T]he real motive may [also] be to make the applicants' own lives more comfortable by shutting out the non-custodial natural parent altogether, or to enable them to conceal the fact of a failed former marriage by presenting their family to the world as a natural one rather than a reconstituted one, or even to hurt the other parent.

Step-parent adoptions have been criticised for allowing children, after the breakdown of a marriage, to be "reshuffled and dealt out like a pack of cards".[82] The analogy with card-playing could, however, be applied in many situations of marital breakdown, irrespective of whether or not adoption occurs. Indeed, in situations of step-parent adoption it could be contended that the reshuffling has already occurred, and the adoption is putting into place permanent arrangements. A further criticism is that, in so far as adoption is meant to provide a child with a secure home and upbringing, the high rate of divorce in second marriages

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78 *Putrino and Jackson* (1978) FLC 90-441 per Lusink J. Mark Duke (written correspondence 25 August 1994) believes that the change of surname is not unhealthy, as it happens also in marriage situations. Mary Ivanek (interview 6 September 1994) believes that concerns about changing a child's name, and indirectly a child's past, can be rectified by using hypenated surnames.

79 Above n25, p 7032, para 6.708. However, this may depend upon the facts, for instance if the natural father is unknown then the step-father will in fact be a substitute rather than additional parent.

80 Dolly Stevenson "The New Style of Adoption" (1988) 1 Family L Bulletin 168, 171.

81 Above n25, p 7030, para 6.708.

82 *Re B* [1975] 2 AllER 449, 462 per Cumming-Bruce J.

makes security problematic.[83] Concern has also been expressed with the fact that no tangible benefits arise from step-parent adoptions[84], and that if the adoption is not granted the child will not necessarily be disadvantaged.[85]

> It is doubtful if the kind of man who is willing to adopt his wife's children would be any less conscientious in his behaviour toward the children without the legal sanction of adoption.

Due recognition must be given, however, to those situations where step-parent adoptions are genuinely made in the best interests of the child involved. This is most likely to be the case where the step-parent has assumed a parent role for many years, or since the child was very young, and the child has never had a relationship with his or her non-custodial biological parent. Cases that justify an adoption order, however, are not limited to these circumstances alone. Blanket disapproval of step-parent adoption fails to take into account those cases where adoption is the only, or is the most effective, means of addressing the parties' needs. The apparent reluctance of some commentators to make concessions suggests an inherent inconsistency in current adoption theory, given that a more flexible adoption regime is advocated in almost all other respects.[86] Perhaps the issue of step-parent adoption requires a closer examination of the actual phenomenon of step-parenthood, in order to discover why such resolute attitudes exist.

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83 Although the 1990 Adoption Practices Review Committee report expressed the breakdown of second marriages as a reason for querying step-parent adoptions, above n29, 62, no New Zealand statistics exist to substantiate this claim. However, proportionately higher divorce rates of second marriages are found in Australia - see above n31, 4; in the United Kingdom - see Frank F Furstenberg Jr and Andrew J Cherlin *Divided Families: What Happens to Children when Parents Part* (Harvard University Press, Cambridge, 1991) 87; and in the United States of America - see Kathleen M Lynch "Adoption: Can Adoptive Parents Change Their Minds?" (1992/1993) 26 Family L Quarterly 257, 260. Furstenberg and Cherlin suggest that the absence of cultural guidelines and the added stress of building durable emotional ties to step-children makes step-families less stable, 87.

84 See *Re S (infants) (adoption by parent)* [1977] 3 AllER 671, 675 per Ormrod LJ (CA). See also *Whittaker v Hancox* [1991] NZFLR 328, 333 per Judge Keane. However, due account must be taken of the fact that children adopted by step-parents may benefit under the laws of succession (see *Re Adoption of A* [1992] NZFLR 422), immigration (see *Re Application by Nana* [1992] NZLFR 37) and child support, among others. Keith Griffith (interview 26 July 1994) believes that a tangible benefit arises if an adult is a proven threat to the child.

85 Above n74, 120, fn 62, from Jessie Bernard *Remarried: A Study of Marriage* (2nd ed, 1971) (unable to locate original source).

86 See W R Atkin "New Zealand: Children Versus Families - is there any Conflict?" (1988/1989) 27 J of Family Law 231, 240.

Step-families, though not new, are becoming a more frequent occurrence. Because census records do not identify step-relationships it is difficult to ascertain their actual magnitude. However, in the United Kingdom it has been estimated that about one fourth of all children born in the early 1980s will live in a step-family before they become adults.[87] Difficulties arise when one seeks to define a step-family. Step-families have been described as "the most complex and heterogeneous form of the family", in which the psychological and physical boundaries are less clear than in "intact" families.[88] Consequently, step-parenthood is a nebulous concept. It has been described as "a special kind of fosterage with no enduring rights or responsibilities".[89] The uncertainty surrounding the concept of step-parenthood, and the corresponding lack of cultural guidelines, may be a contributing factor to the high divorce rate of second marriages.[90] It also makes it more difficult to prescribe the legal position of step-relationships, which unlike biological relationships, have no established paradigm.[91]

As well as being uncertain, the history of step-parenthood is shrouded in negative connotations. From the age old tale of Cinderella to the modern day spectre of the abusive step-parent, step-parenthood receives unflattering descriptions in popular culture.[92] Brenda Maddox provides an intriguing insight into these negative overtones by recounting the origins of the "step" prefix.[93]

> The link with death is old and undeniable. All the *step-* words trace their origin to the Old English *steop-*, which is linked with words for bereavement. A stepchild was a *steopbearn*, an orphan; a stepparent, the new spouse of a widowed parent. The original association, therefore,

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87 Above n74, 102.

88 Above n31, 145 - 146.

89 Frank F Furstenberg Jr and Andrew J Cherlin *Divided Families: What Happens to Children when Parents Part* (Harvard University Press, Cambridge, 1991) 80. Note that in New Zealand, the only statute that imposes a liability on a step-parent is the Child Support Act 1991, but that is only if a s99 declaration is made.

90 See above n83.

91 "Step-parent" has been held to include a spouse who accepts and maintains within the family the children of the other spouse of an adulterous relationship, see *B v W and R* (Family Court, Whakatane FP 087/113/91, 20 May 1992).

92 See Brenda Maddox *The Half-Parent: Living with Other People's Children* (Andre Deutsch Ltd, London, 1975) 143, where the author says that tales of the wicked step-parent flourish in monogamous societies.

93 Above n92, 34.

> is with the greatest pain a child can experience, the loss of a parent and the loss of the central place in the surviving parent's affections.

Maddox continues.

> In an oblique way, the overtones of rejection carried by the *step-* prefixes are accentuated, I think, by the ordinary meaning of the word "step": a step away, one step removed. The word "stepparent" suggests somebody who is a step in distance from the child and a degree less loving, less committed, than a natural parent.

It is, perhaps, unsurprising that, given the history of step-relationships, and the (mis)conceptions that surround step-parenthood today,[94] step-parent adoption has not been condoned, or indeed even accepted, in modern society. In New Zealand guardianship under the Guardianship Act 1968 has been touted as the most accurate legal expression of step-parenthood.[95] However, it could also be contended that adoption in fact confirms the social reality of the child's life, and is therefore a more accurate legal expression of the situation than guardianship. Obviously in practice many step-families are not satisfied, or do not believe that they will be satisfied, with a guardianship order,[96] and are instead applying for adoption.[97] The time has come for the law to redress its current inattention of step-families, and to seek to meet the respective needs and concerns of parties to step-parent adoption.

B INTRA-FAMILY ADOPTION

Like step-parent adoption, intra-family adoption has become an increasingly common form of adoption. In 1992, 23.2 per cent of adoptions that were handled by Social Welfare were

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[94] See above n89, 89, where the authors conclude from their research that there is no reason why step-families should not be encouraged, with children growing up in step-families having the same frequency of problems as children from single-parent families, and an only slightly higher risk of encountering problems relative to children growing up with two biological parents.

[95] Above n25, p 7032, para 6.708.

[96] When I discussed this issue with Vicky Hammond (interview 5 September 1994) she expressed concern that people are often "hung up" on labels, for instance on derogatory connotations associated with guardianship, rather than simply accepting that guardianship can offer them all that they desire.

[97] See below pp 35 - 39 for further discussion of guardianship.

by relatives,[98] compared to 7.54 per cent in 1963.[99] While intra-family adoption is not expressly referred to in the Act, it is implicit in its provisions that relatives - defined as grandparents, aunts and uncles, and siblings - may adopt a child.[100]

Little is known about how children who are adopted by their relatives, informally or formally, fare, though there has been research that suggests children cared for by relatives do well.[101] This is highly plausible given that children fostered by relatives tend to do well,[102] which may be due to the fact that such placements are usually made by the child's natural parents, are generally intended as longterm, and therefore the child is less likely to feel unsure or anxious about his or her status.[103]

Nonetheless, intra-family adoption is actively discouraged by many professionals working in the adoption arena. The 1987 Review by an Interdepartmental Working Party on the Adoption Act 1955 recommended that relative adoption be prohibited because it extinguishes the child's legal relationships on one side of the family, while distorting natural relationships on the other side of the family.[104] The Houghton Committee that looked into adoption in the United Kingdom in 1972 was similarly concerned, pointing out that if the real circumstances were hidden from children, their discovery of them later may be very damaging.[105] For instance, a child may discover that his or her "parents" are really grandparents, and an older "sister" is in fact his or her mother. For these reasons intra-family adoption is generally thought to be inappropriate. Jenny Rockel and Murray Ryburn believe that the only situation in which it should be condoned is when the birth parent who will be excluded by the adoption has never played any part in the child's life, and where the child

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98 Above n70, 155.

99 Above n69, 11.

100 The provision that defines "relatives", s2, specifies that they may be of the full blood, half blood, or by affinity. The only provision that expressly refers to relative adoption is s4(1)(b), which says that if the applicant is a relative of the child, the applicant need only be 20, rather than the usual mandatory 25, years of age.

101 Robert Ludbrook *Adoption: Guide to Law and Practice* (Government Printing Office, Wellington, 1990) 11.

102 Jane Rowe et al (eds) *Long Term Foster Care* (Batsford Academic & Educational, London, 1984) 175.

103 Above n102, 176 - 180.

104 Above n69, 12.

105 Above n65, 27 - 28.

is old enough to understand the full meaning of the adoption and has a strong wish to be adopted in order to strengthen his or her sense of belonging.[106]

Intra-family adoption is important for two reasons. Firstly, in a population that is increasingly aged, and where families are increasingly likely to be headed by either a sole-parent or two working parents, grandparents are increasingly assuming child-rearing responsibilities.[107] Secondly, intra-family adoption is of particular relevance to Maori people. Traditional Maori adoption[108] incorporates the Maori notion of communal rather than individual responsibility for children. As Joan Metge has pointed out, "[w]hen Maori talk about "our children" they mean not "a mama tamariki" (the children of us two) but "a matou tamariki" (the children of us many).[109] This notion of communal responsibility for children is reflected in the Maori concept of adoption or fostering, both of which mean the same thing. An adopted child is referred to as *tamaiti whangai*, *tamaiti* meaning "child", and *whangai* meaning "the feeding and nurturing of body, mind and spirit".[110] *Tamaiti whangai* encompasses all situations where a child is cared for by adults other than parents for a significant period. The reasons why this is done are numerous.[111]

> They did it to relieve stress on their own family unit; to provide companionship for someone living alone; to comfort a childless couple or a family mourning the loss of a child; to strengthen links with the extended family; to provide a *mokai* - another pair of hands - for a family undertaking. In the context of Maori culture, perhaps the most significant reason for adoption was the wish to pass knowledge from one generation to another. Placing a child (often the *mataamua* or first-born) with an older family member... was an accepted means of passing on the wisdom, crafts and customs of the tribe.

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[106] Above n1, 186.

[107] See John Caldwell "Grandparents: Access, Custody and Adoption" [1994] 1 Butterworths Family LJ 69, where he admits there is no published study of grandparenting in New Zealand, but anticipates that New Zealand will follow American trends in this respect.

[108] Joan Metge points out in above n4, 176 that traditional Maori adoption is relatively common in Maori families and communities, but adds that "she is outlining 'the ideal pattern rather than actual behaviour, and that Maori, like other cultural groups, do not always live up to the generally accepted ideal'".

[109] Above n4, 175.

[110] Above n1, 5.

[111] Above n1, 5.

Rather than shrouding the fact of adoption in secrecy, Maori adoption is very open about who the child's biological parents and relatives are. Indeed, this is an essential component of a process which has as one of its twin beliefs that knowing and valuing ancestral origins is the foundation of individual and cultural identity.[112] *Puao-te-ata-tu*, the report undertaken by a Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare, alludes to this when it says that "[t]he physical, social and spiritual wellbeing of a Maori child is inextricably related to the sense of belonging to a wider whanau group".[113] The other belief which lies at the heart of the Maori adoption model recognizes the value of children's whakapapa in linking their own and their culture's past and present.[114]

The Adoption Act 1955 is the only family statute in New Zealand that flagrantly rejects Maori beliefs and practices. While previous adoption statutes had recognised the Maori practice of adoption,[115] the 1955 Act was passed during a political era of assimilation policy, and was "aimed at making Maori abandon their distinctive tikanga and conform to the economic and social patterns of the non-Maori majority".[116] The Adoption Act, as it has traditionally operated and been perceived, is alien to notions of Maori kinship and history. Because descent is so important in establishing the identity of the individual and the tribe, Maori do not approve of complete severance of legal relationships. Neither do they feel the need to sever existing relationships because, under a system of communal responsibility for children, "natural parents do not constitute a threat to the adoptive parents but step easily into the role of supplementary care-givers, especially when adoption takes place within the whanau".[117] When adoption takes place outside the whanau, it is approved of only if the adoptive parents show an appreciation of the significance of the child's cultural heritage. Generally, however, Maori prefer adoptive parents to be relatives of the child.[118]

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[112] Above n1, 6.

[113] *Puao-te-ata-tu (Day Break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (Wellington, 1986) 30.

[114] Above n1, 6.

[115] See Anne Else's summary of the development of legal recognition of Maori adoption in above n4, ch 16, "Aureretanga - The Outcry of the People" 172.

[116] Dame Joan Metge and Donna Durie-Hall "Kua Tutu Te Puehu, Kia Mau: Maori Aspirations and Family Law" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 54, 58.

[117] Above n116, 72.

[118] Above n116, 71.

Given that the genealogy of *tamariki whangai* is not shrouded in secrecy, the argument that natural relationships are distorted is redundant.[119] Similarly, the argument that it may not be in the child's best interests to be adopted by relatives is dispelled, given that Maori agree the child's welfare and interests should be the paramount consideration in all adoption applications.[120] What they do question, however, is the way in which the child's welfare and interests have been determined in the past.

V JUDICIAL APPLICATION OF THE ADOPTION ACT 1955

In recent years, the judiciary have attempted to interpret and apply the provisions of the Adoption Act in a manner consistent with the practical and philosophical developments affecting adoption. In keeping with the idea that the law expresses current values, the judiciary have at times taken a different approach to step-parent and intra-family adoption than to other adoption situations.

A DISPENSING WITH PARENTAL CONSENT

Under Section 7 of the Adoption Act, an adoption order cannot be made unless all of those whose consent is required has been obtained. Thus the consent of the spouse of any sole applicant is always required, as is the consent of the mother, but only upon the child attaining ten days old. The father's consent is only required if he was married to the mother at the time of the child's birth or at or after the time of the child's conception, or if the father is a guardian of the child. The court may also require the father's consent if it is "expedient" to do so.[121]

If an adoption order is applied for, and the natural parent who will be excluded by the

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[119] For an example of this argument being overridden in a non-Maori relative adoption situation, see *M v Kendall* [1992] NZFLR 63 per Smellie J. Vicky Hammond (interview 5 September 1994) pointed out that labels such as "parent" or "aunt" are often of little significance to Maori wishing to adopt, and therefore the distortion of relationships is of less significance.

[120] Above n116, 72 - 72.

[121] With regards to the meaning of "expedient" see *Application by GN (adoption)* [1991] NZFLR 513, 519 per Judge Inglis QC, where he disagrees with above n25 that "expedient" needs clarifying.

adoption order and whose consent is required refuses to consent to the adoption, that parent's consent may be dispensed with under Section 8. The criteria in Section 8 tend to focus on parental shortcomings, reflecting "the notion that parents should not forfeit claims to their children without serious wrongdoing or incapacity on their part".[122] To meet this standard, the court requires that the parent's conduct must amount to or have resulted in a rejection of the parent/child bond.[123]

Although the criteria in Section 8 tend to concentrate on aspects of the parent's conduct, under Section 8(1)(a) parental consent may be dispensed with if the parent has "failed to exercise the normal duty and care of parenthood in respect of the child".[124] This failure is frequently invoked in step-parent applications, and allows the court to consider more child-oriented factors. It requires a broad assessment of the parent's involvement over the child's whole life. In the Court of Appeal decision of *Director-General of Social Welfare v L*, Bisson J cited with approval this quote from Jeffries J in *E v M*:[125]

> The normal duty and care owed by a parent to a child is to nurture the child to a state where it is independent of the parent. The nurturing process has some clearly identifiable characteristics which are shared by most humans. The provision of shelter, clothing, food, together with love and affection. In preparation for independence, education in its broadest sense. All this demands close and attentive physical and emotional involvement.

Obviously, the degree of physical and emotional involvement that a parent can give a child is constrained if that parent does not have the day-to-day care of the child. Due account is therefore taken by the courts of the limited opportunity that a non-custodial parent has to fulfil this role,[126] and the fact that a substitute parent may now be assuming day-to-day care of the child. However, the non-custodial parent still has a continuing obligation to show

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[122] Above n25, p 7025, para 6.708.

[123] Above n51, 133 per Casey J.

[124] The onus is on the applicants to establish the failure alleged in s8(1)(a), *Re Applications by W* [1991] NZFLR 231, 234 per Judge von Dadelszen.

[125] Above n123, 136 per Bisson J, citing with approval a quote from *E v M* (unreported, Wellington Registry, 13 September 1979).

[126] See above n124, 235; see the same sentiments expressed a decade earlier in *In the Adoption of W* (1981) 1 NZFLR 33, 35 per Judge Bisphan.

affection, care and interest toward his or her children.

The actual degree of failure that the court must find in order to determine that a parent has failed to fulfil the normal duty and care of parenthood is indefinite, and depends upon the circumstances of the case. It is an objective standard, and questions of culpability, fault or guilty mind are irrelevant to its determination.[127] Also, the higher the degree of failure, the more likely that the court will dispense with consent.[128] Suggestions have been made that the degree of failure that is required before a ground for forfeiting parental consent has been made out is higher in step-parent applications than in "normal" adoption applications.[129] However, no recent New Zealand cases expressly support this proposition, and usually the degree of failure is only said to contribute to the actual exercise of the discretion to dispense with parental consent. For instance, in *In the Adoption of W*,[130] which was an application by a natural mother and step-father, Judge Bisphan pointed out that, although the father had failed in his duty to exercise the normal duty and care of parenthood, there had not been a high degree of failure, and therefore his consent was not dispensed with.

B EXERCISING THE DISCRETION TO DISPENSE WITH PARENTAL CONSENT

1 The Welfare and Interests of the Child

Once it has been found that grounds exist for the court to dispense with parental consent, it is likely that it will be exercised unless "persuasive reasons in the child's welfare and interests"[131] suggest otherwise. Since the Court of Appeal decision in *Director-General of Social Welfare v L* it has been established that the child's welfare and interests are the paramount consideration in the exercise of this discretion.[132] Richardson J argued in the

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[127] *Director-General of Social Welfare v B* (1984) 3 NZFLR 367, 371 per Judge Bisphan.

[128] Above n124, 234.

[129] See above n25, p 7027, para 6.708, citing an English authority of 1979 in support of this proposition.

[130] Above n126, 35.

[131] *Re Adoption Application by T* (1993) 10 FRNZ 259, 264 per Judge BD Inglis QC.

[132] The law prior to this was uncertain, for instance, if we are to compare two Family Court decisions of 1984, in above n127 Judge Bisphan said that the paramount consideration in the exercise of the Court's discretion was the child's welfare, whereas in *In the Adoption of G* (1984) 3 NZFLR 175, Judge Taylor said that a number of considerations were required, including the rights of the father, the seriousness

same case that, because issues of guardianship and custody are involved in adoption, and because orders under the Guardianship Act are guided by the paramountcy principle, then so too in all adoption cases should the child's welfare be decisive. Despite the fact that legislators of the Adoption Act 1955 did obviously not intend the Act's overriding principle to be the child's welfare and interests, the paramountcy principle is becoming increasingly important in all aspects of adoption proceedings. For instance, in *Re Adoption of Q*[133] a grandmother applied to adopt her grandchild with the support of the natural parents, and the adoption order was granted because it was thought it would further the child's welfare and interests. Also, in *M v Kendall*[134], although it was agreed that the court had not had jurisdiction to grant two adoption orders nine years previously because the children had been wards of the Court, the status quo was maintained because it was in the children's best interests. In applications for step-parent adoption it is particularly important that Richardson J's broader approach be adhered to, because frequently the non-custodial parent who will be excluded by the adoption order does not refuse consent,[135] and therefore the issue of dispensing with consent may not need examining.

Increasing judicial emphasis on child welfare is apparent in New Zealand and overseas jurisdictions, but in New Zealand the courts have taken the unique approach of considering the welfare issue in light of the type of adoption proposed.[136] In cases of step-parent and intra-family adoption factors that are believed to be relevant to the child's welfare are considered. Some of these factors impinge upon more long term considerations. In *Director-General of Social Welfare v L*[137] Bisson J in the Court of Appeal believed that a broad focus was required due to the fact that Section 11(b) of the Adoption Act, which requires that the Court be satisfied, among other things, that "the welfare and interests of the child will be promoted by the adoption", is different from the paramountcy principle in the Guardianship Act, which only mentions the child's "welfare". He thought that the inclusion of the word "interests" in the Adoption Act indicates an extra dimension that requires consideration of

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of the respondent's defaults, etc.

[133] (1993) 10 FRNZ 340.

[134] Above n119.

[135] Above n67, 81.

[136] Above n63, 99.

[137] Above n51.

future implications.[138] In particular, the judiciary must take into account the future importance to the child of links with family, and knowledge of heritage. The other members of the Court of Appeal did not expressly concede with Bisson J, and his points have not been affirmed in subsequent cases. Hardie Boys J, in *Director-General of Social Welfare v L* appeared to differ with Bisson J. He proposed that "once consent is given or dispensed with the natural status and family relationships [of the child] will be of little, if any, consequence in the overall assessment of the child's welfare and interests".[139] In establishing whether or not the making of an adoption order is in the child's welfare and interests, he thought that the only remaining consideration was the child's welfare.

Before outlining the range of considerations that are made when determining whether an adoption order will further the child's interests and welfare, two matters require brief mention. The first is Counsel for the Child, which is not provided for under the Act. The report of the Adoption Practices Review Committee in 1990 reflected recent judicial sentiment,[140] recognising how helpful counsel can be in assisting judges in the exercise of their discretion, particularly in step-parent and intra-family adoptions.[141] Although no express power exists for appointing counsel for the child in adoption cases, some judges have taken it upon themselves to appoint counsel regardless. Judge Pethig in *Re Application by Nana* went so far as to say:[142]

> important as the change of status is, limiting the question to that is to overlook the importance of care and control on the child which of course is the heart of the provisions of the Guardianship Act which does create such a power to appoint counsel for the child...[T]he Court of Appeal has made plain there is a necessary nexus with custody cases, which enables this Court in adoption cases to appoint counsel for the child.

The second matter to be discussed, that is also of potential assistance when judges are deciding whether to exercise their discretion, is the social worker's report, which under

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[138] Above n51, 136 - 137 per Bisson J.
[139] Above n51, 137.
[140] Above n35, 661 per Judge RF Pethig.
[141] Above n29, 75.
[142] Above n2, 44.

Section 10 is required in all adoption situations except step-parent. This has been looked upon by some as another shortcoming of the Act, especially if we are to accept the statement made by Ormrod LJ in *Re S (infants) (adoption by parent)*,[143] that step-parent adoptions "require considerably more investigation and information than in 'normal' adoption cases". A Practice Note issued in 1993 by Judge GF Ellis stated that "children involved in step-parent adoptions are entitled to no less protection than those involved in 'stranger' adoption or any other proceedings affecting the welfare of the child".[144] He then proceeded to point out that he would require the provision of a social worker's report, "or the equivalent",[145] in every adoption application coming before the Court. However, as Judge Pethig made clear in *W v S*,[146] the question ultimately lies with Parliament to decide whether it sees this as a matter of importance.[147]

2 Retention of Links with Natural Parents

Of primary importance in the exercise of the discretion to dispense with parental consent is the child's links with the natural parent who will be excluded by the adoption order. If the child is older and knew the parent, and there is the possibility that the child can derive something positive from the relationship, then the discretion is unlikely to be exercised. It follows that if the step-parent has been a parent-figure to the child for all or most of the child's life, and if the child regards the step-family as his or her only family, then adoption may be seen as merely "bringing the legal position into line with reality".[148] In reality, however, the issue is seldom as clearcut as this. For instance, even if the parent has effectively rejected the parent/child bond, or if there is evidence of neglect and rejection,

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[143] Above n84, 676 (CA).

[144] [1993] NZFLR 894, 895.

[145] Judge Ellis did not elaborate on this point, therefore it is unclear just what "equivalent" refers to. It may be that he is referring to a Maori social worker, where the child is Maori.

[146] Above n72, 661.

[147] Whether or not step-parent adoption requires both a social worker's report and Counsel for the Child may depend upon one's understanding of the role of Counsel for the Child, in particular, whether it involves representing the child's wishes or the child's interests. If it involves the latter then both the report and Counsel will assume an investigatory role with possibly similar results. If it involves ascertaining the child's wishes (and if indeed the child is mature enough to express and understand these wishes) Counsel will assume an advocacy role for the child not undertaken elsewhere.

[148] Above n25, p 7032, para 6.708.

children often retain a positive image of their non-custodial parent,[149] and may not wish to sever links.

When considering the significance of the parent/child bond, attention must be paid to the historical weight attached to parental status. Although in New Zealand there is no presumption that a child's welfare is best met in the care of a natural parent,[150] this presumption did exist in days gone by, and courts have struggled hard to rid themselves of the notion of parental status as determinative.[151]

Insight into the dynamics that underlie discussions on parent/child bonds in adoption cases can be gained by examining "rights" rhetoric in the judicial application of access provisions. There is manifest confusion as to whether or not access is a right of the parent or the child. For instance, in *Sharman v Sharman*[152] Anderson J said that "[t]he child's right to access is paramount". If this is indeed so then a child may effectively sever links with a non-custodial parent, even if the child is under the influence of the custodial parent, or if the child is not mature enough to appreciate the significance of his or her decision. Alternatively, the idea of access as a right of the parent was expressed by the House of Lords in *In re KD (a minor)*,[153] with Lord Oliver stating that natural parents have a claim to access to their children, and that this claim coincides with the child's welfare because it is assumed that children benefit from continued contact with their natural parents. However, Graeme Austin preempts the rights debate by pointing out that "[t]he 'right' to access possibly does little more than express the presumption that children benefit from contact with the non-custodial parent".[154] Certainly this is apparent in contemporary adoption cases, with judges emphasizing that the adoption order will not be made because continued contact with the parent who will be excluded by the order is in the best interests of the child. However, if this reasoning is applied too rigidly the consequences can be highly questionable, as in the case

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[149] Above n31, 136.
[150] See *J v J and J* (1983) 1 FRNZ 1 (CA).
[151] Graeme Austin *Children: Stories the Law Tells* (Victoria University Press, Wellington, 1994) 39.
[152] (1988) 5 NZFLR 91, 92.
[153] [1988] 1 AllER 577, 590 per Lord Oliver.
[154] Above n151, 163.

of *S v Y*[155]. Here, Judge Aubin found that grounds existed for dispensing with the non-custodial parent's consent in a step-parent adoption application -the father had spent lengthy periods in prison, and was found to have failed in the normal duty and exercise of parenthood. However, the judge thought that it was unjust to exercise the discretion, because there was a likelihood that a continuing relationship between the father and son would have existed had the father not gone to jail. Judge Aubin's conclusion that the discretion should not be exercised was arrived at despite the acknowledgement that there was a "question mark of sizeable proportions as to the role which Mr X could play in the life of his son in the future".[156]

Rather than acting on presumptions it is arguably preferable for the court to adopt an individualized, investigative role in determining whether or not the child's welfare and interests will be promoted by retaining legal links with a non-custodial parent. Mark Henaghan proposes that this approach be taken in access cases.[157] However, there is a fundamental difference between cases involving access and adoption, and that is that adoption cases entail a mandatory consideration of the child's longterm welfare. Given the current strong support for open adoption, the presence of a non-custodial parent arguing for a legal right to continued contact with his or her child is likely to carry significant weight. That does not mean, however, that the parent's wishes are relevant to the exercise of the court's discretion. On the contrary, only when a parent has actually exhibited a renewal of interest in the child, which purportedly promotes the child's interests and welfare, will the parent's wishes be influential. If this parental interest is lacking, the adoption order may well proceed, as happened in the case of *A and A v T*[158]. In that case, which had very similar facts to *S v Y*, the discretion to dispense with consent was exercised, the judge saying about the non-custodial parent:

> He has avoided his responsibility by the choice of a particular lifestyle which has resulted in him being almost continuously in prison. I cannot see any advantage in the relationship of the

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[155] (1984) 3 NZFLR 166.
[156] Above n149, 173.
[157] Above n32, 142.
[158] (1986) 2 FRNZ 156.

child with the father being fostered, which relationship is based entirely on a biological link.

3 Retention of Links with Family

In deciding whether to exercise its discretion, the court will also consider the child's links to siblings, grandparents and extended family. It must be kept in mind that this consideration, unlike parental links, has little legal foundation because natural relatives have no rights that are extinguished upon the granting of an adoption order.[159] Generally, though, if the child is older, and knows his or her family, the court may feel that it is not in the child's interests or welfare to sever these relationships.[160]

Often, however, an adoption order is granted in those situations where, although the child has an ongoing relationship with family members, the adoption will occur in an open environment, and these relationships will in practice not be severed. This was the case in *L v B*,[161] where the child was able to maintain contact with siblings via her mother, who also had a strong relationship with the siblings, her own children. Similarly, the applicants' intentions to support the child's contact with her whanau led to Judge Inglis QC granting an adoption order in *In the Adoption of J.*[162] The underlying theme in these decisions is that the adoption is necessary for the child's security, and that if access to family members is to be continued it is in the child's best interests if it is done so "from the security of a family who [the child] knows are responsible for him and will protect his interests".[163] The granting of adoption orders in these circumstances may also be an acknowledgement of the fact that, irrespective of the legal situation that will emerge, "the severance of links with the old family will or will not occur irrespective of court orders".[164]

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[159] See *In re C (a minor) (adoption order: conditions)* [1989] AC 1, 18 per Lord Ackner. It could be contended that because some members of the extended family can apply for guardianship under the Guardianship Act s16 that they do in fact have rights. However, they require leave to do so, and the range of circumstances are very limited.

[160] *Re D (minors) (adoption by step-parent)* (1980) 2 FLR 102 per Ormrod J.

[161] (1982) 1 NZFLR 232.

[162] [1992] NZFLR 369.

[163] Above n131, 265.

[164] Above n76, 154.

4 Retention of links with cultural heritage

Under the Adoption Act 1955 a child's race is unaffected by an adoption order.[165] Little other consideration is shown of cultural factors that necessarily impact upon the adoption of a Maori child. A child's cultural heritage cannot be assured, as an adoption order severs all biological relationships, does not require the input of the whanau or, in some circumstances, the natural father, and the only condition that can be made on an adoption order relates to religion.[166] This can lead to the adoption of Maori children in spite of the objection of the child's Maori whanau. Such a situation arose in *Re Adoption A9/90*,[167] where the natural mother and step-father's adoption application was successful, despite the objection of the Maori natural father, and that the judge was aware that the couple were about to separate and the step-father take the child to Canada with him to live. Judge Inglis's following statement implies that children's knowledge of their cultural heritage is linked to parents' willingness to foster this knowledge. It disregards the fact that in New Zealand a person is much more likely to gain a knowledge of the Maori culture than overseas.[168]

> Against the clear advantages of adoption for [the child], the disadvantages that she will not see her natural father as frequently and the possible impairment of what the natural father describes as her cultural identity are of relatively minor importance. The issue of cultural identity does not trouble the mother, and the natural father's apparent concern about it would have carried more weight if he had demonstrated responsibility as a parent by positive action.

In *T v S (no 1)*[169] Judge Inglis again arrived at a conclusion that did not address the concerns of the Maori in the case. Here, it was the Maori grandmother who was applying for revocation of an interim adoption order. Judge Inglis established that the grandmother did not have standing for the application, and that the grounds she had claimed warranted revoking the order were merely technical matters that would not have warranted revocation anyway. However, Judge Inglis seemed to be aware of the grandmother's real basis for the

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[165] Section 16(2)(e).
[166] Section 11(c).
[167] (1990) 7 FRNZ 524.
[168] Above n167, 528.
[169] [1990] NZFLR 411.

application -"her belief, founded in tradition, that the adoption of a Maori child is a matter to be determined by the whole whanau and not just by the natural parents".[170] He pointed out that the grandmother had no legal interest to apply for revocation.[171]

> [However,] in the Maori perspective [her] position would be seen quite differently, but unless and until the law is changed by Parliament so as to give express recognition of the Maori perspective, the Court must take the law as it finds it.

Similar statements have been made with respect to the access provisions of the Guardianship Act 1968, acknowledging their inherent cultural insensitivity,[172] but aware that access can only be extended to whanau when Parliament so decrees.

Even though the Adoption Act is inconsistent with Maori notions of whakapapa or genealogical inheritance, recent cases have found the law to be flexible enough to develop practices and policies that do in fact align with Maori values. The open adoption movement has been influential in this respect. In *Adoption by RRM and RBM*[173] an aunt's adoption application was successful, Williams J recognising that in practice the bond between the natural parents and the child would not be severed, and instead the natural parents would be additional parents of the child. Williams J stated:[174]

> it is perfectly possible by granting the adoption order to harmonise the different set of values which lie behind traditional approaches to adoption on the one hand and Maori concepts of the family on the other.

A number of cases reflect the idea that the Adoption Act can be applied in a manner that recognises the concerns and values of Maori. Judge Boshier in *Re Adoption of A*[175] granted

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[170] P F Tapp "The Issue of Cultural Identity and the Rights of the Extended Family in Child Placement Decisions" [1990] NZ Recent L Review 102, 105.

[171] Above n169, 422.

[172] For example, see *J v District Court* Unreported, 3 June 1993, High Court, Wellington Registry, CP210/93.

[173] [1994] NZFLR 231.

[174] Above n173, 236.

[175] [1992] NZFLR 422.

an adoption order in favour of the Maori grandparents of a young child whom they had cared for since birth. The decision to adopt had been made by the family, from a Maori customary perspective, and it had been indicated by the applicants that despite the legal change in relationships that an adoption order would create, in practice the operation of the whanau would remain unchanged. In granting the adoption order, Judge Boshier pointed out:

> It can be clearly argued that the place of the Treaty of Waitangi and the concept of partnership between Maori and Pakeha means that a more progressive appreciation of customary law and the Tangatawhenua is now required.

Just such a progressive appreciation of customary law was shown by Judge Boshier in *Re Adoption by Paul and Hauraki*,[176] where, despite the fact that joint applications for adoption under the Adoption Act can only be made by legally married couples, Judge Boshier recognised that the unmarried couple who applied to adopt the child were living in a customary Maori marriage, and therefore the application was allowed to proceed and was successful. A further example of judicial appreciation of Maori values is found in *Application by C*,[177] where the Pakeha applicants who applied to adopt a Maori child were unsuccessful because, despite conforming to the standards required of adoptive parents in every other respect, they showed little appreciation or interest in the significance of the child's Maori heritage, and the judge was therefore not satisfied that the child's welfare and interests would be promoted by the adoption.

5 Child's wishes

Under Section 11(b) the court is required to consider the wishes of the child, having regard to the age and understanding of the child, when determining whether or not the interests and welfare of the child will be promoted by the adoption. Victoria and Tasmania,[178] like New Zealand, rely on the judiciary and other professionals involved in the proceedings to

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[176] [1993] NZFLR 267.

[177] [1990] NZFLR 280.

[178] Margaret Otlowski "The Changing Face of Adoption Law in Tasmania" (1989) 3 Australian J of Family Law 161, 177.

determine the competency of children to ascertain their feelings on the adoption, and the weight to be attributed to these feelings.[179] In the United Kingdom under the current Adoption Act 1976[180] and under the Children Act 1989[181] the Court must likewise pay regard to the child's wishes and feelings, in the light of the child's age and understanding. The White Paper, however, proposes that all children aged 12 years or older must agree before an adoption order is made, unless they are incapable of giving such agreement. Children are also eligible for party status, and are therefore able to directly inform the Court of their own preferences.[182]

In practice it appears that Section 11(b) is seldom influential.[183] It is often thought that children do not understand what adoption is about, or what the full implications of adoption are.[184] As Judge DJ Carruthers said in *Re Adoptions 46 - 47/87*[185] with regard to the wishes of two children aged seven and ten years:

> the children cannot possibly be acquainted with an overall view of the situation nor can they have any appreciation at all of what their own needs might be as they develop and become teenagers and grow into adults.

Children's wishes are also occasionally regarded as circumspect in step-parent applications because of a fear that the child will have been indoctrinated by the natural parent and step-parent against the non-custodial parent.[186] Even if indoctrination is too strong a word, there is evidence that children may feel obliged to emphasize the wishes of their custodial parent.[187]

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[179] The landmark decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authorities* [1986] AC 112 is of relevance here; see above n44, 151.

[180] Section 6 of the Adoption Act 1976 (UK).

[181] Section 1 of the Children Act 1989 (UK).

[182] Below n229, p 6, para 4.3.

[183] Mark Duke (written correspondence 25 August 1994) believes that the child's wishes are very significant, and, in particular, step-parent and intra-family adoption should be available if the child wishes for the adoption to take place.

[184] *Re Adoptions 3 and 4/90* (1990) 7 FRNZ 45, 51.

[185] (1988) 4 FRNZ 50, 55.

[186] Above n124, 237.

[187] Above n67, 81.

Many writers stress the need felt by children to placate and comfort the parent they are living with, and this makes it difficult to ascertain the wishes and feelings of a child who is dependent on the approval of the parent and step-parent who are applying to adopt.

6 Other relevant considerations

A number of other factors are considered when judges seek to determine whether or not the child's welfare and interests will be promoted by dispensing with parental consent and allowing the adoption to proceed. These may include the parental capacity of the adoptive parent/s, and the adoptive parent's relationship with the child. The relationship between the adoptive parent's and absent parent is relevant, because if it is one of acrimony and hostility, the child may suffer conflicting and harmful effects.[188] The applicant's motive in seeking the adoption may be examined, particularly in step-parent applications.

C RE-THINKING GUARDIANSHIP

The outcome of step-parent and intra-family adoptions is likely to be significantly influenced by the judge's decision as to whether or not an alternative legal order will meet the needs of the respective parties. In New Zealand, guardianship assumes fundamental significance in this respect - it is flexible, it can be subsequently altered, and it avoids the bizarre situation of a natural parent applying to adopt his or her own child.[189] Hillyer J was influenced by the Guardianship Act's provisions in *MR v Department of Social Welfare*.[190] He declined to grant an adoption order to the grandmother of a five year old child whom she had cared for since birth, preferring instead to keep in place custody and guardianship orders made in favour of the grandmother, and thereby allowing the child's "affectionate" relationship with his mother to continue unimpeded.

A different approach is evident in the judgement of Williams J in *Application for Adoption*

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[188] Above n161, 239.

[189] Note that under the White Paper, below n229, p 13, para 5.22, a natural parent does not adopt his or her own child.

[190] (1986) 4 NZFLR 326.

by RRM and RBM,[191] where the issue was whether the adoption of a two year old Maori girl by her aunt and uncle with whom she had lived with since birth would further her welfare and interests. Williams J expressly questioned the District Court Judge's reliance on *MR v Department of Social Welfare*,[192] distinguishing the facts of the two cases on a number of grounds, but placing particular reliance on the fact that in *MR v Department of Social Welfare* the grandmother's application had been opposed by the Department of Social Welfare, whereas in the current case the adoption was supported from all quarters, including the Ministry of Maori Development. Although William J's decision in the High Court does undermine the authority of *MR v Department of Social Welfare*, it is constrained by its factual context - a customary Maori adoption - and does not expressly challenge the general notion that guardianship may be a more appropriate legal order in intra-family situations than adoption.

In Victoria and Tasmania alternative legal orders to adoption have assumed such significance that legal presumptions have been enacted, mandating that judges grant an alternative order in applications for step-parent and intra-family adoption, unless adoption better serves the child's interests and welfare, and exceptional or special circumstances exist.[193] In contrast, the recent White Paper on adoption reform in the United Kingdom has recommended that the current presumption in favour of alternative orders be abolished, mainly because the presumption was not in practice reducing the incidence of step-parent and intra-family adoption.[194]

Current sentiments in favour of guardianship as compared to adoption have been given as a reason for challenging New Zealand's traditional role as a "world leader" in child welfare, in a recent issue of the New Zealand Adoption Council's newsletter.[195] This is because New Zealand legislation and policies are being found to be increasingly out-of-step with major

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[191] Above n173.

[192] See *Application to Adopt M* [1993] NZFLR 744.

[193] Sections 11 and 12 of the Adoption Act 1984 (Vic) and s4 of the Adoption (Amendment) Act 1987 (Vic); and ss20 and 21 of the Adoption Act 1988 (Tas).

[194] P Gallagher "Step-parent Adoptions" (1992) 136 Sol J 894, 894.

[195] Above n10, 1.

initiatives throughout the world.[196] Guardianship is an area in which New Zealand is being seen as out-of-date. This is because there are no research studies or data which show that guardianship has any acknowledged benefits for children.[197] Furthermore, the potential disadvantages of guardianship are apparent. "Guardianship is disturbingly similar to long-term foster care, which has been shown through research to have far fewer advantages than adoption, with adoption offering far more stability and benefits".[198] The recent Hague Convention substantiates this claim by only granting recognition to "full" adoption as compared to "simple" adoption or guardianship. In an article in the newsletter, William Pierce cites two major considerations which led to the Convention arriving at this decision.[199] Firstly, "child welfare and child development considerations clearly indicate that a permanent family *in law* is the best way to achieve good results for children who cannot be properly or appropriately reared by their biological parents".[200] Secondly, only a full adoption grants to a child the developmental and legal rights which are in the child's best interests.[201] In conclusion, Pierce proposes:

> Informal adoption, guardianship, and simple adoption are increasingly seen as relics of pre-literate, rural societies where property rights and biological families' interests were considered more important than the best interests of the child. For the 21st Century, full adoption is the social and legal form of adoption of choice, as The Hague Convention clearly reflects.

This proposal is not shared by many professionals involved in the adoption process, particularly in situations where children are older and have had some sort of contact with their natural family, which may often be the situation in step-family and intra-family cases.[202]

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196 Above n10, 1; for instance, in Australia a more rational open records policy is being preferred, and in the United Kingdom and the United States moves are being made to remove ideological concerns from impacting upon child placements.

197 Above n10, 2.

198 Above n10, 2.

199 Above n10, 3.

200 Above n10, 5.

201 Above n10, 5. Mark Duke (written correspondence 25 August 1994) cites as a reason for Maori preferring formal to informal adoption the enabling effect that formal adoption has on land rights.

202 For instance, Keith Griffith (interview 26 July 1994) believes that adoption is usually only appropriate if the child is two years or younger.

Many of those who do believe that guardianship has a role to play in some adoption scenarios are willing to acknowledge that there are situations where adoption is in the child's best interests. This is particularly so in situations where the spectre of the orders being challenged could be destabilizing to the child, as was the case in *Re Adoption of Q*,[203] where the grandmother's custody order over her six year old grandson was replaced by an adoption order. The grandmother applied for adoption because the natural mother's new husband had a history of criminal convictions for sexually deviant crimes, including against children, and the judge was satisfied that the extra security afforded by adoption would further the child's welfare and interests. Children's stability may also be threatened in situations where their custodial natural parent dies, or where the relationship between their natural custodial parent and step-parent breaks down.[204] In the former situation, even if the natural parent had appointed the step-parent, grandparent or any other significant adult in the child's life as the child's testamentary guardian, that adult's status as guardian of the child may be challenged by a surviving natural parent if that parent is also a guardian.[205] In the situation where a natural parent and step-parent divorce, the child's link with the step-parent is reliant on a successful access application.

Guardianship orders may also fail to protect the stability of some children's relationships if the adults concerned do not fit within the criteria in Sections 15 and 16 of the Guardianship Act. Under Section 15 only a child's parents or those in *loco parentis* may initiate proceedings as of right. Section 16 specifies that certain other relatives may apply for guardianship in certain limited circumstances. The adults that may apply are grandparents, siblings, and aunts and uncles. Obviously in some cases relatives *other* than these may wish to apply for access. This is particularly so in cases of traditional Maori adoption. Furthermore, the situations in which relatives under Section 16 may seek the leave of the Court to apply for guardianship are very limited. Either the child's parents must have died,

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[203] [1993] 10 FRNZ 340.

[204] Mark Duke (written correspondence 25 August 1994) does not think that the instability of guardianship *per se* is problematic, given that children are affected by the instability of their parent's marriage/relationship also.

[205] Section 10 of the Guardianship Act 1968 allows the other parent or guardian to apply to the court to have a testamentary guardian removed. Under s10(2) only when parents are being deprived of guardianship must the court be satisfied that the parent is for some grave reason unfit to be guardian of the child or unwilling to exercise the responsibilities of guardianship.

or must have been refused access to the child by the Court, or the parent had access to the child but made no attempt to exercise it.

If guardianship is to retain its challenged role as the "present day panacea for concerns about authority within and continuation of step-relationships with children",[206] and if it is to continue to be applied as an effective alternative to intra-family adoption applications, then the notion of guardianship in the Guardianship Act needs rethinking. In particular, the legal ramifications of guardianship may need amending so that they are less likely to impact in a negative way upon the real and perceived stability of the placement. One suggestion is that a presumption of continued guardianship be applied in situations of testamentary guardianship, thereby ensuring that the situation remains imbued with a sense of stability. This presumption would require any surviving parent to seek leave to apply for removal of the testamentary guardian, the granting of leave conditional on the parent making out a prima facie case that the guardianship appointment is detrimental to the child's welfare.[207]

On the other hand, it may be contended that guardianship is a worthwhile and effective legal remedy as it is currently conceived, but that it is not ideally suited to deal with adoption in general, or with the many and conflicting issues that arise in applications for step-parent and intra-family adoption. Instead, the law may be required to develop a new means of addressing these situations.

VI STEP-PARENT AND INTRA-FAMILY ADOPTION: RECOGNISING "SIGNIFICANT OTHERS"

That New Zealand's Adoption Act 1955 is in need of reform is obvious. In the forty years since its enactment major social upheavals have taken place, and adoption as it is practised today seldom conforms to the assumptions underlying the legislation. Judge Boshier alluded to this when he said "[i]t will be a happy day when aspects of the Adoption Act are

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[206] Above n3, 503.

[207] A Hendra "Stepfamilies: a Fresh Approach" (1993) 1 Butterworths Fam LJ 26, 27.

changed... [to] be replaced by more progressive and uncomplicated considerations".[208] Judge Pethig expressed similar concerns in *Re Application by Nana*,[209] substantiating his argument with the statement that, in particular, the large number of step-parent adoptions are responsible for the Act losing any "inherent integrity" it once possessed.

Yet simple disapproval of the practice of step-parent, and intra-family, adoption is not going to help the parties themselves resolve the complex issues that caused them to make an adoption application. The children who are the subject of step-parent and intra-family adoptions are in need of the law's protection and guidance. The law on adoption needs to recognise that these children have often formed close bonds with their potential adoptive parents, and that these children may also have relationships with a number of other adults. How then can we transform adoption law so that it recognises the role played by "significant others" in these children's lives?

Before considering the various options for the reform of adoption law, it is important that agreement is reached as to the fundamental aim of adoption. That aim is to secure a permanent home for a child.[210] Adoption has traditionally done this by transferring a child, for virtually all purposes, from the biological family to a new adoptive family, *severing all links with the biological family*. It is with some urgency that we must ask "whether this outcome is necessary or desirable in order to ensure permanence or whether it might be more appropriate to achieve this objective in some other way without changing the child's identity and wider relationships?".[211] Current thinking on open adoption suggests that the latter alternative is desirable. That does not mean that the adoptive parents are not ultimately responsible for the child, or that the child's sense of stability will be undermined. Instead, it acknowledges that "stability" is a flexible concept, and means different things to different people.[212]

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[208] Above n175, 427.
[209] Above n2.
[210] See above n145.
[211] Above n65, 56.
[212] Above n63, 86.

> A reformed adoption law must be flexible as well as protective and supportive, enabling adoption to proceed in the child's interests, yet equally serving those interests by allowing for the possibility of contact with the natural family in appropriate cases.

It is also important to keep in mind when considering the various options for reform that if well-informed public debate does not accompany changes in the law, then any change in attitudes or practices is improbable. During the recent discussions on adoption law reform in the United Kingdom it was recommended that a study on the public's view be carried out, in order to ascertain whether a more "inclusive" model, or a wider range of adoptions, would be broadly acceptable.[213]

At the end of the day, however, the ultimate decision lies with the State as to whether or not the reform of adoption law goes ahead. Given that the legislation does not impact on the Government's purse strings, it is unlikely to be a priority in the forthcoming agenda.[214]

A PROTECTING A CHILD'S MANY RELATIONSHIPS

Many commentators have tackled the question of how an adoption order can provide a child with substitute parents while simultaneously protecting the child's other relationships, arriving at a variety of recommendations.[215] One strategy would be to expand our current legal regime under the Guardianship Act, so that step-parents, grandparents and other "significant others" would obtain some form of access to the child without undermining the adoptive parents' authority. This would not require a thorough examination of the Adoption Act except in so far as the adoptive parents may be required to legally acknowledge the role played by these adults in their child's life. However, this proposal fails to challenge the "closed stranger" paradigm that underlies adoption law in New Zealand. If we are to accept

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[213] Above n67, 13.

[214] Bill Atkin and Graeme Austin point out in "Cross-Cultural Challenges to Family Law in Aotearoa/New Zealand" (as yet unpublished, received from Bill Atkin June 1994) that reform of the Adoption Act would be more likely to occur in the near future if the State had a financial stake in the matter, as was the case with the speedy enactment of the Child Support Act 1991.

[215] For instance, see Emily C Patt "Second Parent Adoption: When Crossing the Marital Barrier is in a Child's Best Interests" (1987/1988) 3 Berkeley Women's LJ 96, in which she is influenced by the Supreme Court of California's recognition of the status of "de facto parenthood", and advocates a form of joint adoption that does not rely on a marital relationship.

that children's welfare and interests are promoted by the fostering of a variety of legal relationships with the child, then so too should we recognize how hopelessly inadequate the Adoption Act is in the face of fundamental changes to adoption practice and philosophy. A longterm strategy is required, in which adoption law is transformed so as to meet the needs of today's families.

When considering the transformation of New Zealand's adoption law, it is appropriate to examine the recent changes made to the law of adoption in the United Kingdom. This is because in both countries adoption has been premised on a model of "closed stranger" adoption, but that premise is increasingly obsolete. The 1990 Adoption Practices Review Committee recommended some study be undertaken of the recent amendments in Britain before any broad review of the New Zealand Adoption Act.[216]

Widescale reform of childcare legislation in Britain was heralded by the enactment of the Children Act 1989. Described as the "most far-reaching reform of child law in England this century",[217] the Act did not directly seek to reform adoption law. However, orders available under the Children Act are applicable to adoption proceedings. Also, adoption law will inevitably be influenced by the Children Act's dual principles of parental responsibility and the paramountcy of the child's welfare.

Perhaps the most discernible impact of the Children Act on adoption is the repeal of Section 14(3) of the Adoption Act 1976, which required the court to dismiss a step-parent application if it considered the matter would be better dealt with under custody, or other, proceedings. No doubt the repeal of Section 14(3) was motivated by its failure to halt the increase in step-parent adoptions. It has been noted how paradoxical it is that the Children Act has removed all impediments to the granting of step-parent adoptions, where the other natural parent is permanently excluded, and yet in the field of adoption generally there is a more tolerant attitude towards the idea of contact between children and their natural parents.[218] However, that ignores the range of orders that can be made under the Children Act in *addition* to

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[216] Above n29, 74.

[217] Caroline Bridge "Adoption Law Reform - English Style" (1993) 3 Family L Bulletin 127.

[218] Above n194, 895.

adoption, the effect of which can be a legally imposed open adoption.

Adoption orders could be made subject to access before the enactment of the Children Act. Under Section 12(6) of the Adoption Act 1976 (UK) an adoption order can contain terms and conditions that the court thinks fit. However, the provision received little judicial support, in the light of the prevailing attitude that access is "fundamentally inconsistent with principles which underlie the making of an adoption order".[219] Although residence and contact orders under the Children Act are more accessible than Section 12(6), the granting of these orders may be limited in the face of judicial reluctance, or even disapproval.

A residence order under Section 8 of the Children Act 1989 settles the arrangements to be made as to the person with whom a child is to live. If the order is made in favour of someone other than the child's parent or guardian, that person obtains "parental responsibility" for the child while the order is in force. Parental responsibility is defined in Section 3 as all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his or her property. There are some matters which are not dealt with under the power of parental responsibility which may make it inappropriate in some situations. For instance, the inability to appoint a testamentary guardian may be of great concern to a grandparent who is caring for a child, and does not wish the child to be under the care of the natural parent. Likewise, children who are being cared for by their grandparents may be upset that they cannot change their surname to conform to their grandparents' name in the face of an absent father's refusal to consent.

A contact order under Section 8 requires the person with whom the child lives, or is to live, to allow the child to visit or otherwise have contact with another person. Contact orders can cover a wide ambit of activity, from physical contact to telephone calls, and, like other Section 8 orders, may be made in favour of *anyone* during any family proceedings in which a question arises with respect to the welfare of any child.[220] Generally, the courts are more likely to grant orders to those who have applied for them, or who have indicated their

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[219] *Re C (wardship and adoption)* (1981) 2 FLR 177.

[220] Section 10(1) of the Children Act 1989(UK).

willingness for such an order to be made.[221] Section 10 governs the situations in which applications for Section 8 orders may be made. Any parents or guardians of the child, or any person in whose favour a residence order is in force with respect to the child, are automatically entitled to apply to the court for a Section 8 order.[222] Certain non-parents may apply for a residence or contact order as of right, for instance, if the consent of all those with parental responsibility is obtained,[223] or if the child has lived with the applicant for at least three years (within the past five).[224] A step-parent may be able to apply under a variety of provisions, though of particular relevance is Section 10(5)(a), which provides that any party to a marriage in relation to whom the child is a child of the family may apply. Anyone else may apply with the leave of the court.[225] In determining whether the creation, variation or discharge of a Section 8 order will best serve the child's welfare, the court is required to have particular regard to seven statutory criteria, among them the child's wishes and feelings, the child's needs, and the capability of the parents.[226]

Contact orders under the Children Act have enhanced the notion of access between children and "significant others" upon the incidence of, among other things, adoption. They are permanent[227] and flexible,[228] and may be applied in situations where there is a manifest need for some form of contact, but the law did not previously allow for it. This is particularly so because the court may make a contact order *as well as* an adoption order if it wishes, for instance in favour of the birth parents, or in favour of the birth father in a step-parent adoption. Also, while under Britain's previous access provisions natural relatives had

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221 Above n65, 35.

222 Section 10(4) of the Children Act 1989.

223 Section 10(5)(c) of the Children Act 1989.

224 Sections 10(5)(b) and 10(10) of the Children Act 1989 (UK).

225 Section 10(1)(a)(ii) and 10(2)(b) of the Children Act 1989 (UK).

226 Section 1(3) of the Children Act 1989 (UK).

227 Under s91(14) of the Children Act 1989 (UK), on disposing with any application for an order under the Act, the court may prohibit any named person from applying for an order under the Act without the Court's permission. This provision could be used in cases of step-parent adoption, to prevent an undesirable birth parent or one who is long out of the picture from making upsetting applications.

228 Under s8(2) a s8 order encompasses the making of the order, as well as its variation or discharge. Under s11 of the Children Act, a s8 order may (a) contain directions about how it is to be carried into effect, (b) impose conditions which must be complied with by specified persons, (c) be made to have effect for a specified period, and (d) make such incidental or consequential provisions as the court thinks fit. Section 8 orders may arise during family proceedings, or upon the application of specified persons - see s10.

no right to apply for access once an adoption order had been granted, under the Children Act a relative could apply for a contact order with the leave of the court.

The White Paper on adoption law reform presented by the Secretary of State for Health to the British Parliament in November 1993 builds upon the open framework of the Children Act. The White Paper sought to address a number of problems with the current adoption law. One of these problems was the fact that, although open adoption could now be formalised with orders under the Children Act, legislative policy under the Adoption Act did not favour this approach. A second problem lay with the fact that existing alternatives to adoption in step-parent and intra-family situations often failed to meet the needs of children. In response to these problems, and others, the White Paper proposed a new adoption regime that recognizes a degree of contact with birth families after adoption may be desirable, *but* that upholds the most important objective of adoption to be the support of the new family relationship.[229] Thus, the support given to open adoption is merely qualified. Labled as a "useful" reform, rhetoric surrounding the introduction of the White Paper lauded its "commonsense" approach as an antithesis to the political correctness that had hitherto been distorting the adoption process.[230] Alternatively, critics of the White Paper have been derisive of the conservative "Victorian" or family values that it is based upon, and of the Paper's false claim to political neutrality when in fact it is espousing Conservative rhetoric underlaid with a strong "New Right" agenda.[231] Whatever the ideology is that underlies the White Paper, it does appear to offer an effective solution to the two problems above. This solution is derived from the fact that, although the permanent legal severance that adoption entails is only justified if it is of *clear and significant advantage to the child*, the alternative legal orders have been expanded and strengthened, and do now constitute a legitimate alternative to an adoption order.

The White Paper retains the concept of adoption as a permanent solution for children whose

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[229] "Adoption: The Future" (Department of Health, London, 1993) CM 2288, p 7, para 4.14.

[230] Caroline Bridge "'Adoption: The Future' - Analysis of the British White Paper" (as yet unpublished, received from Bill Atkin April 1994) 5 and 9.

[231] Simon Jolly and R Sandland "Political Correctness and the Adoption White Paper" (1994) 24 Family L 30.

birth families cannot provide them with a suitable upbringing.[232] So long as this remains the definition of adoption, adoption *is* inherently unsuitable for situations where an adult wants his or her care and responsibility for a child to be given legal recognition and protection, yet does not need the adoption order to ensure the provision of a permanent home for the child. This may be more likely to occur in step-parent and intra-family situations than in "stranger" adoptions, simply because children who are the subject of a step-parent or intra-family adoption application are probably already living in a secure family environment, whereas children in state welfare institutions, or babies born to mothers who decide not to bring their children up, are not. However, in some step-parent and intra-family situations that will not necessarily be the case, and it may be in the child's welfare and interests that an adoption order is granted to ensure the child's familial security is not undermined.[233]

Under the current law in Britain, despite legislative and judicial discouragement, step-parent and intra-family adoptions have increased proportionately to other types of adoption. They now constitute half of the total adoptions.[234] It is possible that the reason for this increase is not because these situations all required the unique sense of permanency that accompanies adoption, but because no alternative orders adequately addressed the parties' needs. The White Paper seeks to remedy this trend by strengthening alternative orders to adoption. In particular, it creates the Parental Responsibility Agreement to deal with step-family situations, and Inter-Vivos Guardianship to deal with intra-family situations. Both of these orders are influenced by the philosophy underpinning the Children Act 1989, that is, the retention of legal recognition of the parent/child bond.

The Parental Responsibility Agreement creates a joint parental responsibility to be exercised by both parent and step-parent, without legally severing links with the other birth parent.[235] The procedure is simple, with the consent of the other natural parent not required, no court

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[232] Above n229, p 6, para 4.5.

[233] If a step-parent adoption is granted, the birth parent is no longer obliged to adopt his or her own child, see above n229, p 13, para 5.22.

[234] Above n229, 5.

[235] See above n229, p13, para 5.20, where it is pointed out that the child retains normal rights of inheritance from both birth parents, but different intestacy rights from adopted children or children born of the marriage.

hearing necessary, the child's welfare not investigated and the step-parent's suitability not assessed. The Agreement proposal has been praised because it seeks to meet step-parents' needs in a positive way, and does not replicate the nuclear family paradigm that underlies orthodox adoption law.[236] It is also credited with being revocable, which, unlike adoption, means that issues of abrogation will not arise if the step-marriage subsequently dissolves.

Abrogation of adoption orders has assumed increasing significance in recent years. This appears to be due in part to the relatively higher incidence of divorce in second marriages,[237] and to the more frequent occurrence of step-parent adoptions. A concern that arises is that a step-parent who has adopted his or her step-child may wish to abrogate the adoption when the step-marriage is dissolved. This will allow the step-parent to be rid of the obligations, in particular financial, that accompany the adoption.[238] In the United States the courts are tending to deny abrogations of adoptions.[239] The reasons for this are twofold. Firstly, the courts are influenced by the finality of adoption decrees, and their underlying notion of permanency. Secondly, abrogation of an adoption order is not in the best interests of the child, who may lose his or her only source of financial support.[240]

> [Also, i]f the judge abrogates the adoption and destroys the legal parent-child relationship, the child whose biological parents' rights have ended through death or judicial termination of rights, may be bereft of parents and left to the vagaries of the child welfare system.

Kathleen Lynch[241] recognises that many parents may be forced by economic considerations into the decision to abrogate, but suggests that a preferable and less disruptive solution is for the courts to allow parents to bring a tort action for wrongful adoption, if the situation so demands.[242] The damages awarded in a successful case to parents who have been victims

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[236] Above n230, 8.

[237] See above n83.

[238] The desire to be rid of child support commitments may also have been the natural parent's reason for consenting to the adoption in the first place.

[239] Kathleen M Lynch "Adoption: Can Adoptive Parents Change Their Minds?" (1992/1993) 26 FLQ 257, 261.

[240] Above n239, 257.

[241] See above n239.

[242] For instance, see Michele Schiffer "Fraud in the Adoption Setting" (1987) 29 Arizona LR 707.

of fraud in adoption proceedings could be used to ease the financial burden of child support payments. Lynch concludes that, in an attempt to lessen the frequency of abrogation applications, adoption statutes should include short-time periods before a step-parent can adopt a step-child,[243] and that the only basis for abrogation be fraud.

The second alternative to adoption proposed by the White Paper is a new guardianship order intended to allow relatives or others caring for a child to obtain legal recognition of their role, and, without going so far as adoption, to put their relationship onto a more permanent and clearer basis. The order, known as Inter-Vivos Guardianship, supplements a residence order. The person in whose favour it is made is described as a "foster-parent plus", while the child's legal relationship with his or her parents is not severed by the order. The order remedies previous criticism that residence orders do not allow the appointment of testamentary guardians. It also requires the leave of court for dissolution. In combination with the Parental Responsibility Agreement, it is hoped that Inter-Vivos Guardianship will "add to the range of legal instruments available to reflect and reinforce the various different long-term relationships that children may have with those who care for them in different capacities".[244]

Thus Britian appears to be well on its way to rethinking the legal concept of adoption so that it conforms with current adoption practice and philosophy. Under the Children Act provision has been made for orders that seek to meet the diverse needs of today's families. It is hoped that residence orders will address the concerns of parties to step-parent adoption without requiring the severance of the stepchild's relationship with the other natural parent. Similarly, it is hoped that residence orders will resolve the concerns of a grandparent caring for a grandchild, who does not wish the child to be placed within the care of a natural parent. The strengthening of the residence order under the White Paper's Inter-Vivos Guardianship makes it more likely that adoption will not be looked upon as the only means of addressing needs such as these. If, however, adoption *is* the only effective way of ensuring that the child's welfare and interests will be promoted, the Children Act provides for contact orders, which

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[243] For instance, under s20(2) of the Adoption Act 1988 (Tas) in order to apply for a step-parent adoption the couple must have been married for a period of three years before the adoption order is made, that period including a stable continuous *de facto* relationship immediately before their marriage.

[244] Above n229, p 13, para 5.25.

can ensure that adopted children remain in contact with significant others in their life, thus acknowledging the longterm nature of children's welfare and interests.

New Zealand has much to learn from these developments. Of particular influence is the notion of "parental responsibility" introduced by the Children Act, and expanded upon in the White Paper. Described as "a re-invigorated sense of parenthood and one that is durable despite the vicissitudes that may befall a family",[245] the idea that parents legally take on duties and responsibilities avoids proprietal notions of parenthood whereby parents acquire children at the expense of other people in the child's life.

B MAORI ADOPTION: RECOGNIZING WHANAU INTERESTS

In New Zealand, when considering the legal avenues for familial involvement in the adoption process, particular account must be taken of Maori interests and customary practice. The unique value placed upon cultural heritage, whanau participation in the upbringing of children, and the established custom of *tamariki whangai* combine to give greater emphasis to the need for legal recognition of Maori interests in adoption.

A number of proposals have been made for ensuring that Maori children who are adopted are not alienated from their cultural heritage. Mark Henaghan has suggested that adoption be divided into two separate processes, with the issue of consent considered separately from the child's placement. In particular, this would involve whanau members contributing to the placement of the child, while the mother (and in some circumstances the father) retain the exclusive right to consent to the child's adoption.[246] Another idea is for an extension of Section 11 of the Adoption Act, to allow cultural as well as religious conditions to be appended to adoption orders. Also, it has been proposed that the family group conference favoured under the Children Young Persons and Their Families Act 1989 be extended to cover all custody and access proceedings.[247] This latter suggestion prompts discussion of the two most persuasive aspects of the current debate in favour of Maori input into Maori

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[245] Above n217, 129.
[246] Above n29, 52.
[247] Above n207, 26.

adoptions - the respective influences of the philosophy underlying the Children Young Persons and Their Families Act 1989, and of the Treaty of Waitangi.

If Maori are to obtain a greater say in the adoption of their children, one of the arguments that may support their claim is the promise contained in Article Two of the Treaty of Waitangi that they can govern, among other things, their *taonga* - precious treasures. Children are often referred to as *taonga*.[248] This argument was unsuccessfully used in *R v R*,[249] where a Maori father argued that the Treaty of Waitangi gave him a superior right in a custody dispute. The argument was not accepted because the Treaty of Waitangi was not incorporated into the relevant legislation, the Guardianship Act 1968. This is also the case with the Adoption Act 1955. However, *R v R*, as well as "rais[ing] the cultural stakes too high for the court's liking",[250] was an unfortunate case to first raise these issues in a family context in other respects.[251] For instance, Graeme Austin has outlined a means by which the court could spell out of the Guardianship Act a requirement that the Treaty be considered, applying Cooke P's dictum on "ambiguous legislation" in *New Zealand Maori Council*[252] to the welfare principle.[253] He then proceeds to point out the inherent difficulty in applying mainstream Treaty jurisprudence to family law.[254]

> One problem with applying this line of thinking to child custody law... is that child custody law has already rejected much of mainstream legal thinking and reasoning. That Treaty jurisprudence mounts a challenge to mainstream legal doctrine may be largely irrelevant in an area of judicial activity that has itself said farewell to most of traditional legal reasoning's confines.

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248 Above n116, 64.

249 (1990) 6 FRNZ 232.

250 Above n32, 112.

251 See above n151, 108 - 109. Other reasons why *R v R* was an unfortunate case to first raise these issues in a family context were that the Judge had taken a negative view of the party putting forward the Treaty arguments (the father had a history of violence, had not bonded with the child, and appeared to be without a network of family support) and the arguments presented by the father on his own behalf were merely skeletal.

252 [1987] 1 NZLR 641.

253 Above n151, 111.

254 Above n151, 112.

Austin concludes his Treaty discussion with the salient point that:

> Before the significance of the Treaty of Waitangi to child custody disputes will be realised fully, the assumption that knowledge about children and their welfare exists in the abstract, untainted by the systems of thought that produced it, needs to be reassessed.

The other line of thought that could prove to be persuasive when Maori input into adoption law is being considered is the approach taken up in the Children Young Persons and Their Families Act 1989. This statute is unique amongst family law statutes in New Zealand in its recognition and promotion of whanau participation in family decision-making. The challenge it makes to the traditional adoption paradigm has been noted on several occasions,[255] and was specifically addressed in the 1990 report of the Adoption Practices Review Committee. The report asked two questions with regard to the influence of the Children Young Persons and Their Families Act.[256] Firstly, to what extent should present adoption practices be modified to take account of the 1989 Act? Secondly, should a future reform of the law bring adoption under the 1989 Act? In answering these questions, the report noted arguments for and against amalgamation.[257] For instance, it was noted that adoption is essentially a matter of the care of children, thus inferring that consistency and uniformity in child care law are desirable. In response, it was pointed out that other legislation also deals with child care, for instance the Guardianship Act. Also, it was noted that the 1989 Act reinforces the position that families should decide what is to happen to children, and supports the view that children should not normally be placed outside the family. In response, it was pointed out that a woman may have good reasons for not wanting her family's involvement and not wanting her child placed with her family, for instance, incest or violence. Two other points made against amalgamation were that the 1989 Act was still in its infancy and needed testing over time, and that the child's welfare is not paramount under the 1989 Act as it is under the

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[255] See above n4, 200 and subsequent critique by G W Stewart "Review of *A Question of Adoption: Closed Stranger Adoption in New Zealand 1944 - 1974*" (1992) 3 Family L Bulletin 54, 55; see also above n63, 99.

[256] Above n29, 44.

[257] Above n29, 47.

Adoption Act.[258] In *In the Adoption of J*[259] Judge Inglis disputed that the child's welfare was not the paramount consideration in the 1989 Act, preferring instead his own interpretation of the Act which sees the paramountcy principle as inherent within the Act's provisions. However, Judge Inglis did concede that the considerable stress put on family input when resolving problems relating to a child under the 1989 Act gives rise to a clear danger that the child's interests may be downplayed by an overriding emphasis on family unity.

In conclusion, the report took a stance against amalgamation. It recommended that birth parents should always be encouraged to involve family in decisions about adoption, but that whether to involve family should be up to the birth parents, and the family's opinion should still be subject to the birth mother's need to consent.[260] Despite this apparent reluctance to concede that adoption should be brought within the philosophy of the Children Young Persons and Their Families Act, it is still plausible that the 1989 Act will act as a constraint in certain adoption cases. For instance, given the 1989 Act's emphasis on the importance of family origins and the extended family, Family Court judges may be more hesitant in granting step-parent adoptions.[261]

When discussing Maori participation in future adoption law reform, it is apt to note the development of adoption law in the United States with regard to the native American Indians, who have encountered many of the same difficulties as the Maori. Since 1978 adoption of Indian children in the United States has been governed by the Indian Child Welfare Act.[262] The Act was motivated by the results of an investigation into how Indian children were faring under custody proceedings.[263] It was discovered that social agencies and state courts were insensitive to traditional Indian values and patterns of childrearing. Like the Maori, Indians

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[258] Note that under the Children, Young Persons, and Their Families Amendment Bill 1993 it is proposed that s6 of the current Act be repealed, and in its place the welfare and interests of the child or young person shall be the first and paramount consideration.

[259] Above n162.

[260] Above n29, 48.

[261] Above n32, 148.

[262] 25 USCA 1901 - 63 (1982).

[263] Joan Heifetz Hollinger "Beyond the Best Interests of the Tribe: the Indian Child Welfare Act and the Adoption of Indian Children" (1988/1989) 66 Uni of Detroit LR 451, 454.

preferred communal responsibility of children,[264] yet social agencies and courts were insensitive to traditional Indian values and childrearing patterns, and were imposing upon them white, middle-class norms. These concerns are very similar to those expressed with regard to the adoption of Maori children under the New Zealand Adoption Act 1955. The Indian Child Welfare Act was designed to address these problems, recognizing that "the child's right to its identity and the tribal community's need to perpetuate its culture depend upon prevention of the child's removal from the tribal community".[265]

The American Act utilizes a number of means for ensuring that American Indian children are not removed from their communities.[266] It narrows the grounds for removing children from their parents, and increases the burden of proof that must be sustained by a party seeking to terminate parental rights. Tribal courts applying customary laws are used, or, if the proceedings take place in a state court, the child's tribe may have a right to intervene and to object to the prospective adopters. Preference is also mandated in favour of placements with the child's extended family, tribe, or other Indian families. The Act is guided by the dual goals of tribal survival and the welfare of the Indian child. However, although these goals were initially proclaimed to be harmonious, they are not proving to be so in practice. The massive removal of Indian children from traditional communities is continuing unabated,[267] due to widescale judicial resistance and the use of statutory exceptions under the Act. Despite the Act's laudable intentions, it is not succeeding in redressing the racial inequities of mainstream American adoption practice. Likewise it remains to be seen whether, if legislation was ever passed in New Zealand that accorded with Maori notions of childcare and adoption, it would actually achieve its desired outcome.

VII Conclusion

New Zealand's adoption law is not capable of effectively meeting the diverse and conflicting

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[264] Donna J Goldsmith "Individual versus Collective Rights: the Indian Child Welfare Act" (1990) 13 Harvard Women's LJ 1, 1.

[265] Above n264, 2.

[266] See above n263.

[267] Above n264, 4.

needs of people involved in step-parent and intra-family adoption, be they the child, the birth parents, adoptive parents, step-parent, family members or significant others concerned for the child. A number of options are available if something is to be done to address this current inadequacy.

Firstly, step-parent and intra-family adoption could be prohibited under the Adoption Act 1955, in recognition of how confusing the distortion of family relationships can be for the child, or of how destructive to a child's self-identity it can be for all legal recourse to be lost to the child's alienated natural parent, extended family and cultural heritage. This dramatic option is likely to persuade only those who would happily abolish adoption as a whole,[268] given that it disregards those situations where a step-parent or intra-family adoption will genuinely further the welfare and interests of the child. This may be the case if, for instance, the step-child has only ever known its step-father as a father figure, and has had little or no contact with its paternal extended family.[269] It may also be the case if, as in *Re Adoption of Q*[270] a grandmother who has cared for her grandchild since birth does not wish the natural mother to care for the child for fear of the harm that the natural mother's new husband may inflict on the child.

If there is going to be talk of abolishing step-parent and intra-family adoption, it is likely to be conditional upon exceptions in certain circumstances. Those circumstances are likely to be similar to those outlined above, where there is a manifest need for the security and permanence of an adoption order. Rather than expressing this option in the negative - *abolishing* step-parent and intra-family adoption - it would be more constructive to look upon it as the *retention* of these forms of adoption, subject to the consideration of alternatives. This is in effect the current law in Tasmania and Victoria. It was also the law in the United Kingdom, with regard to step-parent adoption only, prior to the enactment of the Children Act 1989, whereupon it was repealed as a consequence of its failure to decrease the proportion of step-parent adoptions. This option does attempt to grapple with the inherent dilemma in step-parent and intra-family adoption, that although adoption may be deemed as unsuitable

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[268] For instance, see above n56.

[269] See above n185.

[270] See above n133.

in the circumstances, some form of legal order may nonetheless be required to address the applicants' concerns. However, a regime such as this that is essentially opposed to step-parent and intra-family adoption is too inflexible and polarized to successfully meet, or even attempt to meet, the parties' varied and contrasting needs and desires.

The most plausible means for achieving this objective is by retaining step-parent and intra-family adoption under the Adoption Act, but allowing for a nuanced and flexible legal regime of alternative or supplementary orders, as has been implemented under the Children Act 1989 and as is proposed under the White Paper in the United Kingdom. Legal orders which, in appropriate circumstances, allow adults contact with children, or which confer parental status upon adults, or which determine with whom the child shall reside on a day-to-day basis are advantageous in several respects. They allow the child to retain and foster relationships with various adults. This avoids the notion of parenthood as involving exclusive rights and possessions, and allows the focus to change to the responsibilities invoked by parenthood.[271] It also involves rethinking familiar concepts of family.[272] The 1990 report of the Adoption Practices Review Committee expressed particular interest in the new British notion of parenthood, under which duties and responsibilities are assumed, as compared to the idea that parents acquire children at the expense of other people in the child's life.[273]

New Zealand is most likely to resolve the current inadequacy of its law regarding step-parent and intra-family adoption if it implements an adoption regime that conforms in general to the current and proposed United Kingdom amendments. Not only would such a development pay tribute to the array of concerns that these situations involve, but it would also address the broader issue of "open" adoption, given that an adoption order supplemented with a contact order under the Children Act creates a legally mandated form of open adoption.[274] By

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[271] See above n151, 21, and Katherine T Bartlett "Re-Expressing Parenthood" (1988) 98 Yale LJ 293. See also Karen Czapanskiy "Volunteers and Draftees: the Struggle for Parental Equality" (1991) 38 UCLA LR 1415, 1466, wherein the author expresses the concern that a focus on responsibility may ignore the adults' inter-relationship which inevitably impacts upon the welfare of the child.

[272] See Naomi R Cahn "Family Issue(s)" (1994) 61 Uni of Chicago LR 325.

[273] Above n29, 74.

[274] The provision of "open" adoption in appropriate circumstances, be they step-parent, intra-family or other adoptions, is preferable to the enactment of a mandatory open adoption scheme, which by definition denies those situations where open familial relationships may be entirely inappropriate; see above n13.

incorporating a range of innovative and comprehensive legal orders, New Zealand's adoption law will be better able to give cases the individualized and sensitive treatment they so often demand.

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