

PE1701/D

Kenneth McK. Norrie, Professor of Law at the University of Strathclyde submission of 2 October 2018

Adoption of Adults: Conceptually Competent but Practically Pointless

This short paper is a response to Public Petition PE01701, by Nathan Starling seeking a change of the law to allow the adoption of persons over the age of 18 years. It aims primarily to put the debate into an historical perspective, as well as to draw attention to various issues that would have to be addressed if the political decision were made to extend our adoption law in this way.

Scots Law Originally Allowed Adoption of Adults

It is an almost forgotten fact that, when adoption was introduced into Scots law by the Adoption of Children (Scotland) Act, 1930, the legislation allowed, in very limited circumstances, the adoption of adults. Section 10 of the 1930 Act dealt with what was then (and for some time thereafter) called “de facto adoptions”, that is to say informal arrangements by which one family would take in a child from another family in order to bring up the child as their own. Often this was a result of family bereavement (including parental death in the First World War) or desperate poverty; often it involved children subject to private fostering arrangements (regulated by the Children Act 1908); and sometimes it was the result of deliberate familial confusion (to hide the “shame” of unwed motherhood). Whatever the reason, there were substantial numbers of children in the 1920s and earlier who were brought up by persons other than their natural parents, who acted in all important respects as if they were.

After 1930, it would be possible for people bringing up children in these circumstances to seek an adoption order by the new process introduced in that year. But it was considered by Parliament that the court should have the power to deal with pre-existing arrangements by a simplified process: in effect the aim was to give retrospective legal effect to de facto adoptions *that were already in existence* on the day formal legal adoption was made available by statute. This effect could be given to these informal relationships even after the child had reached adulthood. This was achieved by an application under s. 10 of the 1930 Act, which allowed the court to

make an order authorising the adoption of any person who had been at the date of commencement of the Act (1st October 1930) in the custody of and being brought up, maintained and educated by any person or two spouses as his, her or their own child, so long as, on that date, the child was under the age of 21: the age of the adopted person at the time the order was sought was irrelevant. In moving the Second Reading of the (English) Adoption of Children Bill 1926, which contained an identical provision, Mr Galbraith MP described the effect and justification for what became section 10 (of both Acts) as follows:

Clause 10 enables the Court to authorise and to sanction *de facto* adoptions, and in effect it comes to this, that in any case where a child has in fact been adopted and kept and maintained by any person for two years, the Court can authorise and ratify that adoption without obtaining the consent of the person who has given up the child in a case where the Court is satisfied that it is unnecessary or desirable that the consent of that person should be obtained. I believe, so far as my experience is concerned, this is a most desirable provision. I have received, since I put down the Bill, a considerable number of letters from persons who have in years past adopted children, who speak of the way in which they have come to feel great affection for the children, and the children have begun to feel great affection for them, and they have pointed out the haunting fear they have had lest the natural parents, who have taken no interest in the children, may interfere and attempt to take the children away, and I believe the Clause which enables *de facto* adoption to be sanctioned is a good and desirable provision.¹

There was a surprising number of cases under s. 10 of the Scottish Act – and, curiously enough, none at all (at least, none reported) under the English Act. In *G, Petitioner*² a petition was presented to the Court of Session under s. 10 of the Scottish Act craving authority “to adopt a child who had been in the custody of, and *de facto* adopted, brought up, maintained and educated by, the petitioner, since a date more than two years prior to the commencement of the Act, and was at the date of the petition still residing with, and being maintained by, the petitioner.” The “child”

¹ HC Deb. 26th February 1926, vol. 192 col. 925 ² 1939 SC 782.

in this case was over 21 at the date of the application and the court granted the adoption order sought, without issuing any judgment. The same result was reached in *K, Petitioner*³ where the person being adopted was 37 years old. The primary motivation of the petitions in most of these cases was the legitimization of the adopted person (an important social – and indeed, at the time, legal – status), which was the sole remaining effect of an adoption order once the upbringing powers were no longer needed. But in *K, Petitioner*, the benefit was more substantial as the adoption order gave access to the benefits in a superannuation scheme which included adult children. One unsuccessful case was *RB, Petitioners*⁴ where the petition was refused because the child had not resided with the petitioners for the two years before the commencement of the 1930 Act, she coming into their care on 11th November 1928 and the Act commencing on 1st October 1930. She was six weeks short of the requisite period.

The procedure under s. 10 constituted a quite separate code from that contained in the rest of the Act, and many of the conditions applicable to adoption orders under s. 1 – such as the condition that the adopted person be under 21 – were held inapplicable to orders under s. 10. That the adoptee be unmarried was not a requirement under s. 10 (though it was under s. 1) and so in *L, Petitioner*⁵ a 31 year old married man with four children of his own was able to be adopted under the terms of s. 10 by his mother (who had given birth to him while unmarried). Also, the requirement that the parties be resident in Scotland at the date of the order was held not to apply to s. 10 adoptions.⁶ And the court could make an order under this provision if the applicant were male and the child female (otherwise forbidden in the 1930 Act), and indeed even without the consent of the parent or guardian (if it was considered by the court to be just and equitable and for the welfare of the “child” not to require that consent).

Section 10 was eventually abolished by the Adoption of Children Act 1958 and with it the power of the Scottish court to make an adoption order over an adult.

³ 1949 SC 140.

⁴ 1950 SLT (Sh Ct) 73.

⁵ *L, Petitioner* 1951 SLT 270 (IH), overruling *F, Petitioner* 1951 SLT (Sh Ct) 17. ⁶ *H, Petitioners* 1952 SLT (Sh Ct) 15.

Adoption of Adults Today

The Legal Effects of Adoption

It is important to remember that when adoption was introduced in 1930, its legal effects were very much more limited than they are today and the order amounted to little more than a means of securing the custody of the child from challenge. When adults were adopted, that consequence was of course no longer relevant, and adoption was first and foremost a mechanism for legitimising the so-called “illegitimate” person.

The other consequences that characterise adoption today came later: claims for damages for wrongful death came in the 1940s, consequences in terms of forbidden degrees came in the 1950s, and consequences in the law of succession came in the 1960s. Since 1975, indeed, Scots law has adopted the “legal transplant” model, whereby for virtually all legal purposes the effect of adoption is to replace one set of parents with another set of parents. Adoption creates a new parent-child relationship, but at the same time it also destroys the existing parent-child relationship. Legitimation is no longer a relevant issue and the effects of adoption include not only a transference of the parental responsibilities and parental rights to bring up the adopted child but also lifelong consequences for the parent-child relationship, the most obvious being in relation to succession on death of either adopter or adoptee.

It follows that if adoption of adults were reintroduced into Scots law its legal consequences would be very different from what they were under the 1930 Act and would include the life-long consequences such as succession, forbidden degrees of relationship (for incest and marriage/civil partnership), and damages for wrongful death. (This last would not confer new benefits on persons brought up by someone other than their parents since they can presently claim in any case on the ground that they were treated as a child of the family). It would *not* include legitimation since the concept has disappeared, nor upbringing powers since these stop when the child becomes an adult.

The Test for Making an Adoption Order

The adoption order today would therefore have quite significant legal effects, not only for the adopted person but also for BOTH the adopter (and their family) AND the adopted person's existing family – effects that were *not* had under the 1930 Act process of adopting adults. This raises the issue of the test the court would have to apply before granting an order that affected the interests of a variety of persons. The court cannot simply grant an order just because one or more persons asks for it: it must apply a test that addresses the legal effects this has on other people.

With adoption of children, the test is clear and has remained (virtually) the same since 1930: the order is justified by the welfare of the child. In today's world there are two main circumstances in which the Scottish court is asked to apply this test: (i) at the culmination of a child protection process when it is established that it will never be safe to return the child to his or her birth family, and (ii) on family reconstitution when a step parent (otherwise a social and not a legal relationship in Scots law) acts in fact as a parent seeks to replace the (non-resident) parent for the purposes of exercising parental responsibilities and parental rights. In both cases it is considered that full integration into the child's new family can be achieved only by giving the order life-long consequences, and only by removing parenthood from the birth parents. But the important point is that the order will negatively affect the existing legal interests of the birth parents: however, this is justified by the need to ensure the welfare of the child (and the assessment that nothing short of adoption will do).

With adoption of adults questions of upbringing do not arise, and the issue of succession rights – which are completely overshadowed by the child's welfare with adoption of children – takes centre stage. What test would be appropriate, what justification is there, for the court to make an order whose primary *legal* effect would be to alter lines of succession? These effects are significant and potentially wideranging. Adoption not only excludes succession claims by and from birth parents but also by and from other birth relatives (siblings, grandparents and the like). It confers succession rights on the adoptive parents, but at the same time it reduces the succession rights of the adoptive family members in the adoptive parents' estates (because their claims will be diluted by allowing the adopted person to share the

claim). The justification for making an adoption order over a child (the welfare test) addresses the interests of those who lose out – by requiring the court to hold that “nothing else than adoption will do” to further the child’s welfare than the removal of their rights. Likewise, the test for making an adoption order over an adult must reflect the legal consequence for other people if it is to satisfy a challenge under the ECHR (for example under A1P1 protection of rights of property). It is difficult to envisage what an appropriate test for the granting of an order with these potential effects would be.

The Issue of Consent

It might be argued that no test at all is necessary so long as everyone whose interests are potentially affected consent to the order. With adoption of children, the primary legal effect being to transfer parental responsibilities and rights, the birth parents – who otherwise hold these rights – must consent to that transfer (or have their consent dispensed with, often on welfare-related grounds). With adoption of adults, consent would need to be sought from every blood relation who may conceivably succeed on the adopted person’s death, or whose rights are diluted by the adopted person’s claim on the death of an adoptive parent. A new law could of course allow for the dispensation of consent – but it would need to develop a test that was proportionate to what the effect of the law was.

Conclusion

Succession can with far greater ease – and with far less expense in terms of parliamentary and court time – be dealt with by the person who actually brought up the individual now seeking to be adopted making a will in that individual’s favour.

But I suspect that the petitioner is not seeking a change in the law to deal with possible succession consequences. I suspect his motivation is found in a much more emotional desire to be socially recognised as having a particular relationship with another person. However valid that feeling is, the law has no role in protecting it. I consider it highly unlikely that the European Court of Human Rights would find a breach of article 8, with or without article 14, in Scots law’s failure to make provision for adoption of adults, for two reasons. First, the European Convention deals with real and substantive legal effects and not social emotions. Secondly, Scots law does

not inhibit the development of a personal relationship – what it withholds (automatic succession rights) it allows individuals to achieve by their own actions (ie making a will). The ECHR does not require states to do what they allow individuals to do.

Given that, the Scottish Parliament should make its decision on whether to reintroduce adoption of adults not on the basis that it has to in order to achieve ECHR consistency, but because it considers it the right policy decision. That depends on a balance of what the new law would achieve, with the difficulty of achieving it. In my view the complexities, and costs, far outweigh any potential benefit.