



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 24

**Succession Rights of
Adopted Children**

REPORT

JULY 1971

**REPORT
ON
SUCCESSION RIGHTS OF ADOPTED CHILDREN**

To: The HON. R. E. BERTRAM, M.L.A.,
ATTORNEY GENERAL

TERMS OF REFERENCE

1. "To consider any alterations desirable in the law relating to the succession rights of adopted children".

WORKING PAPER

2. The Committee issued a working paper on 28th April last. A copy is attached. The Committee's provisional views were that the present law, which gives the adopted child the right to succeed on the intestacy of his adopting parents but not on the intestacy of the kindred of those parents, and which on the other hand preserves the adopted child's rights to succeed on the intestacy of his natural parents and their kindred, runs counter to the desirability of ensuring that the adopted child becomes a member of his adopted family in the fullest sense.

3. Comments on the working paper were received from -

The Hon. Mr. Justice Burt,
The Council of the Law Society of W.A.,
The Acting Director of the Child Welfare Department,
The Perpetual Executors, Trustees & Agency Company (W.A.) Ltd.

4. All commentators agreed that the present legal position is unsatisfactory.
5. The Child Welfare Department and the Perpetual Executors Trustees and Agency Company are firmly of the opinion that the legal position of the adopted child should be completely assimilated with that of a child born in lawful wedlock of the adopting parents.

The Child Welfare Department indicated that legislation along these lines is already being contemplated by the Minister for Community Welfare.

6. The Council of the Law Society, while agreeing with this general proposition, submits that the law should make provision to preserve the right of those children who are adopted by the surviving natural parent and his or her new spouse to succeed on the intestacy of the natural kindred of the deceased spouse (see paragraphs 7 and 12 of the working paper).

On the other hand, the Child Welfare Department and the Perpetual Executors state expressly that there should be no such special provision.

7. Mr. Justice Burt is of the view that while the adoption order is in force the adopted child should not be able to succeed on the intestacy of his natural parent and pointed to the sheer impracticality of preserving this relationship: in most cases the child would not know of his rights and the administrator of the estate probably would not know of the adopted child's existence. He also drew attention to the vagaries of the present law as to the legal consequences of discharging an adoption order and the difficulties surrounding an application for a second adoption order in respect of the child (see paragraphs 10 and 11 below).

COMMITTEE'S VIEWS

8. The Committee confirms the tentative views expressed in the working paper that the *Adoption Act* should be amended to provide for the complete assimilation of the legal position of the adopted child to that of a child born in lawful wedlock of the adopting parent.

9. The Committee agrees with the Child Welfare Department, and the Perpetual Executors that no special rule is justified in relation to a child adopted by the surviving parent and new spouse (see paragraph 6 above). The question whether the adoption is in the best financial interests of the child should be taken into account by the judge at the time that the adoption application is heard, and the Committee recommends that the Child Welfare Department be required to include in its report to the court whatever information is available on this point.

10. The problems referred to by Mr. Justice Burt appear to have been solved in the legislation in force elsewhere in Australia. (The broad tenor of this legislation is set out in

paragraphs 5 to 8 of the working paper). Section 23(4) and (5) of the *Adoption of Children Ordinance 1965* (A.C.T.), provides that on discharge the rights, duties, liabilities and relationships shall be the same as if the adoption order had not been made (but without prejudice to anything done or any proprietary right or interest vested while the adoption order was in force). The court is also given power to make consequential orders necessary in the interests of the child.

11. The problems relating to successive adoption orders appear also to have been overcome. Section 16(3) of the *Adoption of Children Ordinance* (A.C.T.) provides that an adoption order can be made notwithstanding that the child has been previously adopted. In the case of a child previously adopted the persons whose consents are required are the adoptive parents or the guardian (section 24(4)), and on the making of an adoption order the child ceases to be the child of his former adoptive parent and the previous adoption ceases to have effect (section 33(1)).

12. The questions under the present law as to whether the first adoption order can survive the making of the second order thus giving the child two sets of adoptive kindred, or whether the first order must be discharged before the second order is made and thus creating doubt as to whose consent is required for the making of the second order, are avoided.

13. Paragraph 8 of the working paper makes reference to other features of the legislation enacted elsewhere in Australia as a corollary of assimilating the legal position of the child to that of one born in lawful wedlock of the adopters. The Committee considers that these provisions should also be enacted in Western Australia.

14. Section 102 of the *Property Law Act 1969* makes presumptions about the age at which a woman ceases to be capable of bearing a child, and is principally designed to prevent certain gifts (for example gifts to her grandchildren) being declared void under the rule against perpetuities. If the Committee's recommendations in this report are accepted, it would be desirable to extend s.102 of the *Property Law Act* to cover adopted children (see paragraph 14 of the working paper).

15. **In summary**, the Committee recommends -

- (a) that ss. 7 and 8 of the *Adoption of Children Act 1896-1964* be repealed and in their place be enacted provisions corresponding to s. 33 (1), s. 34 and s .37 of the *Adoption of Children Ordinance 1965* (A.C.T.) relating to the effect of an adoption order;
- (b) that s.9 of the *Adoption of Children Act* be amended along the lines of s. 23(4) and (5) of the *Adoption of Children Ordinance 1965* (A.C.T.) relating to the effect of discharge of an adoption order;
- (c) that s. 5 (1) (8b) of the *Adoption of Children Act* be amended so as to require the Child Welfare Department's report to include reference to the child's financial prospects;
- (d) that s. 102 of the *Property Law Act 1969* be amended to include adopted children.

C. le B. Langoulant

CHAIRMAN

E. J. Edwards

MEMBER

B. W. Rowland

MEMBER

13th July 1971.