

For information
on 4 March 2004

Bills Committee on Adoption (Amendment) Bill 2003

Adoption Orders made outside Hong Kong - Question of Recognition in Hong Kong

Purpose

This paper informs Members of the circumstances under which adoptions made outside Hong Kong are recognized in Hong Kong, and the impact of the Adoption (Amendment) Bill 2003 (the Amendment Bill) on such arrangements.

Background

2. At the meeting on 7 January 2004, Members requested information on, amongst others, the question of recognition in Hong Kong of adoption orders made outside Hong Kong, including if the law of that place does not require prior consent of both birth parents for adoption of the child, whether such adoptions made outside Hong Kong would still be recognized in Hong Kong.

Present Position

3. Consent of parents or guardians etc. for adoption of the child is a basic requirement in the legislations of the UK (including Scotland), Australia, New Zealand and Singapore. We are checking with the Commonwealth Legal Advisory Service on the practice of other Commonwealth countries, and still waiting for their replies.

4. Section 17 of the Adoption Ordinance (Cap. 290) provides –

- (1) where a person has been adopted in any place outside Hong Kong according to the law of that place and the adoption is one to which section 17 applies (see sub-paragraph (2) below), then

the adoption shall have the same effect as an adoption order validly made in accordance with the Adoption Ordinance;

(2) section 17 only applies to an adoption order made outside Hong Kong that satisfies the following conditions -

(a) the adoption is legally valid according to the law of that place; and

(b) according to the law of that place, the adoption had, immediately following the adoption, the effect of giving the adoptive parent(s) a right superior to that of the birth parent(s) in respect of the custody of the adopted person; and

(c) either -

(i) the adoption order was made by an order of any Court whatsoever of a Commonwealth country or of the United States of America or of any State or territory of the United States of America; or

(ii) according to the law of that place, the adoptive parent(s) had, in consequence of the adoption, immediately following the adoption, a right superior to or equal with that of any birth parent(s) in respect of any property of the adopted person which was capable of passing to the parent(s) of the person, if the person -

- dies intestate without other next of kin;

- is domiciled in the place where the adoption was made; and

- is a national of the State which had jurisdiction of that place.

5. Therefore, **provided that *all the criteria set out in paragraph 4(2)(a), (b) and (c) are satisfied, an adoption order made outside Hong Kong would be recognized under section 17.*** Whether or not an adoption order made outside Hong Kong falls within section 17 is a

matter requiring expert evidence/opinion of lawyer(s) qualified in the law of the place where the adoption is made.

6. ***If the criteria set out in paragraph 4(2)(a), (b) and (c) are not satisfied, whether an adoption order made outside Hong Kong would be recognized would be determined under the common law.*** Please note that section 17(3) of the Adoption Ordinance provides that nothing in section 17 shall restrict or alter the effect of any other adoption made in any place outside Hong Kong.

7. If the law of that place does not require prior consent of both birth parents¹ for adoption of the child (in case there is any), on a literal interpretation of section 17, the adoption would still come within the ambit of section 17 if it meets the requirements of section 17(2).

Impact of the Proposed Legislative Amendments

8. One of the objectives of the Hague Convention is to secure the recognition in Contracting States of adoptions made in accordance with its provisions. The details are set out in Articles 23 to 27 of the Hague Convention, and clause 24 (sections 20F to 20I) of the Amendment Bill.

9. Generally speaking, intercountry adoptions made pursuant to the Hague Convention in a Contracting State or in any other part of the People's Republic of China (PRC) where the Convention is in force, will have the same effect as an adoption order validly made in accordance with the Adoption Ordinance in respect of a "full adoption"².

10. As regards non-Convention adoptions, they will continue to be subject to the criteria set out in section 17 of the Adoption Ordinance.

11. Legal advice is that currently, an adoption made in the Mainland has the same effect as a valid adoption order under the Adoption

¹ as opposed to the Court exercising its power to dispense with the consent of the parents in certain circumstances

² According to clause 24 (section 20G) of the Amendment Bill, 'full adoption' means an adoption by virtue of which the adopted person falls to be treated in law as if he were not the child of any person other than the adopter. This means that all the legal ties between the child and his/her birth parents will be severed.

Ordinance, if it satisfies the criteria laid down in section 17 of the Adoption Ordinance. While the Hague Convention does not apply to intra-country adoptions (i.e. adoptions between different parts of the same country), Convention adoptions between any part of the PRC to which the Hague Convention applies and another Contracting State are Convention adoptions which must be recognized in all Contracting States, including the PRC. Therefore, Convention adoptions made in any other part of the PRC to which the Hague Convention applies (being PRC children adopted by adoptive parents in other Contracting States or PRC adoptive parents adopting children in other Contracting States) should be recognized in Hong Kong. Recognition of non-Convention adoptions made in any other part of the PRC will continue to be subject to section 17 of the Adoption Ordinance.

Effect of Recognition

12. Under sections 13 and 15 of the Adoption Ordinance, after an adoption order is made, an adopted child is treated as if he was a child of the adopter born in lawful wedlock, for the purpose of his custody, maintenance and education, and for other purposes such as giving consent/dissent to marriage and succession on intestacy.

13. The definition of 'child' in various Ordinances include a child adopted in pursuance of an adoption recognized as valid by the law of Hong Kong under section 17 of the Adoption Ordinance. It is in that context that provisions of section 17 of the Adoption Ordinance need to be examined. Examples of such Ordinances are Non-Contentious Probate Rules (Cap. 10A), Fatal Accidents Ordinance (Cap. 23), Intestates' Estates Ordinance (Cap. 73), Surviving Spouses' and Children's Pensions Ordinance (Cap. 79), Inland Revenue Ordinance (Cap. 112), Widows and Orphans Pension Ordinance (Cap. 94), Employee's Compensation Ordinance (Cap. 282), Employees' Compensation Assistance Ordinance (Cap. 365), and Parent and Child Ordinance (Cap. 429).

Presentation

14. Members may wish to take note of the information above to facilitate their consideration of the Adoption (Amendment) Bill 2003.

Health, Welfare and Food Bureau
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