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Scottish Law Commission

(SCOT. LAW COM. No. 50)

ADOPTION (SCOTLAND) BILL

REPORT ON THE CONSOLIDATION OF CERTAIN ENACTMENTS RELATING TO ADOPTION IN SCOTLAND

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by Command of Her Majesty
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REPORT ON THE CONSOLIDATION OF CERTAIN ENACTMENTS RELATING TO ADOPTION IN SCOTLAND

To: The Right Honourable Ronald King Murray, Q.C., M.P.,
Her Majesty's Advocate.

The Adoption (Scotland) Bill which is the subject of this Report consolidates various enactments relating to adoption in Scotland. In order to facilitate a satisfactory consolidation we are making the recommendations set out in the Appendix to this Report.

Neither of the recommendations could, in our view, have been made under the Consolidation of Enactments (Procedure) Act 1949.

The Scottish Education Department, who are affected by the first recommendation, and the Registrar General for Births, Deaths and Marriages in Scotland, who is affected by the second, have been consulted and they agree with the recommendations.

J. O. M. HUNTER
Chairman

19th April, 1978.

APPENDIX

RECOMMENDATIONS

1. Section 8(3) and (4) of the Childrens Act 1975 provides that the making of an adoption order operates to extinguish parental rights and duties relating to the child in certain circumstances. The provisions read as follows:—

- “8. (3) The making of the order operates to extinguish—
- (a) any parental right or duty relating to the child which—
 - (i) is vested in a person (not being one of the adopters) who was the parent or guardian of the child immediately before the making of the order, or
 - (ii) is vested in any other person by virtue of the order of any court; and
 - (b) any duty arising by virtue of an agreement or the order of a court to make payments, so far as the payments are in respect of the child's maintenance for any period after the making of the order or any other matter comprised in the parental duties and relating to such a period.
- (4) Subsection (3)(b) does not apply to a duty arising by virtue of an agreement—
- (a) which constitutes a trust, or
 - (b) which expressly provides that the duty is not to be extinguished by the making of an adoption order.”

These provisions are not apt for Scotland in several respects. First, it seems desirable, and may have been intended, that, under section 8(3)(a), an adoption order should operate to extinguish the functions of any tutor or curator holding office in relation to the child immediately before the making of the order. It is not clear whether this result has been achieved, for example, in relation to testamentary curators or curators appointed by the court under section 12 of the Administration of Justice (Scotland) Act 1933 and perhaps also in relation to certain classes of tutor. Second, section 8(3)(b) refers to a duty arising by virtue of an agreement but the duty in question may arise in Scots law from a unilateral promise. Third, it seems desirable, and may have been intended, that an adoption order should operate to extinguish any alimentary right or duty which existed immediately before the order as between a child and a member of his family. Such rights and duties are not all extinguished in terms of section 8(3)(a) since they may arise as between the child and a member of his family other than a parent (e.g. a grandparent) and are not therefore necessarily comprised in “the parental rights and duties” referred to in section 8(3)(a). Nor are they all extinguished in terms of section 8(3)(b) since the duty of aliment may arise by operation of law rather than “by virtue of an agreement or the order of a court” and, since the duty in question may be a duty to provide aliment in kind (e.g. board and lodging) rather than “to make payments” and may, in principle, be owed by, as well as to the child.

Section 8(4) does not reflect the fact that a trust may be constituted in Scotland otherwise than by agreement. It seems to us desirable that it should do so. We also consider that it should be spelled out that the provision in section 8(3) whereby the making of an adoption order operates to extinguish certain rights and duties will not of itself terminate the appointment or functions of any judicial factor *loco tutoris* or *curator bonis* appointed to administer the whole or any part of the child's estate.

We recommend therefore that express provision on the above lines should be made regulating the effect of an adoption order on the functions of any tutor or curator of the child and ensuring that an adoption order will normally extinguish all alimentary rights and duties which may exist as between the child and his family or other persons but will not of itself terminate the appointment or functions of any judicial factor *loco tutoris* or *curator bonis* appointed to administer the whole or any part of the child's estate.

Effect is given to this recommendation in clause 12(3) and (4) of the Bill.

2. Section 22(3) of the Adoption Act 1958 as originally enacted entitled "every person" to search the index of the Adopted Children Register and to have an extract of any entry in the register on the same terms, conditions and regulations as to payment of fees and otherwise as were applicable under the Registration of Births, Deaths and Marriages (Scotland) Act 1854 to 1938 in respect of searches in other indexes kept in the General Register Office and in respect of the supply from that office of extracts of entries in the registers of births, deaths and marriages. By paragraph 7 of Schedule 1 to the Registration of Births, Deaths and Marriages (Scotland) Acts 1965 the reference in section 22(3) to the 1854 to 1938 Acts was replaced by a reference to the said Act of 1965, but the substantive provision was left unchanged. We agree with the Registrar General for Scotland that that provision is not in line with modern provisions in relation to registration, an example of which is to be found in section 38(2) of the 1965 Act. Under that provision the Registrar General is obliged, on payment to him of the prescribed fee—

- (a) to cause a search to be made of the indexes of the registers of births, deaths and marriages on behalf of any person or permit that person to search the index himself, and
- (b) to issue to any person an extract of any entry in the said registers which that person may require.

We recommend that a parallel to the 1965 Act provisions relating to the searching of the public registers and the issue of extracts should apply to the searching of the indexes and the issue of extracts of entries in the Adopted Children Register.

Effect is given to this recommendation in clause 45(3) of the Bill.

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