A Submission On Father's Rights

Submission to the NSW Legislative Council's Inquiry into Adoption Practices. Subject: Father's Rights.

Submission by:
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Preamble.

On page 87 of transcripts of Adoption Inquiry Witnesses 1998, Dr Arthur Chesterfield-Evans asked the following question of witness "M"

"Did birth fathers have any rights in terms of the decisions made with regard to adoption, were they taken into account, and how were they informed and involved?

Witness "M" answered:

"Birth fathers had no legal rights until the 1980 amendments to the Adoption of Children Act, which gave fathers who had been identified on the birth certificate, or who had by some other means been identified as the father of the child, the right to be informed of the signing of the consent and to put forward within 14 days an alternative plan for the child... After 1980 the birth fathers had those limited rights. They still do not have the right to consent. There is not the requirement that the birth father consent to the adoption."

This submission will examine witness M's answer with reference to specific laws. It is interesting to note that witness M's answer was reminiscent of the answers given to the writer by Ms T (verbally) and Ms B (in writing) in 1998, both of whom are, or have been, adoption consent takers at the Catholic Adoption Agency (now known as Centrecare Adoption Agency).

Father's rights circa 1958:

Prior to 1967, adoption of children was governed by the *Child Welfare Act 1939 (as amended).* The social working industry derived from this act, their *Child Welfare in New South Wales Training Manual 1958,* which laid down recommended work practices for social workers in this state.

In this manual on page 31 it states:

"In this state the mere signing of a consent does not remove the parental rights, which remain until the order is made, but in signing an open consent the parent places the responsibility of selection of adopting parents on the department's shoulders."

Note firstly, that no distinction is made between male or female parent.
Note secondly, that according to this recommended interpretation of the law, both natural parents retained certain rights. The right of access to their child for example. The right to

argue in court for full custody, for example.

Note the only right given up by the signing of a consent, was the right to choose the adopting parents. There was no legal requirement, for example, for the child to be removed to a foster situation. The rights of a natural parent of either gender, to care for his/her child were not removed simply by the signing of a consent.

Even as early as 1958, fathers had these rights over their children, even if an adoption consent had been signed by the mother. There was no change to these rights with ensuing changes to the law. The only difference made by the 1965 Act was that the period for adoption revocation was shortened.

Father's rights, circa 1967.

The *Adoption of Children Act 1965* was proclaimed and in force in 1967. This Act specifically codified a father's rights in section 23:

"The court may permit such persons as the court thinks fit, to be parties to the proceedings for an adoption order, ***for the purpose of opposing the application."***

This clause in the *Adoption of Children Act 1965* makes it abundantly clear that **anyone** with an interest in the welfare of the child, could apply to the Supreme Court and challenge the adoption. This right was not contingent on that person having in place an alternative plan for the child, as stated by witness M in her evidence to the 1998 Inquiry.

Quite clearly, under section 23 of the *Adoption of Children Act 1965,* fathers had a definite right to oppose the adoption.

Contrary to witness M's answer, a father also had the right to join the mother in signing the consent.

Father's rights, circa 1977.

The *Children (Equality of Status) Act 1976* represented a legal recognition of the attitude shift which had occurred, acknowledging the role of fathers in conceiving and parenting a child. Similar laws had previously been introduced to Victoria and South Australia, as well as New Zealand. The *Children (Equality of Status) Act 1976* was enacted for a singular purpose, as stated in its preamble:

"An Act to remove legal disabilities of ex-nuptial children..."

Since an adoption consent taker's entire career was to impact tremendously on the lives of ex-nuptial children, they were surely duty bound to make themselves knowledgeable of this law and its impact on the rights of ex-nuptials and their parents.

Section 6 of the *Children (Equality of Status) Act 1976* states:

"Whenever the relationship of a child with his father fails to be determined under the laws of New South Wales, that relationship shall be determined irrespective of whether the father and mother of the child are, or have ever been married."

What did this mean in practice?

All laws governing the guardianship of children stated that within marriage, both parents were

co-guardians of any children produced by that marriage.

What the *Children (Equality of Status) Act 1976* and similar laws in other states did, was to extend the guardianship rights and responsibilities of natural fathers, beyond the bounds of marriage.

The *Children (Equality of Status) Act 1976* effectively made all natural fathers of ex-nuptial newborns, legal guardians of their natural child.

This is how a number of judgements interpreted clause 6 of the *Children (Equality of Status) Act.*

Justice Kaye in his 1977 ruling on *G v P* stated:

"A child's rights are the same irrespective of whether he was born in wedlock or out of it. As a consequence, a putative father occupies the same position in law, in relation to his natural child as he does to his child born in wedlock."

Justice Hutley in *Gorey v Griffith* stated:

"What this section [Section 6] *does, in my opinion, is to abolish the doctrine that a child born out of wedlock is 'filius nullius'- a child of no one - and replaces it with the contrary doctrine that in law, it is the child of its natural parents."*

Again, the *Youngman v Lawson* decision (1981: NSWLR 439) formally declared natural fathers as legal co-guardians of their ex-nuptial children.

Equally an amendment was put into the Federal *Family Law Act 1975* to make the guardianship rights of putative fathers perfectly clear.

So what does guardianship status for putative fathers of ex-nuptial children, mean in adoption procedures?

The wording of the *Adoption of Children Act 1965* is very clear:

"The Court shall not make an order for the adoption of a child unless consent...to the adoption has been given by the appropriate person or persons...

In the case of an illegitimate child who has not previously been adopted, the appropriate persons are ***every person*** *who is the mother or guardian of the child."*

There is some uncertainty for that period between the 1977 proclamation of the *Children (Equality of Status) Act* and the 1981 *Youngman v Lawson* precedent, whether a putative father had to have his paternity and guardianship formally declared by the Courts. The previously mentioned interpretations from Justices Kaye and Hutley, undoubtedly grant putative fathers the right to be declared guardians. But certainly since *Youngman v Lawson,* his guardianship has been automatic, unless formally revoked.

In other words, since 1981, and possibly from 1977, the consent of a putative father to an adoption was not a nicety bestowed if the consent taker felt charitable - **it was a legal requirement.**

The only exception was if the father could not be found, or of course, had died.

The question is then, given the erroneous answer to this question by witness M, supposedly one of this state's most experienced adoption workers, how many adoptions have been

procured in breach of the legal rights of fathers, since the proclamation of the *Children (Equality of Status) Act?*

While ignorance is no excuse before the law, can the adoption industry claim to have been uninformed of this law?

In his speech to the New South Wales Legislative Assembly on 16th November 1976, the Attorney-General, Frank Walker MLA stated that in the process of formulating the *Children (Equality of Status) Act:*

"A broad cross section of interests were consulted and asked for their views.. The views of agencies such as the ***Catholic Adoption Agency,*** *Burnside Presbyterian Homes, Lifeline and the Church of England Counselling Service were also* ***actively sought."***

The Principal officer of the Catholic Adoption Agency in 1975 through to around 1987, was witness M. Since witness M can quote almost verbatim the amendments placed into the *Adoption of Children Act* in 1980, we can only assume that her memory loss is rather selective.

With Burnside Presbyterian, Church of England Counselling, the Council of Social Services, the National Council for Single Women with Child and all the law societies, being actively briefed by the New South Wales Government, it is hard to believe that the adoption industry has been accidentally ignorant of the operation of the *Children (Equality of Status) Act 1976* and its superseding law, the *Status of Children 1996,* for the past 20 years.

Fathers' rights, 1981 and beyond:

Various amendments to the *Adoption of Children Act 1965* have been inserted in an attempt to require adoption agencies to at least notify a putative father that an adoption consent has been signed.

Anecdotal evidence suggests that such notifications have not been carried out by the adoption agencies in the vast majority of cases, particularly in the 1980s.

The law regarding the rights of fathers as guardians of ex-nuptial children have been muddied by contradictory interpretations of rather convoluted amendments placed into the *Adoption of Children Act 1965.*

The *Adoption of Children Act 1965* now defines a guardian to include:

"...a person who is or is deemed to be the guardian of a child...under a law of the Commonwealth..."

Section 26(3A) of the *Adoption of Children Act* turns this definition on its head by stating:

"A person who is the putative father of a child...who...is not deemed to be the guardian of the child...under a law of the Commonwealth...is not a guardian of the child..." [for the purpose of applying the *Adoption Act.*]

In attempting to reconcile these two seemingly contradictory clauses in *Hoye v Neely,* the Family Law Court held that section 26(3A) did not apply because the father of an ex-nuptial child is a guardian under the Commonwealth's *Family Law Act.* The ruling here was that the consent of the father was required for the adoption of the child.

However, in the Supreme Court case of *C v Director-General of the Department of Youth and*

Community Services, Justice Waddell J. Held that:

"The Adoption of Children Act 1965...provided a context in which 'guardian' is not to be given its full legal meaning and hence the consent of the father to the adoption of an ex-nuptial child was not required."

Waddell's reasoning was that:

"If the New South Wales Parliament had wanted to require consent from unmarried fathers falling outside the 'common household test', it would have amended the Adoption Act accordingly."

This seems to be rather flawed reasoning, since the New South Wales Parliament **has** amended the *Adoption Act,* such that the word "guardian" is defined in two separate sections to include those deemed to be guardians under Commonwealth Law - therefore including the putative father of an ex-nuptial child.

There is no reason for the New South Wales Parliament to further amend the *Adoption of Children Act* to require consents from unmarried fathers falling outside the "common household test" because the definition of "guardian" in the *Adoption Act* already includes them, by defining a guardian with reference to Commonwealth Legislation.

Admittedly, it could be made a whole lot clearer so that your average adoption consent taker could have no excuse - but then what would we need lawyers for?

A father's response to witness M:

Witness M, in her evidence to the Adoption Inquiry, categorically stated that *"birth fathers had no legal rights until the 1980 amendments."*

Clearly, witness M, despite her 35 years experience in the adoption industry (or maybe because of it), is wrong. Birth fathers, as she prefers to call natural fathers of adopted children, had multiple rights which were breached, even as far back as 1958, and certainly after the 1965 and 1976 Acts were proclaimed.

Her referral to the 1980 amendments is also fraught with error. The 1980 amendments did not give fathers the right to be notified that an adoption consent had been signed - they placed upon principle officers of agencies the **requirement** to notify the father.

Furthermore, the amendments did not give fathers 14 days to prove to the court they could be good parents to the child, as witness M's answer implies. The father is given 14 days to simply apply to the Court to oppose the adoption. (See section 31C *Adoption Act.*)

The requirement of fathers to prove their worth as a parent, has been a work practice imposed not by the *Adoption Act,* but by adoption workers 'misinterpreting' section 31C of the *Adoption Act.* It is draconian and unlawful. If it were not unlawful, then the Department of Community Services could march in on any single father and make him prove his ability as a parent under threat of losing his children to adoption. Clearly this is not how the law works. **The onus of proof is on the Department** to demonstrate to the court that a child's welfare is at risk under the guardianship of a single father, or anyone else for that matter.

Witness M also states in her answer that

"The recommendations of the current Law Reform Commission report are that birth fathers should also have to consent to the adoption."

This submission should have demonstrated that a father's consent is already required. The Law Reform Commission's inability (or anyone else's for that matter) to properly divine the relevant laws, doesn't change that. It is hoped that the Law Reform Commission merely recommends that the *Adoption Act* make the requirement of a father's consent, abundantly clear.

On a last personal note:

Witness M, in her answer, further went on to say that, in regards to a father's right to consent to an adoption:

"Very marked changes in practices started to occur probably from about the mid-1970s"

While witness M was not the consent taker in the 1980 case of mother and newborn, she certainly was the principle officer of the agency involved, and liaised with the adoptive parents, personally handing the child over to them at the Kyeemagh foster home.

As the natural father of that child, I can categorically state that I was actively discouraged by the consent taker Ms H, from being in any way involved, and that despite asking if there was any way I could stop the adoption or adopt the child myself, I was given a resounding, and repeated, "No."

As I have stated in previous submissions, the agency knew full well that the mother gave her consent under immense duress (physical and emotional) from her parents, and documents recently gained by me show, that they knew I was opposing the adoption.

The agency's refusal to inform me of my rights under the *Children (Equality of Status) Act* might be put down to ignorance.

However, witness M's ability to quote verbatim from the *Adoption Act* leads me to the obvious conclusion that the agency's advice to me that I had no rights, went beyond negligence.

Her answer at the Inquiry, is an indication that her misapplication of the *Adoption Act* particularly her lack of memory concerning section 23, has been systematically to deny father's their rights in order to procure adoptions through her agency.