

Madras High Court

Mr.Tim Cecil vs Unknown on 13 June, 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13-06-2011

CORAM:

THE HONOURABLE MR. JUSTICE V. RAMASUBRAMANIAN

O.P.No.247 of 2011

In the matter of Guardians
& [Wards Act](#) 1890 of Minor
female Child by name
N.Emmarose Annamma

1.Mr.TIM CECIL

2.Mrs.STEFFI CECIL

.. Petitioners

This Original Petition is filed under the Guardians and [Wards Act](#), 1890 under [Sections 3, 7 to 10](#) read with Order XXI, Rules 2 and 3 of High Court Original Side Rules 1956 to appoint the petitioners as guardian of the minor female child by name N.Emmarose Annamma.

For Petitioners : Mr.O.R.Abul Kalam

O R D E R

On the occasion of the 30th anniversary celebrations of the Joint Council on International Children's Services (JCICS), Ms.Melanie Chung-Sherman, Director of Adoptions, Texas, Dillon International Inc., delivered a speech, which was very poignant and moving, the reason being that she herself was a Korean adoptee. The

following excerpts from her speech may aptly reflect the dilemma in which I have been placed, in the case on hand:

".....this field unlike others requires a higher degree of introspection and self reflection in order to serve the needs of many. We have a heavy burden and responsibility to not only look inward, but also outward and upward. As a Korean adoptee, my life is a myriad of juxtapositions-born of one parentage and raised in another, continually balancing two worlds and cultures, teaching and being taught, losing and gaining, searching and being found. Each of those equates who I am, where I am going and where I have come from. I am Melanie Chung-Sherman. Wife. Daughter. Sister. Orphan. Adoptee. Korean. American. Advocate. Ambassador. Social Worker. Teacher. Student. Humbled. Flawed. Resilient. And above all, a child of God.

.... I have travelled to the far ends of the earth where forgotten children lay in cribs, rocking themselves for comfort, visited orphanages where running water was rationed, if on at all, watched as children bathed in raw sewage and consoled the children who were considered 'too old and unwanted' by the rest of the society. I have also seen incredible acts of humility and love-- as a birth mother signs over relinquishment with sorrow and hope, as a Russian Judge confirms an adoption in a cold, stoic court room, as a child arrives to the anxious arms of his new parents."

2. The petition on hand under [Sections 3 and 7 to 10](#) of the [Guardians and Wards Act, 1890](#), is one filed by a couple from Germany, seeking their appointment as the guardians of an infant girl aged about 8 months. What makes this case different from the others is that it is filed with the consent of the biological parents, without being processed through a recognised agency from either of the countries involved.

3. As per the averments contained in the petition, the petitioners are German Nationals. They started living together from 1997 and got married on 8.2.2008. They do not have any biological child and as per medical opinion, the first petitioner suffers from Azoospermia, which makes him incapable of fathering a child.

4. When the petitioners came to India, they got acquainted with a couple by name N.Vijayakumar and N.Kalpana of Oothukottai, Thiruvallur District. The couple offered to give their female child, born on 20.8.2010, for being fostered and brought up by the petitioners. The biological parents already have three female children by name Hemalatha, aged 11 years and Jeyanandam, aged about 8 years and Usha

Sakunthala, aged about 6 years. The child whom the biological parents have offered to give, is the fourth child.

5. Since it is a case of Inter Country Adoption, the petitioners were required by law to be sponsored by a recognised Agency. But contending that in a case of this nature, the said requirement of law under Rule 10(A)(1) of Order XXI of the High Court Original Side Rules, need not be insisted upon, the petitioners filed Application No.1560 of 2011 for dispensing with the said requirement. On 21.3.2011, I passed an order in the said application to the following effect:-

"Office is directed to number this Original Petition and list it for interviewing the biological parents and the adoptive parents on 25.3.2011 at 4.00 P.M., in the Chambers".

Accordingly, the Original Petition got numbered and it was posted in my Chamber. I first interviewed the petitioners as well as the biological parents and their evidence was also recorded later in my Chamber. The biological father N.Vijayakumar was examined as PW-1. He filed the following documents as exhibits:-

(i) An outpatient slip issued by the Primary Health Centre where the minor child was born, as Ex.P-1.

(ii) The Birth Certificate of the minor child, as Ex.P-2.

(iii) The photograph of the minor child with the negative, as Ex.P-3 and

(iv) The consent letter given by the biological parents, as Ex.P-4.

6. The biological mother was examined as PW-2. She identified Ex.P-1 to P-4 and she also confirmed that she and her husband were willingly giving the child in adoption.

7. The second petitioner was examined as PW-3. She stated that she is employed in a Travel Agency and is earning about Euros 2,000/- per month. She filed her Marriage Certificate as Ex.P-5 and filed the Pay Advice given by her employer, as Ex.P-6. She also filed a letter of consent given by both the petitioners to take the child in adoption, as Ex.P-7. She stated on oath that the petitioners would be able to take care of the child, educate her and pay for all her needs.

8. The first petitioner was examined as PW-4. He filed the Certificate of Marriage issued by the Civil Registry Office of the Town by name Worms, as Ex.P-5. He is employed as a Manager in a Marketing Company, earning a monthly income of Euros 3,500/-. Ex.P-8 is the Pay Advice of his employer. The Certificate of Residency issued by the Office of the Civil Registry of the Town to the petitioners, was filed as Ex.P-9. The Medical Certificate filed as Ex.P-10 shows that the first petitioner suffers from Azoospermia, which makes him incapable of fathering a child. Exx.P-11 and P-12 are the Police Clearance Certificates issued for both the petitioners, indicating that they do not have any bad antecedents.

9. From the averments contained in the petition and from the oral and documentary evidence on record, the case on hand appears to be a genuine one. The consent of the biological parents does not appear to have been brought forth by coercion, undue influence or any other consideration.

10. But the question that I should consider first and foremost is as to whether the subjective satisfaction reached by me could form the basis for ordering this Original Petition. As stated earlier, the petitioners have not been sponsored through any recognised Agency in India or abroad. Consequently, there is no Home Study Report. But Mr.O.R.Abul Kalam, learned counsel for the petitioners contends that sponsorship by an Agency and a Home Study Report, are necessary only in cases of adoption of abandoned children and that the same need not be insisted upon in cases where the biological parents themselves willingly give their child in adoption.

11. The Rules relating to Inter Country Adoptions came to be framed in pursuance of the judgment of the Supreme Court in [Lakshmi Kant Pandey vs. Union of India](#) {AIR 1984 SC 469}. In paragraph 11 of the said decision, the Supreme Court made it clear that they were not concerned in that case with cases of adoption of children living with their biological parents, since in those cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents or not. It was also clarified in paragraph 11 of the said decision that it is only in cases where the children sought to be adopted are destitute or abandoned and are living in Social or Child Welfare Centres that it was necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare. Therefore, drawing my attention to the observations of the Supreme Court, contained in paragraphs 11, 12 and 13 of the said decision, the learned counsel for the petitioners contended that there is no requirement of sponsorship by an Agency or the production of a Home Study Report.

12. In *Anokha (Smt) vs. State of Rajasthan* {2004 (1) SCC 382}, a couple who were Italian Nationals adopted a female child from its biological mother, after the father of the biological child, known to them for 20 years, died in a road traffic accident. The District Judge before whom a petition was filed under Sections 7, 10 and 17 of the Guardians and Wards Act, 1890, dismissed the same on the ground that the guidelines prescribed by the Ministry of Welfare, Government of India, would have to be followed and that unless an authorised agency in Italy submitted an enquiry report and a No Objection Certificate was issued by the Ministry of Welfare, the application for appointment of foreigners as Guardians could not be accepted. The District Judge, while holding so, took the view that the guidelines would apply irrespective of whether the child's biological parents were alive or not. The High Court also affirmed the said view. While reversing the decisions of the District Court and the High Court, the Supreme Court referred to the decision in *L.K Pandey* and held as follows:-

"8.

The decision has referred to three classes of children: (i) children who are orphaned and destitute or whose biological parents cannot be traced; (ii) children whose biological parents are traceable but have relinquished or surrendered them for adoption; and (iii) children living with their biological parents. The third category has been expressly excluded from consideration as far as the decision was concerned "for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents" (*Ibid.*, SCC p. 264, para 11 of the Report). The reason is obvious. Normally, no parent with whom the child is living would agree to give a child in adoption unless he or she is satisfied that it would be in the best interest of the child. That is the greatest safeguard.

12. The Guidelines have formulated various directives as given by this Court in the several decisions and do not relate to regulation of the adoption procedure to be followed in respect of the third category of children, namely, children with their biological parents who are sought to be given in adoption to a known couple as is the situation in this case. It is only where there is a need to impersonalised attention of a placement of authority that there is a need to closely monitor the process including obtaining of a no-objection certificate from the Central Adoption Resource Agency (CARA). Ministry of Welfare, the sponsorship of the adoption by a recognised national agency and the scrutiny of the inter-country adoption by a recognised Voluntary Coordinating Agency (VCA). Indeed CARA has been set up under the

Guidelines for the purpose of eliminating the malpractices indulged in by some unscrupulous placement agencies, particularly the trafficking in children.

13. Under the Guidelines, the Home Study Report to be enclosed with an application for adoption must be routed through a foreign and enlisted agency which must be an enlisted agency in India with a copy to CARA. The Home Study Report is required to contain the following particulars:

- (a) Social status and family background.
- (b) Description of home.
- (c) Standard of living as it appears in the home.
- (d) Current relationship between husband and wife.
- (e) Current relationship between the parents and children (if any children).
- (f) Development of already adopted children (if any).
- (g) Current relationship between the couple and the members of each other's family.
- (h) Employment status of the couple.
- (i) Health details such as clinical test, heart condition, past illness etc., (medical certificate etc.).
- (j) Economic status of the couple.
- (k) Accommodation for the child.
- (l) Schooling facilities.
- (m) Amenities in the home.
- (n) Reasons for wanting to adopt an Indian child.
- (o) Attitude of grandparents and relatives towards adoption.
- (p) Anticipated plans for the adoptive child.
- (q) Legal status of the prospective adopting parents.

14. The report is required to be notarised which must in turn be attested either by an Officer of the Ministry of External Affairs or an Officer of the Justice or Social Welfare Department of the foreign country concerned or by an Officer of the Indian Embassy or High Commission or Consulate in that country.

15. None of these provisions in the several decisions of this Court impinge upon the rights and choice of an individual to give his or her child in adoption to named persons, who may be of foreign origin. The Court in such cases has to deal with the application under [Section 7](#) of the Guardians and [Wards Act](#), 1890 and dispose of the same after being satisfied that the child is being given in adoption voluntarily after being aware of the implication of adoption viz., that the child would legally belong to the adoptive parents' family, uninduced by any extraneous reasons such as the receipt of money etc.; that the adoptive parents have produced evidence in support of their suitability and finally that the arrangement would be in the best interest of the child."

The above observations made in Smt.Anokha seem to support the contention of the learned counsel for the petitioners.

13. Similarly, in a case decided by R.Sudhakar, J., in [Mr.Frank M.Costanzo and Another vs. Regional Passport Officer](#) dated 17.9.2010, passed in W.P.No.14880 of 2010, a question arose as to whether the Regional Passport Officer could insist upon a No Objection Certificate from the Central Adoption Resources Agency (CARA) for the issue of a passport to a child adopted by Foreign Nationals. In that case, the adoptive parents filed a petition under [Sections 7](#) and [10](#) of the Guardians and [Wards Act](#), 1890 before the Family Court at Puducherry. The biological parents recorded no objection and the Family Court passed an order appointing the Foreign Nationals as Guardians. Thereafter, they also filed another application under [Section 17](#) read with [Section 26](#), seeking permission to take the child to U.S.A. The Government Pleader, who represented the Union of India, Social Welfare Department, endorsed no objection and the petition was allowed, granting permission to the adoptive parents to take the child to U.S.A. But when they applied for the issue of a passport to the adopted son, the Regional Passport Officer rejected the request on the ground that the adoption was not done in accordance with the procedures and guidelines framed by the Supreme Court and incorporated into the Rules. The Regional Passport Officer consequently demanded a No Objection Certificate from CARA. Challenging the said decision, a writ petition was filed by the adoptive parents. After quoting paragraph-11 of the decision of the Supreme Court in Lakshmi Kant Pandey,

R.Sudhakar, J., also referred to the decision of the Supreme Court in Anokha (Smt.), and held that in the case of adoption from biological parents, the guidelines would not apply. Consequently, the learned Judge came to the conclusion that the Regional Passport Officer was not entitled to insist upon a No Objection Certificate from CARA.

14. But the said decision arose out of a case where the adoptive parents at least produced a Home Study Report, though not sponsored by an Agency. In the case on hand, there is neither a sponsorship by an Agency nor a Home Study Report. In such circumstances, the question that poses a challenge to me is as to whether the right of the biological parents to offer their children in adoption or foster care to foreigners can be said to be unfettered and uncontrolled by any guidelines, as appears to have been suggested in Smt. Anokha.

15. In a book titled "Every Child Deserves a Loving Family" published by the Central Adoption Resource Authority of the Ministry of Women and Child Development, Government of India, the following observations have been made with regard to the decision of the Apex Court in Smt. Anokha:-

"Under a special situation, one direct case of inter-country adoption was allowed by Honourable Supreme Court of India which was not compatible with Hague Convention on Inter-country Adoption ratified by Government of India. This can not be used as a precedent since Hague Convention on Inter-country Adoption-1999, ratified by Government of India does not recognise any case of direct adoption and the receiving country will not issue permission under [Article 5/17](#) to agree to such kind of adoption without involvement of recognised agencies and authorities."

16. The above observations have to be seen in the context of the statistics about the status of children in India. A recent report contained the following statistics:

(i) There are 18 million street children

(ii) There are 100 million child labourers

(iii) Over 59 million children have no access to school.

(iv) One out of two children between the ages of 6 and 14 has no access to primary education.

(v) Out of 27 million children born every year, 2 million do not survive to celebrate their first birthday.

(vi) Every year 27,06,000 children under 5 years die.

(vii) Millions of children are denied even the most basic rights of survival and protection.

(viii) About 60 million children under the age of 6 live below the poverty line.

(ix) Children from 100 million families live without water at home.

(x) 500,000 children are forced into this commercial sex trade every year.

(xi) 1 out of every 3 girls does not live to see her 15th birthday.

(xii) Every sixth girl child's death is due to gender discrimination, 3 lakh more girls than boys die every year.

(xiii) Female mortality exceeds male mortality in 224 out of 402 districts in India.

(xiv) 53% of girls in the age group of 5 to 9 years are illiterate.

(xv) Unrecorded numbers of girl children are killed within hours of being born.

(xvi) While in 1960 there were 976 girls born for every 1000 boys, in 2001, there are only 927 girls for every 1000 boys.

Even if one does not give undue weightage to these statistics, the social picture presented by it, cannot be ignored in toto.

17. In a newspaper report published on 14.6.2010 from Karnataka, it was stated that impoverished parents put up their children to sale for a few thousands of rupees. It was reported therein that in a week immediately preceding the date of the report, six families in Tiptur Taluk of Tumkur District of Karnataka sold their children to prosperous families and that adoption procedures were not followed in those cases. Therefore, I think that a blanket exemption of biological parents from the safeguards prescribed in other inter-country adoptions, may not be in the interest of the children, to whom the Court owes an obligation as a Court of Wards. Children are not properties of their parents so as to entitle them to have absolute dominance over them. In a country where abject poverty drives a few families to sell their children for

beggary, forced labour or prostitution, it is not safe to rely entirely upon the wisdom of the biological parents, to give their children in adoption or for foster care, to foreigners. As a matter of fact, adoption is evolved as a method of providing alternative care for children deprived of a healthy and happy environment. Therefore, it is accepted as a mode of enforcement of the fundamental rights of the child and hence it cannot be looked at as an exercise of the rights of the biological parents over the child.

18. In the Declaration of the Rights of the Child adopted by the United Nations General Assembly, Resolution No.1386 of 10th December 1959, the need for appropriate legal protection to the child before as well as after birth was emphasised. [Article 4](#) of the said Declaration states that the child shall be entitled to grow and develop in health and that special care and protection shall be provided both to him and to his mother. [Article 6](#) of the Declaration states that the child shall, wherever possible, grow up in the care and under the responsibility of his parents and in any case in an atmosphere of affection and of moral and material security. [Article 6](#) states further that a child of tender years shall not, save in exceptional circumstances, be separated from his mother. [Article 9](#) of the Declaration states that the child shall not be the subject of traffic in any form.

19. The Convention on the Rights of the Child, adopted by the General Assembly Resolution 44/25 of 20 November 1989 and ratified by India, contains several mandates. The Convention recognizes that each child should grow up in a family environment, in an atmosphere of happiness, love and understanding and a child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, both before as well as after birth. It further states that in all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of Law, administrative authorities or legislative bodies, the best interest of the child shall be a primary condition. In fact, the UN Convention on the Rights of the Child, 1989 recognizes family as the fundamental group of the society and the natural environment for growth and well being of all its members and particularly children. [Article 21](#) mandates as follows:-

"States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the

child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognise that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs."

20. In the Hague Convention on Protection of Children and Cooperation in respect of Inter Country Adoption, concluded on 29.5.1993, several obligations were imposed upon the States Parties. Even the Preamble to the said Convention recalled that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin. The Convention recognised the necessity to take measures to ensure that Inter Country adoption are made in the best interests of the child and with respect for his fundamental rights and to prevent abduction, the sale of or traffic in children. Articles 4, 5, 15, 17, 19 and 29 of the said Convention are of relevance to our discussion and hence, they are extracted as follows :

"[Article 4](#) :

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin -

(a) have established that the child is adoptable;

(b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an inter country adoption is in the child's best interests;

(c) have ensured that (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin;

(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing;

(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn; and (4) the consent of the mother, where required, has been given only after the birth of the child; and

(d) have ensured, having regard to the age and degree of maturity of the child, that (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required, (2) consideration has been given to the child's wishes and opinions, (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and (4) such consent has not been induced by payment or compensation of any kind.

Article 5 :

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State -

(a) have determined that the prospective adoptive parents are eligible and suited to adopt;

(b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and

(c) have determined that the child is or will be authorised to enter and reside permanently in that State.

Article 15 :

(1) If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical

history, social environment, reasons for adoption, ability to undertake an inter country adoption, as well as the characteristics of the children for whom they would be qualified to care.

(2) It shall transmit the report to the Central Authority of the State of origin.

Article 17 :

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if -

(a) the Central Authority of that State has ensured that the prospective adoptive parents agree;

(b) the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;

(c) the Central Authorities of both States have agreed that the adoption may proceed; and

(d) it has been determined in accordance with [Article 5](#), that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State.

Article 19 :

(1) The transfer of the child to the receiving State may only be carried out if the requirements of [Article 17](#) have been satisfied.

(2) The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parents.

(3) If the transfer of the child does not take place, the reports referred to in Articles 15 and 16 are to be sent back to the authorities who forwarded them.

Article 29 :

There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements

of [Article 4](#), sub.paragraphs (a) to (c), and [Article 5](#) sub.paragraph (a), have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin."

21. In order to achieve the purposes of the Convention on the Rights of the Child, an Optional Protocol was also adopted by the General Assembly Resolution No.54/263 on 25.5.2000. It was a Protocol to the Convention on the Rights of the Child, on the Sale of Children, child prostitution and child photography. The preamble to the Optional Protocol recognised the factors of under development, poverty, economic disparities, inequitable socio-economic structures, dys-functioning of families, lack of education, urban rural migration, gender discrimination, harmful traditional practices, as the contributing factors for the sale of children.

[Article-1](#) of the Optional Protocol require the States Parties to prohibit the sale of children.

[Article-2](#) define the sale of children as an act or transaction whereby a child is transferred by a person to another for remuneration or any other consideration.

[Article 3.1\(a\)\(ii\)](#) require the States Parties to ensure, as a minimum, that the act of improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable International Legal Instruments on Adoption, is fully covered by the Criminal or Penal Law of the States Parties.

[Article 3.5](#) mandates that all States Parties should take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child, act in conformity with applicable International Legal Instruments.

22. Concerned to prevent, in the context of inter-country adoption, the abduction, sale and traffic in children and their illicit procurement, the Special Commission of the Convention on Protection of Children and Co-operation in respect of Inter-Country Adoption comes out with resolutions from time to time to streamline adoption programme. The Convention sets a framework of internationally agreed minimum norms and procedures that are to be complied with to protect the children involved and the interests of their parents and adoptive parents. The recent Special Commission held in 2010 in Hague Secretariat draws the attention of both sending and receiving countries to the following essential features for a well regulated system:

- (a) Effective application of Hague Convention procedures and safeguards including, as far as practicable, in relation to non-Convention adoptions;
- (b) Independent and transparent procedures for determining adoptability and for making decisions on the placement of a child for adoption;
- (c) Strict adherence to the requirements of free and informed consent to adoption;
- (d) Strict accreditation and authorisation of agencies, and in accordance with criteria focussing on child protection;
- (e) Adequate penalties and effective prosecution, through the appropriate public authorities, to suppress illegal activities;
- (f) Properly trained judges, officials and other relevant actors;
- (g) Prohibition on private and independent adoptions;
- (h) Clear separation of inter-country adoption from contributions, donations and development aid;
- (i) Regulated, reasonable and transparent fees and charges;
- (j) Effective co-operation and communication between relevant authorities both nationally and internationally;
- (k) Implementation of other relevant international instruments to which States are parties;
- (l) Public awareness of the issues.

23. The 146th Report of the Law Commission of India submitted on 26.2.1993 was on the subject of "Sale of Women and Children". This Report was submitted suo motu, after a news item appeared in the Press to the effect that a 2 year old baby was sold by her uncle. In the Report, the Law Commission took note of the lacunae in the existing provisions such as [Sections 372 and 373](#) of the Indian Penal Code and [Section 17](#) of the Hindu Adoptions and [Maintenance Act](#), 1956. The provisions of [Sections 372 and 373](#) IPC had two limitations viz., (i) that they were confined only to sale of minors and (ii) that they were confined only to transactions entered into for specific purposes such as prostitution, illicit intercourse or any unlawful, immoral

purpose. Similarly, [Section 17](#) of the Hindu Adoptions and [Maintenance Act](#), 1956, prohibited the receipt of any payment or reward in consideration of the adoption of any person. If any such consideration was received or promised, it was a punishable offence under [Section 17\(2\)](#). Therefore, the Law Commission recommended the insertion of [Section 373-A](#) in the [Indian Penal Code](#).

24. The 153rd Report of the Law Commission of India concerned Inter-country adoptions. It was suggested therein that certain normative safeguards are to be adopted in the case of Inter-country adoptions. Paragraph 5.8 appearing in Chapter V of the said Report lays down the guidelines with regard to Inter-country adoption of children living with biological parents. The said paragraph reads as follows:-

"The child living with biological parents 5.8. Where a child is living with his biological parents, they would be the best persons to decide whether to give their child in adoption to foreign parents.

When the parents decide to give their child in inter-country adoption, there should be following safeguards:-

(1) The biological parents should not be induced or encouraged or even permitted to take a decision in regard to giving of a child in adoption before the birth of the child or within a period of three months from the date of birth of the child.

(2) Proper counselling should be given to the biological parents before a decision about relinquishing the child for adoption is taken.

(3) The counselling should be done by social or child welfare agency to which the child is being surrendered and relinquished.

(4) Before a decision is taken by the biological parents, they should be helped to understand all implications of adoption including the possibility of adoption by foreign parents.

(5) The biological parents should be specifically told that in case of the child is adopted, it would not be possible for them to have any further contact with the child.

(6) The biological parents should not be subjected to any duress in making a decision about relinquishment of the child.

(7) Even after the biological parents have taken a decision to relinquish the child for giving in adoption a further period of about three months should be allowed to them to reconsider their decision.

(8) But once the decision is taken and not reconsidered within a further period of three months, it must be regarded irrevocable.

(9) In order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the social or child welfare agency to which the child is being surrendered by the biological parents, should take from the biological parents, a document of surrender duly signed by the biological parents and attested by at least two responsible persons.

(10) Such surrender document should not only contain the names of the biological parents and their addresses but also information in regard to the birth of the child and its background, health and development.

(11) The procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child under the Guardians and [Wards Act](#), 1890.

(12) Thereafter, there would be no necessity to consult the biological parents again as to whether they wish to give the child in adoption or they want to take it back.

(13) If the biological parents have stated a preference for the religious upbringing of the child, their wish should as far as possible be respected and given effect accordingly.

(14) However, the biological parents should be informed that the child may be given in adoption even to a foreigner who professes a religion different from that of the biological parents as ultimately the best interest of the child alone should be the sole guiding factor and paramount consideration for giving to the child in adoption to the foreigner.

25. In Chapter VII of its Report containing the recommendations, the Law Commission indicated in paragraph 7.5 that the Law (proposed) should regulate adoption of a child with the consent of the biological parents and that the consent should be free from duress or inducement and after proper counselling with regard to the implications of the consent.

26. Moreover, the questions of adoption and guardianship are not confined anymore to the provisions of the Guardians and Wards Act, 1890 and the Hindu Adoption and Maintenance Act alone. With a view to fulfil the obligations enshrined in Articles 15 (3), 39 (ef), 45 and 47 of the Constitution and in order to bring the law relating to juvenile in conformity with the standards prescribed in the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration Juvenile Justice 1985, the Parliament enacted the Juvenile Justice (Care and Protection of Children) Act, 2000. It is an act to consolidate and amend the law not only relating to juvenile in conflict with law, but also providing for proper care, protection and treatment of children by catering to their developmental needs and by adopting a child friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation. One of the objects of the Act as enacted in the Statement of Objects and Reasons is to provide for effective provisions and various alternatives and rehabilitation and socio-reintegration such as adoption, foster care, sponsorship and after care of abandoned, destitute, neglected and delinquent juvenile and child. Section 2(aa) of the Act, defines adoption to mean "the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship. It is relevant to point out that the Act did not contain the definition of the word "adoption", when it was enacted in 2000. Section 2(aa) was incorporated into the Act only by way of an amendment brought forth under Act 33 of 2006. Section 41 of the Act after the amendment Act 33 of 2006, reads as follows:-

"41. Adoption-(1) The primary responsibility for providing care and protection to children shall be that of his family.

(2) Adoption shall be resorted to for the rehabilitation of the children who are orphan, abandoned or surrendered through such mechanism as may be prescribed.

(3) In keeping with the provisions of the various guidelines for adoption issued from time to time, by the State Government, or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoption by a Court after satisfying itself regarding the investigations having been carried out, as are required for giving such children in adoption.

(4) The State Government shall recognise one or more of its institutions or voluntary organisations in each district as specialised adoption agencies in such manner as may

be prescribed for the placement of orphan, abandoned or surrendered children for adoption in accordance with the guidelines notified under sub-section (3):

Provided that the children's homes and the institutions run by the State Government or a voluntary organisation for children in need of care and protection, who are orphan, abandoned or surrendered, shall ensure that these children are declared free for adoption by the Committee and all such cases shall be referred to the adoption agency in that district for placement of such children in adoption in accordance with the guidelines notified under sub-section (3).

(5) No child shall be offered for adoption -

(a) until two members of the Committee declare the child legally free for placement in the case of abandoned children.

(b) till the two months period for reconsideration by the parent is over in the case of surrendered children, and

(c) without his consent in the case of a child who can understand and express his consent.

(6) The Court may allow a child to be given in adoption -

(a) to a person irrespective of marital status; or

(b) to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters; or

(c) to childless couples."

27. The United Nations Guidelines for the Alternative Care of Children adopted by the General Assembly on 24.2.2010, for setting out desirable orientations for policy and practice with the intention of enhancing the implementation of the Convention on the Rights of the Child and of relevant provisions of other international instruments regarding the protection and well-being of children, contained the following guideline:-

"14. Removal of a child from the care of the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible duration. Removal decisions should be regularly reviewed and the child's return to

parental care, once the original causes of removal have been resolved or have disappeared, should be in the best interests of the child, in keeping with the assessment foreseen in paragraph 49 below."

28. Therefore, in the light of the mandate contained in the Convention on the Rights of the Child and the Hague Convention, both of which have been ratified by India and also in the light of the provisions of the Juvenile Justice (Care and [Protection of Children](#)) Act 2000 as amended by Act 33 of 2006, the primary responsibility of providing care and protection to children is that of his birth family. Since the child has a fundamental right to be protected against any kind of exploitation, the biological parents cannot be held to have an absolute and unfettered right to give their children in adoption or for foster care to foreign nationals. It is true that the Personal Law of Hindus have always recognised the right of the biological parents to give their child in adoption. But this recognition under the Hindu Law, as pointed out by Sir Henry Maine and other Scholars, was a contrivance to prevent the interruption of succession. The origin of this institution amongst the Hindus was attributed to the religious belief of spiritual efficacy of the possession of a son and a belief that by leaving a male issue in this world, they would save themselves from the torments of the next. Consequently, there was to some extent an element of protection in the form of succession to property. Therefore, the same cannot, as on date, enable the biological parents to contend that their rights to give their children in adoption to foreign nationals is absolute and unfettered. In such circumstances, despite the fact that the parties involved in this case appear to be genuine, I am unable to order the original petition as prayed for unconditionally without even a Home Study Report.

29. Even decisions taken by Courts prove at times to be wrong. Therefore, the decision taken by the biological parents, however bona fide, need not always be an informed decision or a decision which would stand the test of time. Hence the minimum safeguard that could be adopted is to call for a Home Study Report, if not a sponsorship through an agency, so that the decision taken by the biological parents to hand over their child to the petitioners herein, could be accepted to be a decision taken in the best interest of the child.

30. In view of the above, a direction is issued to the Central Adoption Resource Authority, Ministry of Women and Child Development, Government of India, West Block-8, R.K.Puram, New Delhi, to engage the services of a recognised and approved agency in Germany and have a Home Study conducted in respect of the petitioners

and submit the same to this Court, to enable this Court to allow the above original petition as prayed for. A copy of this order along with a copy of the petition is directed to be sent to the Central Adoption Resource Authority and the Authority is directed to get the Home Study Report and file it before this Court, at the earliest, preferably within a period of 3 months. It is made clear that the Central Adoption Resource Authority need not insist upon the petitioners being sponsored by an agency. All that is required is that the Central Adoption Resource Authority should request an approved agency in Germany to conduct a Home Study and send a report, which report could be forwarded by the Authority to this Court within the period stipulated above.

31. Call the original petition before me on 12.9.2011 or immediately upon the receipt of a report from CARA, whichever is earlier.

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