



母親的抉擇
Mother's Choice

Changing Life Stories:
Understanding the Legal Aspects of
Working with Children and Families

Adoption: Law and Practice



An Introductory Manual for Child Welfare Professionals

About the Authors



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Mother's Choice is a charity serving the many children without families and pregnant teenagers in Hong Kong. We join hands with our community to give hope, and change the life stories of vulnerable girls and babies. We are a champion for children and a voice for every child to be in a safe, loving and permanent family.

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Adoption

United Nations Convention on the Rights of the Child

Article 20

1. *A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*
2. *States Parties shall in accordance with their national laws ensure **alternative care for such a child.***
3. *Such care could include, inter alia, foster placement, kafalah of Islamic law, **adoption** or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.*

Article 21

"States Parties that recognize 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 authorized 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. *Recognize that intercountry 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."*

Adoption

INTRODUCTION

Under the United Nations Convention on the Rights of the Child (UNCRC), a child permanently deprived of his or her family environment may be adopted where it is considered to be in the child's best interests.

An adoption recognizes a new legal relationship between a child and their adoptive parents. The birth parents are released on all legal connections with the child, and the adoptive parents take on legal parental responsibility towards the child.¹

OVERVIEW OF THE ADOPTION PROCESS IN HONG KONG

The adoption process in Hong Kong is administered by SWD and governed by the Adoption Ordinance, Cap 290. The Adoption Unit of SWD takes the application and handles the matters in relation to adoption in Hong Kong. For intercountry adoptions (where a child habitually resident in one jurisdiction has been, is being, or is to be moved to another jurisdiction)², articles 2 to 37 of the Hague Convention have the force of law under the Adoption Ordinance³.

An adoption is only legal and effective under an Adoption Order. The proposed adopter or adopters are required to apply to the District Court for an Adoption Order. As a general rule, an Adoption Order would only be made by the court if consent is obtained from every person who is a parent or guardian of the child, or who is liable by virtue of any order or agreement to contribute to the maintenance of the child⁴ ("**Adoption Order with Consent**"). In extreme circumstances, the court may dispense with any consent required where adoption is deemed in the child's best interests⁵.

If the Director of Social Welfare is the legal guardian of the child or the child is in the care of the Director of SWD, the Director can apply to the court to release or "free" the child for adoption if the court is satisfied that consent required should be dispensed with ("**Freeing Order**"). Upon the making of the Freeing Order, all rights, duties, obligations and liabilities of the parents or guardians of the child shall vest in the Director as if the order were an Adoption Order and the Director were the adopter. The Director or an accredited body could then place the child for adoption.

If the necessary consent or a Freeing Order is obtained, the Director of Social Welfare could place the child for adoption.

Local Adoption in Hong Kong Local Adoption means the adoption of an infant resident in Hong Kong by a person resident in Hong Kong⁶.

1 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art. 26; Adoption Ordinance (Cap 290), s 13.

2 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art. 2; Adoption Ordinance (Cap 290), Sch 3.

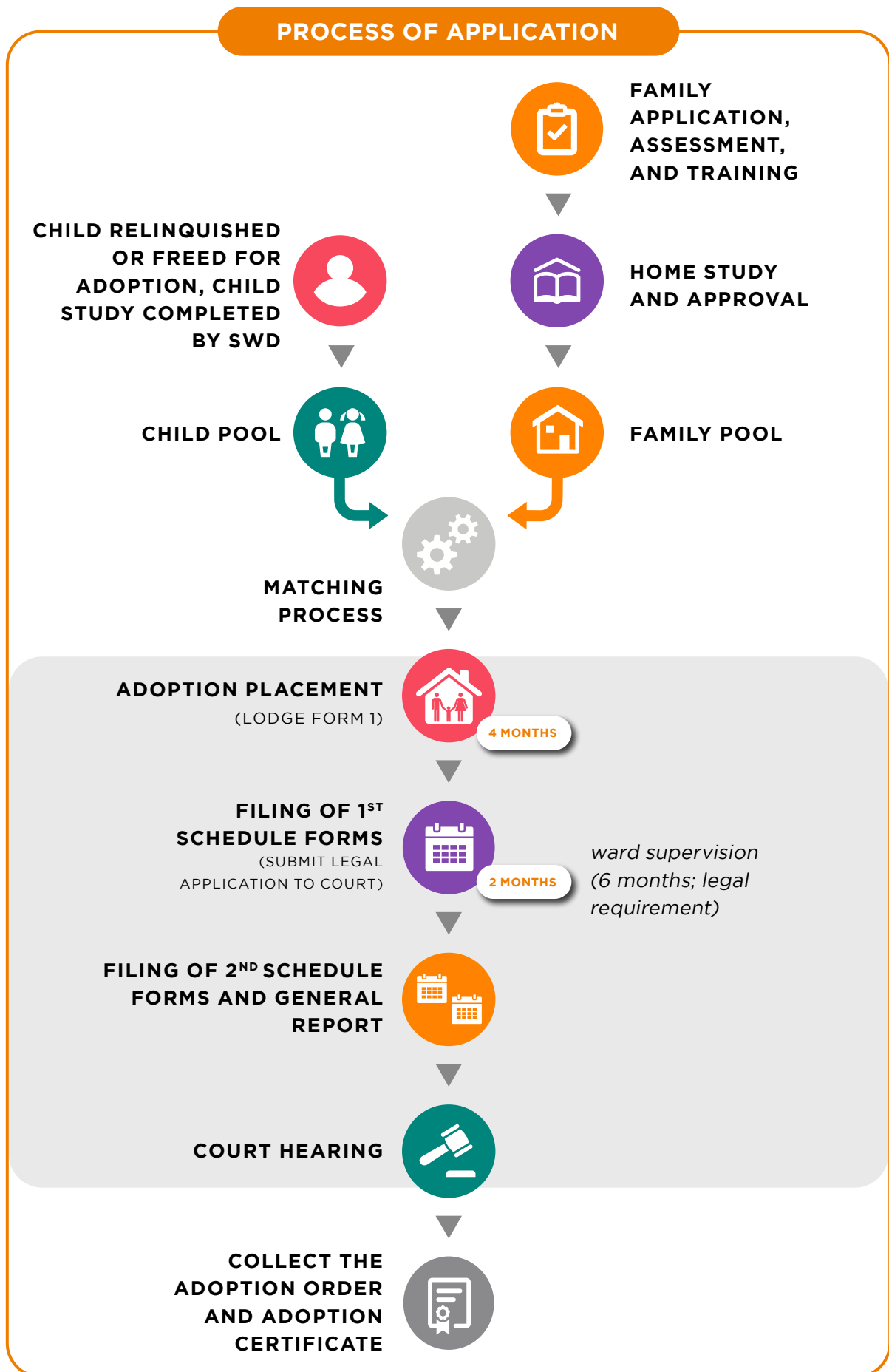
3 Adoption Ordinance (Cap 290), s 20B, Sch 3.

4 Adoption Ordinance (Cap 290), s 5(5)(a).

5 Adoption Ordinance (Cap 290), s 6.

6 Adoption Ordinance (Cap 290), s 7(25).

PROCESS OF LOCAL ADOPTION OF CHILDREN WHO ARE WARDS OF THE DIRECTOR OF SOCIAL WELFARE



OVERVIEW OF INTERCOUNTRY ADOPTION IN HONG KONG

Hong Kong, as a Special Administration Region of the People's Republic of China, the Convention is party to the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (the "**Convention**"). All intercountry adoptions in Hong Kong have to meet the requirements of the Convention according to s.20B of the Adoption Ordinance (Cap. 290). The Convention seeks to protect the rights of the adopted child and the basic principles under the Convention are detailed below.

The Convention recognizes that the best place for the full development of a child is to "grow up in a family environment, in an atmosphere of happiness, love and understanding."⁷ International law requires that governments which are signatories to the Convention should prioritize taking steps to assist families, and enable a child to remain in their family of origin.⁸ In some cases, however, this is not possible. In these cases, the Convention still recognizes the importance that a child grows up in a family environment.⁹

The Convention states that the first consideration in all adoptions, for both in-country and international adoptions must always be the **best interests** of the child.¹⁰

While there is a preference for a child to be adopted within their original country, in some cases intercountry adoption may offer the possibility of a permanent family to a child for whom a suitable family cannot be found in locally.¹¹ Adoption of a child must be done in accordance with all applicable laws and procedures in the state of origin.¹² It is important that consent is obtained from all appropriate persons,¹³ and that these individuals have all been properly counselled on the process and meaning of adoption¹⁴.

Children have a legal right to have their opinions and wishes considered during the adoption process.¹⁵ The adoptive child should also be counselled about the process of adoption.¹⁶

7 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), preamble.

8 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), preamble.

9 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), preamble.

10 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), preamble, art. 1(a); Convention on the Rights of the Child, art. 21.

11 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), preamble; Convention on the Rights of the Child, Art. 21(b).

12 Convention on the Rights of the Child, Art. 21(a); Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art. 1.

13 Convention on the Rights of the Child, Art. 21(a); Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art. 4(c).

14 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art 4(c)(1).

15 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art 4(d)(2).

16 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art 4(d)(1).

PROCESS OF OVERSEAS ADOPTION OF CHILDREN WHO ARE WARDS OF THE DIRECTOR OF SOCIAL WELFARE



ADOPTION ORDER WITH CONSENT – WHOSE CONSENT IS REQUIRED TO FREE A CHILD FOR ADOPTION?

Consent is needed from any individual who has legal parental rights over the child¹⁷. Generally, this means that at a minimum the birth mother must consent to the adoption.

In cases where the birth mother is married, it is assumed that her husband is the biological father and also has parental rights over the child.¹⁸ In such cases, consent is typically also needed from the legal husband. If there is evidence that shows on the balance of probabilities the legal husband is NOT the biological father, however, his consent is not needed (see box below).

An unmarried biological father does **not** have any automatic parental rights over the child.¹⁹ Currently, the consent of an unmarried biological father would only be legally required if he has been given parental rights through a court order, for example an order for custody, guardianship, or access.²⁰ This is true even if his name is on the child's birth certificate.²¹ Under recent case law, however, he may have a legal right to be contacted, to see if he would like to seek a court order which gives rise to his parental rights (see box below).

In the case that the parents of the child are both deceased, consent is required from the child's guardian or someone who is liable by virtue of any order or agreement to contribute to the maintenance of the child.²²

NOTE

What if the Legal Husband is not the Biological Father?

The legal husband of the mother of the child is presumed to be the biological father of a child. If there is evidence that the legal husband is NOT the biological father of the child, this presumption is rebuttable on the balance of probabilities (i.e. meaning the burden of proof is on the applicant to show that it is more likely than not).²³ Evidence that could prove this might be, for example, DNA test results, interview statements or immigration records proving the legal husband was not physically present in Hong Kong during the conception period.

However, if the legal husband is appointed to be the guardian of the child or if he applies to be and is ordered by the court to be the guardian of the child, the legal husband's consent is still required.

WHAT IS THE DIFFERENCE BETWEEN GENERAL CONSENT AND SPECIFIC CONSENT ADOPTIONS?

General consent adoption refers to cases where the parents or guardian of the child give consent to adoption without specifying the adoptive parents. General consent

17 Adoption Ordinance (Cap 290), s 5(5)(a).

18 Parent and Child Ordinance (Cap 429), s 5(1).

19 Guardianship of Minors Ordinance (Cap 13), s 3(1)(c)(ii).

20 Guardianship of Minors Ordinance (Cap 13), 3(1)(c)(ii).

21 The name on the birth certificate is considered evidence of paternity, but does not on its own provide the putative father with any parental rights or responsibilities. See Chapter on Birth Registration, as well as The Law Reform Commission of Hong Kong, Report on Illegitimacy (1991), p. 52, para 5.15, p. 61, para 5.45.

22 Adoption Ordinance, s 5(5)(a).

23 Parent and Child Ordinance (Cap 429), s 5(2).

should be given under a prescribed form²⁴ and once the general form of consent is executed, the parent who gives the consent ceases to have any parental rights, duties, obligations or liabilities in respect of the child.²⁵ The Director of Social Welfare immediately becomes the guardian ad litem of the child.²⁶

Specific consent adoption refers to adoptions where the parents or guardian of the child give consent to specific, named adoptive parents. Specific consent is given under a prescribed form.²⁷ A parent does not lose his or her parental rights upon giving specific consent and his or her parental rights will only be permanently lost when the Adoption Order is made.²⁸

According to the forms provided under the Adoption Rules (Cap. 290A, forms 4 and 4B), specific consent adoption can occur in a wide variety of situations, including step parent situations, situations where the parents or guardian know the adopter's names, or even situations where the parents or guardian only know the adopter's serial number because the adopter wishes to remain anonymous (Rule 6).

CAN THE CONSENT TO ADOPTION BE REVOKED?

Specific consent does not relinquish parental rights. It could be revoked at any time before an Adoption Order is made.²⁹

General consent relinquishes the parental rights of the parent who gives consent. A general consent adoption can be revoked within three months by written notice to the Director of SWD.³⁰ After three months, it is necessary to seek the permission of the court to revoke the general consent.³¹

CAN BIRTH PARENTS REQUEST SPECIFIC REQUIREMENTS OF THE ADOPTIVE PARENTS, FOR EXAMPLE RACE OR RELIGION, WHEN THEY SIGN A GENERAL CONSENT FORM TO FREE THEIR CHILD FOR ADOPTION?

Birth parents have no general rights to make any special requests when freeing their child for adoption. If there are any special considerations taken, this will be on a case-by-case basis and would be up to the discretion of the SWD worker assigned to the case. Ultimately, the SWD has a legal duty to act in the best interests of the child, even when conflicts arise with respect to any requests made by the birth parents.

ADOPTION BY FREEING ORDER - CAN A CHILD BE ADOPTED EVEN WITHOUT THE BIRTH PARENTS' CONSENT?

Under s.5(5)(a) of the Adoption Ordinance, an Adoption Order shall not be made except with the consent of every person who is a parent or guardian of the child. However, in extreme cases, a child could be adopted even without the consent of the parents. The court may dispense with the consent requirement under s.6 of the Adoption Ordinance if it is satisfied that:

- a. the parent or guardian of the child has abandoned, neglected, or persistently ill-treated the child;

24 Form 4A of Adoption Rules (Cap 290A).

25 Adoption Ordinance (Cap 290), s.5(5B).

26 Adoption Ordinance (Cap 290), s.5(5F).

27 Form 4 or Form 4B of Adoption Rules (Cap 290A).

28 Adoption Ordinance (Cap 290), s.8(1)(a).

29 Adoption Ordinance (Cap 290), s.8(1)(a).

30 Adoption Ordinance (Cap 290), s 5(5C).

31 Adoption Ordinance (Cap 290), s 5(5D).



- b. the person liable by virtue of an order or agreement to contribute to the maintenance of the infant has persistently neglected or refused so to contribute;
- c. the person whose consent if required cannot be found, or is incapable of giving his consent or has unreasonably withheld consent; or
- d. it is of the opinion that such consent ought, in all the circumstances of the case, to be dispensed with.³²

In these cases, the Director of Social Welfare can apply for a Freeing Order to free the child for adoption if the Director is the legal guardian of the child or the child is in the care of the Director.³³

When applying for a Freeing Order, any person whose consent would normally be required (normally the child's parents) must still be notified that such order is being sought and they must be given the opportunity to be heard.³⁴ This is because an order which dispenses with the consent of a parent, if granted, would permanently sever the legal relationship between the parent and the child. It is an extremely serious invasion of parental rights, and would only be sanctioned by the court after hearing the parent or after making all reasonably practicable efforts to notify him or her of the proceedings.

WHAT COUNTS AS ABANDONMENT UNDER S6 OF THE ADOPTION ORDINANCE?

Abandonment has been described in Hong Kong case law as a situation where the parent completely disregards their parental duty and “gives up the child and has left it to its fate”³⁵

The Director of Social Welfare must have taken all reasonably practicable steps to get in contact with the parents regarding the child and the future welfare plan for the child.³⁶ This may include trying to reach the birth parent by phone, post, home visits, etc.³⁷

In some cases, the court may also require that there be “substituted service” as a means of trying to reach the birth parents. This means that in addition to trying to reach the parents by traditional means, a notice must be advertised in public newspapers.³⁸

32 Adoption Ordinance (Cap 290), s 6.

33 Adoption Ordinance (Cap 290), s 5A(1)-(2).

34 Adoption Ordinance (Cap 290), s 5A(3).

35 *Re C* [2011] HKCFI 1669, [2012] 1 HKLRD 308, HCMP 1292/2011 (18 November 2011), at para. 25, citing *Watson v Nikolaisen* [1955] QB 286, at 295.

36 *Re C* [2011] HKCFI 1669, [2012] 1 HKLRD 308, HCMP 1292/2011 (18 November 2011) at para. 29, citing *In re F(R) (an infant)* [1970] 1 QB 385, per Salmon LJ at p.389C and *Re A (adoption of a Russian child)* [2000] 1 FCR 673, per Charles J at p.683a-e; *D v [] & Anor* HCMP 1566/2015.

37 *Re C* [2011] HKCFI 1669, [2012] 1 HKLRD 308, HCMP 1292/2011 (18 November 2011), at para. 30.

38 *Re C* [2011] HKCFI 1669; [2012] 1 HKLRD 308; HCMP 1292/2011 (18 November 2011), at para 2.

CASE
EXAMPLE

D v [redacted] & Anor HCMP 1566/2015

WKY's birth mother and biological father were both residents of mainland China. WKY was born during a visit to Hong Kong. Both parents were suspected of having mental illnesses and could not properly care for the baby. The parents had signed a letter of authorization authorizing an aunt, Madam Wong, to bring WKY to Hong Kong and to care for the baby. Both of the parents disappeared sometime in 2010. Madam Wong and WKY's other family members were no longer able to care for her and approached the SWD for assistance. Repeated attempts to locate the birth parents were not successful. Newspaper notices were posted in mainland China and broadcasts were made on the radio. Notices were also posted in Social Welfare Offices, police stations, and other government and NGO offices. The parents could still not be located.

In light of all the evidence, the court therefore found that the parents had abandoned and/or neglected the baby and that the SWD had taken all reasonably practical steps to locate the birth parents and inform them of the proposed welfare and adoption plan for WKY. The court ordered that WKY be freed for adoption.

WHAT COUNTS AS NEGLIGENCE UNDER S6 OF THE ADOPTION ORDINANCE?

A parent is considered to have neglected their child where they do not make the proper arrangements for the care and nurturing of the child. Neglect involves a very serious dereliction of parental responsibility, in that the parent fails to provide for "adequate and proper food, nursing, clothing, medical aid, accommodation, education or any other special needs of the child."³⁹

CASE
EXAMPLE

Re C [2012] 1 HKLRD 308

The court found that there was overwhelming evidence on both abandonment and neglect. The mother had four children, all between the ages of one and thirteen. All four children were in residential care. The mother had a long history of drug abuse, had been in and out of drug treatment, and had a history of disappearing. She had no regular employment or stable relationships. She continued to take drugs during pregnancy, completely ignoring the health of her children and did not take good care of them or have any concrete welfare plan. Two of her children exhibited drug withdrawal symptoms at birth. After giving birth to her youngest child, she was discharged from hospital for treatment of her own drug withdrawal symptoms and since then she has become untraceable.⁴⁰

39 *Re C* [2011] HKCFI 1669; [2012] 1 HKLRD 308; HCMP 1292/2011 (18 November 2011), at para. 26.

40 *Re C* [2011] HKCFI 1669; [2012] 1 HKLRD 308; HCMP 1292/2011 (18 November 2011).

WHERE THE BIRTH PARENTS ARE MISSING, WHAT ARE THE PROCEDURES AND TIMELINES FOR TRACING THE PARENTS FOR THE PURPOSE OF OBTAINING CONSENT AND/OR PROVING ABANDONMENT?

There are no legally required timelines or procedures regarding the tracing process. Tracing guidelines are internal guidelines of the SWD and are not made public.

This makes it especially important that social workers continue to monitor a case and advocate for agreed upon deadlines to be met. Otherwise it is possible that the child's case could become "stuck" because of an impasse in the tracing process.

Current procedure is first to check with the Immigration Department, to see whether the birth parents or other relevant individuals remain in Hong Kong.

LOCAL TRACING - If these individuals are in Hong Kong, tracing is conducted internally within the Social Welfare Department and other Government Departments via memos to the Police and CSSA, Housing Department, Transport Department, and Utilities Units. Externally, advertisements will be placed on the radio and in local newspapers. In practice it appears that recent domestic tracing cases are typically completed within six months.

OVERSEAS TRACING - If these individuals are no longer in Hong Kong, the case will be referred to International Social Services to conduct overseas tracing. Overseas tracing can take at least four to six months and is heavily dependent on the country in which the birth parent or other individuals are currently living and the speed and capabilities of the overseas partnering agency in that country.

WHAT COUNTS AS "UNREASONABLE WITHHOLDING OF CONSENT" UNDER S6 OF THE ADOPTION ORDINANCE?

The courts have explained that "unreasonable withholding of consent" means that a parent, in refusing to give consent to free the child for adoption, is "refusing to acknowledge the realities that point so clearly to his or her inability – past, present and future – to be able to care for the child and in that refusal, is prejudicing the child's manifest best interests and thereby acting unreasonably."⁴¹

The fundamental question is what a reasonable parent, placed in the position of the parent in question, would do.⁴² The unreasonableness of the parent who is withholding consent must, if he or she has ignored or disregarded some appreciable ill or risk, be likely to be avoided or some substantial benefit likely to accrue if the child is adopted.⁴³

A recent English case has stated that the important question to ask is whether a Freeing Order is a "**necessity**" in order to protect the best interests of the child.⁴⁴ This means that the bar for proving "unreasonable withholding of consent" is high. There is no Hong Kong case to date which follows this English decision on this point and it is not sure whether such a high threshold will apply in Hong Kong.

Examples of circumstances where parents have been "unreasonably withholding

41 *Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008 at para 11 citing *Director of Social Welfare v DT* [2008] 3 HKLRD 192, per Hartmann J (as he then was) at para 29.

42 *Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203 at para 10; *Re W (an infant)* [1971] AC 682.

43 *Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203 at para 11 citing *In re W (an infant)* [1971] AC 682, per Lord MacDermott at p 709A-C.

44 *In Re B (A child)* [2013] UKSC 33.

consent” include cases where they continue to abuse drugs and/or alcohol⁴⁵, have been criminally convicted⁴⁶, suffered from mental health disorder⁴⁷, and/or have no concrete plan to care for their children.⁴⁸ Under these circumstances, the Hong Kong courts have dispensed with the need for consent from a parent or guardian, thereby freeing the children for adoption.

CASE
EXAMPLE

Director of Social Welfare v DTTH [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008

The mother was a long term drug addict and repeat criminal offender. She had three children, one of whom had already been freed for adoption. Her youngest child exhibited withdrawal symptoms at birth and was placed into foster care. The mother had no contact with the birth father. After the child’s birth, the mother was imprisoned for nearly a year and a half on theft charges.

The court cited the following facts in justifying the making of its order:

1. The mother had **failed to put her life in order**. For example, even after she was released from prison, she did not have a stable residence, regular employment or relationships. She failed to keep her promises to resume her parental duties or cooperate with case workers. She had been involved in repeated criminal offenses and had a history of drug abuse.
2. She lacked child-care abilities and had **failed to show concern** for the infant. For example, she did not keep in touch with case workers and rarely enquired about the infant’s conditions.
3. She **failed to come up with a concrete child-care plan** for the child.

In light of all of this evidence, the court determined that the mother was demonstrably unable to care for the infant, but she simply refused to give consent to the infant’s adoption. In so doing, she was prejudicing the child’s manifest best interests and thereby acting unreasonably. Any reasonable parent in her position would not withhold her consent to the infant’s adoption. The court also stated that the advantages of adoption for the infant are sufficiently strong to justify overriding the views and interests of the mother. The court therefore held that she was “unreasonably withholding consent” and freed the child for adoption.

NOTE: Questions to consider on whether to apply for a Freeing Order

1. Is there any realistic long-term plan for the care of the child?
2. Do the birth parent(s) and the child continue to have any sort of substantial relationship?
3. What is in the best interests of the child?

Having asked these questions, if the social worker feels that freeing a child for adoption is the best course of action, he or she should consider seeking legal advice before moving forward. Note – only the Director can make the application for the freeing order.

45 *Director of Social Welfare v DTTH [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008; Director of Social Welfare v DT [2008] 3 HKLRD 192, HCMP 1620/2007.*

46 *Director of Social Welfare v DTTH [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008, Director of Social Welfare v DT [2008] 3 HKLRD 192, HCMP 1620/2007.*

47 *Director of Social Welfare v L [2006] 3 HKLRD 789, HCMP 972/2006.*

48 *Director of Social Welfare v DTTH [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008.*

WHAT EVIDENCE CAN BE COLLECTED BY A SOCIAL WORKER TO PROVE THE NEED FOR A FREEING ORDER?

Courts have considered the following when deciding whether or not to free a child for adoption. Social workers should record case-note evidence on these topics.

- The views of the child
- The views of those around the child (siblings, grandparents, caregivers, teachers)
- Does the parent have a stable residence?
- Does the parent have regular employment?
- Is drug use occurring?
- Has the parent kept his or her promises around parental duties?
- Has the parent kept in touch with child-care workers?
- Has the parent inquired about the child's condition?
- Does the parent have a concrete plan on how to care for the child?

DOES DEATH OF A PARENT DISPENSE WITH THE REQUIREMENT TO SEEK CONSENT?

If a parent dies, the surviving parent (if any) is the guardian of the minor either alone or jointly with any guardian otherwise appointed.⁴⁹ As such the death of a parent will dispense with the need to seek that parent's consent to a Freeing Order. Consent however will need to be obtained from the child's surviving parent and/or guardian.

Do factors such as long-term incarceration, criminal record, or continued substance abuse dispense with the requirement to seek consent?

When deciding whether to free a child for adoption, courts must balance all of the available evidence and factors of the case. Long-term incarceration, criminal records, or continued substance abuse are not reasons to dispense of parental consent by themselves.⁵⁰ Courts would seriously consider whether these factors prevent the parents from carrying out their parental duty and responsibility and these concerns may be used as evidence in court to show whether the parent is carrying out their parental duty.

Case law has shown incarceration is one of the factors the Court will take into account when considering whether a parent has unreasonably withheld their consent to a Freeing Order.⁵¹ However, consent must always be sought from the parent or legal guardian. Depending on the circumstances, their refusal to provide consent may be viewed by the Court as indication that consent is unreasonably withheld.

49 Guardianship and Minors Ordinance, s 5.

50 *Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008 at para 10, "[W]hether a parent has unreasonably withheld his consent is a question of fact to be determined objectively with regard to the totality of all the circumstances of the case."

51 *Director of Social Welfare v DT* [2008] 3 HKLRD 192, HCMP 1620/2007; *Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008.



Prospective Adoptive Parent Suitability Assessment

WHAT ROLE CAN I PLAY?

Social workers screen prospective adoptive parents to make sure that they are a good match for the child. They can help counsel birth parents to make sure that they understand what it means to give a child up for adoption and what the process would look like. They can counsel children and help prepare them for the adoption process. They can also counsel adoptive parents and help support them as they transition into their new parenting roles.

Social workers can help advocate for both families and children during matching panels, and make sure that the “best interests of the child” always remains the top priority. Social workers can also be advocates for the children by presenting information about them in a way that draws interest and gives them the best possible chance at adoption.

It is important that social workers consider their own values on adoption, inter-racial families and other related issues to make sure that their judgments are not affected by their own personal biases.



WHAT ARE THE BASIC REQUIREMENTS OF A PROSPECTIVE ADOPTIVE PARENT?

The following are the basic requirements for a married or single person to apply to be an adoptive parent:⁵²

- he or she is at least 25 years old and mature enough to make the life-long commitment to adopt a child and to take up parental responsibilities;
- he or she has good physical and mental health without serious illness/disability and is thus able to raise the child until the child can be independent;
- he or she is reasonably educated, preferably with at least six years of post-kindergarten primary-level education;
- he or she is in stable employment and has sufficient financial resources, and a stable accommodation in which to bring up a child;
- he or she has resided in Hong Kong for 12 months or longer so as to be familiar with the social environment and community resources, and can stay for a continuous period of 12 months or more to complete the adoption process (not applicable to intercountry adoption);
- (if married) he or she has been married for at least 3 years and the marriage is stable enough to provide the child with secure home care; and
- he or she has no criminal record.

HOW ARE PROSPECTIVE ADOPTIVE PARENTS ASSESSED ON THEIR SUITABILITY TO BECOME PARENTS?

Under both international and Hong Kong law, prospective adoptive parents must be evaluated to determine whether or not they are suitable to become adoptive parents.⁵³

Under the Adoption Ordinance, the Director of SWD or an accredited body may decide whether an applicant is suitable to become an adoptive parent. The accredited bodies registered by SWD are Mother's Choice, Po Leung Kuk and International Social Services, Hong Kong. For overseas adoptions the Director may take into account any recommendations made by the relevant accredited body.⁵⁴ Social workers therefore have the duty to provide their professional judgment on whether or not a prospective family is suitable to become adoptive parents.

If a prospective adoptive family raises red flags, it is important to investigate and deal with this early on in the application process. If a prospective adoptive family is found to be highly unsuitable, the SWD should be alerted to prevent the parents from "agency-shopping" by later re-applying through other agencies.

52 See further details in the "Considering Adoption" leaflet published by the SWD at http://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_listofserv/id_adoptionse/

53 Adoption Ordinance (Cap 290), ss. 27 and 29; Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), arts. 5(a), 15.

54 Adoption Ordinance (Cap 290), s 29(3).

WILL A CHILD'S VOICE/OPINION BE HEARD IN ADOPTION PROCEEDINGS? WHAT IF A CHILD DOES NOT WANT TO BE ADOPTED?

Under both international and Hong Kong law, a child has the right to have his or her voice and opinion considered in adoption proceedings. The Adoption Ordinance specifically requires that the court must give “due consideration” to the wishes and opinions of the child.⁵⁵

How much weight is given to a child's opinion is dependent on the age of the child and the other factors in the case.⁵⁶ The overarching factor in any adoption proceeding is always the best interests of the child.⁵⁷ The ultimate decision on this is always up to the court when deciding the case.

In practice, a child should typically be counselled regarding the adoption process and a social worker or clinical psychologist's assistance should be provided in order to prepare a child for adoption. This is especially true in cases of intercountry adoption.⁵⁸

If a child expresses that he or she does not want to be adopted, this is an important consideration. This must be weighed, however, against the long-term interests of that child in going to a permanent family and the knowledge that the child may not fully understand the adoption process. In practice, counselling the child to help him or her understand the process and prepare the child for the adoption is often necessary. The child will have an opportunity to express his or her views before the court, and it will be up to the court to decide whether adoption is in the child's best interests.

WHAT IS THE LEGAL STATUS OF AN ADOPTION CERTIFICATE AS COMPARED TO A BIRTH CERTIFICATE?

An adopted person will be re-registered in the Adopted Children Register.⁵⁹ The original birth entry will be marked with the word ‘Adopted.’⁶⁰

Under Hong Kong law, a certified copy of an entry in the Adopted Children Register, if sealed and stamped by the register's office and if it has a record of the date and country of birth, can be used as evidence of the date and country of birth, just as if it was an ordinary birth registration.⁶¹

Any person is entitled to ask for a certified copy of an entry in the Adopted Children Register, under the same terms as they could ask for a certified entry under the Births and Deaths Registration Ordinance.⁶²

55 Adoption Ordinance (Cap 290), s 8(1)(b).

56 Adoption Ordinance (Cap 290), s 8(1)(b).

57 Adoption Ordinance (Cap 290), s 8(1)(b).

58 Social Welfare Department, 2014 Submission on the 1993 Hague Intercountry Adoption Convention Country Profile, p.11.

59 Adoption Ordinance (Cap 290), s 19.

60 Adoption Ordinance (Cap 290), s 19.

61 Adoption Ordinance (Cap 290), s 18(2).

62 Adoption Ordinance (Cap 290), s 18(3).

The Right for Children to Know their Parents

ARTICLE 7

United Nations Convention on the Rights of the Child

*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, **as far as possible, the right to know** and be cared for by **his or her parents**.*

INTRODUCTION

Under Article 7(1) of the Convention on the Rights of the Child, a child, whether adopted or not, **has the right to know his or her parents**.

The right to know his or her parents should always be extended to the child in consideration of his or her best interests save that the right of a child to know information about his or her birth parents in cases of adoption may be limited in some adoption contexts.

Closed Adoption: An adoption process where there is no interaction or communication between the birth family and adoptive families, nor any identifying information provided to either party.

Open Adoption: A form of adoption in which there are some kind of contact or link between the biological family and the adoptive family relating to the adopted child. Normally the identifiable information including contact are shared between both parties, and the birth family is able to maintain a relationship with the child.

In Hong Kong, under a “General Consent to Adoption”, the system is generally one of closed adoption. However, where known, the name(s) of the birth mother (or father) are included in the Child’s Adoption Order.

The Adoption Unit of the SWD collects relevant information on the background of the child, including medical records, and birth family history, which is passed to the child and adoptive family. However, all identifying information of the birth parents based on the file records is not shared.

The SWD cannot disclose any identification information of the birth parents based on the file records without the birth parents’ permission. The SWD cannot disclose any identification information of the adoptive parents or the child based on the file records without the adoptive child and/or their parents’ permission.

ROOT TRACING

“Root tracing”, as it is termed in Hong Kong, is the process by which an adopted person, or their adoptive family, seeks information about his or her birth family.

WHAT ROLE CAN I PLAY?

Social workers and NGO staff can play a critical role in helping a child to understand his or her story.

The first thing that they can do is to keep excellent records of the child's life when he/she is in care. This allows a child who later wants to root trace to be able to have a more accurate and detailed understanding of his or her own history.

A social worker or case worker supporting a birth mother who is choosing adoption for her child can encourage her to leave a letter, photos, gifts, and information in the child's case file.

Social workers and NGO staff can also be an important source of information regarding root tracing. They can share information with the adoptive parents and children about how to access root tracing services and can also share with both adoptive parents and birth parents the benefits that can come from allowing a child to access information about his or her birth family.

HOW CAN ONE COMPLETE ROOT TRACING?

The Adoption Unit of the SWD has a formal application process by which an adopted person or their adoptive family can apply for information about their birth parents.

In certain cases, it is also possible to **apply to the court** for an order requiring a search of the Adopted Children Registry to find an adopted person's record.⁶³

WHO CAN APPLY TO THE ADOPTION UNIT OF THE SWD FOR ROOT TRACING?

- An adopted person over 18,
- An adopted person under 18 with consent from their adoptive parents,
- Adoptive parents, whose child is under 18.

CAN A BIRTH PARENT APPLY TO THE ADOPTION UNIT OF THE SWD SEEKING INFORMATION ABOUT THE CHILD?

- A birth parent will be encouraged to leave their updated contact details with the Adoption Unit, in order for it to be possible for them to be contacted if the adopted child/person, or adoptive family request root tracing services. A birth parent may also be allowed to leave a letter or gift to the child to keep in the child's file.

63 Adoption Ordinance (Cap 290), s 18(4).

Individuals who want to start the process of root tracing should contact the Adoption Unit of SWD to explain the reason for contact and why the individual is root tracing, which may include:

- Seeking identifying information such as medical information,
- Seeking information regarding the names or last known location of their birth parents,
- Request to establish contact with their birth family through a social worker, through exchanging letters, emails, or phone calls, or meeting with birth family members,
- Seeking information on birth family members including parents, grandparents, and siblings.

The Adoption Unit of the Social Welfare Department should request the adopted person's documents as proof of identity before commencing the root tracing process:

- Passport
- Adoption Order
- Adoption certificate

Once the Adoption Unit receives the documentation, they will start a search for the adopted person's file. They will then send a short letter to the last known address of the birth parents, to inform them of the adopted person's search, and whether any information has been requested (for example, contact details, photographs, or permission to share photographs of the adopted person).

If the adopted person has a birth sibling who has been adopted by a different adoptive family, the Adoption Unit may contact the sibling's adoptive family to inform them of the adopted person's search.

Consent of the birth parents or sibling will be sought on whether to provide the information requested. The Adoption Unit cannot force the birth parents to consent to the adopted person's request.

If all parties have consented to contact, any contact between the adopted person and the birth parents will first be facilitated by a mediator from the Social Welfare Department.

The mediator may facilitate contact may include sending letters and photos, exchanging medical information, and arranging the first meeting between the parties.

The Adoption Unit may offer limited counselling services to all parties involved, including the birth parents, adopted person and adoptive parents, to discuss the expectations of both parties and to help parties prepare for the reunion.

Contact information

Social Welfare Department - Adoption Unit

auenq@swd.gov.hk



What are the Rights of the Child?

We have a responsibility to uphold children's rights. How does understanding the rights of children help us to be the voice for vulnerable children and families?

- 1 Everyone under 18 has these rights
- 2 **All children have rights, and I should be treated fairly and equally no matter who I am, what I look like, where I live, what language I speak, what my religion is, whether I am a boy or a girl and whether I have a disability.**
- 3 Adults must do what is best for me.
- 4 The government has a responsibility to make sure my rights are protected and respected.
- 5 **My family has the responsibility to help me learn to exercise and protect my rights.**
- 6 I should be supported to live and grow.
- 7 I have the right to a name, and to belong to a country.
- 8 I have the right to an identity which no one can take away.
- 9 **I have the right to live with a family who cares for me.**
- 10 I have the right to be together with my family if we live in different countries.
- 11 I have the right to be protected from kidnapping.
- 12 **I have the right to be listened to, and to be taken seriously.**
- 13 I have the right to find out and share information, unless it harms or puts someone in danger.
- 14 I have the right to have my own beliefs and choose my own religion, with my parents' guidance.
- 15 I have the right to meet with friends and join groups, unless it harms or puts someone in danger.
- 16 I have the right to my privacy.
- 17 **I have the right to get information in lots of ways, and adults have a responsibility to make sure it is not harmful.**
- 18 I have the right to be raised by both parents if possible.
- 19 **I have the right to be protected from abuse – from being hurt or badly treated in body and mind.**
- 20 & 21 **I have the right to special protection, care and support if I cannot live with my parents. I have the right to have care and protection if I am adopted or living in foster care.**
- 22 If I am a refugee (if I have been forced to leave my home country), I have the same rights as children in my new country.
- 23 **If I have a disability, I have the right to special care and education.**
- 24 I have the right to good quality healthcare, to clean water, and good food.
- 25 **If I am waiting for my safe, loving, and permanent family, I have the right for my care to be reviewed regularly to make sure it is good for me.**
- 26 I have the right to receive help from the government if my family doesn't have enough money.
- 27 I have the right to a safe place to live, food, and clothing to help me reach my potential.
- 28 I have the right to an education, and I should be encouraged to go to school to the highest level I can.
- 29 I have the right to an education which allows me to thrive, live peacefully, protect the environment, and respect others.
- 30 I have the right to speak my own language, and follow my family's religion and culture if I choose.
- 31 **I have the right to play and rest.**
- 32 If I work, I should be paid fairly, and I should not be made to do work that is dangerous or hinders my education and development.
- 33 I should be protected from dangerous drugs.
- 34 **I have the right to be free from sexual abuse. No one should touch me in ways that make me feel uncomfortable, unsafe, or sad.**
- 35 I should not be kidnapped, or sold.
- 36 I have the right to protection from being taken advantage of.
- 37 I have the right not to be punished in a cruel or hurtful way.
- 38 I have the right to not be enlisted in the army until I am 15 (18 years old in HK).
- 39 I have the right to help if I have been hurt, neglected, or badly treated.
- 40 I have the right to legal help and to be treated fairly if I have been accused of breaking the law.
- 41 If my country has laws that treat me better than the UNCRC, then those laws apply.
- 42 **I have the right to know my rights! And everyone around me should learn about my rights.**
- 43 - 54 These articles are about how governments and international organizations will work together to give children our rights.

Hong Kong agreed to the United National Convention on the Rights of the Child (UNCRC) in 1994.

I am a child, and I have all of these rights.

As I grow older, I have more responsibility to make choices and exercise my rights.

These rights will help me thrive and reach my full potential.

