

## ADOPTION UNDER KOREAN LAW

Prior to the enforcement of the new Civil Code of 1960,<sup>1/</sup> the Korean law governing adoption was primarily a customary law based upon the considerations of "preservation of the family" and "continuation of lineage." The new Code, which incorporates the Korean customary law, tends to stress the welfare of the adoptive child as well as the equality of the sexes, the principle embodied in the Constitution of 1948. It also retains some of the feudalistic elements to which reference was made above. The old customary law was changed to some extent so as to conform to the new social requirements. In 1961, two laws on adoption of Korean orphans were enacted, i.e., the Special Law Concerning Adoption of Orphans<sup>2/</sup> and the Law Concerning Guardianship for the Orphans Held in a Charitable Organization.<sup>3/</sup>

### I. Substantive Requisites Under the New Code.

With respect to the substantive requisites for adoption, the Korean Civil Code has set forth its general principles in the provisions of Articles 866 to 897 inclusive.

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<sup>1/</sup> Law No. 471, promulgated on February 22, 1958; effective on January 1, 1960, as amended by Law No. 1250, December 31, 1962.

<sup>2/</sup> Law No. 731, September 30, 1961.

<sup>3/</sup> Law No. 703, August 21, 1961.

As to the age of a person who may adopt another,  
Article 866 of the Civil Code provides:

Article 866. Any person who has attained majority  
may adopt another. 4/

The word "majority" is defined in Article 4 of the same  
Code as follows:

Article 4. Majority is attained on the completion  
of a full twenty years of age.

However, an ascendant or a person of an elder age may  
not be adopted by a younger person, as stipulated in Article 877,  
paragraph 1 of the same Code:

Article 877. 1. No ascendant or person of an elder  
age may be adopted.

A husband and wife jointly may adopt a child or be  
adopted by another person. Thus Article 874, paragraph 1 of the  
same Code states:

Article 874. 1. A person who has a wife may neither  
effect an adoption nor be adopted, except jointly with his  
spouse.

In the case of the wife's absence, however, the husband  
alone may effect an adoption or may be adopted in the name of

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4/  
"Another" is construed to include females. See the  
Record of the National Assembly, 26th Plenary Session, No. 60,  
p. 17. "Another" is also construed to mean that there would be  
no restriction on the number of adoptive children, i.e., one can  
adopt several children regardless of whether or not one has children  
of one's own. See Kim Chai-su and Kim Yong-han, Sin ch'inzok  
sangsokzon kang'ni [Lecture on the New Family and Succession Law],  
Seoul, Pagyongsa, 1961, p. 204.

both, <sup>5/</sup> as provided in paragraph 2 of the same Article:

Article 874. 2. If it [adoption or being adopted] cannot be effected jointly due to the absence of the wife or any other cause, the husband alone may effect an adoption or may be adopted in the name of both.

Regarding disagreement between the adopting parents and adopted child, Article 883 states:

Article 883. An adoption shall be void if it falls under one of the following items:

1. Where there is no agreement to effect adoption between the parties.
2. [Omitted.]

An adult may become an adopted child, but usually the consent of the natural parents is required. <sup>6/</sup> Article 870, paragraph 1 of the same Code states:

Article 870. 1. The person to be adopted shall obtain the consent of his father and mother, and if consent cannot be obtained from them due to death or any other cause, the consent of any other lineal ascendant, if any, shall be obtained.

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<sup>5/</sup> In pointing out that, under this provision where adoption or being adopted cannot be effected jointly in the absence of the husband, the wife alone may not effect an adoption in the name of both, Mr. Kwon Il states that the wife's status, even under the new Code, is not equivalent to that of the husband. See Kwon Il, Han'guk ch'insook sangsookpon [Family and Succession Law of Korea], Tokyo, Kobundo, 1961, p. 126.

<sup>6/</sup> Professors Kim Chu-su and Kim Yong-han are of the opinion that this provision should be discarded because it is based entirely upon the demands of the feudalistic family system. See Kim Chu-su and Kim Yong-han, Sin ch'insook sangsookpon kang'ui, p. 206. However, in view of the fact that the old customary law required the consent of the head of the family, in addition to the consent of the natural parents, the new Code seems to be more progressive in this respect.

In the case of the adoption of a child (under 15 years of age), assent to the adoption must be obtained from his parents <sup>2/</sup> or guardian, as set forth in Article 869 of the Code:

Article 869. If the person to be adopted is under fifteen years of age, his father and mother, or his guardian, if he has neither father nor mother, shall give assent to the adoption in their place. However, if his legitimate mother, step-mother or guardian gives assent to the adoption, the consent of the family council shall be obtained.

In the case of the adoption of a minor (under 20 but over 15 years of age), the consent of the parents or lineal ascendants or guardian is required. Article 871 of the same Code provides:

Article 871. If the person to be adopted has not attained majority and he has neither a father nor a mother nor any other lineal ascendants, he shall obtain the consent of his guardian.

In the case of an orphan, a charitable society which maintains and cares for a child may consent to its adoption as guardian as stipulated in Article 2 of the Law Concerning Guardianship for the Orphan Held in a Charitable Organization:

Article 2.

1. The director of the public charitable organization shall perform the duties of the guardian for a minor orphan under the custody of the said organization.

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<sup>2/</sup> In this case, the parents or guardian actually become one party who agrees to effect adoption between the parties. (Article 883, paragraph 1). See Chong Kwang-hyon, Sin ch'insok gansakpoo yoron [New Family and Succession Law], Seoul, Uisong Munhwasa, 1963, p. 230.

2. In the case of a minor orphan under the custody of the private charitable organization, the Mayor of Seoul Special City or the Governor of the province where such organization is located shall designate the person who is to perform the duties of the guardian.

Finally, in order to preserve the family system, the new Code continues to provide for adoption after the death of the head of the family and also makes adoption possible by the terms of a will. References are made to Article 867, paragraph 1 and Article 880 of the same Code:

Article 867. 1. In case the head of a family is deceased, a child being adopted after the death of the head of a family may be elected [to succeed to the family headship] by the spouse of the deceased, his lineal ascendant or the family council, provided that no lineal descendant of the deceased is living.

Article 880. Adoption may be effected by a will . . . .

A guardian may adopt his ward according to Article 872 of the same Code:

Article 872. A guardian shall obtain the consent of the family council if he adopts his ward.

## II. Formal Requisites.

In order for an adoption to be valid, it must fulfill the formal requisites in addition to the substantive requisites noted above. Thus, a valid adoption must be registered with the Family Registrar, as stipulated in Article 878, paragraph 1 of the Civil Code.

Article 878. 1. An adoption becomes effective by notification thereof in accordance with the provisions of the Family Registration Law.

The method of notification is described in paragraph 2 of the same Article:

Article 87E. 2. The notification mentioned in the preceding paragraph shall be made in writing with the joint signature of both parties and two witnesses who are of legal age.

Article 70 of the Family Registration Law <sup>S/</sup> states as follows regarding the place for registration:

Article 70. The notification of adoption shall be given in the domicile or residence of the adopting parent, or in the district in which he presently resides.

As to the place for registration of an alien, Article 25, paragraph 2 of the same Law provides:

Article 25. 2. Notification with respect to a person who does not have the nationality of the Republic of Korea shall be given in the place where he resides, or in the permanent residence or present residence of the person giving notification.

The person to give notification is the person who agrees to effect an adoption, i.e., the adopting parent or adoptive child. <sup>2/</sup> However, in the case of a minor (under 15 years of age), notification must be given by the natural parents or guardian of the adoptive child who gave consent to its adoption. Article 68 of the same Law provides:

Article 68. If the natural parents of the adoptive child or others wish to effect its adoption on behalf of the child (under 15 years of age), the notification of adoption shall be given by the person who has wished to effect the said adoption.

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<sup>S/</sup> It came into force on the same day as the Civil Code became effective. Law No. 535, January 1, 1960.

<sup>2/</sup> See Chong Kwang-hyon, Sin ch'insok sangsaekmee yorum, p. 225.

The term "proxy adoption" is not expressed in the new Code. Nevertheless, when the person to be adopted is a minor (under 15 years of age), the person giving assent to its adoption must register and not the adopted person or the adoptive parents.

In the even that a husband effects an adoption in his own and his wife's name, he must state his reason. Article 67 of the same Law reads:

Article 67. In case the husband effects an adoption in the name of both partners, the reason for the adoption shall be stated in the written notification.

When adoption is effected by a will, the executor or the adoptive child must register in accordance with the provisions of Article 880 of the Civil Code and Article 69 of the Family Registration Law:

Article 880. Adoption may be effected by a will. In such a case the executor shall submit a notification thereof in accordance with the provisions of Article 878.

Article 69.

1. In the case of an adoption by a will, the executor or the adoptive child shall submit a notification thereof immediately after the will become effective.

2. [Omitted.]

### III. Adoption by American Citizens.

Under the Statute Regarding Conflict of Laws, the conditions for the adoption of a Korean child by an American citizen

are determined by both the Korean and American (state) laws. The validity of such adoption, however, is governed by American (state) law. Reference is therefore made to Article 21 of the same Statute<sup>10/</sup> which states as follows:

Article 21.

1. The conditions for adoption shall be determined for each party concerned by the law of his or her home country.

2. With respect to the validity of an adoption and of the dissolution of an adoption, the law of the home country of the adopting parents shall govern.

Thus, an American citizen can adopt a Korean child if he can meet the requisites of adoption stipulated in the law of his country and as far as these requisites are not contrary to Korean law.

With regard to the validity of adoption by American citizens under Korean law, a letter of the Minister of Foreign Affairs of the Republic of Korea addressed in 1954 to the American Ambassador in Seoul, Korea,<sup>11/</sup> states as follows:

Upon careful and extensive investigation of the Supreme Court decisions and the judgments of other Courts concerning adoption, it is confirmed that there have been cases of adoption of Korean nationals by aliens, notably by American nationals, which usually took place through the process of 'the permission of the Chief Justice of the Supreme Court,' and which were recognized as valid by the Korean Government.

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<sup>10/</sup> Law No. 966, January 15, 1962. Article 21 corresponds to Article 19 of the old Japanese law which had been applied in Korea for a period of approximately 50 years until the enforcement of the present law.

<sup>11/</sup> Note No. 89, April 30, 1954.

The same letter further states:

In the legal opinion of the Supreme Court, such adoptions have become established Court precedents in Korea resulting in the unchangeable Korean customs and official interpretation that aliens, whether they be Americans or otherwise, can legally adopt Korean nationals.

On September 30, 1961, in order to facilitate the adoption of Korean orphans by foreign nationals (mainly by American citizens), the Special Law Concerning Adoption of Orphans was enacted. This law was enacted after the passage of the revised Immigration and Nationality Act of the United States (amended on September 26, 1961, and effective on September 30, 1961; 75 Stat 650; 8 U.S.C. 1101). The above U. S. Act of 1961 recognizes only non-proxy adoption, requiring a face-to-face interview of the adoptive child by the adopting parent and the "home-study" report to be prepared by the local child welfare agencies in the United States.

There exist no Korean laws against adopting a Korean minor of 16 years of age by an American national presently residing in Korea. In order for an adoption to be valid, however, the law requires that notification of adoption be filed with the local Family Registrar concerned. Unlike some other countries, Korean law does not require the leave or decree of the court in the adoption of a minor child; the consent of the parents or legal guardian is sufficient for such adoption. At present, the Korean-American adoption program is administered by the Child Placement Service in Seoul under the direct supervision of the Ministry of Public Health and Social Welfare, the Republic of Korea.

Aside from the question of adoption, it should be noted that all males of conscription age (between 18 and 20 years of age) are, with certain exceptions, prohibited from going abroad under a Ministry of Defense regulation.<sup>12/</sup> According to an official of the Korean Embassy, the recent government policy effective from December 1968 also temporarily restricts the issuance of Korean passports in the case of minors between 14 and 18 years of age.<sup>13/</sup>

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<sup>12/</sup> Ministry of Defense Regulation No. 84, October 5, 1963.

<sup>13/</sup> This statement was confirmed by a telephone conversation exchanged between Dr. Cho and Korean Consul Lee Keun-pal on September 10, 1969.

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