

CHAPTER 7 ADOPTION OF CHILDREN BY STEP-PARENTS AND RELATIVES

7.1 Background

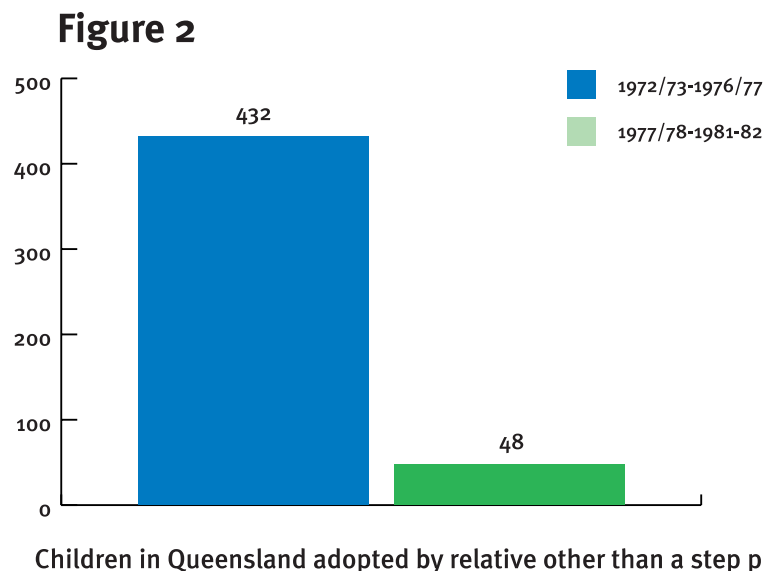
It was fairly common for children in Queensland to be adopted by their step-parent or another relative in the 1960s and 70s. In the decade from 1967-68 to 1976-77, 3,585 children were adopted by their step-parents and 754 children were adopted by other family members.

In 1977-78, the number of children adopted by a relative other than a step-parent decreased by 47 per cent compared with the previous year, and the number of children adopted by a step-parent decreased by 42 per cent in the same period.

The marked decrease in adoption by relatives resulted from recognition of the negative effect it can have on family relationships and on a child's identity. The decrease in step-parent adoption resulted from the Department's endeavours to assist step-families explore legal avenues other than adoption to secure children's interests.³³

The number of adoption orders made in favour of step-parents and relatives continued to decline in subsequent decades. The number of children adopted by step-parents and relatives decreased by 71 per cent in the two decades between 1977-78 and 1996-97.

The most significant decrease has been in the number of adoption orders made in favour of relatives other than step-parents. In the five years from 1977-78 to 1981-82, the number of children adopted by relatives declined more than 88 per cent compared with the previous five years, as illustrated in Figure 2.



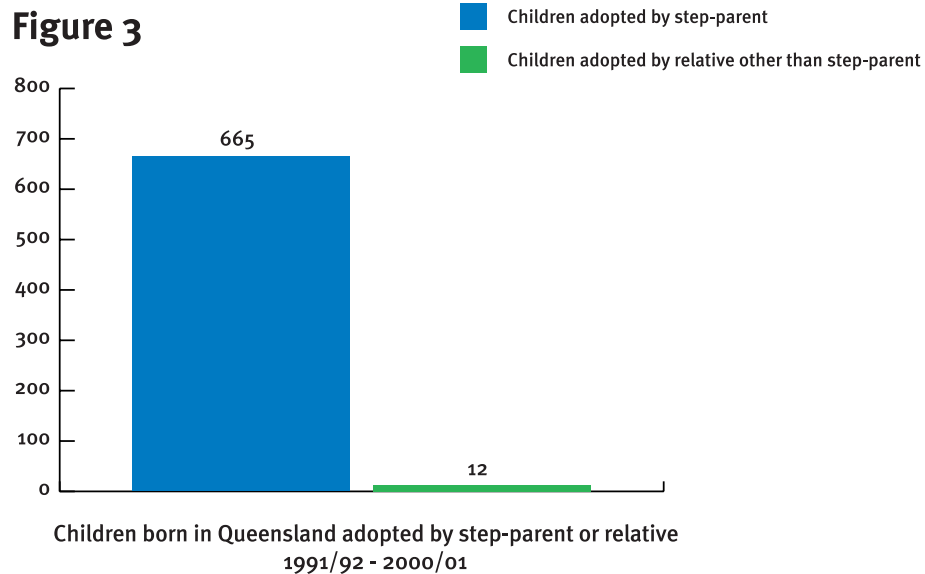
The Department's 1981 annual report noted that the "severing of legal relationships which occur in this (adoption of children by relatives) process are often not in the interests of the child". The report also noted that:

Although the Act prescribes that adoption by relatives is permitted, the Director will only make an order in these cases where the changes of status involved and the severing of legal relationships can be seen to be in the interests of the child.

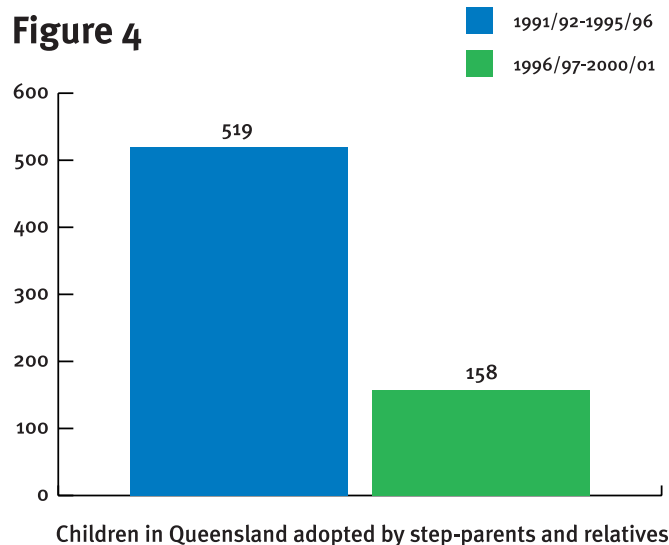
³³ Department of Children's Services, Annual Report 1978



In the ten years from 1991-92 to 2000-01, the number of adoption orders made in favour of relatives other than a step-parent continued to decline (see Figure 3). There has only been one adoption order made in favour of a child's relative since 1993-94.



In the five years from 1996-97 to 2000-01, the number of adoption orders made in favour of step-parents or relatives decreased by more than 69 per cent from the previous five years (see Figure 4).



Families can now consider alternatives to adoption that did not exist in the 1960s, which secure the interests of children in step-families, but some families still identify adoption as the preferred option for their family. All Australian jurisdictions include some provision in their adoption legislation for step-parent adoption in defined circumstances, and apply policy and guidelines to inform assessment and decision-making processes within the relevant government agencies.

Only a very small number of step or blended families in Australia now consider adoption. Data from the Australian Bureau of Statistics indicates that in 1997 there were 33,100 step and blended families in Queensland involving 73,700 children aged 0-17 years.³⁴ There were 114 children adopted by their step-parent in Australia in 1999-00³⁵. In 2000-01, 13 children were adopted by their step-parents in Queensland and at 30 June 2001, 125 people were seeking to adopt their step-child.

³⁴ ABS, (1996) *Australia's Families, Selected Findings from the Families in Australia*, cat. no. 442.0 as quoted in *Queensland Families – Across Three Generations* Queensland Government 2000.

³⁵ AIHW, *Adoption Australia, Child Welfare Series*, 2000.

7.2 Current Law and Practice³⁶

The *Adoption of Children Act 1964* makes provision for a child to be adopted by a relative only when the Chief Executive of the Department is satisfied that the welfare and interests of the child would be better served by an adoption order rather than another type of order that grants custody or guardianship of the child³⁷. An adoption order cannot be made in favour of a relative if a parenting order made by the Family Court, or a child protection order made by the Children’s Court that grants long term guardianship of the child, can better serve the child’s interests.

The *Adoption of Children Act 1964* defines “relative” as:

- a grandparent, brother, sister, uncle or aunt of the child, whether the relationship is of the whole blood or half blood or by affinity, notwithstanding that the relationship depends upon the adoption of any person; or
- the spouse of a parent of the child, whether natural or adoptive³⁸.

There have been no recent instances in which making an adoption order in favour of a relative other than a step-parent has been considered to better serve a child’s interests than another type of order. As a result, “Relative Children’s Adoption” has become synonymous with the term “Step-Parent Adoption”.

The Act makes provision for an adoption order to be made in favour of a person who “is the spouse of the natural or adoptive parent of the child concerned”.³⁹ However this appears to be somewhat contradictory to the Act’s objective which is to “facilitate securing for children who are available for adoption the best possible placements...”⁴⁰

Step-children are not “available for adoption” as they are already placed within their family. They are not in need of a permanent legal family - they already have one. A step-child’s placement within his/her own family, which comprises a birth parent and step-parent, pre-dates any application to adopt the child which may be made by the child’s step-parent and will continue regardless of whether an adoption order is made in favour of the child’s step-parent.

The New South Wales Law Reform Commission stated in its report of the review of the *Adoption of Children Act 1965* (NSW):

Step-parent and relative adoptions differ from other types of adoption in that agencies do not select the adoptive parents. Instead the issue is whether the existing care arrangement should be transformed into an adoption.⁴¹

Leave of the Family Court

Making an adoption order extinguishes birth parents’ parental responsibilities under the provisions of the *Family Law Act 1975*. However, making an adoption order in favour of a child’s step-parent does not automatically extinguish a birth parent’s rights and responsibilities unless the Family Court has granted leave for the adoption by the step-parent to proceed.

³⁶ The content of this chapter is based on a report on step-parent adoption issues commissioned by the Department of Families in 2001. A. Elliot and C.Sultman, Draft Policy Paper – Step-parent Adoption, Queensland, 2001.

³⁷ Adoption of Children Act 1964 section 12(5)

³⁸ Adoption of Children Act 1964 section 6

³⁹ Adoption of Children Act 1964 section 12(3)(a)

⁴⁰ Adoption of Children Act 1964 section 5A

⁴¹ Law Reform Commission publications, Report 81 (1997) – Review of the *Adoption of Children Act 1965* (NSW), Law Reform Commission NSW, Sydney 1997.



In Queensland, the Department requires a step-parent seeking to adopt a step-child to obtain legal advice about whether or not he/she needs to apply to the Family Court for leave to proceed with an application to adopt his/her step-child. Applicants are then required to provide the Department with a statement outlining the legal advice they have obtained and whether or not they are applying for leave of the Family Court.

The Family Court may grant leave for the adoption application to proceed, however, the granting of leave does not mean that an adoption order will automatically be made in favour of the step-parent.

Under the *Adoption of Children Act 1964*, a step-parent seeking to adopt his/her step-child must meet prescribed eligibility criteria. If he/she is eligible, the step-parent's adoption application must be favourably assessed for an adoption to be made. An assessment will only be favourable if making an adoption order in favour of the step-parent would serve the welfare and interests of the child.

An adoption order may be made without obtaining leave of the Family Court. However, where an adoption order is made in favour of a step-parent without leave being obtained, the non-custodial birth parent's parental responsibility is not extinguished for the purposes of the Family Law Act and the non-custodial birth parent may apply to the Family Court for a parenting order in relation to the child.

The outcome sought by many step-parents (and their families) seeking to adopt their step-child, is for the child to be provided with the security of being raised by two parents who have sole legal rights and responsibilities for parenting the child. The making of an adoption order where leave of the Family Court has not been granted does not achieve this outcome.

7.3 Eligibility and Assessment

A person seeking to apply to adopt his/her step-child, or a child to whom he/she is related, must meet eligibility criteria prescribed in the *Adoption of Children Regulation 1999* which include:

- the person is resident or domiciled in Queensland;
- the person is an Australian citizen or married to an Australian citizen;
- the person must have been married for two years; and
- the person must have custody of the child he/she is applying to adopt.⁴²

The provisions of the *Adoption of Children Act 1964*, which specify that an adoption may only be made in favour of a relative (including a step-parent) if the welfare and interests of the child would not be better served by another type of order that grants custody or guardianship, must be considered in the assessment. The Regulation outlines the matters that must be considered in assessing whether the welfare and interests of a child would be promoted by making an adoption order in favour of a relative including a step-parent. (See Appendix 2)

7.4 Effect of adoption by a step-parent

After making an adoption order in favour of a child's step-parent, the step-parent becomes the child's permanent, legal parent. A new certificate of birth is issued that names the child's custodial birth parent and the step-parent as the child's parents, as if the child had been born to them. The other birth parent's name is permanently removed from the child's certificate of birth after adoption. An adoption order remains, regardless of whether the birth parent and adoptive parent (formerly the child's step-parent) separate or divorce at a later stage.

⁴² Although not prescribed in the Regulation, the Department's administrative guidelines require the person to have had the child in their custody for at least two years at the time of application.

7.5 Alternatives to step-parent adoption

The majority of step-families secure family relationships and children's interests without adoption. Many families find some or all of the following options sufficient to meet their needs:

- a parenting order from the Family Court which legally recognises a child's step-parent as having parenting rights and responsibilities, which can be amended or rescinded or may remain in effect until a child turns 18;
- an application to the Registrar of Births, Deaths and Marriages to legally change a child's surname to the child's mother's married surname (i.e., the step-father's surname); and/or
- securing a child's inheritance rights by making specific provision for him/her in the parent's and step-parent's will/s and the wills of other family members.

7.6 Other jurisdictions

Adoption legislation in all Australian jurisdictions makes some provision for step-parents to apply to adopt their step-child in certain circumstances.

Most States and Territories have legislation that states an adoption order for a step-child should not be made unless the decision-maker is satisfied that the order will serve the child's interests better than a parenting order made by the Family Court or another type of order (e.g., a child protection order). The number of orders made in favour of step-parents varies between jurisdictions (see Table 1 below).

Under the provisions of South Australia's *Adoption Act 1988*, the Court will not make an adoption order in favour of a relative or step-parent unless it is satisfied that adoption is clearly preferable, in the interests of the child, to any alternative order that may be made under the laws of the State or the Commonwealth.

Table 1
Known Children (including step-parent) adoption orders
by State or Territory 2000/01⁴³

NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
53	10	13	48	1	5	7	NIL	137

Note: these data include all "known children" adoptions of which 83% were step-parent adoptions. The total number of step-parent adoptions was 98.

Under the provisions of *Victorian Adoption Act 1984*, the Court must not make an order for the adoption of the child by a step-parent unless it is satisfied that:

- the making of an order in relation to the guardianship or custody of the child under the Family Law Act 1975 would not make adequate provision for the welfare and interests of the child; and
- exceptional circumstances exist which warrant the making of an adoption order; and
- an order for the adoption of the child would make better provision for the welfare and interests of the child than an order referred to in paragraph (a).

Under the provisions of the *Adoption Act 2000* in New South Wales, the Court must not make an adoption order in favour of a step-parent unless it is satisfied that making the adoption order is clearly preferable, in the best interests of the child, to any other action that could be taken by law. It must be preferable to making a care order under the *Children and Young Person's (Care and Protection) Act 1998* or a parenting order under the Commonwealth *Family Law Act 1975*.

⁴³ AIHW, Adoption Australia, Child Welfare Series, 2002.



When considering the variation in the numbers of adoption orders made in favour of step-parents in the different States despite similar legislative provisions and policy positions, it is apparent that the way legislation and policy are applied varies according to:

- the degree to which the States actively promote applicants' understanding of the provisions, their implications and the alternatives to adoption;
- whether there is a legislative requirement for leave to be granted by the Family Court before a step-parent adoption application can be made;
- the extent to which a Court is bound to consider an independent report by an adoption service prior to deciding an application; and
- the policy guidelines established by various States to determine the "exceptional circumstances" in which making an adoption order in favour of a step-parent would be supported.

7.7 Concerns expressed by some people affected by step-parent adoption

The Department has been contacted by a number of people affected by step-parent adoption after the family has been separated by divorce. They include: people who have been adopted by their step-father; men who have adopted their step-children; and women whose children have been adopted by their step-father. Their requests may include:

- that the adoption order be discharged and that the step-parent's name be removed from the person's certificate of birth and that the birth parent's name be re-instated;
- that the adoption order be discharged because the person adopted was too young to understand the effect of the adoption order at the time it was made; and/or
- the adoption order be discharged so the adoptive parent can cease to be legally required to recognise the adopted child as his/her child, to cease to have responsibility for paying child support in relation to the adopted child and to extinguish the adopted child's right to inherit from him/her.

Although a marriage may dissolve after an adoption order has been made in favour of a step-parent, it does not provide grounds for an adoption order to be discharged. A step-parent who becomes the adoptive parent of his/her step-child remains the legal parent of the adopted person permanently.

In many of these instances, it is apparent that the families' motivation for the step-parent adopting the child was problematic, though not acknowledged at the time of assessment. It appears from discussions with affected individuals that adoption was being pursued to:

- resolve or finalise issues in the relationship between the child's birth parents;
- give the step-parent increased authority or status in the family;
- counteract the non-custodial birth parent's past behaviour or apparent lack of interest in the child;
- strengthen the step-parent's commitment to the marriage and the family;
- improve a conflictive relationship between a child and his/her step-parent; and/or
- alter child support payment requirements.

Adoption may strengthen bonds within some families and create a permanent legal relationship between the step-parent and step-child, but it cannot remedy problematic relationships. Where this is the motivation, making an adoption order creates a relationship that exists only in law and one that is unlikely to endure.

The consequences of formalising a relationship between a child and his/her step-parent through adoption may include:

- permanently severing the legal relationship between the child and his/her non-custodial birth parent and members of the child's extended birth family before the child is of an age to understand or value such relationships;
- permanently severing the social and familial relationship between the child and his/her non-

- custodial birth parent and members of the child's extended birth family;
- failing to consider the interests of a deceased birth parent where a step-parent applies to adopt the deceased person's child; and/or
- creating an environment in which family members can disguise that the child was not born to the marriage and in which information about the child's birth history is not readily available to the child.

7.8 Proposals for the future

Most step-families formalise family relationships without the use of adoption. Usually, custodial and non-custodial parents reach agreement about the ongoing care of their children without considering adoption, including issues associated with the role of the custodial parent's partner.

There is growing community recognition and acceptance of various family structures and that step-families and blended families do not need to be sanctioned by adoption for strong, caring relationships to develop.

Any child in Queensland who requires a permanent legal family - which can only be provided or is best provided by adoption - should be able to be provided with such a family. In rare instances, making an adoption order could be the only or best way to provide children living with relatives with a permanent legal family, including a family comprising a birth parent and a step-parent.

If adoption is to remain an option available to secure any child's welfare and interests, regardless of whether the most appropriate prospective adoptive parent is the relative or step-parent of the child, careful consideration must be given to what comprises "exceptional circumstances". Such circumstances should clearly relate to the child's circumstances and not the needs and circumstances of the person seeking to adopt him/her.

Decisions regarding an application made by a person to adopt a step-child or a child to whom they are related should be based on guidelines which clarify what "exceptional circumstances" may result in such an adoption being the only or the best option for securing a permanent family for a child. Circumstances such as a custodial parent's remarriage, an absent or deceased father or a history of parental or familial conflict or abuse within the family could not be considered to be exceptional as the child's needs and best interests in such circumstances can be addressed without adoption.

Should Queensland legislation enable a relative or a step-parent to adopt a relative or step-child:

- *only where exceptional circumstances exist which warrant making an adoption order; and*
- *where adoption would serve the interests of the child better than any other available order for parental responsibility, residency or contact?*

Would circumstances such as the following constitute 'exceptional circumstances':

- *where it would be in a child's interests for a legal parental relationship between the child and his/her relative or step-parent to endure beyond childhood because the child has specific needs;*
- *where a child's emotional or psychological well-being would be enhanced by an adoptive parent relationship existing between the child and his/her relative or step-parent, rather than another type of legal relationship (i.e., a legal relationship created by a Family Court order).*

As in some other States, should step-parents be required to obtain leave from the Family Court for an adoption to proceed before an assessment of an application by a step-parent to adopt his/her step-child can proceed?