Migration Review Tribunal
AUSTRALIA

MRT RESEARCH RESPONSE

Research Response Number: IND34669
Country: India
Date: 6 April 2009

Keywords: India – Adoption laws

Questions
Please advise whether the Guardianship Order from the court is an adoption according to the law of India.

RESPONSE

Please advise whether the Guardianship Order from the court is an adoption according to the law of India.

There are various procedures by which a legal adoption can take place in India, and the sources referred to in this response are not entirely clear on the delineation between some of them. The legal requirements for adoption depend on whether the adoption is being carried out by an Indian national living in India, a Non-Resident Indian, an Overseas Citizen of India, a Person of Indian Origin, or a foreigner. This situation is further complicated by the different laws under which Hindus and non-Hindus undertake adoption; full adoption was not available to non-Hindus until the recent passing of The Juvenile Justice (Care and Protection of Children) Act, 2000 (amended by The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006) (JJA). Hindus were able to legally adopt under the Hindu Adoption and Maintenance Act 1956 (HAMA), while non-Hindus and foreigners were only able to obtain a court order of guardianship under the Guardians and Wards Act 1890 (GAWA), which lapsed when the child turned eighteen unless a full legal adoption was obtained in another country ('Hindu Adoptions and Maintenance Act, 1956' 1956, Department of Revenue, Rehabilitation and Disaster Management, Government of Punjab website, 21 December http://punjabrevenue.nic.in/hadoptact(1).htm – Accessed 28 March 2009 – Attachment 6; 'The Guardians and Wards Act, 1890' 1890, Ministry of Women and Child Development, Government of India website, 21 March http://wcd.nic.in/gawaact.htm – Accessed 28 March 2009 – Attachment 7; 'The Juvenile Justice (Care and Protection of Children) Act, 2000' 2000, Ministry of Women and Child Development, Government of India website, 30 December http://wcd.nic.in/childprot/jjact2000.pdf – Accessed 28 March 2009 – Attachment 8; 'The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006' 2006, CARA website, 22 August http://www.cara.nic.in/pdfs/jjactamedment.pdf – Accessed 28 March 2009 – Attachment 9).

Information on adoption law in India is provided in three sections: information provided by the Central Adoption Resource Authority in India; information on Indian adoption law drawn from other sources; and previous MRT research responses on Indian adoption law.

The Central Adoption Resource Authority

Information on the process of adoption in India is provided on the website of the Central Adoption Resource Authority (CARA), which describes itself as "an autonomous body under the Ministry of Women & Child Development, which functions as the Central Authority of the Government of India in matters related to adoptions". CARA's web page of frequently asked questions about adoption provides an overview of the process by which a foreign national adopts an Indian child, and also provides information on adoptions by non-Resident Indians:

3. Can I as a foreigner, adopt an Indian child?

Yes. But you have to follow procedures laid down in Guidelines for Adoption from India 2006

4. I am a foreigner – how do I adopt an Indian child?

Your original application along with the prescribed documents should be forwarded by the Agency enlisted by CARA in your country to a Recognized Placement Agency in India.

5. There is no Agency recognized by CARA in my country. What do I do?

You may forward the application and related documents through concerned Government Department/ Ministry of your country to CARA.

6. How long does it take to complete an inter country adoption?

It takes 4 to 6 months to complete the process of an inter-country adoption after a suitable adoptable child is identified.

7. What is NOC?

NOC is a "No Objection Certificate" issued by Central Adoption Resource Agency for a child to be placed in Inter-country adoption with a particular parent / parents.

8. How long does it take for a NOC to be issued? Is there any fee for it?

If all papers are in order and complete, it will not take more than 10 – 15 days to issue a NOC. There are no fees chargeable for it.

9. Where can I know the status of my child's NOC?

You can approach the Indian Placement Agency from where you have accepted the Child.

10. What are the chargeable fees for inter-country adoptions?

In inter-country adoption, an adoption fee of a fixed amount of US$3500 or its equivalent in Indian rupees will be payable by the adoptive parents to the Recognised Indian Placement Agencies through EFAA or a central authority.

11. Do I have to visit India to complete the adoption process?

No, it is the responsibility of Indian Placement Agency to complete the necessary process and formalities in India.

…13. Are Non-Resident Indians given any preference in inter-country adoption?

Yes. As per the Revised Guidelines, the order of preference for adoption of Indian children is:

1. Indian citizens living in India

2. Indian citizens living abroad

3. Both Parents of Indian origin abroad

4. One parent of Indian origin abroad

5. Foreign families

(The above order of preference may undergo a change in the near future as a proposal to include PIO/OCI is under consideration)

14 Where can I get a list of Indian & Foreign Agencies recognized by CARA?

You can access CARA's website, i.e. www.adoptionindia.nic.in for such information.

15. Is there an age limit for prospective adoptive parents?

Prospective Adoptive Parents having composite age of 90 years or less can adopt infants and young children. In case of older and special needs children, the upper age limit can be relaxed based on the merits of the case.)

16. What is the criteria for eligibility of children?

- The child must be legally free for adoption.
- Clearance from ACA is mandatory for inter-country adoptions.
- Siblings/twins/triplets cannot be separated except in exceptional cases.
- Two unrelated children cannot be proposed to a foreign family at a time.
- A child may as far as possible be placed in adoption before it reaches the age of 12.
- The consent of the child above 6 years should be taken for the adoption.
- Age difference of the adoptive parents and child should be 21 years or more.

17. I am an Indian staying in India. Where can I register?

You can register with a Sishu Greh or a Placement Agency or an Adoption Coordinating Agency.

18. I am an Indian staying abroad. Where can I register?

You can register with a RIPA/EFAA/Central Authority/Govt. Deptt.

19. I am a PIO staying at present in India. Where can I register?

You can register with a RIPA.

20. I am a PIO staying abroad at present. Where can I register?

You can register with EFAA/Central Authority/concerned Government Department.

21. I am a foreigner staying in India over 1 year. Where can I register?

You can register with RIPA in India

22. I am a foreigner. Where can I register?

You can register with EFAA/Central Authority/concerned Government Department.

…24. What is HAMA, GAWA & JJ Act?

HAMA – Hindu Adoption and Maintenance Act, 1956. Hindus, including Sikhs, Jains & Buddhists can adopt under this Act.

GAWA – is Guardians And Wards Act, 1890. Foreigners and non-Hindus can resort to this Act for the purpose of guardianship.

Under Juvenile Justice (Care & Protection of Children) Act(2000 amended in 2006), a child of either sex can be given in adoption by the court to a person irrespective of his/her marital status and number of biological or adopted children.

25. I have a biological male child. Can I adopt second male child under HAMA?

No. You can adopt under JJ Act (2000 amended in 2006)

…27. Is there any policy in relation to length of the time one must be married before being eligible to adopt a child?

The couple should preferably have been married for at least 5 years.

28. Can I adopt an older child?

Yes, you can. Please also refer to reply to Q. No 16.

…31. What are the documents required for inter-country adoption?

Please see Annexure 2 of the Guidelines for Adoption from India 2006 (Central Adoption Resource Authority (CARA) (undated), 'Frequently Asked Questions', CARA website http://www.cara.nic.in/faq.htm – Accessed 28 March 2009 – Attachment 1).

The CARA website also provides more detailed information on the procedure for inter-country adoption in India. According to CARA: "The Supreme Court of India has laid down that every application from a foreigner/NRI/PIO (as applicable) desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the Government or a Department of the Foreign Govt. to sponsor such cases in the country in which the foreigner is resident". CARA's information also states that: "No application by a foreigner/NRI/PIO for taking a child in adoption should be entertained directly by any social or child welfare agency in India". The full procedure for inter-country adoption, as set out by CARA, follows:

PROCEDURE FOR INTER-COUNTRY ADOPTION

The Supreme Court of India has laid down that every application from a foreigner/NRI/PIO (as applicable) desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the Government or a Department of the Foreign Govt. to sponsor such cases in the country in which the foreigner is resident. The foreign agency should also be an agency 'authorised' by CARA, Ministry of Social Justice & Empowerment, Govt. of India. No application by a foreigner/NRI/PIO for taking a child in adoption should be entertained directly by any social or child welfare agency in India.

4.1 Criteria for Foreign Prospective Adoptive Parent/s (FPAP):

- Married couple with 5 years of a stable relationship, age, financial and health status with reasonable income to support the child should be evident in the Home Study Report.

- Prospective adoptive parents having composite age of 90 years or less can adopt infants and young children. These provisions may be suitably relaxed in exceptional cases, such as older children and children with special needs, for reasons clearly stated in the Home Study Report. However, in no case should the age of any one of the prospective adoptive parents exceed 55 years.

- Single persons (never married, widowed, divorced) up to 45 years can also adopt.

- Age difference of the single adoptive parent and child should be 21 years or more.

- A FPAP in no case should be less than 30 years and more than 55 years.

- A second adoption from India will be considered only when the legal adoption of the first child is completed.

- Same sex couples are not eligible to adopt.

The following procedures will be followed in all cases of inter-country adoptions:

Step I) Enlisted Foreign Adoption Agency (EFAA)

- The applicants will have to contact or register with an Enlisted Foreign Adoption Agency (EFAA)/Central Authority/Govt. Deptt. in their country, in which they are resident, which will prepare the Home Study Report (HSR) etc. The validity of "Home Study Report" will be for a period of two years. HSR report prepared before two years will be updated at referral.

- The applicants should obtain the permission of the competent authority for adopting a child from India. Where such Central Authorities or Government departments are not available, then the applications may be sent by the enlisted agency with requisite documents including documentary proof that the applicant is permitted to adopt from India

- The adoption application dossier should contain all documents prescribed in Annexure-2. All documents are to be notarized. The signature of the notary is either to be attested by the Indian Embassy/High Commission or the appropriate Govt. Department of the receiving country. If the documents are in any language other than English, then the originals must be accompanied by attested translations

- A copy of the application of the prospective adoptive parents along with the copies of the HSR and other documents will have to be forwarded to RIPA by the Enlisted Foreign Adoption Agency (EFAA) or Central Authority of that country.

Step II) Role of Recognised Indian Placement Agency (RIPA)

- On receipt of the documents, the Indian Agency will make efforts to match a child who is legally free for inter-country adoption with the applicant.

- In case no suitable match is possible within 3 months, the RIPA will inform the EFAA and CARA with the reasons therefore.

Step III) Child being declared free for inter-country adoption – Clearance by ACA

- Before a RIPA proposes to place a child in the Inter country adoption, it must apply to the ACA for assistance for Indian placement.

- The child should be legally free for adoption. ACA will find a suitable Indian prospective adoptive parent within 30 days, failing which it will issue clearance certificate for inter-country adoption.

- ACA will issue clearance for inter-country adoption within 10 days in case of older children above 6 years, siblings or twins and Special Needs Children as per the additional guidelines issued in this regard.

- In case the ACA cannot find suitable Indian parent/parents within 30 days, it will be incumbent upon the ACA to issue a Clearance Certificate on the 31st day.

- If ACA Clearance is not given on 31st day, the clearance of ACA will be assumed unless ACA has sought clarification within the stipulation period of 30 days.

- NRI parent(s) (at least one parent) HOLDING Indian Passport will be exempted from ACA Clearance, but they have to follow all other procedures as per the Guidelines.

Step IV) Matching of the Child Study Report with Home Study Report of FPAP by RIPA

- After a successful matching, the RIPA will forward the complete dossier as per Annexure 3 to CARA for issuance of “No Objection Certificate”.

Step V) Issue of No Objection Certificate (NOC) by CARA

- RIPA shall make application for CARA NOC in case of foreign/PIO parents only after ACA Clearance Certificate is obtained.

- CARA will issue the ‘NOC’ within 15 days from the date of receipt of the adoption dossier if complete in all respect.

- If any query or clarification is sought by CARA, it will be replied to by the RIPA within 10 days.

- No Indian Placement Agency can file an application in the competent court for inter-country adoption without a “No Objection Certificate” from CARA.

Step VI) Filing of Petition in the Court

- On receipt of the NOC from CARA, the RIPA shall file a petition for adoption/guardianship in the competent court within 15 days.

- The competent court may issue an appropriate order for the placement of the child with FPAP.

- As per the Hon'ble Supreme Court directions, the concerned Court may dispose the case within 2 months.

Step VII) Passport and Visa

- RIPA has to apply in the Regional Passport Office for obtaining an Indian Passport in favour of the child.

- The concerned Regional Passport Officer may issue the Passport within 10 days.

- Thereafter the VISA entry permit may be issued by the Consulate/Embassy/High Commission of the concerned country for the child.

Step VIII) Child travels to adoptive country

- The adoptive parent/parents will have to come to India and accompany the child back to their country.

4.2 Criteria for eligible children:

- The child must be legally free for adoption.

- Clearance from ACA/State Government is mandatory for all children except wherever exempted under the Guidelines.

- Siblings/twins/triplets cannot be separated except in exceptional cases.

- Two unrelated children cannot be proposed to a foreign family at a time.

- A child may as far as possible be placed in adoption before it reaches the age of 12.

- The consent of the child has to be obtained wherever applicable.

4.3 Where there is no Enlisted Foreign Adoption Agency (EFAA)

In the case of an Indian National residing in a country where there is no Enlisted Agency, CARA may allow an organisation or individual recommended by the Indian Embassy to do the Home Study Report (HSR), undertaking as prescribed in the Guidelines and other documentation. The said application may be forwarded with the approval of the Indian Embassy to CARA.

Wherever there is no Foreign Adoption Agency enlisted by CARA in any country, the concerned Government Department/Ministry or any authorised body of that country may forward the original application and related documents of the prospective adoptive parents to CARA through the Indian Embassy/High Commission. In case of resident non-citizens where the host Govt. may not be willing to sponsor the cases, the documentation may be done through the Embassy of the country to which the applicant belongs. Home studies however will have to be prepared by a qualified Agency/Social Worker in all cases. In case CARA receives the papers it will send those papers to any of the Recognised Indian Placement

> Agencies (RIPA) for further processing the case only after HSR has been approved by it. The procedure to be adopted thereafter shall be the same as indicated in the process.
>
> 4.4 Foreign nationals living in India
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> In case of foreigners who have been living in India for one year or more, the HSR and other connected documents may be prepared by the RIPA which is processing the application of such foreigners for the guardianship of the child. An undertaking should be given by the concerned Embassy/High Commission that the child will be legally adopted in that country and also mention an agency/orgn. who would send the progress reports and take care of the child in case of any disruption as and when the child is taken abroad. However a certificate is required from the competent authority in the country of permanent residence of the FPAP indicating that the child shall be allowed to enter the country and get adopted in due course.
>
> 4.5 Rights of the child taken abroad
>
> When the Court makes an order appointing adoptive parents as the guardians of the child, the order shall contain an undertaking of the adoptive parents that they shall protect and safeguard the best interest of the child and that the child would be legally adopted in the receiving State not later than two years from the date of the order. On such adoption in the receiving State, subject to the Laws of the country the child would have all rights recognised under International Law (Central Adoption Resource Authority (undated), 'Procedure for Inter-Country Adoption', CARA website http://www.cara.nic.in/guide_inter_country_chap4.htm – Accessed 28 March 2009 – Attachment 2).

A flow chart depicting the procedure for inter-country adoption from India, sourced from the CARA website, is provided as Attachment 3 (Central Adoption Resource Authority (undated), 'The Inter-Country Adoption Sequence', CARA website http://www.cara.nic.in/inter.htm – Accessed 28 March 2009 – Attachment 3).

From the information provided on the CARA website, and given that the applicant claims to have been adopted by relatives, it is possible that the regulations relating to Indian Family Adoptions may apply to them. CARA's information states that: "For the purpose of qualifying adoption of a relative's child, the prospective adoptive parent should be Indian born in India and staying abroad either with Indian or Foreign citizenship"; and that: "For such family adoption, the relation should be limited to first degree of relationship from both adoptive parents and biological parent's family tree":

> 1.1 For the purpose of qualifying adoption of a relative's child, the prospective adoptive parent should be Indian born in India and staying abroad either with Indian or Foreign citizenship. For such family adoption, the relation should be limited to first degree of relationship from both adoptive parents and biological parent's family tree.
>
> 1.2 Requirements of age criteria and Home Study Report shall be as per In-country Guidelines issued by Central Adoption Resource Agency, Govt. of India.
>
> 1.3 In case of eventuality or extraordinary circumstances, a second adoption from India may be considered only when the legal adoption of the first child is completed.
>
> 1.4 In case of Non-Hague counties, the legal measures for finalization of adoption should be as per the concerned country's laws ('Guidelines for Family Adoption of Indians Staying Abroad' (undated), Central Adoption Resource Authority website http://cara.nic.in/guide_familyeligibility4PAP.htm – Accessed 6 April 2009 – Attachment 4).

The CARA website provides the following information on the process of In-Country adoption in India:

Stage I

- Prospective adoptive parent(s) should register themselves with the local RIPA / LAPA or Adoption Coordinating Agency or with the State Adoption Cell.

Stage II

- A home study report of the prospective adoptive parents will be prepared by the social worker of the Agency. To allay the fears and apprehensions of the prospective adoptive parent(s), pre-adoptive counselling sessions will be undertaken by the social worker during the preparation of the home study report. Assessing the ability of a couple to parent a child not born to them is of crucial importance in a successful adoption. Therefore, their suitability to care for an unrelated child is assessed through this home study and counselling. Documents relating to the financial and health status of the prospective parent(s) will be part of the Home Study Report.

- In case of Inter-State adoption applications by parent(s), they will be accompanied by Home Study prepared by a qualified social worker working in a RIPA/LAPA. Where State Govt.'s have officially delegated such work for its Officials, the Home Study Report could be prepared by the concerned Official.

- Criteria for eligibility of parent(s) will be adhered to, as stated in Para 1.1.7.

- The Agency will make a suitable reference from amongst the admitted children legally free for adoption. If no suitable child is available, the family will be referred to the ACA.

Stage III

- After a Home Study has been accepted and approved, a child will be shown to the parent(s). The agency will take care to match a child meeting the description, if any, desired by the parent(s).

- In case of placement of older children (above the age of 6), both written and verbal consent of the child will be obtained.

Stage IV

- Once a successful matching has been done, the agency will file a petition in the Court/JJB for obtaining the necessary orders under the relevant Act. The above process will normally be completed in 6-8 weeks.

Adoption Act

The child can be legally placed with the parent(s) under HAMA/GAWA/JJ-Act 2000. The prospective parents should be informed about the different Acts available and the ramifications of each one. It would be left to them to decide as to which Act they would like to file their petition under, provided that they are eligible to do so under the chosen Act. As stated above, the prospective parents must be made to fully understand the status of their adoption under each Act.

> Follow up visits
>
> Once an order has been issued, it should be followed by regular follow-up visits and post adoption counselling by the social worker till the child is adjusted in the new environment. The follow up should preferably be for a period of one year at-least or as directed by the Court/JJB. Copies of the follow-up reports will be sent to the District Social Welfare Officer/concerned State Government Department, concerned Scrutiny Agency and the Court/JJB from where the order was obtained ('Procedure For In Country Adoption' (undated), Central Adoption Resource Authority website http://cara.nic.in/ad_procedure_in_country.htm – Accessed 6 April 2009 – Attachment 5).

Adoption law in India

Adoption law in India is composed of three pieces of legislation:

- for Hindus, Sikhs, Jains and Buddhists, or "any other person who is not a Muslim, Christian, Parsi or Jew by religion", the relevant law is the Hindu Adoptions and Maintenance Act, 1956 (HAMA). Under HAMA, Hindus may not adopt a child if they already have a child of that gender ('Hindu Adoptions and Maintenance Act, 1956' 1956, Department of Revenue, Rehabilitation and Disaster Management, Government of Punjab website, 21 December http://punjabrevenue.nic.in/hadoptact(1).htm – Accessed 28 March 2009 – Attachment 6);

- for Moslems, Christians, Parsis and Jews, and for foreigners seeking to adopt in India, the relevant legislation is The Guardians and Wards Act, 1890 (GWA). Legal adoption is not possible under this law; rather it enables a decree of Guardianship to be awarded, which expires when the child turns eighteen unless the adoption has been formalised in another country ('The Guardians and Wards Act, 1890' 1890, Ministry of Women and Child Development, Government of India website, 21 March http://wcd.nic.in/gawaact.htm – Accessed 28 March 2009 – Attachment 7).

- The most recent legislation to contain material relevant to adoption is The Juvenile Justice (Care and Protection of Children) Act, 2000, which was amended by The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 (JJA). This legislation is intended to provide a secular adoption process enabling those not covered by HAMA to legally adopt ('The Juvenile Justice (Care and Protection of Children) Act, 2000' 2000, Ministry of Women and Child Development, Government of India website, 30 December http://wcd.nic.in/childprot/jjact2000.pdf – Accessed 28 March 2009 – Attachment 8; 'The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006' 2006, CARA website, 22 August http://www.cara.nic.in/pdfs/jjactamedment.pdf – Accessed 28 March 2009 – Attachment 9).

The US Department of State's information page on inter-country adoption from India states that "Indian law does not permit foreigners to adopt Indian children", but does not specify the legal position of Indians with dual citizenship; it also states that "Indian law only allows Hindus, Sikhs, Jains and Buddhists to complete full adoptions of Indian children":

> Indian law does not permit foreigners to adopt Indian children, but rather to receive guardianship (or legal custody) of a child. This allows prospective adoptive parents to depart India and to adopt the child in the United States.

> …Indian law only allows Hindus, Sikhs, Jains and Buddhists to complete full adoptions of Indian children. However, Under the Guardian and Wards Act of 1890, foreigners may petition an Indian District Court (or Family Court in larger urban areas) for legal custody (guardianship) of a child for the purpose of taking the child abroad to conclude a full and final adoption ('India – Country Information' (undated), Intercountry adoption, Office of Children's Issues, US Department of State website http://adoption.state.gov/country/india.html# – Accessed 28 March 2009 – Attachment 10).

Information sourced from the adoption.com website is also unclear on the position of non-resident Hindu Indians, as it states that: "Except for adoption by Hindus, Indian law has no provision for adoption. Children are placed under guardianship of adopting parents to exit the country, and adoption must take place in the parents' home country" ('India Adoption' (undated), adoption.com website http://india.adoption.com/ – Accessed 28 March 2009 – Attachment 11).

In April 2009, the NSW Department of Community Services supplied the following advice regarding the Overseas Citizen of India (OCI) passport, which, since November 2006, confers the equivalent of dual citizenship on OCIs:

> It continues to be difficult to locate agencies in India that are able to accept applications from Australia.
>
> However, applications from people where one of the couple has an Indian passport or an Overseas Citizen of India passport are given preference and are more readily accepted by Indian adoption agencies.
>
> Overseas Citizen of India is commonly known as dual Citizenship. Since 26 November 2006, Overseas Citizen of India passports and Indian passports are of equal status ('Current adoption news – April 2009' 2009, New South Wales Government Department of Community Services website, April http://www.community.nsw.gov.au/parents_carers_and_families/fostering_and_adoption/adoption/current_adoption_news.html – Accessed 6 April 2009 – Attachment 14).

According to information provided on the website of the Indian NGO Catalysts for Social Action (which describes itself as "a social welfare organisation dedicated to the cause of child welfare"), the Juvenile Justice (Care and Protection of Children) Act 2000 states the following of inter-country adoptions:

> The amended JJ Act extends to the whole of India except the state of Jammu and Kashmir. The Act seeks to consolidate and modify the law relating to juveniles in conflict with the law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development 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. This could be through various institutions (Government or NGO) established/recognized under this enactment or through non institutional services such as adoption, foster care, and sponsorship. An attempt has been made through this enactment to make up for the lacunae in the existing adoption laws by permitting persons belonging to all religions to adopt.
>
> With regard to Inter-country adoption, the Act states the following:
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> – All applications for adoption of a child by foreigners shall be sponsored by a social or child welfare agency so recognised or licensed by the Government of the country to which the foreigner belongs.

– No application by a foreigner for taking a child in adoption shall be entertained or filed directly by any social or welfare agency in India but will be routed through an agency in the country to which the foreigner belongs and which is recognised by CARA.

– Every such application from such social or child welfare agency shall be accompanied and supported by a Home Study Report in detail with recent photographs of the family and other particulars showing the social and economic status of the foreigner and declaration that he will maintain the child as his own and provide for his education and upbringing.

– All private adoptions directly or indirectly in any manner are banned and any such adoptions shall be null and void ('Catalysts for Social Action – The Juvenile Justice Act (JJA), 1986' (2000), Catalysts for Social Action website http://csa.org.in/JJA.html – Accessed 6 April 2009 – Attachment 12).

Nonetheless, the Catalysts for Social Action website also states that: "A Hindu, even if he/she is a foreign national, may adopt a Hindu child in India under the HAMA" ('Catalysts for Social Action – Guardians & Wards Act (GWA), 1980' (2000), Catalysts for Social Action website http://csa.org.in/gwa.html – Accessed 6 April 2009 – Attachment 13).

An article in the November 2008 issue of the *Income Tax Review*, published as part of a special issue on Hindu laws by the Indian Chamber of Tax Consultants, assesses the processes for in-country and inter-country adoptions in India, as well as providing information on the three pieces of legislation regulating adoption in India. Information from this source suggests that: "In-Country Adoptions are adoptions by prospective parents who are Indians resident in India"; and that: "The definition precludes Non Resident Indians (NRI); i.e., those Indians who are Indian citizens but have not stayed in the country for a continuous period of 2 years, immediately prior to the registration for adoption". Of inter-country adoption, the website states that: "Inter-country adoption is an adoption by a person/couple who is not an Indian citizen resident in India":

Only a recognized Child Welfare Agency can undertake Adoptions. Agencies are separately licensed to do in-country, and international placements. The Government of India also, registers international placement agencies which can co-ordinate with agencies in India, for placing a child.

Types of Adoption/Placements

1) In-Country Adoption/Placement

In-Country Adoptions are adoptions by prospective parents who are Indians resident in India.

The definition precludes Non Resident Indians (NRI); i.e., those Indians who are Indian citizens but have not stayed in the country for a continuous period of 2 years, immediately prior to the registration for adoption.

…2. Inter-Country Adoption/Placement

Inter-country adoption is an adoption by a person/couple who is not an Indian citizen resident in India. This category of Adoption is regulated by CARA guidelines for Inter-country adoption. Foreign Prospective Adoptive Parent/s (FPAP) are specified by Government of India, from time to time.

• The applicant must have the permission of the competent authority in the country of residence, for adopting a child from India.

…Legislation in India

The adoption procedure is based on the legislations available in India that are applicable based on the religion of the adopter and the child can be legally placed with the parent(s) under any of the following:

• Hindu Adoption and Maintenance Act

• Guardians and Wards Act

• Juvenile Justice Act, 2000

The prospective parents should be informed about the different Acts available and the ramifications of each one. It would be left to them to decide as to which Act they would like to file their petition under, provided that they are eligible to do so under the chosen Act. The prospective parents must be made to fully understand the status of their adoption under each Act.

1) Hindu Adoption and Maintenance Act, 1956 (HAMA)

HINDU LAW

The legislature, while passing the Hindu Adoption and Maintenance Act, 1956, has taken into consideration only the secular object of adoption as under the Act a daughter could also be adopted. Also this is the only codified law available on the subject of adoption in India.

The HAMA (amended 1960 & 1962) came into force on 21st December, 1956. Prior to this Act only a male could be adopted, but the Act makes a provision that a female may also be adopted. This Act extends to the whole of India except the State of Jammu and Kashmir and extends to only the Hindus, which are defined under section 2 of the Act and include any person, who is a Hindu by religion, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj, or a Buddhist, Jain or Sikh by religion, to any other person who is not a Muslim, Christian, Parsi or Jew by religion. It also includes any legitimate or illegitimate child who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as a Hindu, Buddhist, Jain or Sikh.

The Hindu Adoption and Maintenance Act has codified the Hindu law as well as modified it. The changes incorporated were demanded by the progressive section of Hindu society while the orthodox opposed it. Section 5 : “Now after the enforcement of the Act all adoptions shall be made in accordance with the provisions of this. An adoption made in contravention shall be void which neither creates any rights nor destroys the right of the person in the family of his birth.”

…2) The Guardians and Wards Act, 1890 (GWA)

The Guardians and Wards Act, (GWA) 1890, [Act No. 8 of year 1890, dated 21st. March, 1890], is indirectly invoked by other communities, such as Christians, Parsis, Muslims etc., to become guardians of the child during minority. The statute does not deal with adoption as such but mainly with guardianship. This Act formalized the process of bringing up a child as one’s ward. The Act confers Guardianship status to the adoptive parents until the child reaches maturity; i.e., when children turn 21 years of age; they no longer remain wards and assume individual identities. The child however is not ‘legally’ their own and does not have automatic inheritance rights. Also, the guardianship status ceases to exist once the child reaches maturity. Thus, unlike an adopted child, the ‘ward’ doesn’t receive the full status of a biological child, and is not automatically entitled to the family name or property. Adoptive

parents have to leave whatever they wish to bequeath to their children through a will, which can be contested by any `blood' relative.

The personal laws of Non-Hindus (i.e., Muslims, Christians, Jews and Parsis) do not sanction adoption. Members of these religions can take a child as their ward under the Guardians and Wards Act.

Inter-country adoptions (except in the case of NRI/PIO Hindus) are also carried out under this Act. Foreigners adopting from India, appointed as the child's guardian by the Indian Court, are expected to formalize the legal adoption of the child in their country of residence as per the law prevailing, within a period of 2 years from the date of adoption in India.

A Hindu however, even if he/she is a foreign national, may adopt a Hindu child in India under the HAMA.

3) The Juvenile Justice (Care and Protection of Children) Act, 2000

The amended JJ Act extends to the whole of India except the State of Jammu and Kashmir. The Act seeks to consolidate and modify the law relating to juveniles in conflict with the law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development 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. This could be through various institutions (Government or NGO) established/recognized under this enactment or through non institutional services such as adoption, foster care, and sponsorship.

An attempt has been made through this enactment to make up for the lacunae in the existing adoption laws by permitting persons belonging to all religions to adopt.

With regard to Inter-country adoption, the Act states the following:

• All applications for adoption of a child by foreigners shall be sponsored by a social or child welfare agency so recognised or licensed by the Government of the country to which the foreigner belongs.

• No application by a foreigner for taking a child in adoption shall be entertained or filed directly by any social or welfare agency in India but will be routed through an agency in the country to which the foreigner belongs and which is recognised by CARA.

• Every such application from such social or child welfare agency shall be accompanied and supported by a Home Study Report in detail with recent photographs of the family and other particulars showing the social and economic status of the foreigner and declaration that he will maintain the child as his own and provide for his education and upbringing.

• All private adoptions directly or indirectly in any manner are banned and any such adoptions shall be null and void (Savla, P. 2008, 'Special Story – Adoption in General', *Income Tax Review*, Chamber of Tax Consultants website, November http://www.citcindia.org/ITR/Nov08/SS-ParasSavla.htm – Accessed 6 April 2009 – Attachment 15).

The Indian financial planning website moneycontrol.com also provides legal information on the overseas adoption of Indian children. This source appears to be an interview with an expert in Indian adoption law, although neither the source nor the interviewer is identified. According to this source: "In India the only act which permits adoption is the Hindu Adoption and Maintenance Act and that applies across the board the Hindus irrespective of

the country where they residing. They can invoke the Hindu Adoption and Maintenance Act for the purposes of adopting a child and succeed in getting an adoption decree with the court in India”:

> What is the Juvenile Justice Act?
>
> The Juvenile Justice Act, will give you adoption decree, which is recognised, since it’s a legal decree. If you are a Hindu, you can approach the court under the Hindu Adoption and Maintenance Act, HAMA as we call it and its only under the GAWA, that is the Guardianship and Wards Act, that you only get the guardianship decree, which then needs to finally be confirmed with an adoption decree from the country of residence of the adoptive parents.
>
> …What are the laws really under which adoptions are regulated in India and are they the same in for inter country adoptions as well? How does the JJ Act specifically if at all impact NRI adoption cases, if you could just take us through the legal aspect, what are the acts, what are the regulations?
>
> The Juvenile Justice Act is in matter, which is being tested, and even today most of the courts proceed under the Hindu Adoption and Maintenance Act or the Guardian and Wards Act. The Guardian and Wards Act is applied to non Hindus even in India or even if they are residents abroad because that is the only act which actually permits a person to obtain custody of a child till the child attempts majority (he did say majority and not maturity) at the age of 18. On attaining maturity or after attaining maturity the Indian families are at a disadvantage because they cannot complete the process of adoption being non-Hindu.
>
> So they continued just being guardians?
>
> They continue to remain guardian. So at the age of 18, the child might just decide to say thank you very much, it’s been very nice of you to look after to me, I am now going. The parents have no recourse. In the western countries or in other countries after you are appointed as a guardian, you are entitled to complete the adoption proceeding in those countries by the applicable laws.
>
> Which means from guardianship you can attain parenthood?
>
> Yes, in foreign countries not in India. In India the only act which permits adoption is the Hindu Adoption and Maintenance Act and that applies across the board the Hindus irrespective of the country where they residing. They can invoke the Hindu Adoption and Maintenance Act for the purposes of adopting a child and succeed in getting an adoption decree with the court in India. The Juvenile Justice Act one has to read with a certain amount of trepidation because the legislative functions, which should have been incorporated in specific terms, have been kept a bit vague (‘FAQ: How to adopt a child from India’ (undated), moneycontrol.com website http://www.moneycontrol.com/mc_new/nri/adopt_child.php – Accessed 6 April 2009 – Attachment 16).

An article sourced from the *Economic Times* and hosted on the Karmayog.org website claims that the Indian Ministry of Overseas Affairs has proposed “that the overseas citizens of India (OCIs) and NRIs (Non-Resident Indians) be treated at par with all Indian citizens in matters of adoption”, and that the “ministry of women & child development has, in fact, started to treat OCIs at par with NRIs in this regard. What that means is that an adoption co-ordination agency in the home country – as is required for PIOs and foreigners – is not required for NRIs & OCIs”:

THERE'S some hope for overseas Indian couples who are keen on adopting Indian children as well as for a few of the 11 million abandoned children in India.

While there are long queues of non-resident Indians, people of Indian origin and overseas citizens of India, who are keen on adopting Indian children, now a streamlining of Indian adoption guidelines – both in-country and inter-country – may help clear some of the backlogs and reduce delays.

Demographers predict that the young Indian population will help fill in global skills shortages and inter-country adoption is seen as an ideal route for this. Indians based overseas have faced big delays while trying to adopt children from India. This is despite a proposal by the Ministry of Overseas Indian Affairs, that the overseas citizens of India (OCIs) and NRIs be treated at par with all Indian citizens in matters of adoption. The ministry of women & child development has, in fact, started to treat OCIs at par with NRIs in this regard. What that means is that an adoption co-ordination agency in the home country – as is required for PIOs and foreigners – is not required for NRIs & OCIs (Duttagupta, I. 2009, 'A shot in the arm for overseas adoption scene', Karmayog.org website (source: *Economic Times*), 6 January http://karmayog.org/adoptionnews/adoptionnews_21619.htm – Accessed 7 April 2009 – Attachment 21).

Previous research responses

Two previous MRT Research Responses provide information on adoption law in India.

- Question 2 of MRT *Research Response IND23684*, of 5 September 2005, provides information on the process of adoption in India under HAMA, GAWA and JJA; while Question 3 provides information on waiting periods for prospective adopters (MRT Country Research 2005, *Research Response IND23684*, 5 September – Attachment 19).

- MRT *Research Response IND17246*, of 24 March 2005, provides some information on adoption under HAMA and GAWA, on whether the JJA will effectively provide a secular alternative to existing adoption laws, and on illegal or informal adoptions (MRT Country Information 2005, *Research Response IND17246*, 24 March – Attachment 20).

List of Sources Consulted

Internet Sources:

Region-specific Links
Central Adoption Resource Agency (CARA) website http://www.cara.nic.in/carahome.html
ICHILD – India Adoption Resources website http://www.ichild.org/index.htm
Catalysts for Social Action (CSA) website http://www.csa.org.in/
Search Engines
Google search engine http://www.google.com

Databases:

FACTIVA (news database)
BACIS (DIAC Country Information database)
REFINFO (IRBDC (Canada) Country Information database)
ISYS (RRT Research & Information database, including Amnesty International, Human Rights Watch, US Department of State Reports)
RRT Library Catalogue

List of Attachments

1. Central Adoption Resource Authority (CARA) (undated), 'Frequently Asked Questions', CARA website http://www.cara.nic.in/faq.htm – Accessed 28 March 2009.

2. Central Adoption Resource Authority (undated), 'Procedure for Inter-Country Adoption', CARA website http://www.cara.nic.in/guide_inter_country_chap4.htm – Accessed 28 March 2009.

3. Central Adoption Resource Authority (undated), 'The Inter-Country Adoption Sequence', CARA website http://www.cara.nic.in/inter.htm – Accessed 28 March 2009.

4. 'Guidelines for Family Adoption of Indians Staying Abroad' (undated), Central Adoption Resource Authority website http://cara.nic.in/guide_familyeligibility4PAP.htm – Accessed 6 April 2009.

5. 'Procedure For In Country Adoption' (undated), Central Adoption Resource Authority website http://cara.nic.in/ad_procedure_in_country.htm – Accessed 6 April 2009.

6. 'Hindu Adoptions and Maintenance Act, 1956' 1956, Department of Revenue, Rehabilitation and Disaster Management, Government of Punjab website, 21 December http://punjabrevenue.nic.in/hadoptact(1).htm – Accessed 28 March 2009.

7. 'The Guardians and Wards Act, 1890' 1890, Ministry of Women and Child Development, Government of India website, 21 March http://wcd.nic.in/gawaact.htm – Accessed 28 March 2009.

8. 'The Juvenile Justice (Care and Protection of Children) Act, 2000' 2000, Ministry of Women and Child Development, Government of India website, 30 December http://wcd.nic.in/childprot/jjact2000.pdf – Accessed 28 March 2009.

9. 'The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006' 2006, CARA website, 22 August http://www.cara.nic.in/pdfs/jjactamedment.pdf – Accessed 28 March 2009.

10. 'India – Country Information' (undated), Intercountry adoption, Office of Children's Issues, US Department of State website http://adoption.state.gov/country/india.html# – Accessed 28 March 2009.

11. 'India Adoption' (undated), adoption.com website http://india.adoption.com/ – Accessed 28 March 2009.

12. 'Catalysts for Social Action – The Juvenile Justice Act (JJA), 1986' (2000), Catalysts for Social Action website http://csa.org.in/JJA.html – Accessed 6 April 2009.)

13. 'Catalysts for Social Action – Guardians & Wards Act (GWA), 1980' (2000), Catalysts for Social Action website http://csa.org.in/gwa.html – Accessed 6 April 2009.

14. 'Current adoption news – April 2009' 2009, New South Wales Government Department of Community Services website, April http://www.community.nsw.gov.au/parents_carers_and_families/fostering_and_adoption/adoption/current_adoption_news.html – Accessed 6 April 2009.

15. Savla, P. 2008, 'Special Story – Adoption in General', *Income Tax Review*, Chamber of Tax Consultants website, November http://www.citcindia.org/ITR/Nov08/SS-ParasSavla.htm – Accessed 6 April 2009.

16. 'FAQ: How to adopt a child from India' (undated), moneycontrol.com website http://www.moneycontrol.com/mc_new/nri/adopt_child.php – Accessed 6 April 2009.

17. Central Adoption Resource Authority (undated), 'List of Recognised Indian Placement Agencies – Punjab', CARA website http://www.cara.nic.in/ipas_list_punjab.htm – Accessed 28 March 2009.

18. Central Adoption Resource Authority (undated), 'Foreign Agencies/Government Departments Enlisted with CARA – Australia', CARA website http://www.cara.nic.in/list_of_foreign_agencies_australia.htm – Accessed 28 March 2009.

19. MRT Country Research 2005, *Research Response IND23684*, 5 September.

20. MRT Country Research 2005, *Research Response IND17246*, 24 March.

21. Duttagupta, I. 2009, 'A shot in the arm for overseas adoption scene', Karmayog.org website (source: *Economic Times*), 6 January http://karmayog.org/adoptionnews/adoptionnews_21619.htm – Accessed 7 April 2009.