Acquisition of U.S. Citizenship by Children Adopted under the Civil Act in the Republic of Korea

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Professor Mundy would like to thank the following law students who contributed valuable research and writing skills to the production of this document including Sam Kane, Sherri Sturgeon, Josiah Robinson, Kim Dong Min, Hojin Joung, and Ji Hun Park as well as to Professor Steven Seefried. Professor Mundy would also like to thank Attorney Im Chanhee from DREAM legal clinic, D.J. Abrahmson the president of Family Advocacy Network, and Dr. Lee Okja from Life House.

Abstract

The Republic of Korea, as a former Confucian society once known as the Hermit Kingdom, continues to adjust in the face of emerging social justice concerns. At the intersection of multiculturalism and social justice stands the issue of adoption, especially adoptions by multicultural families residing in Korea.

This paper clarifies a unique aspect of Korean adoption law whereby non-Korean citizens who reside inside of Korea may, in limited cases, adopt under the domestic, civil law and not under the Special Adoption Act. We also describe an aspect of Private International Law whereby international adoptions in Korea are governed by the law of the adoptive parent's home country.

We also explain the process by which a child, adopted through the private adoption process, may obtain U.S. Citizenship even *without* moving permanently to the United States, thus shedding light on an obscure area of immigration law, but one of particular interest to adoptive expats who may never intend to return to or reside in the United States.

Key words: Korea, Adoption, Overseas adoption, International adoption, Multicultural families, Single mothers, Adoption by non-Korean citizen, U.S. Naturalization, U.S. Citizenship

Manuscript received: May 27, 2020; review completed: September 22, 2020; accepted: November 13, 2020.

I. Introduction

Adoption stirs up great emotions. Hope in the adoptive parents. Loss in the donative mother or father. Uncertainty for the child. Tragedies are loudly and nationally decried. Successes are privately and quietly celebrated. This is especially true as to international adoption. Everyone involved wants to make sure the process works well, especially from the child's perspective, from the beginning of the adoption process through possible emigration to the adoptive parents' home country.

For that reason, this paper explains how a child adopted in the Republic of Korea (hereinafter "Korea") by a U.S. citizen parent who resides in Korea may obtain U.S. citizenship. However, there should first be some background given about the Korean adoption process as it pertains to U.S. citizens who are living in Korea.

In the Republic of Korea, the Special Adoption Act of 2011 governs overseas adoptions of children. This is the only way a non-Korean who does not reside in Korea can adopt from within Korea. Such adoptions are facilitated by adoption agencies. However, non-Koreans who reside in Korea may, with court approval and oversight, adopt under the Civil Act via a private agreement between the adoptive and donative parents.

As to this adoption process under the Civil Act, which we will hereinafter refer to as "private adoption" or the "private adoption process,"[1] two main points of confusion have arisen. First, some Korean courts may be under the impression that all international adoptions—defined as adoptions where one parent is non-Korean—must go through the Special Adoption Act. Rather, adoption through the Special Adoption Act applies only to "children in need of protection"—defined as children who are in State care and/or whose adoption is overseen by adoption agencies.

In the alternative, some courts have tried to prevent adoptions under the Civil Act by extending the definition of "children in need of protection" under the Special Adoption Act. Rather, the courts should recognize that the Special

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1 As a technical matter, as one expert noted, private adoption would better be called "adoption based on the Civil Act" (민법). The Civil Act is general private law (일반사법), and the Special Adoption Act is special private law (특별사법), which means both are private domestic law. But by "private adoption" we are using American legal English to signify adoption by way of "private" agreement.

Adoption Act does not apply to all person-to-person adoptions under the domestic law. Of particular concern are the rights of single mothers living in Korea who are being denied the opportunity to choose an adoptive family for their child by private adoption because the courts construe their child to be a "child in need of protection." Therefore, Part II of this article will explain how an international adoption can take place under the civil law based either on the Special Adoption Act or based on the private adoption process and will focus on the definition of "child in need of protection" under the Special Adoption Act.

The other point of confusion is that Article 43 of the Private International Law says that in the case of "international adoptions," Korean courts must consider the law of the adoptive parents' country or countries. Thus, the foreign national law and Korean law must be considered. The idea behind Korea's Private International Law choice of law is to allow a Korean court to consider and have some assurance that the adoption will be recognized by the adoptive parents' home countries so as to protect the rights and interests of both adoptive parents and the rights and interests of the child.

Included in the best interests of the child is a path to citizenship in the adoptive parents' home country. Therefore, in Part III we explain how children adopted in Korea can become U.S. citizens should they wish to do so. Some supposed experts have posited that the agency adoption process is easier for foreigners as it will make it easier for the child to go through the citizenship process. However, this is not necessarily the case, especially for U.S. citizens who are residing in Korea and who intend to continue to reside in Korea. Whether by agency process or not, acquiring U.S. citizenship for an adopted child is a relatively straightforward process that does not require a child to immigrate to America and in some cases, as with children adopted by U.S. government workers, can be accomplished without ever leaving Korea.

In delimiting the U.S. legal requirements and procedures for gaining U.S. citizenship, the purpose of this article is to compile various and diverse laws, regulations, and agency interpretations—to make them available in a single, organized location. To our knowledge, this is the first article to explain this obscure process, which may be of interest to U.S. citizens who adopt while living in Korea and who never intend to return to or reside in the United States.

II. General Overview of the Korean Adoption System

Korea has a unique adoption system. Adoption in Korea goes back to the time of the Joseon Dynasty.[2] The civil law at that time allowed for adoption in order to preserve succession or to provide a relative who would carry on religious rites related to ancestor worship once the adoptive parents had passed on.[3] These laws can be found by the early 15th century; however, adoption was not a widespread practice until the 16th century.[4]

In more recent times, the first adoption law was enacted in 1958.[5] This law (and changes made thereto) can be found in Articles 866 through 908-8 of the Korean civil law.[6] This remains the defining legal document that governs domestic adoptions in Korea.

However, in 1961 Korea also created the Act on Special Cases Concerning the Adoption of Orphans.[7] This Act was promulgated following the Korean War, and its purpose was to encourage the overseas adoption of Korean children. This Act outlined the legal process for overseas adoptions of Korean children.[8] Under this Act, a foreigner living overseas could easily adopt a Korean child if he or she met the requirements for being an adoptive parent.[9] This mainly included submission of a written oath that promised freedom of religion for the child, appropriate education and safety for the child, and the protection of the child's human

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2 Geung-Sik Jung, *Joseonsidaeui Gagyegyeseungbeopje [A Study on Legal System of Succession of Family in the Traditional Korean Society]*, 51 Seoul L. J. 69 (2010) (S. Kor.); Tae-Won Kim, *Joseonsidae Yangjain-jeungje-do [Joseon Dynasty Adoption Certification System]*, 30 Dongyangyehakoe 149 (2013) (S. Kor.).

3 Jung, *supra* note 2, at 101.

4 *Id.* Adoption laws from the Joseon Dynasty can be found in the Kyungkuktaechun, which was the most renowned and widely used code of law during the early Joseon Dynasty. For example, one of the Articles in the Kyungkuktaechun, called Bongsa or Ancestor-Worship, allowed for adoption where a family lacked a first-born male child who was to lead the ritual ancestor memorial ceremony—where food is served to the deceased ancestors. Meanwhile, an article in the Kyungkuktaechun called Yiphu or Adoption was created for the purpose of adopting a male heir to ensure succession of the family line.

5 Moon-Hee Ahn, Ibyangjedo Gaeseon Bangane Gwanhan Yeongu [Improvement Measures for the Adoption System] 10 (Judicial Policy Research Institute, 2018) (S. Kor.).

6 Minbeob [Civil Act], Act. No. 11300, Feb. 10, 2012, art. 866-908-8 (S. Kor.), *translated in* Korea Legislation Research Institute online database, http://elaw.klri.re.kr/eng_service/lawView.do?hseq=45912&lang=ENG.

7 Goaibyangteungnyebeop [Act on Special Cases Concerning Adoption of Orphans], Act. No. 731 (Sept. 30, 1961) (S. Kor.).

8 *Id*. art. 1.

9 *Id.*; Ahn, *supra* note 5, at 11.

rights.[10] Once the oath was submitted, it was up to the district court to make a judgment as to whether to authorize the adoption.

That process was updated when, in 1976, a Special Adoption Act was promulgated.[11] It filled in the gaps of the old Act.[12] The 1976 Special Adoption Act specifically stated that its purpose was to facilitate the adoption of "unfortunate children" overseas and domestically.[13] Hence, it differed from the 1961 Act in that it tried to promote both domestic and overseas adoption. Furthermore, it expanded the scope of children being protected under the law to "unfortunate children," which it defined as children needing protection, instead of merely to orphans.

Then, in 2005 and 2011, the Korean National Assembly amended the Civil Act, to incorporate the Full Adoption Law, and also amended the Special Adoption Act, to reform both domestic and international adoptions.[14] The 2005 Full Adoption Law was created to provide a full legal transfer of parental rights to the adoptive parents.[15]

On the other hand, the 2011 Special Adoption Act achieved two major objectives. First, to mandate government protection for children who require protection.[16] Second, to encourage domestic adoption, while reducing overseas adoption.[17] Minor amendments were made to the Special Adoption Act in 2017 and 2019.[18]

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10 *Id.* art. 3.

11 Ahn, *supra* note 5, at 12.

12 *Id.* at 13.

13 Ibyangteungnyebeop [1976 Special Adoption Act], Act. No. 2977, Dec. 31, 1976, art. 1 (S. Kor.), http://law.go.kr/lsInfoP.do?lsiSeq=3547&viewCls=lsRvsDocInfoR#; Ahn, *supra* note 5, at 13. The official document that states the purpose of the 1976 Special Adoption Act uses the word "unfortunate children" in Korean. But the Act itself uses the term "children required to be protected."

14 Minbeob [Civil Act], Act. No. 11300, Feb. 10, 2012, art. 908-2-908-8 (S. Kor.); Ibyangteungnyebeop [Special Adoption Act], Act No. 11007, Aug. 4, 2011, art. 1-45 (S. Kor.).

15 Minbeob [Civil Act], Act. No. 11300, Feb. 10, 2012, art. 908-3 (S. Kor.).

16 Ibyangteungnyebeop [Special Adoption Act], Act. No. 11007, Aug. 4, 2011, art. 3 (S. Kor.); Ahn, *supra* note 5, at 15.

17 *Id.* at art. 7-8; Ahn, *supra* note 5, at 15.

18 Ibyangteungnyebeop [Special Adoption Act], Act. No. 14890 (Sep. 19, 2017) (S. Kor.). The Special Adoption Act was entirely amended in 2011, and it was partially amended in 2017. Also, another part of the law that was referred in the 2017 Special Adoption Act was amended in 2019. However, the sections that are cited in this paper have not been changed: they remain the same even after the 2019 change (the most current change). In 2017 there was an amendment regarding punishment.

Overall, as stated above, the current adoption system in Korea is divided into two major parts: (1) private adoption governed by the 2005 updated Civil Act and (2) adoption governed by the 2011 Special Adoption Act. As to private adoption under the Civil Act, it is further divided into two processes: (a) what we will refer to as the generic adoption process (as was in place prior to 2005) and (b) the full adoption process (which came into effect with the 2005 legislation).

Throughout this paper, we may refer to "full adoption" as "private adoption." Technically speaking, we ought to refer to it as adoption under the Civil Act which is based on general private law. However, by "private adoption" we are thinking of the English legal expression regarding a "private" agreement between parties. Again, there are two avenues for adoption under the Civil Act, including generic and full adoption.

On the other hand, there is also the Special Adoption Act which is specifically aimed at regulating "overseas adoptions" of children who are under the protection of adoption agencies.[19] We will refer to these as "overseas adoptions." However, first, we have to deal with the "elephant in the room" as it were: what is an "international adoption" in Korea and what import does that term have?

A. International Adoption Definition & Private International Law

An "international adoption" according to the Ministry of Government Legislation website is defined as one in which either one or both parents are "foreigners."[20] That website goes on to mention that "overseas adoptions" under the Special Adoption Act "is also a kind of international adoption . . . . However, in the Special Adoption Act, there are special cases for the requirements and procedures of adoption, such as the qualifications of the adoptee (Articles 18 and 19 of the Special Adoption Act)." We will discuss those special qualifications in great detail below.

Thus, international adoptions that take place under the Special Adoption Act are one kind of international adoption. It can be argued that according to the aforementioned website, an "international adoption" also takes place under the

19 Ibyangteungnyebeop [Special Adoption Act], Act. No. 16248, Jan. 15, 2019, art. 19 (S. Kor.).

20 Ministry of Government Legislation, Easy to Find Practical Law, http://www.easylaw.go.kr/CSP/CnpClsMain.laf?popMenu=ov&csmSeq=656&ccfNo=2&cciNo=1&cnpClsNo=4 (hereinafter "Korea PIL & International Adoption Law Summary").

private adoption process in Korea where an adoptive parent and a donative parent reach an agreement that is subject to court approval.

Moreover, according to that website and citing to Article 43 of the Korean, Private International Law, "Adoption and its dissolution shall be governed by the law of nationality of the adoptive parent at the time of the adoption."[21] The word nationality there would be "mother country" and not merely the country of residence. Moreover, Article 44 of the Private International Law states that when the laws of an adoptee child's country require consent or the acceptance of the child or a competent third party (like a parent or legal guardian or agent), that consent or acceptance should be so procured.[22] Hence, the law of the adoptive parent's country and the law of the adoptee's country must be considered concurrently. Where the parents are of two different nationalities, the laws of both must be applied.[23]

The law applies not to Choice of Law or to Conflicts of Law that take place *after* an adoption but during the formation or *establishment* of the adoption. The Ministry of Government Legislation says that Korean courts must look to the laws of a foreign country when *establishing* an international adoption:

> The "Private International Law," which establishes the law governing legal relations with foreign elements, unifies the law governing adoption into the laws of both parents' home countries in order to facilitate the establishment of adoption, and protects both parties in the establishment of parent-child relations. In the law of the home country, when the consent of the child or consent of a bilateral or a third party is required for adoption, provisions have been made to ensure that the requirements are also met. Therefore, the law governing adoption becomes the law of the parents' home country, and the laws of both countries are applied overlappingly for the protection of both parents.[24]

Article 43 of the Private International Law is, of course, perfectly within the principles of Private International Law which in their original and purest form

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21 Gukjesabeop [Korean Private International Law], Act. No. 13759, Jan. 19, 2016, art. 43 (S. Kor.).

22 *Id.* at art. 44.

23 Korea PIL & International Adoption Law Summary, *supra* note 20, citing Ministry of Justice, International Legal Affairs Division, Interpretation on Private International Law, pp. 153-154 (May 2001).

24 *Id.*

concerned inheritance rights. Put another way, Article 44 of the Private International Law could be seen as establishing the predicate that the donative mother's rights have been terminated and all has been done in accordance with the national law of Korea. That accomplished, under Article 43, the capacity of the adoptive parents—their change of rights and obligations toward the child—is established under the laws of their nation under which those rights and obligations would normally be adjudicated since, under Private International Law, the status of the person is usually determined by the laws of their country.

The government website goes on to say:

> The actual establishment requirements for international adoption are the actual establishment requirements for adoption stipulated in the laws of the person's home country (e.g., age of the adoptee, joint adoption of a couple, consent from a third party, permission from a public institution, etc.) . . .
>
> Both the protection requirements (for example, consent of the person, consent of a third party, permission of a public institution, etc.) must be met as prescribed by the law of the person's home country.[25]

As aforementioned, the idea behind Article 44 and 43 may be that once the rights of the Korean mother and father are terminated according to any consent or agreement needed under Korean law (Article 44), then the parental status of the adoptive parents must be decided according to the laws of the adoptive parents' home country(s). The only odd thing is that it seems to leave out the rights and interests of the child who appears to be having a change in status as well; yet, it may also be that only the parents' status is changing as regards obligations to the child and that there is no juridic act occurring to the child; moreover, it may be that the child's interests are protected not under Private International Law in Korea but under principles of Public Law. This is quite an interesting topic; and Korea's approach bears further study.

However, the practical implications are not changed by the reason or philosophy behind the rule: Adoptive parents should be aware that family courts in Korea will likely require that American adoptive parents provide a statement of the law of their state, even if that state says it simply recognizes valid foreign adoption orders. But a better practice may be to provide a detailed summary of

25 *Id.*

the requirements for a similar adoption were it to take place in that state and any other requirements by that state as to international adoptions.

By way of example, we recently encountered a case where a Korean single mother wished to adopt her child to American parents who have been living in Korea for many years (under an E1 visa and not a permanent resident visa). From an American law perspective, although they are not "permanent residents" in Korea, for the purposes of American law they are seen as residents (domiciled) in Korea. Hence, the laws of their previous state of residence, Texas, have little or nothing to do with them. (Some Americans have no state residency and are only recognized as U.S. citizens. When they vote, they check a box that says "Overseas citizen without an intent to return to a specific state.")

Yet the family court judge in Korea asked for a statement of adoption law in Texas. Despite the potential difficulty and expense, an opinion letter was secured from an attorney who is an expert in adoption law in Texas. We will summarize those findings in Part II, A below. The attorney concluded by saying:

> As to foreign orders of adoption, as long as the foreign country's adoption order complies with Texas law [that is, to say, it is not against the state's public policy], Texas courts will provide full faith and credit to the order. We are required to file a translated copy with the Court and upon hearing the Court will recognize the foreign order and even allow a name change if necessary.

Perhaps it bears repeating; in order to apply for and receive a domestic adoption order in Korea, a U.S. citizen adoptive parent needs no approval from the American federal government, though there are some laws concerning immigration that ought to be taken into consideration as we will discuss below. Should Korea ratify the Hague Convention on Adoption, that may change.[26] Unfortunately, such changes are beyond the scope of this article which was originally intended only to explain an obscure area of U.S. immigration law but which grew into a general overview of Korean domestic adoption law. At present, an adoptive parent need only get permission from the U.S. government if the adopted child wishes to emigrate to America or to become a citizen as we will examine in Part III below.

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26 Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Hague Conference on Private International Law, https://www.hcch.net/en/instruments/conventions/status-table/?cid=69 (last updated Mar. 6, 2019).

Nor is approval from a state authority needed. In Texas, if an adoptive parent later comes to a Texas court asking the court to do something on behalf of their child (such as obtaining a legal name change), the adoptive parents, of course, must prove that they are, in fact, related to that child and can do so by way of a foreign adoption order. As a matter of Private International Law (conflicts of law) in Texas, the court might consider the laws of adoption in Korea if there was some dispute as to whether the adoption was correct. For example, Texas courts would consider whether the adoption offended state public policy.

This is similar to how the law of marriage is treated as between the various states in America. In general, the law of the place of marriage governs whether the marriage was valid, not the law of the couple's current state of residence. Every state is required to give full faith and credit to foreign marriages (occurring either in a different state in America or occurring overseas) that do not violate that state's public policy (such as bigamous, incestuous, or child marriages). Nevertheless, divorce would be determined not by the state wherein the marriage was conducted but in the state wherein the parties reside.

At first, the Texas attorney was somewhat surprised that the Korean courts "gave a hoot" (as Texans might say) to what the law was in Texas, since—from her perspective—the laws of Korea governed the adoption. Not surprisingly, Korean family court judges are unconcerned with what American lawyers think about the Korean law. It seems that Korean family law judges *are required* to apply American laws, which may mean the laws of an American's last state of residence, when deciding on an international adoption.

We hope this explication of Articles 1, 43, and 44 of Korea's Private International Law clears up some confusion on the part of Americans adopting in Korea[27] and on the part of Korean courts when facing an international adoption under the Civil Act.

Our strong recommendation is that Korea reconsider the Private Interna-

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27 On a side note, for an American residing in Korea to adopt a non-Korean child also residing in Korea (such as children born to migrant workers) is much more difficult if not impossible. We have seen private, domestic adoptions where the child's natural father was Korean, registered the child under his name, and consented to the adoption. However, adoption of the child of a citizen of the Philippines, for instance, by a U.S. citizen in Korea seems nigh-on impossible. But based on the Private International Law articles 1, 43, and 44 it may be possible for a Korean court to apply the laws of the Philippines (which is a Hague Convention country) and the laws of America should a Philippine donative mother, for instance, wish to enter into a private adoption contract with an American adoptive parent.

tional Law as it relates to adoptions from the United States of America, which has been a major receiving country for adoption. There may be some confusion as to the nature of America's republic system. America is not a monolithic nation where all the laws come from Washington, D.C. When it comes to adoption, state law governs. Also, it is possible and even probable that U.S. citizens who have resided in Korea for some time may no longer have a state of residence in the United States. It is unclear what law, then, a Korean family law judge should apply to American adoptive parents. We recommend the application of the law of their last state of residence as a matter of common sense.

B. Private Adoption (민법상 입양)

Private adoption also known as "adoption based on the Civil Act" or 민법상 입양 is regulated under Articles 866 to 908-8 of the Korean civil law.[28] Private adoption laws govern adoptions based on consent between the biological parent and the adoptive parent.[29]

Moreover, private adoption is further divided into two subcategories: (a) generic adoption (일반입양) and (b) full adoption (친양자입양).[30] Before the civil law changed in 2005, the only way to privately adopt was through the generic adoption process, which was considered an incomplete adoption since parental rights remained with the biological parents and the family line of the child remained registered officially under his or her biological parent. However, since 2005, one can fully become the legal parent of an adopted child by going through the full adoption process.

As aforementioned, full adoption and generic adoption have differing legal effects and legal requirements. Nevertheless, both types of private adoptions are based on consent (a private contract) between the parties. We will not focus on generic adoption (the requirements for which may be easily found on the Ministry of Government Legislation website)[31] but on full adoption, as that is the

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28 Minbeob [Civil Act], Act. No. 11300, Feb. 10, 2012, art. 866-908-8 (S. Kor.).

29 Ahn, *supra* note 5, at 18; Minbeob [Civil Act], Act. No. 11300, Feb. 10, 2012, art. 870-871 (S. Kor.).

30 Hye-Ryeon No, Ibyang Sahusangdam Maenyueol Yeon Gu [A Study on Welfare Services After Adoption] 11 (Korea Adoption Services, 2017) (S. Kor.).

31 Ministry of Government Legislation, Ibyang [Adoption] 8-12 (2019) (S. Kor.); *See generally* Ministry of Government Legislation, *Ilbanyangjaui Ibyang*, Easy to Find Practical Law (Jun. 15, 2019), http://easylaw.go.kr/CSP/CnpClsMain.laf?popMenu=ov&csmSeq=656&ccfNo=2&cciNo=1&cnpClsNo=1#copyAddress (S. Kor).

process most non-Korean adoptive parents may be interested in.

Full adoption, as promulgated in 2005, is different from generic adoption as it involves adoption by decree—that is, a court must be involved in the process.[32] In other words, there needs to be both consent between the parties involved in the adoption, and the court also needs to authorize the adoption.

As for the requirements, the court where the child resides will be asked to evaluate evidence and will initiate various processes, including inspections.[33] Then the court will make the final decision as to whether it is in the child's best interest to be adopted by the adoptive parents.[34] The court will consider the criminal records, the financial background of the adoptive parents, the purpose of the adoption, the ability of the adoptive parents to raise the child, and many other factors that would provide the court a holistic perspective of the adoption.[35] The adoptive parents must have been married for at least three years, unless one of the parents is biologically related to the child;[36] in which case, they need to have been married at least one year.[37] In addition, the child being adopted needs to be a minor in order to go through the full adoption process.[38]

With a full adoption, the parental rights of the biological parents are terminated. These rights are fully transferred to the adoptive parents.[39] Therefore, the adopted child is treated as the birth child of the adoptive parents. Accordingly, it is possible for the child to change its official registry—removed from the biological parents' official registry. The child may also change its given name.[40] If the adoptive parents are not Korean citizens and, therefore, have no registry, a registry may be created under the child's name and, in a quirk of fate, the foreign parents are added under the child's registry.

Based on interviews with adoptive parents, the process of full adoption is

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32 Minbeob [Civil Act], Act. No. 11300, Feb. 10, 2012, art. 908-2 (S. Kor.); Ahn, *supra* note 5, at 15.

33 Minbeob [Civil Act], Act. No. 11300, Feb. 10, 2012, art. 908-2 (S. Kor.); Ahn, *supra* note 5, at 35.

34 Minbeob [Civil Act], Act. No. 11300, Feb. 10, 2012, art. 908-2 (S. Kor.); Ahn, *supra* note 5, at 15.

35 Minbeob [Civil Act], Act. No. 11300, Feb. 10, 2012, art. 908-2 (S. Kor.); Ahn, *supra* note 5, at 35.

36 Minbeob [Civil Act], Act. No. 11300, Feb. 10, 2012, art. 908-2 (S. Kor.).

37 *Id.*

38 *Id.*

39 Minbeob [Civil Act], Act. No. 11300, Feb. 10, 2012, art. 908-3 (S. Kor.); No, *supra* note 30, at 11; Ahn, *supra* note 5, at 13-14.

40 *Id.*

as follows: First, the parties must document their consent. Documents must be obtained showing that the biological parent agrees to abandon her rights to the child. If the biological father is available, his agreement also is often secured. If the biological mother and father are minors, the agreement of their parents or guardians may be required. Second, the parties must gather the necessary documentation such as the family relation certificate and a copy of the resident registration. These documents must be submitted to the court as an adoption petition. Then, the court may order a home visit by an adoption agency or by a social welfare worker. In this process, a government agent will visit the house of the adoptive parent, interview the adoptive parent and their children, interview the biological parent or guardian, go through a background check, and go through financial documents and other necessary documents. In addition, the adoptive parents will be ordered to complete an education program, where they learn about the legal consequences of adoption, the psychological process of adopting and raising an adopted child, and how to maintain a happy family.

Finally, this entire process is documented by the government agent and submitted to the district family court with all the necessary documents. Then, the court makes a decision and may issue an adoption decree. Afterward, the new family has to go through some local processes such as changing or creating a new family registry, petitioning the family court for a name change, and applying for a Korean passport, if so desired.

However, based on the above analysis of Korea's Private International Law, when a Korean family court is considering an international adoption, the court may need to follow the requirements of the American citizens' home state. Here are the requirements for a typical American state, in this instance Texas, for a person-to-person, private adoption:

- Petitioner for adoption must be an adult, and if married, both spouses must petition for adoption.
- Child must reside with potential adoptive parent for at least 6 months.
- Biological Parents must be deceased, or their parental rights terminated.
- An Adoption Evaluation of the Petitioners must be completed. (Homestudy)

- The biological parents are ordered to provide their medical history for their families.
- Both petitioners must complete a Criminal History Background check.
- As to foreign orders of adoption, as long as the foreign country's adoption order complies with Texas law [editor's note: that is, to say, it is not against public policy, for example, foreign orders allowing homosexuals to adopt would have at one time been against public policy and would not have been recognized in Texas], Texas courts will provide full faith and credit to the order. We are required to file a translated copy with the Court and upon hearing the Court will recognize the foreign order and even allow a name change if necessary.[41]

One can see at a glance that these requirements are quite similar to Korean law.

Whether applying Korean or American law, the Korean family court is heavily involved in the private adoption process. The court where the child resides has the jurisdiction. Ultimately, the qualifications of the adoptive parents are up to the court to decide. The visa status of the parents does not seem to be an official factor but does seem to have been considered by some judges. Permanent residency has not always been required. For example, members of the U.S. armed services who were stationed in Korea for a set period have been allowed to adopt via the private adoption process.

Nevertheless, for reasons explained below, most international adoptions and some domestic adoptions are processed via the Special Adoption Act. However, as we will demonstrate in the following section, nothing in the Special Act prohibits non-Korean parents who qualify under the domestic law from using the private adoption process. Of course, children who meet a particular set of criteria (including being adopted from adoption agencies) must have their international adoptions regulated by the Special Adoption Act, while children who are adopted domestically by the consent of individual parties (technically also an "international adoption" where it involves a non-Korean parent) may be governed by the adoption laws contained in the Korean civil law.

41 E-mail from Jody A. Fauley, attorney at Fauley Law Firm (May 16, 2020) (on file with the author).

C. Adoption through the Special Adoption Act (요보호아동입양)

The Special Adoption Act applies to adoptions processed and organized by adoption agencies in Korea. Both Korean residents and overseas residents may adopt via this act, provided they are adopting from adoption agencies. However, this is the *only* way that overseas residents may adopt from Korea.

Specifically, the Special Adoption Act regulates the adoption of a certain subset of "children requiring protection."[42] This is not unusual given that its predecessor, the 1976 Special Adoption Act, specifically stated that its purpose was to facilitate the adoption of "unfortunate children" overseas and domestically.[43] As we will see, the definition of "children requiring protection" under the 2011 Special Act typically refers to children who have been institutionalized, as in the orphanages run by adoption agencies.

"Children needing protection" is defined under Subparagraph 4, Article 3 of the Child Welfare Act. This definition refers to children who have no caregiver or who have become estranged from a caregiver or whose caregiver is incapable of raising the child, for reasons such as abuse.[44] This definition is included by reference in Article 2 of the Special Adoption Act.[45]

However, the Special Adoption Act does not cover all "children needing protection" under Subparagraph 4, Article 3 of the Child Welfare Act. Rather, Article 9 of the Special Adoption Act says that the Act *only* applies to a small subset of such children—to children entrusted to public facilities such as Holt or Central Adoptions. Specifically, Article 9 of the Special Adoption Act limits the Act to a subset of "children in need of protection," since Article 9 explicitly states: "A child in need of protection who falls under any of the following subparagraphs

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42 Ibyangteungnyebeop [Special Adoption Act], Act. No. 16248, Jan. 15, 2019, art. 9 (S. Kor.).

43 Ibyangteungnyebeop [1976 Special Adoption Act], Act. No. 2977, Dec. 31, 1976, art. 1 (S. Kor.), http://law.go.kr/lsInfoP.do?lsiSeq=3547&viewCls=lsRvsDocInfoR#. *See also* note 13 *supra* regarding the term "Unfortunate Children."

44 Adongbokjibeop [Child Welfare Act], Act. No. 16248, Jul. 16, 2019, art. 3 (S. Kor.), *translated in* Korea Legislation Research Institute online database, http://elaw.klri.re.kr/eng_service/lawView.do?hseq=45855&lang=ENG. The Child Welfare Act states, "The term 'child subject to protection' means a child who has no protector or is separated from a protector, or whose protector is unsuitable for, or incapable of, rearing them, such as in cases of child abuse by the protector." Meanwhile, "The term 'protector' means a person with parental authority, a guardian, a person who protects, rears and educates a child or who is liable to do so, or a person who actually protects and supervises a child due to the relations of business, employment, etc."

45 Ibyangteungnyebeop [Special Adoption Act], Act. No. 16248, Jan. 15, 2019, art. 2 (S. Kor.).

may be adopted under this Act":

1. A person who does not have any guardian and whose protection is requested by the Special Metropolitan City Mayor, a Metropolitan City Mayor, a Do Governor, or the Governor of a Special Self-Governing Province (hereinafter referred to as "Mayor/Do Governor"), or the head of a Si/Gun/Gu (limited to an autonomous Gu; hereinafter the same shall apply), to the assistance facilities prescribed by the Basic Livelihood Security Act (hereinafter referred to as "assistance facilities"), because it is impracticable to find any person responsible for his or her support;

2. A person whose parents (or another lineal ascendant, if the parents cannot give consent due to death or other grounds) or guardians consent to the adoption, and whose protection is requested to assistance facilities or adoption agencies specified in Article 20;

3. A child of a person who is deprived of parental authority by a court ruling, and whose protection is requested of assistance facilities by a Mayor/Do Governor or the head of a Si/Gun/Gu;

4. A person whose protection is requested of assistance facilities by a Mayor/Do Governor or the head of a Si/Gun/Gu, because it is impracticable to confirm persons responsible for his or her support.[46]

Hence, the Special Adoption Act primarily applies to adoptions processed and organized by *adoption agencies*.

The best understanding of Article 9 is that the Special Adoption Act applies only to a narrow subset of children in need of protection. This subset (those in adoption agencies) may be adopted under the Special Adoption Act. The law, then, is silent as to the larger set. Hence, adoption under the Civil Act may be followed as to the children who fall into the larger set.

Certainly, the explicitly stated legislative intent behind the Special Adoption Act was to prioritize domestic adoption and reduce overseas adoption. As a result, overseas adoptions have significantly decreased in recent years.[47] This

46 *Id.* at art. 9.

47 Ministry of Health and Welfare, 2018 Ibyangtonggye [2018 Adoption Statistics] 1 (2018) (S. Kor.); Ahn,

intent is spelled out in Article 7 and 8 of the Law. To be specific, Article 7, Preferential Promotion of Domestic Adoptions, states the following:

1. The State and local governments shall implement the policies, with the highest priority, in finding domestic adoptive parents for children whose adoption is sought.

2. The head of an adoption agency shall take measures to find domestic adoptive parents for a child whose adoption is sought, as prescribed by Ordinance of the Ministry of Health and Welfare, and report the results thereof to the Minister of Health and Welfare.

3. Where the head of an adoption agency fails to find any adoptive parents despite taking the measures for domestic adoption under paragraph (2), he or she shall provide domestic adoption services through the sharing of information with the relevant agencies by utilizing the information system provided for in Article 6.

4. The head of an adoption agency may provide overseas adoption services, only if he or she fails to find a person to be the adoptive parent despite taking measures under paragraphs (2) and (3).[48]

5. Moreover, Article 8, Reduction of Overseas Adoptions, states that "The State shall endeavor to reduce overseas adoptions for the sake of implementing its duties and responsibilities to protect children."[49]

Furthermore, as a practical matter, this intent is achieved through Articles 18 and 19 of the Act. For example, Article 19 of the Act specifically states that when "a foreigner residing overseas intends to adopt a child residing in Korea, he or she shall proceed with the adoption process through an adoption agency."[50]

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supra note 5, at 190-191. Citing to the statistics from the Ministry of Health and Welfare, on page 1, we can see that the total number of overseas adoptions decreased drastically after 2012. Although the Special Adoption Act was passed in 2011, we believe it was not enforced until 2012, perhaps accounting for this significant decrease. Furthermore, the total number of adoptions in Korea has continued to significantly decrease since 2012. While we cannot specifically say that the overall decrease was caused solely by the 2011 Special Adoption Act, we could certainly say that it was a contributing factor.

48 Ibyangteungnyebeop [Special Adoption Act], Act. No. 16248, Jan. 15, 2019, art. 7 (S. Kor.).

49 *Id.* at art. 8.

50 *Id.* at art. 19.

This Article mandates that "a foreigner residing overseas" go through the Special Adoption Act. It says nothing about foreigners residing within Korea.

It has always been the case that domestic adoptions by Korean parents residing in Korea may take place based on the domestic, civil law if there was a private agreement between the parties or based on the Special Adoption Act if the child was in an orphanage. The argument is that the same should apply to non-Korean parents who reside in Korea and are subject to Korean law.

We should remember that the 1976 Special Adoption Act encouraged both overseas and domestic adoption of "unfortunate children."[51] The 2011 Special Adoption Act made some changes, defining "Children in Need of Protection" according to the Child Welfare Act but limiting the application of the Special Adoption Act primarily to such children who are under the provinces of *adoption agencies*.

In addition, the Special Adoption Act states that it was created to encourage domestic adoption. Because of social concerns about the effects of overseas adoptions on the mentality of the child,[52] the law also states that it was created to discourage international adoption,[53] and the new process certainly made international adoption quite difficult, costly, and rarer.[54] There are also movements to revise the act due to horrific incidents.[55]

Nevertheless, at present, Article 19 of the Special Adoption Act only requires "foreigners residing overseas" to go through adoption agencies.[56] The Special Adoption Act does not mention foreigners residing in Korea. Furthermore, aside from the three objections listed above, there are no specific Articles or Clauses in the Korean civil law that prevents foreigners who reside in Korea

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51 Ahn, *supra* note 5, at 12; Ibyangteungnyebeop [1976 Special Adoption Act], Act. No. 2977, Dec. 31, 1976, art. 1 (S. Kor.). *See also* note 13 *supra* regarding the term "Unfortunate Children."

52 Wilfred Chan, *Raised in America, Activists Lead Fight to End S. Korean Adoptions*, CNN, https://edition.cnn.com/2013/09/16/world/international-adoption-korea-adoptee-advocates/index.html; No, *supra* note 30, at 12, 21-22.

53 Ibyangteungnyebeop [Special Adoption Act], Act. No. 16248, Jan. 15, 2019, art. 8 (S. Kor.).

54 Ahn, *supra* note 5, at 190-191; *See also* Ministry of Health and Welfare, 2018 Ibyangtonggye [2018 Adoption Statistics] 1 (2018) (S. Kor.).

55 Ra-mi So, *Review of the Amendment of "The Special Act on Adoption," Based on the Result of the Truth Investigation of the Case of an Adopted Child Who Was Abused to Death*, 32(1) Kor. J. of Fam. L. 309, (2018).

56 Ibyangteungnyebeop [Special Adoption Act], Act. No. 16248, Jan. 15, 2019, art. 19 (S. Kor.).

from adopting Korean children.[57]

It is our opinion that foreigners *who reside overseas* may *only* adopt children in Korea through the Special Adoption Act process. However, at the discretion of the court, some non-Koreans who live in Korea have adopted via the private adoption process. Put another way, foreigners living in Korea, can adopt Korean children *both* through the Special Adoption Act *and* through the Private Adoption process, particularly the full adoption process—in the same way that Korean citizens residing in Korea can adopt *both* through the Special Adoption Act *and* through the private adoption process. In either case, if an adoptive parent is non-Korean the adoption may be categorized as an "international adoption."

If foreigners who reside in Korea must adopt through the Special Adoption Act, adoptions will be quite limited, and the choice of Korean donative parents to choose a family for their child will be severely curtailed. For example, it is not possible for foreigners who adopt through the agency process to specify a child for adoption.[58] Therefore, if a court orders foreigners to go through an agency adoption, such parents cannot specify the child to be adopted. In addition, foreigners will not usually be able to adopt a newborn baby during critical bonding time as, according to Holt International, "Children are on average 2 years old at the time of placement." Moreover, Holt says, "Children without identified special needs are adopted domestically, so they are no longer available for international adoption."[59]

Because this difficult question of statutory construction is left to the judge who has jurisdiction over the adoption, disparate outcomes have resulted, with the court in Suwon rejecting three private adoption cases while other cases went forward.[60] These cases were not denied based on the qualifications of the parents

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57 Minbeob [Civil Act], Act. No. 11300, Feb. 10, 2012, art. 866-908-8 (S. Kor.).

58 E-mail from Tavie Wiscarson, Service Specialist for Holt International (October 20, 2020) (on file with the author).

59 https://www.holtinternational.org/adoption/criteria.php#tab2 (last visited October 21, 2020).

60 *See* these conflicting decisions from the court in Suwon: Suwon Jibangbeobwon [Suwon Dist. Ct.], [May 17, 2019], 2018Nudan50369 (Application for adoption) (S. Kor.); Suwon Jibangbeobwon [Suwon Dist. Ct.], [May 17, 2019], 2018Nudan50556 (Application for adoption) (S. Kor.); Suwon Jibangbeobwon [Suwon Dist. Ct.], [May 17, 2019], 2017Nudan50644 (Application for adoption) (S. Kor.). *But see* Suwon Gajeongbeobwon [Suwon Fam. Ct.], [May24, 2017], 2016 Nedan 50510 (Adoption Decree) (S. Kor.); Suwon Jibangbeobwon [Suwon Dist. Ct.], [Mar. 11, 2019], 2018 Nundan 50199 (Application for adoption) (S. Kor.); Suwon Gajeongbeobwon [Suwon Fam. Ct.], [Feb. 3, 2018], 2017 Nedan 50357 (Adoption decree) (S. Kor.); Suwon Gajeongbeobwon [Suwon Fam. Ct.], [Mar. 1, 2019], 2017 Nedan 50698 (Adoption decree) (S. Kor.).

but were denied based on uncertainty as to whether the non-Korean parents must adopt under the Special Act. In those cases, the judges seemed concerned that the donative mothers had been under the care of a home for single mothers which had arranged foster care for those children. Thus, when the foster parents sought to adopt with the consent of the mother, the judges felt the children were "children in need of protection" and must be adopted if at all, under the Special Adoption Act.

Recently, the judge in the aforementioned case of the Texas adoptive parents also indicated an intent to dismiss because the donative mother was a single mother who received minimal assistance from a private NGO. At best, these recent decisions may show a lack of uniformity in the interpretation and application of the law which may need to be addressed in order to provide consistency so as to allow for proper future planning by donative mothers and adoptive parents. At worst, it seems that, according to the Family Advocacy Network, an NGO located in Seoul, that under the current administration, international adoptions are being strictly adjudicated by judges.

Returning to the law of the Special Act, the legal effect of the adoption via the Special Adoption Act is the same as that of full adoption, where the adoptive parent gets full parental rights and the rights of the biological parents are extinguished.

However, the requirements for a parent to become an adoptive parent and the requirements for the family court to authorize the adoption is much more rigorous when the Special Adoption Act is applied. Such requirements can be found in Articles 10 and 11 of the Special Adoption Act. We will not detail the process of adopting via the Special Adoption Act. Frankly, most parents who adopt through agencies will be guided step by step through this process by the agency. In addition, many agencies, such as Holt International, have thoroughly documented the process online.

Regardless, based on Articles 1, 43, and 44 of the Private International Law, it seems that international adoptions that take place under the Special Adoption Act must also to be governed by the laws of the adoptive parent's country with reference to any special conditions in the adoptee's country's law.

As for American federal law, if a U.S. citizen wishes to adopt from overseas and return with the child to America, they must adopt via the Special Adop-

tion Act. They must also meet certain American immigration law requirements as will be outlined in PART III(B)(1)(b). However, it is also possible for an American adoptive parent to satisfy American immigration law requirements by showing two years of physical and legal custody over the child. If Korea ratifies the Hague Convention[61] in the future, it may drastically affect a U.S. citizen's ability to adopt in Korea via the domestic adoption process.[62] Nevertheless, at present, no matter which route to adoption is followed, it is quite possible for adoptive parents to secure U.S. citizenship for such children, even if the child never emigrates to America.

Some advocates have strong feelings about amendments to adoption law.[63] For example, at present, there is a 7 day waiting period before a mother can give her child up for adoption either privately or to an agency. Some would like to see that time period extended to 14 days. However, based on our extensive social work with single mothers, we see no need for such an extension. It may be better to separate a mother and baby where the mother is considering adoption, to allow the mother to make a decision in the cold light of practicality rather than based on the warm maternal feelings that naturally and biologically flow from nurturing the child. That said, if a mother chose to allow friends or foster parents to keep the baby for a week while she made a decision, a judge might decide that the child had no "guardian" and so had become a "child in need of protection." This has a chilling effect on mothers in at-risk categories from seeking assistance. It seems a bizarrely patriarchal view of the agency of single mothers in the current day. Nevertheless, it is becoming increasingly difficult for a mother to find an institution that will keep a baby while adoption is pending, even for agency adoptions. The only adoption agency in Gyeongsanbukdo recently closed its childcare facilities. It is unclear whether this is the result of economic practicalities or due to the priorities of the current administration.

Our recommendations concerning revision to the Special Adoption Act or to adoption based on the Civil Act (aka private adoption) are as follows. First, we believe that foreign nationals who are residing in Korea should be able to adopt through the Special Adoption Act, where necessary, as would Korean na-

61 *See* Hague Convention *supra* note 26.

62 Frankly, an American will likely not be able to adopt via the private adoption process and will have to utilize the agency process which is being set up in the model following the Hague Convention on Adoption. However, once again we must reiterate that the effect of the Hague Convention on adoption, should Korea choose to ratify it, is beyond the scope of this limited article.

63 *See* So, *supra* note 55.

tionals residing in Korea. At present, it is impossible either due to procedures or nearly impossible due to the financial burden for a foreign national (including an international adoption where one parent is non-Korean) to adopt via the Special Adoption Act. However, secondly, we believe the law shoud be implemented as written—that is, full adoption decrees should be issued and judges ought not discriminate against the constitutional rights of single mothers under Articles 34, 35, and 36 of the Korean Constitution or against foreign nationals residing in Korea.

III. Naturalization of Korean Children Adopted by U.S. Citizens in Korea

There is a clear path to U.S. citizenship for children adopted by parents who are living in and who wish to remain in Korea. An adopted child can obtain U.S. citizenship without ever emigrating to America. As we will explain below, an adopted child residing in Korea can become a U.S. citizen provided that some forms are filed and that the child travels to the U.S. on an immigrant or on a special visitor's visa.

However, there is no need to obtain U.S. citizenship for an adopted child if the adoptive parents plan on remaining in Korea. Although it is quite easy for an adopted child to get U.S. citizenship, there is no requirement that an adopted child get U.S. citizenship.[64] A Korean child has Korean citizenship. He or she may obtain a Korean passport.

It is possible to make temporary visits to the United States with the child.[65] Provided the child has a Korean passport, then the child can qualify to travel to the U.S. via the electronic visa waiver program (VWP) or can affirmatively apply for a non-immigrant, visitor visa (a B-2 visa). The benefit of applying for a B-2 visa is that it allows for a longer stay, typically six months but up to a year if re-

64 For an FAQ on the Child Citizenship Act of 2000, *see* U.S. Department of State, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Child-Citizenship-2000-Sections-320-322-INA.html.

65 The State Department in general will "not issue a nonimmigrant visa in lieu of the IR3/4 for an orphan or IR2 for an adopted child. The issuance of an NIV to an orphan *to effect a child's immigration* violates the law, places the child in an untenable immigration predicament, and circumvents the scrutiny intended to protect the orphan and the adoptive parents. The issuance of an NIV also does not accomplish the intended goal, since the orphan cannot adjust status under DHS regulations." 9 Foreign Affairs Manual § 402.2-4(B)(7) (2019).

quested and granted by the agents at the border. Also, unlike VWP, B-2 holders can apply for an extension of stay or a change of status—such as changing to a non-immigrant visa like a student visa. Lately, however, the wait-times involved in applications for extensions or changes of status may exceed the grant of the visa. Under President Obama, if a valid application for a change of status or extension of status was filed, the visa holder could remain in the U.S. pending a decision on that application. Such has not been the case under President Trump's administration. Finally, a B-2 visa allows for multiple entries, usually for ten years; whereas VWP is valid for two years.

Under the B-2 visa, on entry, the U.S., the Customs and Border Patrol agent will be the one who decides how long the visa holder (the adopted child) can stay in America. Usually, the longest they give is 6 months, but it is a little-known fact that one can ask for up to a year, if one is able to justify such a request.

While an adopted child need not seek U.S. citizenship, especially if the child is continuing to reside in Korea with the adoptive parents, there has been some recent controversy about adoptive parents neglecting or refusing to obtain U.S. citizenship for an adopted child.[66] In one frustrating case, the U.S. government deported an adult who had been adopted as a child and taken to America. In that case, the adoptive parents either by mistake or neglect failed to file the documents needed to convert that child from a permanent resident into a U.S. citizen. Thus, when—as an adult—he later ran into trouble with the law, he faced deportation. As we will demonstrate below, that problem could have been solved had the parents been informed as to the law and had the parents filed a few simple forms.

A. Adopted Child Becoming a U.S. Citizen

Adoption alone will not grant U.S. citizenship to a child nor the ability to travel and stay in the United States indefinitely. Nevertheless, there is a simple process for obtaining U.S. citizenship.

1. Parent's Ability to Transmit Citizenship

First, the adoptive parent must be eligible to petition on behalf of the child.

66 Ra-Mi So, *Hangugeseoui Ibyangje-do Hyeonhwanggwa Gwaje [The Current Situation and Issue of Adoption System in Korea]*, 32(3) Kor. J. of Fam. L. 1, 16 (2018).

Simply stated, under the law as it presently stands, at least one parent must be a U.S. citizen by birth or naturalization. Adoptive parents who would like for the child to be able to naturalize while abroad, without the child becoming a permanent resident, will need to fulfill some additional requirements. In such cases, the adoptive U.S. citizen parent usually will have had to physically reside in the U.S. for at least five years and two of those years must have been after the age of fourteen. If an adoptive parent cannot qualify, sometimes the parent of that adoptive parent can help qualify the adopted child.[67]

2. Child's Admissibility to the United States

Second, the child must be "admissible" to the United States. To get a visa to go to America, the law says that one cannot be "inadmissible."

Therefore, before beginning the process of adopting, if one wants the child to be able to visit or live in America, one must consider whether the child is "admissible" to the United States.[68]

Frankly speaking, problematic activities such as terrorism,[69] trafficking,[70] and espionage[71] are not typical issues for children in Korea. Neither is membership in the Communist party[72] or genocide.[73] Therefore, only a few issues concerning inadmissibility could potentially apply to a child adopted in Korea.

The first issue would be health.[74] The U.S. government prohibits the admittance of individuals with certain designated diseases such as infectious syphilis, active tuberculosis, and gonorrhea.[75] The list of banned diseases can change depending upon Presidential Executive Orders, the Centers for Disease Control and Prevention (CDC), and the World Health Organization, given the level of public

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67 8 U.S.C. § 1431 (2019); *see also* 8 U.S.C. § 1433(a)(1).

68 *Id.* § 1182.

69 *Id.* § 1182(a)(3)(B), (F).

70 *Id.* § 1182(a)(1)(C), (H).

71 *Id.* § 1182(a)(3).

72 *Id.* § 1182(a)(3)(D).

73 *Id.* § 1182(a)(3)(E)(ii).

74 *Id.* § 1182(a)(1).

75 *See id.* § 1182(a)(1) ("...determined in accordance with regulations prescribed by the Secretary of Health and Human Services …"); *See*, *e.g.* 42 C.F.R. § 34.2(3)-(6) (2019).

health concern at a given time.[76]

Additionally, physical or mental disorders may also cause a child to be inadmissible should there be a history of a threat to the safety of the child or others that could recur in the future.[77]

Regarding the health of a child, documentation may need to be provided that the child has been vaccinated against vaccine-preventable diseases such as measles, hepatitis B, and polio.[78] There are certain exceptions to this requirement, if, for example, the child is under ten years of age,[79] or if verification can be provided that the child will be vaccinated within 30 days of arrival.[80] Further, waivers of this requirement may be available for reasons such as religious or moral objections.[81]

The second major category of inadmissibility that could apply to a child's citizenship process is whether he or she is likely at any time to become a public charge.[82]

Multiple factors are taken into account in evaluating whether a child may become a public charge including age, health, family status, assets, resources, and financial status, as well as education and skills.[83]

For example, one experienced attorney raised a question about whether a disabled child or a child with down syndrome would be admissible. Likely this may hinge on whether the child is seen as someone who may become a public charge. Another example would be a child requiring ongoing, extensive, and expensive medical treatment like kidney dialysis.

If adoptive parents are applying for a child to permanently immigrate to the U.S. with the intent to reside in the U.S. and not in Korea, then they must apply for the child as an "Immediate Relative of a U.S. Citizen."[84] For that application,

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76 42 C.F.R. §§ 34.2(a)-(b) (2019).

77 *See* 8 U.S.C. § 1182(a)(1)(A) (2019).

78 *Id.* § 1182(a)(1)(A)(ii).

79 *Id.* § 1182(a)(1)(C)(iii).

80 *Id.* § 1182(a)(1).

81 *Id.* § 1182(g)(2)(C).

82 *See id.* § 1182(a)(4).

83 *Id.* § 1182(a)(B)(i)(I)-(V).

84 *See* "IR-2," "IR-3 and IR-4" below.

an affidavit of support may be required to demonstrate the adoptive parents' ability to provide for the child and promising to compensate for any costs should the child become a public charge.[85] Yet if both adoptive parents take part in the adoption process in Korea—as would likely be the case for a private adoption—such an affidavit may *not* be required.[86] If this is the case, an exemption may be requested; however, under the Trump administration the rules regarding public charges has become more strict.[87]

Ultimately, if a child is deemed inadmissible, there are waivers available for most issues. If granted a waiver, a child will be able to travel to the United States and thereby obtain U.S. citizenship.[88]

Normally, any issues of inadmissibility are handled at the U.S. consulate in Seoul when parents apply for a visa on behalf of the child. However, if a child is inadmissible—that is—she does not meet the requirements for admission, and the consulate does not catch it—there may yet be immigration consequences.[89] If a child was inadmissible at the time of entry into the United States, that may mean the child's entry was unlawful, which would have certain consequences. For example, the child could be subject to deportation and any later acquired benefit, like citizenship, could be revoked.

It is best to be aware of any issues and handle them upfront. Unfortunately, the U.S. Consulate usually will not talk to U.S. citizens directly about any potential issues. They will require such parents to submit a visa application and handle any issues during the adjudication of that petition. This means that adoptive parents must take a risk that the child could have her visa petition denied. However, many people are able to get a visa after having been denied, provided they can prove that they are no longer inadmissible or that they have received a waiver. Moreover, for adoptive parents who adopt via the agency process, the agencies are well aware of these issues, and the chances of adopting a child who is inadmissible to the U.S. is quite small. In addition, whereas the U.S. consulate will

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85 8 C.F.R. § 213a.2(a) (2019).

86 *Id.* § 213a.2(a)(ii)(E).

87 *Id.* § 213a.2(a)(B); *see also* Catholic Legal Immigrant Network, LLC, *The Public Charge Final Rule: FAQs for Immigration Practitioners*, available at https://cliniclegal.org/resources/ground-inadmissibility-and-deportability/public-charge/public-charge-final-rule-faqs (last updated Jan. 30, 2020).

88 Find the form at https://www.uscis.gov/i-601.

89 8 U.S.C. § 1182(a) (2019) ("Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States.").

not usually speak with individuals prior to the filing of a petition, it is possible to get an opinion from a qualified immigration attorney before beginning or during the adoption process.

B. The Path to Citizenship

There is a quick, fairly simple path to citizenship for adopted children who were adopted before the age of 16 and who remain unmarried and under the age of 21.

First, one might petition for the adopted child to receive a lawful permanent resident visa. Such a visa is necessary for parents who wish to return to the U.S. permanently with the child. In such cases, adopted children who enter the U.S. as a lawful permanent resident[90] in the legal and physical custody of a U.S. citizen parent[91] while under the age of 18[92] usually become citizens automatically. Unmarried children who are under the age of 21 but older than 18 may have to satisfy the requirements for becoming a U.S. citizen which includes being a permanent resident for five years.

Once an adopted child marries or is older than 21, it will become much more difficult to get U.S. citizenship for that child. They will have to wait in a long queue to get a visa to come to the U.S. as a lawful permanent resident; then they will have to wait another five years to become a U.S. citizen.[93] Of course, they could still visit the U.S. on a temporary visa in the meantime.[94] This provision applies to any "child" of a U.S. citizen who wants to permanently immigrate

90 *See* generally U.S. Citizenship and Immigration Servs., Policy Manual, vol. 12, pt. H, ch. 4, n.4 (2019) ("A person is generally considered to be a[sic] [legal permanent resident] once USCIS approves his or her adjustment application or once he or she enters the United States with an immigrant visa."). An "Orphan" may not be able to adjust status under DHS guidelines.

91 *See* 8 U.S.C. § 1431 (2019).

92 The Child Status Protection Act "freezes" a child's age once an immediate relative petition is filed; so the child may technically be over the age of 18 at entry. *See id.* at § 1151(f).

93 *See* generally Priscilla Alvarez, *What the Waiting List for Legal Residency Actually Looks Like*, The Atlantic (Sept. 21, 2017), https://www.theatlantic.com/politics/archive/2017/09/what-the-waiting-list-for-legal-residency-actually-looks-like/540408/.

94 A pending I-130 will make it harder for a nonimmigrant visa applicant to prove that he or she intends to return overseas since he or she has an immigrant petition pending on his or her behalf. If he or she travels to a port of entry using the Visa Waiver Program (VWP), Customs and Border Protection (CBP) may deny admission. The applicant could apply for a visa instead, but CBP can still deny admission even if the initial nonimmigrant visa application was approved. CBP is more likely to admit an applicant in these circumstances if he or she has a dual-intent visa as opposed to simply a non-immigrant, visitor visa.

to the United States, whether that child qualifies by way of being an orphan (IR-3 visa) or by way of being in the physical and legal custody of the adoptive parents for two years (IR-2 visa).[95]

It is also possible, as we will demonstrate below, for an adopted child to become a U.S. citizen by traveling to the U.S., but without an intent to permanently reside in the U.S. Admission, on a B-2 visa. This option is potentially useful for expats who do not intend to reside in the U.S. with their adopted child.

If a parent does not intend to reside in the U.S. with their adopted child, in fact, one should not apply for an Immediate Relative visa (IR visa).

1. Qualifying as a Child, Orphan, or Convention Adoptee

To qualify for immigration benefits under U.S. law, the adoptee needs to be legally defined as a "child," or "orphan," or "convention adoptee."[96]

Since Korea is a non-Hague Convention country,[97] there are only two options available—qualify the adoptee as a "child" or as an "orphan."

Meeting the definition of "orphan" is quite complicated. Meeting the definition of "child" is quite easy but takes time:[98] two years of both physical and legal custody to be precise.

a. Immigrant Petition for a "Child" to Reside in the United States(IR-2)

The simplest route to U.S. citizenship is for the adopted child to qualify as a "child" under U.S. law. It just takes time. A "child" who intends to reside in the U.S. can apply for and receive an immediate relative, immigrant visa. On admission, such "child" may automatically become a U.S. citizen under INA 320.[99]

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95 INA 320 applies to an adopted child as defined in INA 101(b)(1)(E), (F), and (G). 8 Foreign Affairs Manual 301.10-2(A)(e) (2019).

96 9 Foreign Affairs Manual § 502.3-1(D) (2018).

97 *See* Hague Convention, *supra* note 26.

98 For a general overview guide on the three options, *see* https://www.uscis.gov/sites/default/files/USCIS/Resources/A3en.pdf (last visited 15 Oct. 2019).

99 Automatic citizenship under INA 322 (8 U.S.C. § 1431) does not apply to a step child who has not also been adopted, though that child may qualify as a "child" for immigration purposes and may receive an IR-2 visa.

To qualify an adoptee as a "child," for the purposes of U.S. immigration law, the adoptive parent must have *both* legal custody of the adoptee for 2 years *and* reside with the adoptee for 2 years.[100] These requirements do not have to overlap. If an adoptive parent fostered a child for a year before the court adoption order came in; that year would count toward the 2 year "residing with" requirement.[101] (However, it may or may not count toward the two-year legal custody requirement, depending on the nature of how the foster parent relationship was established. For instance, whether a court order or government order was involved.)

Also, both requirements are counted in aggregate, so—for instance—a break in legal custody or in joint residence will not affect the time already fulfilled.[102]

Some sources indicate that the "reside with" option has to happen outside the U.S. The language of the Immigration and Naturalization Act (INA) does not include such a requirement. The Act's definition of *child* includes "a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adoptive parent or parents for at least two years."[103]

Put another way, the Foreign Affairs Manual (FAM), which is the guide for U.S. Consulate practice, says a U.S. citizen may "petition for an unmarried, under age 21 'child' who was adopted while under the age of 16, and has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years."[104] The same applies if, concurrently or subsequently, you also adopt a sibling under the age of 18.[105]

Simply stated, if an adoptive parent has legal custody of and resides with an adopted child for two years, then the adopted child is then defined by law as a "child" of the adoptive parents. Then, that parent can apply for that "child" as an immediate relative of a U.S. citizen. In fact, such "child" does *not* have to meet the definition of an orphan. The FAM explicitly states, "If a child qualifies [as a child], adopting parents should *not* be encouraged to pursue orphan processing

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100 *See* 8 U.S.C. § 1101(b)(1)(E)(1) (2019).

101 9 Foreign Affairs Manual § 502.3-2(B)(d)(2) (2018).

102 *See id.* § 502.3-2(B)(d)(3).

103 8 U.S.C. § 1101(b)(1)(E)(1) (2019).

104 9 Foreign Affairs Manual § § 502.3-1(D)(a) (2018).

105 *See id.* § 502.3-2(B)(a)(1)(a).

for the child."[106]

According to the FAM, the adoption has to be both final and legal in Korea, creating a permanent parent-child relationship between the adoptive parent and the child, thereby terminating the previous legal parent-child relationship.[107]

First, the adoptive parent needs to prove two years of "legal custody" meaning: the assumption of responsibility for a minor by an adult under the laws of Korea and under the order or approval of a Korean court of law. There must be a legal process involving the court. An informal custodial or guardianship document, such as a sworn affidavit signed before a notary public, is not sufficient.[108]

The two-year, legal custody requirement is a tough one because, in the private adoption process, it sometimes takes a while to get a final court order. However, although there must be some legal process involving the court, the FAM does not require a final court order to begin running the clock on "legal custody." The legal custody requirement may be fulfilled either prior to or after the child's final adoption decree. Could a foster parent agreement suffice? Probably not without some sort of official, governmental recognition. Nevertheless, if the adopting parent was granted legal custody by the court or recognized governmental entity prior to the adoption, that period may be counted toward fulfillment of the two-year legal custody requirement.[109] Normally, however, the issuance of an adoption decree by the Korean court marks the commencement of legal custody.[110]

Second, the adoptive parent has to reside with the child for two years. To prove this element, an adoptive parent may show that they have been living together in the same physical location. Regardless, even if the child is living with someone else, even with a natural parent, an adoptive parent is allowed to prove that he or she was exercising "primary parental control" (by showing things like financial support, day-to-day care, and being responsible for important decisions).[111]

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106 *Id.* § 502.3-2(B)(e) (emphasis added).

107 *See id.* § 502.3-2(B)(b)(1).

108 *See id.* § 502.3-2(B)(c).

109 *Id.*

110 8 C.F.R. § 320.1(2) (2019).

111 9 Foreign Affairs Manual § 502.3-2(B)(d) (2018).

If these requirements are met, and if one wants to move permanently to the United States with an adopted child, then the U.S. citizen parent may file an I-130 form,[112] Petition for Alien Relative, along with the supporting paperwork. Normally, the I-130 goes to the U.S. Bureau of Citizenship and Immigration Services in the Department of Homeland Security (USCIS). The I-130 usually is not filed with the embassy, unless the petitioner qualifies for special expedited treatment.

In normal times, processing may run anywhere from 3 to 12 months. Once all the necessary documents are submitted and approved, the U.S. citizen parent may submit a Form DS-260 online to apply for a permanent resident visa. Along with this form, the applicant must submit supporting documents to show the child is medically fit and has good reason to immigrate. What follows next is a consular meeting with the adoptive parents and the child.

If all goes well, the child should receive an "IR-2"[113] permanent residence visa. The visa will consist of a packet of supporting documentation and either a cover sheet or visa placed in the child's passport. Both should be hand-carried with the child (not packed in luggage) when traveling to the U.S. and should be presented to the immigration inspectors at the port of entry. Do not open the envelope of supporting documents. Typically, the child will have six months to enter the U.S. following the grant of that visa.

The final step, then, is for the child to enter the U.S., passing through Customs and Border Protection (CBP) at the point of entry. CBP may automatically notify the U.S. Bureau of Citizenship and Immigration Services in the Department of Homeland Security (USCIS) to mail the "green card" for the child along with a social security card if one was requested (in the Form DS-260 submitted to the consulate). Permanent residence is commonly referred to as getting a "green card." The cards are no longer green.

Normally, a permanent resident needs to wait a few years to naturalize, becoming a U.S. citizen. However, with the passage of the Child Citizenship Act, *children under 18 are automatically granted citizenship when they enter the United States as lawful permanent residents* (in this case, with an IR-2 visa).

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112 Find the form at: USCIS. (2019). I-130, *Petition for Alien Relative*, https://www.uscis.gov/i-130 (last visited Oct. 15, 2019).

113 *See* a simplified unofficial guide at: VisaGuide.World. (2019). *IR-2 Visa,* https://visaguide.world/us-visa/immigrant/ir2/ (last visited Oct. 15, 2019).

To obtain proof of citizenship, the adoptive parent can, but does not have to, apply for a certificate of citizenship[114] (Form N-600) from the U.S. Bureau of Citizenship and Immigration Services in the Department of Homeland Security (USCIS) with the appropriate documentation.[115] In the alternative, the child can apply for a U.S. passport as proof of citizenship.

b. Immigrant Petition for an "Orphan" Intending to Reside in the United States (IR-3 or IR-4)

A U.S. citizen who adopts a child in Korea and cannot meet the two year "legal custody" and "residing with" requirements, will need for the child to meet the legal definition of "orphan" in order to obtain U.S. citizenship for the child. This is what happens with overseas, agency adoptions. If a child is adopted entirely overseas, the child may receive an IR-3 immigrant visa. Admission to America under that visa may automatically qualify the child as a U.S. citizen. If an adoption is started outside the U.S. but is finalized inside the U.S., the child may get an IR-4, and citizenship usually becomes automatic after the process is completed inside the United States.

It is a complicated process. We will first examine the legal requirements before turning to the procedural requirements.

i. Legal qualifications to be designated as an "Orphan" under U.S. law

Legally, to qualify as an orphan, the adopted child must have a Form I-600 (Petition to Classify Orphan as an Immediate Relative) filed with the U.S. government on his or her behalf before the child's 16th birthday (or before the 18th birthday of a sibling adopted at the same time or thereafter). While processing, the child needs to remain unmarried. Orphans have to be adopted before their 16th birthday or 18th birthday if one later adopts a sibling.

The adoptive parent needs to be a U.S. citizen who is married (to a U.S. citizen or to a spouse who is in lawful immigration status) or be single and at least 25 years old. Moreover, the child has to be an orphan *either* because of the death or disappearance, abandonment or desertion by, or separation from or loss of both

114 8 C.F.R. § 320.3(b)(2) (2019).

115 For a list of required supporting evidence, *see id.* § 320.3(b).

parents *or* because the child's sole or surviving parent is incapable of providing proper care and has, in writing, irrevocably released the child for emigration and adoption. All of these terms are specifically defined in U.S. Immigration Law.

By way of warning, terms used by Korean authorities (such as "abandonment") may not always be equivalent to definitions for such terms in U.S. immigration law. Hence, an "orphan" per Korean law may not be an "orphan" per U.S. law.

To be qualified as an "orphan," U.S. law also requires that the adoption be a full and final adoption under the laws of Korea. And it is best if at least one of the adoptive parents personally sees the orphan prior to or during the adoption process and, if married, that the parents jointly adopt. Otherwise, additional requirements kick in.

The adoptive parents will also need proof of an irrevocable release of the orphan for emigration and adoption from the person, organization, or competent Korean authority that had the immediately previous legal custody or control over the orphan. Finally, adoptive parents must intend to have a bona-fide parental relationship with the child and demonstrate that the previous parental rights have been severed.

Frankly, adoptive parents who pursue this process usually go through an agency like Holts International or Eastern who handles the paperwork on the Korean side.

ii. Procedure for qualifying as an "Orphan" under U.S. law

Turning now to the specific process, usually, when a U.S. citizen decides to adopt abroad—that is, they want to travel overseas to adopt and to return home with a child—they must first submit a form I-600A with U.S. immigration proving eligibility. This is not a requirement for adoption per se, it is an immigration requirement.

According to the state department, Form I-600A should be filed if you have not yet identified a child or intend to go abroad to locate a child for adoption.[116]

116 Non-Hague Adoption Process, U.S. Dep't of State, https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/how-to-adopt/non-hague-adoption-process.html (last updated Nov. 19, 2018).

However, a note says "parents who have adopted abroad without first demonstrating suitability to adopt by filing an I-600A must file the I-600 petition (and accompanying suitability documents identified in Step 1) with the appropriate DHS/CIS office, not with a consular officer. Consular Officers can only accept I-600 petitions at a U.S. embassy or consulate abroad when they have been notified that an I-600A for a family has already been approved."[117]

Form I-600A requires a home study with a recommendation by an agency by the U.S. government, not to mention a hefty filing fee. For U.S. citizens who reside in Korea—if they want to qualify the child as an "orphan" so as to secure immigration benefits for that child prior to having two years physical and legal custody—in order to meet the requirements for the I-600A, they may have to hire and pay the expenses for a U.S. licensed social worker do the home study in their home in Korea.

After receiving approval for form I-600A, where necessary, adoptive parents must later file form I-600 (Petition to Classify Orphan as an Immediate Relative) along with supporting documents. This proves the child is classified as an orphan and determined ready for adoption as your immediate relative.

Next, the consular officer of Korea conducts a thorough investigation and documents their findings in a Form I-604. Afterward, the adoptive parents may officially apply for an immigrant visa by filing the Immigrant Visa Electronic Application, Form DS-260, online. At this time, the adoptive parents may schedule a consular interview. Finally, the child must attend this interview. This entire process can take 6 months to a year.

In the end, the adopted child should receive a permanent resident visa: either IR-3 or IR-4. The visa will consist of a packet of supporting documentation and either a cover sheet or visa placed in the child's passport. Both should be hand-carried with the child (not packed in luggage) when they travel to the U.S. and should be presented to the immigration inspectors at the port of entry. Do not open the envelope of supporting documents.

IR-3 is for children adopted abroad where the adoptive parents have seen the child before or during the foreign adoption proceeding (and not just during visa processing). If the child enters the U.S. on an IR-3 visa, while under the age of 18, and intends to reside in America in the adoptive parents' legal and physical

117 *Id.*

custody, the child will *automatically* acquire U.S. citizenship as of the date of admission to the United States.

It is *crucial* to note that an IR-3, an immediate relative, immigrant visa, is for someone who intends to become a permanent resident—that is, who intends to reside in the United States. If an adopted child does not intend to reside in the United States with the adoptive parents, according to INA 320, it is imprecise to secure an IR-3, and the Department of Homeland Security may not issue a Certificate of Citizenship to such a child, though that child may under INA 322 qualify instead to file an N-600K and receive a Certificate of Citizenship in that manner. The N-600K is for children who do not intend to reside in America. And as we will see below, there is no need for them to have an immigrant visa.

We are told that the USCIS Buffalo Field Office processes newly entering IR-3 visa packets, automatically sending Certificates of Citizenship to eligible children without requiring additional forms or fees. Adoptive parents may also request a U.S. passport for the child. Some professionals suggest that even though the adoption was finalized in Korea, for IR-3 holders adoptive parents may still want to undertake "re-adoption" legal procedures in the home state for purposes of getting state recognition of the adoption and a local birth certificate.[118]

Children who are admitted based on the IR-4 visa classification will not immediately acquire citizenship. IR-4 classification is for orphans where *either* (1) the adoptive parents have legal custody for purposes of emigration and adoption and have satisfied any applicable pre-adoption requirements in their home state *or* (2) it is for orphans who had a full and final adoption overseas, but whose adoptive parents did not see the child prior to or during the local adoption proceedings.

IR-4 visa recipients become lawful permanent residents upon admission to the United States but do not automatically acquire U.S. citizenship. Such children acquire U.S. citizenship as of the date of a full and final adoption decree in the United States (assuming they're under 18 at that time). Thus, they will need to complete the adoption process in their home state. Adoptive parents will need to file Form N-600, Application for Certificate of Citizenship, and submit it to the USCIS to receive a Certificate of Citizenship. Alternatively, adoptive parents

118 Considering Adoption, *When You Need an International Re-adoption*, https://consideringadoption.com/international-adoption/international-adoption-processes-and-resources/when-you-need-an-international-re-adoption/.

may request a U.S. passport for the child as evidence of citizenship.

2. Obtaining Citizenship While Residing Abroad

Obtaining citizenship while abroad is also quite easy. A "child" including an adopted "orphan" who is residing overseas may automatically qualify for citizenship by filing a form N-600K, by traveling to the United States on a temporary visa, and when required by taking an oath of allegiance. The child need not get an IR-2 or IR-3, and it would be imprecise to do so if the child has no intent to reside in America.

It should be noted that a "child" who is living with parents who are abroad pursuant to official military orders or with parents in service to the U.S. government may *wholly* complete the citizenship process without returning to the United States.[119] However, such parents should pay careful attention to any changes made by USCIS.[120] For instance, it may be that citizenship is not automatic and yet may be applied for while overseas.

Children who are not living with parents who are abroad pursuant to official military orders may complete the process but must at least be admitted to the U.S. on a temporary visa. Arguably, travel under the visa waiver program may qualify since INA 322 says that the child need only be "temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful admission."[121] Meanwhile, admission is defined as "the lawful entry of the alien into

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119 *See* INA 322, codified at 8 U.S.C. § 1433(d) (2019).

120 For example, the USCIS field office in Seoul says on its website, "The USCIS Seoul Field Office may not be able to complete adjudication of pending Form N-400, Form N-600, and Form N-600K applications for overseas military personnel and qualified family members. Those cases have been transferred to the Guam Field Office to complete processing." https://www.uscis.gov/about-us/find-a-uscis-office/international-offices/asiapacific-apac-district/south-korea-uscis-seoul-field-office. That may be because in August 2019, USCIS issued a policy alert noting that military members would not be viewed as residing inside the U.S. for the purposes of INA 320, codified at 8 U.S.C. § 1431. Specifically, the policy alert "[c]larifie[d] that temporary visits to the United States do not establish U.S. residence and explains the distinction between residence and physical presence in the United States . . . [as well as] [e]xplain[ing] that USCIS no longer considers children of U.S. government employees and U.S. armed forces members residing outside the United States as 'residing in the United States' for purposes of acquiring citizenship under INA 320." Instead they should formally apply for citizenship under INA 322. U.S. Citizenship and Immigration Serv., Policy Alert, Aug. 28, 2019, PA-2019-05, available at https://www.uscis.gov/sites/default/files/policymanual/updates/20190828-ResidenceForCitizenship.pdf.

121 Provided entry under the VWP counts as an "admission," it should suffice for the purposes of acquiring citizenship under INA 322. Parents should check with a practicing U.S. immigration law attorney to be sure.

the United States after inspection and authorization by an immigration officer."[122]

The law requires that the adoptive U.S. citizen parent, by birth or naturalization, must have physically resided in the U.S. for at least five years and two of those years must have been after age fourteen.[123] However, the five-year requirement can be met by time in-country, whether or not the adoptive parent was a U.S. citizen at that time.[124] If the adoptive U.S. citizen parent cannot qualify, their U.S. citizen parent (the adopted child's grandparent) may aid in qualification whether living or deceased.[125]

In order to obtain citizenship abroad, the adoptive parent should file an N-600K "Application for Citizenship" form. This form is only for a "child" who regularly resides outside of the U.S.[126] and may be filed before traveling to the U.S.[127] In support of the application, several documents must be supplied unless they are already on file with the USCIS as part of certain earlier processes. These documents include the child's birth certificate; evidence of citizenship and previous physical presence in the United States of the parents; a full and final adoption decree if applicable; and verification of the child's residence and domicile and custody.[128]

Following this documentation and upon issuance of a certificate, the adoptive parent and the child must appear in person for an interview and to give an oath of allegiance before a USCIS officer. The oath can and may be waived for children under 14 years of age.

Upon approval of the application of citizenship, the child must be "lawfully admitted, physically present, and maintaining lawful status in the United States at the time the application is approved and the time of naturalization."[129] Lawful admittance and presence can be acquired via a B-2 visa. [130] A B-2 visa may be

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122 8 U.S.C. § 1101(13)(A) (2020).

123 *See id.* § 1433(a)(2)(A).

124 *See* 12 USCIS-PM H.5(c)(1) (2019), https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-5.

125 12 USCIS-PM H.5(c)(3) (2019).

126 N-600K, Application for Citizenship and Issuance of Certificate Under Section 322 (Sept. 20, 2019), https://www.uscis.gov/n-600k.

127 12 USCIS-PM H.5(a) (2019), https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-5.

128 *Id.*

129 *Id.*

130 9 Foreign Affairs Manual § 402.2-4(B)(7) (2019).

granted for a child that intends to return to a residence abroad. Hence, the child need not be a "permanent resident" in the U.S. to get citizenship.

An adoptive parent and the child are a "resident" of Korea if they intend to remain in Korean and not in the U.S. It almost goes without saying that legal residence is different than "permanent residence." One's legal residence, for example, for U.S. tax purposes, is in the state or country where one intends to permanently reside. Some expats may think they are not legal residents of Korea because they are not permanent residents. However, "permanent resident" and "resident" are different. Legal "residence" has both a subjective component, based on intent, and an objective component, that there is evidence that a reasonable person would think one intends to reside in Korea (for instance, holding a job in Korea, owning a house, having family living here, etcetera).[131]

An adopted child who holds a Korean passport may affirmatively apply for a B-2 visa. Typically, the U.S. Embassy prefers for those capable of doing so to travel under the Visa Waiver Program. But it *may* be necessary in order to get citizenship that a child acquire a B-2 visa.[132] To get a B-2 visa, the adoptive parents may be required to produce documents showing that the child has a U.S. naturalization interview appointment, show an approval of Form N-600K, demonstrate that the child is eligible as a "child" on having completed the two-year resident and legal custody requirements or is an "orphan" and has the requisite approved forms on record, etcetera. Again, it is important that the child and family do not plan on residing in the U.S. when applying for this B-2 visa as it is a non-immigrant visa and non-immigrant intent is required.

3. Dual Citizenship

Once citizenship is granted an adopted child may need to inform and file renunciation of citizenship documents with the Korean government. As of 2010, Korea allows for permanent dual citizenship in certain limited circumstances.[133] To be precise, those who are in one of the categories mentioned in Subparagraph

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131 *See* 8 U.S.C. § 1391 (2019).

132 9 Foreign Affairs Manual § 402.2-4(B)(7) (2019). It is the author's opinion that travel under the Visa Waiver Program should qualify as a lawful admission to the United States. Admission is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(13)(A) (2020).

133 Chulwoo Lee, Gukjeokbeobe Daehan Sahujeok Ipbeoppyeong-ga [Ex Post Legislative Evaluation on Nationality Act] 194 (Korea Legislation Research Institute, 2018) (S. Kor.).

2, Article 10 of the Nationality Act will be able to permanently maintain their multi-nationality if they vow not to exercise their foreign nationality in Korea.[134] This includes children who have been adopted by foreign parents when they were minors and currently have recovered their Korean nationality. In light of these facts, it is possible for overseas adopted children to permanently retain his or her dual citizenship if he or she is willing to vow not to exercise his or her foreign nationality in Korea. For males, this may mean that they will have to go to the army once they agree to the vow. This is because once they vow not to exercise their foreign nationality in Korea, they are under Korean law, and the Korean law mandates that they go into the army.

While permanent dual citizenship is possible, Korean law states that anyone who voluntarily obtains a foreign citizenship must forfeit their Korean citizenship.[135] To be precise, Article 12 of the Nationality Act states that Koreans who voluntarily obtain a foreign citizenship after the age of 20 have two years to decide which nationality he or she wants to acquire.[136] On the other hand, Koreans who have acquired multiple nationalities before the age of 20 must choose his or her nationality before turning 22 years of age.[137] Therefore, failure to renounce citizenship may lead to problems traveling or in reinstating Korean citizenship later.

The Nationality Act also allows Korean citizenship to be recovered by adopted children.[138] The process[139] is somewhat complicated, even more so for male children who face mandatory military service, but may be available for your adopted child as long they meet basic criteria.

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134 Gukjeokbeop [Nationality Act], Act. No. 15249, Dec. 19, 2017, art. 10 (S. Kor.), *translated in* Korea Legislation Research Institute online database, http://elaw.klri.re.kr/eng_service/lawView.do?hseq=48862&lang=ENG; Lee, *supra* note 133, at 196.

135 *Id.* at art. 15.

136 *Id.* at art. 12.

137 *Id.*

138 *Id.* at art. 9.

139 *See* Dual Citizenship, Global Oversees Adoptees' Link, https://www.goal.or.kr/citizenship (last visited Aug. 11, 2019).

IV. Conclusions

Adoption is quite controversial in Korea.[140] There have been painful anecdotal stories of children who lived the "American dream" and yet still felt stigmatized.[141] There have also been terrible cases such as a child adopted through the Special Act who was abused to death.[142] Moreover, there was the aforementioned case of the adult facing deportation from the U.S. because his adoptive parents never bothered to file the right forms. Yet, these painful, individual anecdotes need to be considered in light of the thousands of successful adoption cases and based on the best interest of the children and of the rights of single mothers to choose the best family possible for their children.

Without addressing that controversy, the simple purpose of this paper is to note that non-Korean parents may adopt in Korea using the domestic, private adoption process. This has taken place hundreds of times. Although adoptions by non-Koreans under the private adoption law may yet be "international adoptions" this does not mean they must be managed under the Special Adoption Act which only applies to a certain subset of "children in need of protection."

Rather, both Koreans and non-Koreans have been adopting in Korea using the domestic civil law and using the Special Act on occasions based on the individual circumstances of each case. For example, a certain subset of "children in need of protection" as enumerated in the Special Act must be adopted by the Special Act, and this includes children located in orphanages affiliated with private adoption agencies. The Special Act applies in such cases *both to Korean and to non-Korean adoptive parents*. Nevertheless, if a biological mother (and father where available) decides by private agreement to adopt their child to a foreign couple who is living in Korea, and under the jurisdiction and keen oversight of the courts of Korea, then such has been and should be allowed under the domestic civil law for non-Koreans just as it is for Koreans.

Finally, in any event, we wish to show that there is a clear-cut, simple

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140 *See* So, *supra* note 66.

141 We note the story of Deann Borshay Liem in her memoir *First Person Plural* who suffered so much in her international adoption, despite externalities of success, such as being a cheerleader and prom queen. Margaret Homans, The Imprint of Another Life: Adoption Narratives and Human Possibility 180 (2013). The Special Adoption Act was passed due in part to Liem's harrowing story and that of activist Jane Trenka. https://edition.cnn.com/2013/09/16/world/international-adoption-korea-adoptee-advocates/index.html.

142 *See* So, *supra* note 55.

path to citizenship for children adopted in Korea whereby they can become U.S. citizens upon receipt of an immigrant or even a non-immigrant visa and where they travel to the United States on said visa. Some children, those adopted by U.S. military members, may even obtain citizenship without stepping foot in the United States.

That being said, based on the intent of the Special Act to preserve Korean children within Korean culture, let us remember that there is no reason why a U.S. citizen who is residing in Korea need ever seek U.S. citizenship for a Korean child as that child already has Korean citizenship and, quite frankly, that child may enjoy more benefits including social insurances and assistance while remaining a Korean citizen. Korea is a wonderful place to live and raise children. Thus, there are many such cases where the adoptive parents choose not to obtain U.S. citizenship for a child, leaving up to that child the question of whether he or she would like to become U.S. citizens at a future date.

In conclusion, we thank the judges and lawyers of Korea who are working on these complicated issues every day as well as the social workers who must make their best decision on a case by case basis as to adoption and the best interest of the child. At present too few fully understand this matter particularly as concerns foreign adoptive parents; we are grateful for those who welcome and understand the condition of multicultural families who live in a monoculture like Korea. And finally, we are thankful for adoptive parents who are willing to open their homes and show love to the least advantaged in our society.

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