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FILE NO. S-430
CHILDREN AND FAMILY SERVICES:
Adoption of Ward by Alien

Honorable Edward T. Weaver
Acting Director
Department of Children
and Family Services
524 South Second Street
Springfield, Illinois 62706

Dear Director Weaver:

I have your letter of November 19, asking my
opinion as follows:

"The Department of Children and Family Services has proposed the adoption of one of their wards by Mr. and Mrs. Hartnut Broghammer. The home study has been completed by the Department and it has been determined that the Broghammer's home would be an ideal adoptive home for this particular ward. The Broghammers, however, are not, as yet, citizens of the United States. The Broghammers have filed their intent to become citizens of the United States but will be unable to complete their citizenship requirements until the expiration of the waiting period, which is November 4, 1972.

"Judge Mahoney of the Kane County Court, wherein the petition for adoption would be heard, has indicated that he sees no legal problem connected with an alien adopting a ward of the Department. However, since no authority can be found concerning the adoption of a minor by an alien, the Department would appreciate an opinion from the Attorney General's office setting out your views with regard to an adoption by an alien."

Section 2 of "AN ACT in relation to the adoption of persons, and to repeal an act therein named", (Ill. Rev. Stat. 1971, ch. 4, par. 9.1-2) is controlling. Under the editorial head of "Who may adopt a child" the following provision is made:

"A. Any of the following persons, who is under no legal disability (except the minority specified in subparagraph (b) and who has resided in the State of Illinois continuously for a period of at least 6 months immediately preceding the commencement of an adoption proceeding, may institute such proceeding:

"(a) A reputable person of legal age and of either sex, provided that if such person is married, his or her spouse shall be a party to the adoption proceeding, including a husband or wife desiring to adopt a child of the other spouse, in all of which cases the adoption shall be by both spouses jointly;

"(b) A minor, by leave of court upon good cause shown.

"B. The residence requirement specified in paragraph A of this Section shall not apply to an adoption of a related child or to an adoption of a child placed by an agency."

You will note that the person adopting is not required under the statute to be a citizen of the United States, and need only be a resident of the State of Illinois for a period of six months preceding the commencement of the adoption proceeding. The section does make reference to "legal disability", excluding such persons from standing as adoptive parents. Under the head "Technical Legal Sense", in 26A C.J.S. Disability, p. 963, the following definition is found:

"In a technical sense, the word [disability] implies want of power, not want of inclination, refers to incapacity, and not to disinclination, and has been defined as meaning disqualification, incompetency, legal incapacity, or want of legal qualification to do a thing; also, an instance or cause of such incapacity; the want of legal capacity to do a thing; the want of legal ability or capacity to exercise legal rights either special or ordinary, or to do certain acts with proper legal effect, or to enjoy certain privileges or powers of free action; the absence of legal ability to do certain acts or enjoy certain benefits; a personal incapacity, such as the disability to sue, take liens by descent, enter into contracts, alien property, etc.

"The disability may relate to the power to contract or to bring suits, and may arise out of want of sufficient understanding, such as idiocy, lunacy, infancy, or want of freedom of will, as in the case of married women and persons under duress, or out of the policy of the law, such as alienage, when the alien is an enemy, outlawry attainder, praemunire, and the like. At the present day 'disability' is generally used to indicate an incapacity

for the full enjoyment of ordinary legal rights. Sometimes the term is used in a more limited sense, as when it signifies an impediment to marriage, or the restraints placed upon clergymen by reason of their spiritual avocations." Emphasis supplied

Note that the reference to alien incapacity is to that of an enemy alien or to dealing with the property of an alien.

2 C.J.S. Adoption, sec. 8 states that:

"The adoptive parent or parents must be of the age prescribed by statute, but, in the absence of a provision to the contrary in the adoption statute, an advanced age will not disqualify. Corporations may not adopt under a statute limiting the right to natural persons, and under other statutes only persons who are, or may become, citizens may adopt, although under appropriate statutory provision an alien may adopt a citizen, and the child's right of inheritance in the adoptive parent's country is not essential to a valid adoption in the forum."

Its obvious implication is that the statute may specifically provide for, or limit, adoption of United States citizens by aliens. Illinois has not seen fit to place any limitation on alien adoptions, and it may therefore take place under the statute.

Indeed, the United States Supreme Court has recently considered the matter of citizenship as a statutory test of eligibility for the receipt of public aid. In Graham v. Richardson, et al, 91 S. Ct. 1848, laws in Arizona and Pennsylvania requiring citizenship or a length of residence of fifteen years for an alien to qualify for public

Honorable Edward T. Weaver - 5 -

aid were found unconstitutional on the basis that they denied equal protection to aliens. The same result might well apply to a citizenship qualification for adoption.

It is, for the foregoing reasons, my opinion that aliens are persons who may adopt a child under sec. 2 of "AN ACT in relation to the adoption of persons, and to repeal an act therein named", Ill. Rev. Stat. 1971, ch. 4, par. 9.1-2.

Very truly yours,

A T T O R N E Y G E N E R A L