Copy: Mr. Justice Kearney

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IN THE SUPREME COURT)
OF PAPUA NEW GUINEA)

CORAM : MINOGUE C.J.
Tuesday,
11th September 1973.

RE T.

1973

Jun 12 and
15, Aug 31.

LAE.

Sep 11.

PORT
MORESBY.

Minogue, C.J.

B and his wife have applied for an order authorizing them to adopt T.

Sec.6 of the Adoption of Children Ordinance 1969 directs that the Court shall not make an order for the adoption of a child unless at the time of the filing in the Court of the application for the order each of the applicants was resident or domiciled in Papua New Guinea and the child was present in this country. Both applicants have been resident in New Guinea for some years although they shortly propose to leave Lae wherein is their present home and to reside in New South Wales. So far they have not acquired a home there. At the present time the only home they have is the one in which they have resided for a long period and from which the male applicant has built up a successful business in this country. Residence is a question of fact and denotes some degree of permanence. See Re Adoption Application No. 52/1951(1). With some hesitation I conclude that the applicants are resident and that the Court has jurisdiction by virtue of sec.6.

A difficulty arises at the outset in that T is a girl aged 15 years who was born on 30th January 1958 and although B is now 33, having been born on 25th August 1939 and consequently is more than 18 years older than T, his wife who was born on 17th April 1949 and is now aged 24 is not quite 9 years older than T.

Sec.11 of the Adoption of Children Ordinance 1968 provides that the Court shall not make an order for the adoption of a child in favour of a person who being a female person is less than 16 years older than the child unless the applicant or at least one of the applicants is a natural parent of the child or the Court considers there are exceptional circumstances that justify making an adoption order. I should add that the female applicant is the half-sister of T.

(1) (1951) 2 All E.R.931.

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Sec.11 is preceded by sec.8 which enacts that for all purposes of this Part (both sections being in the same Part) the welfare and interests of the child concerned shall be regarded as the paramount consideration.

The circumstances are certainly unusual. T's mother is an indigenous woman living in her village. Her father is unknown both by T and the female applicant, although the latter informed me he was not of the same race as T's mother. B is an Australian citizen who has been in Papua New Guinea for some years and has become reasonably successful in business. It is his intention to return to Australia in or about October next and to seek to buy a beef cattle property in south-eastern New South Wales, in a region not unknown to me for its comparatively high elevation and cold winters. Mrs. B's father who has been dead for some 20 years, was apparently a native of Guam in the Marianas and her mother is also the mother of T. B and his wife have been associated for some years and have two children, a daughter born in March 1968 and a son born in February 1970. They were married in May 1971 and have for some time been living in Lae. Mrs. B is now a naturalized Australian citizen.

T has a number of half-sisters and half-brothers, one of whom is a peripatetic worker and who has had no close contact with T at any stage of her life, another has married on several occasions by native custom and is at present living on a plantation in another part of the country. He likewise has had no close contact with T at any stage of her life. Yet another half-brother resides some distance from Lae with a de facto wife and four children of theirs together with another child of the wife. Another half-sister aged 20 lives in New Ireland in what has been described to me by the female applicant as an apparently unstable relationship with a man of mixed race, and another sister aged 18 resides with T's mother in the village. The mother who has consented to the application for adoption is of advanced age and has little means and I am satisfied that there are no other relatives of T or sufficiently close friends who would be willing and able to accept and care for her.

T has never resided in the area in which her mother lives and has only been there for brief visits. She has been educated at a primary school in Rabaul and presently is at the Lae High School. She has no cultural ties whatever with her mother's people and although she understands she does not speak the language spoken by the people of her mother's area. She came to reside with

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another half-sister in Lae in early 1971. Residing also in that household was a young man aged 20, a brother of that half-sister's husband. In August 1972 it was discovered that this young man had been having sexual intercourse with T. To this she submitted I am satisfied with reluctance and did not at first make any complaint because of the circumstances in which she found herself. However, the relationship was discovered and caused both B and his wife considerable concern. After discussions with the police and welfare authorities and with the Stipendiary Magistrate in Lae T was brought before the latter and declared to be a neglected child and on 27th August 1972 the magistrate ordered that she be committed to the care of the applicants until she attains the age of 16 years, on the conditions that she be not brought in contact with her defiler, that she remain subject to the supervision of the Children's Welfare Department and comply with the Welfare Officer's requirements and that she continue her schooling in Lae. Since the date of the order she has been under the care of the applicants and is currently attending the Lae High School where she is now in Form 3. She has been described to me as an average student. Her 1972 school report commended her over-all behaviour and ability to work to her capacity. Her scholastic results were of average level and she participates in sports, particularly in basketball.

I have now on two occasions discussed her position with T. She is a well-built and attractive girl who looks somewhat older than her 15 years. She does not appear to me to be of mixed European and New Guinean race but could well be taken for a girl of the area from which her mother comes. She has informed me that she is anxious to continue with her schooling and to eventually become, if she is able a teacher in Australia, and she expresses her desire to live permanently in Australia although of course she has never been in that country. Apparently in 1970 she was selected to attend a boarding school in Australia but for a reason which was not stated to me this did not eventuate.

As required by the Ordinance I have been supplied with a report by the Director of Child Welfare which has annexed to it a report from a Welfare Officer in Lae. I am satisfied that the applicants themselves believe that T has a better future with them in what they regard as a happy and secure environment. The Welfare Officer reports that B and his wife lived in a de facto relationship for about 8 years before their marriage but that at no time have they separated or suffered from marital disharmony. They have two happy, well-adjusted children, the older of whom began school this year and is making good progress. B and his wife consider that the advantages of adopting T and taking her to Australia

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with them as their daughter outweigh any other disadvantages. They hope to see her develop into a self-sufficient capable child with their guidance and under their supervision and to give her an opportunity for a higher education and assistance in determining her career and future method of living. The Director himself has some doubts whether it will be preferable to change the existing foster relationship. In his view it appeared that a secure place with a good family would offer her more prospects for the future than would a return to the care of her mother or to the care of the relatives with whom she was living at the time she was found to be neglected. The Director feels that if T is to go with the applicants to Australia and make her future there then perhaps an adoption would be appropriate and might indeed be a pre-condition to her gaining permanent entry. He finds himself unable to make a firm recommendation.

When the applicants and T were first before me in June last I adjourned the matter for further consideration and requested a report from the Child Welfare Department in New South Wales as to the provision of educational facilities in the area to which the applicants proposed to take T, as to the likelihood of her fitting in to a country community such as is the one in which it is proposed she should live, and as to anything that might be known of the male applicant and his family in that area. With ready co-operation that Department furnished me with a report from which I learnt that the Principal of the High School in the area is confident that a "Papuan" girl such as T would be well received into the local school community and in which the opinion is expressed that she would be readily accepted within the community generally. It appears also that the applicant's wife has been happily accepted into her husband's family, that two of the male applicant's brothers are still residing in the district in which he proposes to reside, one of whom is conducting a trucking business there, and further that the family is in good repute.

I listed the matter for hearing again at Lae on Friday 31st August and requested the assistance of Miss Campbell of the Public Solicitor's Office, which assistance I found most helpful. In an informal way I interviewed both T and the applicants separately. I am entirely satisfied that T is a happy member of the applicants' household and that she is most anxious for an adoption order to be made and to live in Australia. She has a good deal of poise and balance for her age and I am confident a determination to succeed in the environment in which she wishes to live. I further learned that a daughter of one of the other half-sisters has already spent some time in the area to which T wishes to go and that from the point of view of a girl of approximately her own age

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she is reasonably aware of the sort of life into which she would be induced. B informed me that he is retaining some business interests in New Guinea and that from time to time he will be visiting this country and that he proposes that T will be able to return here for holidays.

I have not found this an easy matter to decide. By virtue of sec.32 of the Adoption Ordinance I could make an interim order committing her to the custody of the applicants. That order would be exhausted in 12 months and it would be possible for the applicants then to make application for adoption to a Judge in Equity in New South Wales. The provisions of the New South Wales Adoption Act are substantially the same as those in Papua New Guinea although in a case such as this where it is a relative who seeks adoption the Court does not have to find exceptional circumstances to be able to make an order. The other alternatives are for me to make an order for adoption here or to refuse to make an order at all. The latter I rule out of consideration.

If I make an order for adoption the consequence follows that T acquires the domicil of the applicants but she does not acquire Australian citizenship. That is a matter for subsequent determination by the Australian Government upon application being made to it. From the Australian Department of Immigration Citizenship Circular 4/72 produced to me by Miss Campbell an adoption order made by me would probably facilitate the granting of citizenship if that is desired. However, I am satisfied that the acquisition of citizenship is not a primary motive behind the application and that this case is different from a number of New South Wales cases cited to me by Miss Campbell; for example, Re An Infant, L., and the Adoption of Children Act (2). I am satisfied that the application is motivated by concern for the welfare of T. Being a native of New Guinea, until application is made T will remain an Australian protected person. It is as yet unknown what will be the requirements of the citizenship laws of this country. Whatever be the eventual situation I do not imagine that T will be debarred from returning to Papua New Guinea should that be her ultimate wish.

T can look to no material benefits from her natural mother and in her society it is not unusual for children to live for long periods nor indeed for a lifetime away from its natural parents. With the education she has I cannot see her being able to settle successfully into the area in which her mother lives. If she is not to stay with the applicants I cannot see any person qualified to guide her through her difficult adolescent years. It will not be long of course before she will want to stand on her own feet and my assessment of the applicants is that they will do everything in their power to fit her for maturity. Materially

(2) (1969-70) 90 W.N.(Pt.1) (N.S.W.)461.

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with them she will have the benefit of a comfortable home and environment and if I make an order she will have the certainty of recognition as a member of the applicants' family, and with regard to disposition of property the benefit of sec.28 of the Adoption Ordinance.

I was initially attracted by the idea of making an interim order for custody but on reflection I think that on the whole it is better that I should make an order for adoption. I am satisfied that the welfare and interests of T would be best served if I make that order and that I thereby relieve all parties of the uncertainties consequent upon my not doing so. I am confident that the applicants are deeply concerned about T's welfare and that they will make suitable parents.

There is one matter which I have not dealt with and that arises under sec.11. Before I make an order I have to determine that there are exceptional circumstances that justify my making it. As I observed earlier the New South Wales Act does not require the existence of such circumstances where one of the applicants for adoption is a relative of the adoptee. As McInerney J. said in another connection in Re S (3) at p.495: "The question whether they are 'exceptional circumstances' or whether there is some 'exceptional reason' why the adoption order should be discharged must, in the end, be a matter to be determined by the Court on the facts of each individual case." Whether such circumstances exist is a matter to be determined on all the relevant facts.

From the facts which I have already set out I am of the view that these exceptional circumstances exist in this case. Of prime importance I think are the facts that T has already suffered a traumatic experience which her adoption into the applicants' household has enabled her to weather successfully; that there are no other persons fitted and able to guide T through the next few years of her life (and they are very important years) if she does not remain with the applicants; that she is already in fact a member of the family and that if she goes to Australia with them it is desirable to have her position legally recognized.

Accordingly I order that the applicants be authorized to adopt T.

Solicitors for the Applicants : Messrs. Reynolds, Rissen & Co.

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(3) (1969) V.R.490.