Raine, J.

745

IN THE SUPREME COURT)
OF PAPUA NEW GUINEA)

CORAM: RAINE, J.
Tuesday,
29th May, 1973.

IN THE MATTER of the ADOPTION OF CHILDREN ORDINANCE 1968

AND IN THE MATTER of an APPLICATION BY XY and YY

1972
Sept. 19
1973
May 11,29
PORT MORESBY

RAINE, J.

This is an unusual case, and has given those involved a deal of concern. I propose to circulate the judgment, and, because of this will only state the facts very broadly, so that the usual cloak of anonymity that shrouds these matters is not rent. I will call the applicants XY and YY.

The child the subject of the application is a native girl aged a little over five years. The applicants are married and are Australians. Her mother was very young when the child was born, the father considerably older. There were in fact twin girls born, but one perished shortly after birth. The survivor, the subject child, whom I will call Z, was very small, and was born prematurely.

Early in Z's life she contracted pneumonia. When Z's father visited the hospital, which is in the Southern Highlands, he was annoyed at the state of Z's health, and attacked his wife, for which he was charged, and sent to a Corrective Institution for a short time.

In the meantime one of the applicants' daughters, who worked at the hospital, and was then aged about eighteen, took a close interest in Z and Z's mother. This was not lost on the young mother, who asked Miss Y to take Z. Miss Y declined to do this, but her interest in the child continued.

As the time approached when the husband was due to be released from the Corrective Institution, his wife became apprehensive, and she fled from the

hospital. Z's condition deteriorated after this, and Miss Y prevailed on the applicants to permit Z to be taken to their home at night, and during the weekend. The hospital authorities agreed, as at night and in the weekends, in the mother's absence, there was inadequate supervision, the hospital was short staffed, and trained staff, however devoted, must sleep and rest.

When this commenced Z was about nine months old, and in very poor condition. The child responded very well to the care and attention given it, and while this obviously gave the applicants great pleasure it did not then occur to them to adopt Z.

However, a succession of difficulties and crises occurred, and the applicants then kept the child at home all the time, again with the hospital's approval. The natural mother made it clear that she did not want Z back, she was frightened of her husband, and her union with him was at an end. The father visited the applicants at their home only when the child was eighteen months old. He made no attempt to take Z away, but said that he would do so when she reached school age. He and the mother are Highlanders, and seem to be very unsophisticated, he wears sparse native dress, neither he nor his wife speak English or Pidgin.

Through interpreters the applicants tried to dissuade him, pointing out that when Z was of school age she would not understand his place talk, and would be unsuited to village life. They also drew attention to her bronchial trouble. This has persisted since the early bout of pneumonia.

By this time the applicants had become very fond of Z, and knew it would be difficult for them to part with her.

In January, 1970 the applicants were due to leave the Highlands posting, and take long leave. After leave they moved far away, to the coast.

They obtained permission from the Director of Child Welfare to take Z to Australia for twelve months, and they also visited Fiji, where Mrs. XY was born. Z's mother also gave her consent, and further consent was given for the Fiji visit by the Director.

Of course, as time passed, the applicants became more and more fond of the child. No doubt the fact that their own four children have grown up and are independent has played some part, the little girl has probably filled something of a gap in the applicants' lives.

The present situation is not a contrived one, far from it. The applicants and their daughter became concerned with a sick baby. It is clear that as the child flourished under their admirable care that they became increasingly attached to her. This is not a case, and I suppose there are such cases, of a white couple making an over-emotional, albeit kindly decision to adopt a native child. The applicants have lived all over the Territory for many years. The female applicant has involved herself in community work. She and her husband would not lack in appreciation of the problems involved.

The applicants are respectable people. They are in a sound financial position. Their health is good. They are fit and proper in every way to fulfil the responsibilities of adopting parents as required by the Ordinance. Their own natural children raise no objection. Their difficulty is that Z is a native child whose parents have not given the requisite consent. See Section 18. I should add that Miss Campbell, who appears by leave as 'amicus curiae', assured me that notice has been given to the natural parents as required by Section 13, and this has now been formally proved.

It is clear, from what I have said, that had there been consent, and had there been no other problems, I would have regarded this as a proper case to make an order in favour of the applicants.

The evidence makes it clear that consent would be given if each natural parent is paid a sum of money by the applicants. A satisfactory agreement could have been reached, at least with the mother, were it not for the provisions of Part V of the Ordinance. This Part is headed "OFFENCES". Section 41 provides:-

> "41. (1) Subject to this section, a person shall not (whether before or after the birth of a child) make, give or receive, or agree to make, give or receive, a payment or reward for or in consideration of -
>
> (a) the adoption or proposed adoption of the child;
>
> (b) the giving of consent, or the signing of an instrument of consent, to the adoption of a child;
>
> (c) the transfer of the possession or control of a child with a view to the adoption of the child; or
>
> (d) the conduct of negotiations or the making of arrangements with a view to the adoption of a child.
>
> Penalty: Four hundred dollars or imprisonment for six months.
>
> (2) Subsection (1) of this section does not apply to or in relation to any of the following payments or rewards in connexion with an adoption or proposed adoption under this Ordinance:-
>
> (a) a payment of legal expenses;
>
> (b) a payment made by the adopters, with the approval in writing of the Director or with the approval of the Court, in respect of the hospital and medical expenses reasonably incurred in connexion with the birth of the

child or the ante-natal or post-natal care and treatment of the mother of the child or of the child; and

(c) any other payment or reward authorized by the Director or by the Court.

(3) ....."

Thus the applicants were unable to enter into any negotiations. The amounts mentioned by the natural parents were probably not proposed in contravention of Section 41, apparently the figures were mentioned when the local administration made special inquiries to ascertain the attitudes of the two natural parents. Even if there was a technical breach it would be ludicrous to charge these simple Highlanders with offences under the section.

Counsel rather approached the problem on the basis that it might be open to me to dispense with consent, as I have power to do under Section 24(1), but make the dispensation subject to a condition that reasonable sums be paid to the natural parents by the applicants. Section 24(1) reads:-

"24. (1) The Court may, by order, dispense with the consent of a person (other than the child) to the adoption of a child where the Court is satisfied that -

(a) after reasonable inquiry, the person cannot be found or identified;

(b) the person is in such a physical or mental condition as not to be capable of properly considering the question whether he should give his consent;

(c) the person has abandoned, deserted or persistently neglected or ill-treated the child;

(d) the person has, for a period of not less than one year, failed, without reasonable cause, to discharge the obligations of a parent or guardian, as the case may be, of the child; or

(e) there are any other special circumstances by reason of which the consent may properly be dispensed with.

(2) .....

(3) ....."

The difficulty, so it seems to me, is that all Section 24(1) provides is five reasons why consent may be dispensed with, and in this case it seems clear that I could rely on sub-sections (c), (d) and (e). Section 24 is contained within Part III of the Ordinance while Sections 41 and 42 are in Part V. I really see no relationship between the three sections and the question of payment or reward is a separate matter to the considerations that arise under Section 24. It might well be, of course, that in considering Section 24(1)(e) that the court might exercise its discretion in favour of applicants where it was clear that a payment or reward had been agreed upon under circumstances where the court thought that it was proper that a payment or reward be made. However, because Section 24 and Section 41 are in different parts the difficulty I feel is reaching agreement as to what is a proper sum. I find it difficult to envisage how a "payment or reward" under Section 41(2)(c) can be quantified by the interested parties without prior negotiations between them which would be struck at by sub-section (1). See also Section 42(1).

So far as the suggestion is concerned that I should dispense with consent under Section 24(1) upon a condition that a reward be paid, I strongly doubt my power to do this, where, under Section 41(2)(c) there is specific power given to me to ignore Section 41(1) and authorize a payment or reward.

I drew the attention of Counsel to these problems,

and the matter was then adjourned for a considerable length of time to enable field officers at Mendi to talk to the natural parents. This has been done. In this way the problem about negotiations between the applicants and the natural parents has been largely overcome. No problem arises so far as the natural mother is concerned. She still lives apart from her husband and she would be satisfied to see the child adopted if she received the sum of $200.00. Material placed before me in two affidavits by field officers in the Mendi area suggests very strongly that there is nothing unreasonable in the natural mother's attitude, bearing in mind traditional rights of parents 'qua' their children. Unfortunately the natural father demanded a grossly excessive sum and the field officers clearly regard his claim as ridiculous. How serious the demand is is hard to say, as the field officers were not present as negotiators.

The affidavits of the field officers persuade me that I would be doing justice if I approved the payment of $200.00 to the natural mother, which is all she asks, and the sum of $270.00 to the natural father, and I propose to consent to these payments being made. In fact, the evidence of the field officers suggests that I am being a little over generous in the case of the natural father but this is not to such an extent as to impose an unfair burden upon the applicants.

I would not want it to be thought that natural parents who are native people are going to receive large sums of compensation as of right. This could lead to abuse. However, the evidence of the field officers shows that traditional practices in the Mendi area make it not unreasonable for me to consent to payments to the natural parents. This course has been followed before, and Minogue,J. (as he then was) consented to the payment of $150.00 to a natural mother in an application on the 15th October, 1965. This was nearly eight years ago and it might well be that the sum of $150.00 at that time would now represent something in the order of $250.00, or rather more.

I am grateful to the authorities at Mendi for the

assistance they have given me. Were it not for that assistance I do not see how this matter could have been resolved so far as compensation is concerned. It seems to me, in view of the evidence that is now before me, that I clearly have power under Section 41(2)(c) to assess proper payment or reward, and this I propose to do. The sums of money that I have indicated above were not ascertained as a result of negotiations between the parties or people acting on their behalf. They were independent investigations aimed at establishing what might be called a reasonable "child price" in the area, and also aimed at getting some indication from the natural parents as to the figure they thought was reasonable. But they were not negotiations clearly struck at by Section 42(1). The field officers were not bargaining with the natural parents and did not, and could not, make any counter proposals. They were obtaining information for the Court. But the method adopted is far from satisfactory, and goes close to offending against the provisions of the Ordinance.

As I indicated above, when I set out the various sections, I feel that a very difficult situation is created where the natural parents wish the child to be adopted in return for some reasonable reward or, in a case such as this, where it is in the interests of the child to be adopted, but consent is withheld by one or both of the natural parents except upon the payment of a most unreasonable reward. The difficulty is, in my opinion, that there is no way in which the would be adopting parents and the natural parents can get together and discuss the question of quantum. See Section 41(1). The matter can only be resolved under Section 41(2)(c) which allows the Court or the Director to authorize a payment or reward notwithstanding the provisions of sub-section (1). The problem in many cases is that the Director or the Court will have really nothing to guide them, because one of the best guides they could get would be a decision reached by the parties themselves, but this is forbidden, and Section 41(1) not only prohibits a person from making, giving or receiving a payment or reward, but it also forbids a person <u>agreeing</u> to make, give or receive a payment or reward for or in consideration of adoption, the giving of consent etc. It does not seem to me

that Section 24 relieves this difficulty, and I have already referred to the further difficulty created by Section 42.

I would respectfully suggest to the Legislature that a further provision be inserted into the Ordinance which allowed the proposed adopting parents and the natural parents to get together and reach an amicable and sensible agreement. There would have to be proper safeguards, because nobody would wish this new provision to open the door to what has been called, if I may use the vulgarism, "baby farming". Sometimes that which was done here will solve the difficulty, but I can envisage many cases where the independent inquiries made by field officers could easily develop into negotiations, and as the Ordinance presently stands, this is struck at by Section 42. In fact, that which I have countenanced in this case might be thought to have been very close to the wind.

It was suggested to me that in deciding whether or not I should make an order for adoption that I should consider the position of a Papuan child adopted by Australian parents. The problems that might possibly arise are that the child might not be allowed to enter Australia with the applicants, or, having entered Australia, that the child might be deported.

The curious anomaly that exists is that while a Papuan child is an Australian citizen (see infra), it may, and possibly will, be refused permission to leave this country. See Section 51 of the Migration Ordinance, 1963-1967, which provides:-

> "51. Subject to the provisions of this Division, a native shall not leave the Territory unless a permit under the last preceding section has been issued and is in force, and except in accordance with the conditions subject to which the permit was issued."

Section 50 provides for the Administrator issuing the permit to leave to a native and provides further for the lodgment of a cash bond with an approved surety, or cash

deposit. In addition, any other condition may be imposed.

Thus it will be seen that the advantages, if any, of Australian citizenship, can be nullified, as the citizen, if denied a permit, is forbidden to leave these shores.

I have been greatly assisted by Mr. J.L. Goldring's article, "Nationality and Citizenship in Papua New Guinea", which will be found in the Melanesian Law Journal, Vol. 1, No. 3 at p. 75. At pp. 81 and 82 the learned contributor says:-

> "If a Papuan or New Guinean wishes to enter Australia, he must obtain an entry permit under the provisions of the Australian Migration Act 1958 as amended, upon the wording of which the Papua New Guinea Ordinance is based. This Act also does not refer to 'Australian citizens' as those who may enter Australia without first obtaining an entry permit: its tests, like those contained in the Papua New Guinea Ordinance are also based on birth or residence.
> Even though the law of both Australia and of Papua New Guinea would allow the authorities in both places to permit a person of any race born in either country to enter and reside in the other, whether he would be able to do so in practice rests upon an administrative decision by a government officer - i.e. the Administrator in the case of entry to Papua New Guinea, or the Minister for Immigration in the case of Australia. This administrative decision will be made in the light of current government policies and the information available to the official. There is no right for any person not born in Papua New Guinea to reside there, nor for any native to leave. The fact that many people do so is simply due to the fact that an administrative decision had been made."

With respect I agree in this. Thus, even if this Papuan child enters Australia legally there is no certainty that she will be permitted to remain. If this happened, then

in view of the age of the applicants, the probability would be that they would be forced to remain in Australia, and the child would return to this country, and be placed in a quite hopeless situation, unable to speak the place talk of her parents, parents who are separated in any event.

I only find it necessary to advert generally to these problems. I say this because I have no doubt at all that it is in the best interests of this child that it should be adopted by the applicants, and in view of the nature of the events leading up to the application for adoption I would hope that the immigration authorities in Australia would permit the child to enter the Commonwealth and remain there, or would not resist a subsequent application to naturalize the child, if this is necessary.

Under the Nationality and Citizenship Act of 1948 (Commonwealth), Section 5(1), the definition section, used to provide that Australia includes the Territory of Papua. It now provides that it includes the Territories of the Commonwealth that are not trust territories. (Act 85 of 1953). But the result is the same. Section 10(1) provides that a person born in Australia after the commencement of the Act shall be an Australian citizen by birth. The provisions of sub-section (2) do not alter the situation so far as this child and the applicants are concerned.

As far as I can ascertain, great concern is felt about the future situation of people born in Papua, and there is uncertainty as to what their position will be. Of course Section 10 could be repealed by the Australian Parliament, and, at the same time, Papuans could be divested of their Australian citizenship. I see no constitutional problem there. Thus I do see many possible difficulties in the future, but in my opinion it is in the best interests of the child that she should be adopted, live with, and be cared for by the applicants, and so far as I am concerned that is the end of the matter, and the future will have to look after itself. The Adoption of Children Ordinance has nothing to say about the effect of adoption on the citizenship of an adopted child. As I understand the law, unless adoption legislation specifically provides for

the adopted child to take the nationality of the adopting parents, the child's nationality remains unchanged, unless, of course, the adopting parents cause the child to be naturalized.

Before making my formal orders, one of which dispenses with the consent of the natural parents, it is proper that I should indicate that I only do so in this case because I believe that powerful reasons have been advanced that make it proper to do so. The effect of an adoption order is so great that consent should not be dispensed with, and the natural parents barred thereafter from any legal or social control over their child, unless the Court treats the matter with very great care and dispenses with consent only where a strong, even exceptional, case is made out. It is sufficient to refer to Mace & Anor. v. Murray (1). The High Court was there considering a New South Wales provision which is not dissimilar to Section 24(1)(e) of our Ordinance. The New South Wales provision read:-

> "Provided that the Court may dispense with the consent..... where, having regard to the circumstances, the Court deems it just and reasonable so to do."

At pages 380 and 381 the joint judgment of the High Court reads:-

> "His Honour's statement of his reasons reflects a lively consciousness of the grave responsibility which the application placed upon him. He commenced his consideration of the matter by recognizing, first, that s. 167 prima facie forbids the making of an adoption order in respect of an illegitimate child if the mother does not consent, and, secondly, that the natural ties between mother and child ought not to be lightly broken. It was plainly right thus to emphasize at the outset the necessity, arising from the terms of the legislation and the nature of the jurisdiction it confers, of insisting that powerful reasons must be shown before a court can properly

(1) (1954-1955) 92 C.L.R. 370

> deem it just and reasonable, notwithstanding a mother's objection, to sever the relationship between her child and herself and make the child for most purposes of the law, and consequently for most practical purposes, the child of other persons. That this is the drastic effect of an adoption order is seen from ss. 168 and 169. Subject to certain exceptions of no great general importance it is provided that when an adoption order is made, for all purposes civil and criminal, and as regards all legal and equitable rights and liabilities, the adopted child shall be deemed a child of the adopting parent, and the adopting parent shall be deemed a parent of the adopted child, as if such child had been born to such adopting parent in lawful wedlock, and the order of adoption shall terminate all rights and liabilities existing between the child and his natural parents; and the adopted child shall take the surname of the adopting parent in substitution for his own surname. The natural parent thenceforth has no rights whatever with respect to the custody, control, training or education of the child, and cannot even have access to the child unless by the grace of the adopting parent; and the child can no longer expect from the natural parent any of the benefits which the natural relationship ordinarily yields. It must be a rare case in which the judicial mind can be satisfied to hold it just and reasonable that such a change should be brought about against the will of a mother."

Of course, that was a case where the mother's consent, initially granted, was later withheld, or withdrawn. The situation here is rather different. As I understand the natural mother's attitude she impliedly consents if paid a reward. The natural father's attitude is rather different, as is indicated by the grossly excessive reward that he thought fit to seek. However, as I have indicated, bearing in mind the welfare of the child, the circumstances leading up to this application, the

fact that the natural parents have separated, the length of time the child has been away from its tribal area, the child's health, and the suitability of the applicants, I have no doubt that it is proper to dispense with the consent of the natural parents. There are powerful reasons for doing so.

I make the following orders:-

I ORDER that XY and YY the applicants herein be and are authorised as spouses to adopt the child referred to in the schedule of particulars to the Notice of Motion dated 31st August, 1972.

I APPROVE the names..... .... as the forenames of the said child.

I ORDER that the consents of the natural parents of the said child be dispensed with upon the ground that there are special circumstances by reason of which the consent may properly be dispensed with.

I CONSENT to the payment by the abovenamed applicants to the natural parents of the sum of $270.00 to the natural father of the said child, namely ...., and the sum of $200.00 to the natural mother, namely ....

I DIRECT that the said monies be paid into Court within fourteen (14) days from the date hereof, for payment out by the Registrar to the natural parents as aforesaid.

Upon payment into Court of the sum of $470.00 as aforesaid I release the solicitors for the applicants from their undertaking given on 11th May, 1973, to hold the sum of $550.00 in their trust account until further order.

Solicitors for the Applicants: Messrs. Craig Kirke & Co.