EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT HAMILTON

FAM-2005-019-001682
[2018] NZFC 3355

IN THE MATTER OF	THE ADOPTION ACT 1955
BETWEEN	[AMY RICHARDSON] First Applicant
AND	[SETH GRIFFITHS] Second Applicant to adopt a child

Hearing:	5 April 2018
Appearances:	R Sporle for the Applicants M Earl as Lawyer to Assist M Sharplin as Lawyer for Oranga Tamariki
Judgment:	18 May 2018 at 3.30 pm

RESERVED JUDGMENT OF JUDGE G S COLLIN
[Adoption Act 1955]

Introduction

[1] At aged 2 years and 8 months, [Layla McRoy], also known as [Layla McRoy Griffiths], was placed by Child Youth and Family Services into the care of [Amy Richardson] and [Seth Griffiths]. They have continued to parent her since.

[2] Mr [Griffiths] and Ms [Richardson] have applied to adopt [Layla]. However, in May 2008 they separated, and on 25 April 2010 their marriage was dissolved. Both have since re-partnered and remarried. The application made by Mr [Griffiths] and Ms [Richardson] is based on their 16 years of caring for [Layla], initially as a married couple living together, but subsequently as deeply committed parents sharing every aspect of her care. But for the hurdle posed by s 3 of the Adoption Act there would appear to be no impediment to the making of an adoption order.

Issues for determination

[3] The principal issue for determination is whether an adoption order can be made in favour of Mr [Griffiths] and Ms [Richardson], whose marriage has been dissolved, when s 3(2) provides that an adoption order may be made "on the application of 2 spouses jointly in respect of a child".

[4] A secondary issue was raised by Mr Earl, Lawyer to Assist the Court, who proposed that the matter be referred to the High Court by way of case stated. This proposition was supported by Ms Sharplin on behalf of Oranga Tamariki, and not opposed by the applicants. However, I have determined to deal with the matter in the knowledge that my decision can be appealed.

[5] In order to determine the principal issue, counsel have framed the question they consider the Court should answer:

(a) Mr Earl proposes that the question should be framed:

> Is it permissible to interpret the expression "spouses" in s 3 of the Adoption Act 1955, so as to include a man and woman whose marriage has been dissolved but have provided a stable and committed parenting relationship for the child?

(b) Ms Sharplin proposes that the question should be framed:

> Is it permissible to interpret the expression "spouses" in s 3 Adoption Act 1955 so as to include a man and a woman whose marriage has been dissolved and each of whom have remarried and are in committed relationships with other persons, but have provided a stable and committed parenting relationship for the child?

(c) For the reasons set out in this judgment, I consider that the questions that the Court must answer are:

(i) Can Ms [Richardson] and Mr [Griffiths], who were married, but have now had their marriage dissolved, adopt [Layla]?

(ii) If Ms [Richardson] and Mr [Griffiths] can adopt, does it make any difference that each of them has entered into a new relationship and married their new partner?

What should not be considered?

[6] The Adoption Act sets out four steps that must be satisfied before the Court can make an adoption order:

(a) That it has the power to make an adoption pursuant to s 3;

(b) That there are no restrictions on the making of adoption order pursuant to s 4;

(c) That pursuant to s 7 and s 8 a child's natural parents have either consented to an adoption, or had their consent dispensed with;

(d) That the factors set out in s 11 have been satisfied, namely:

(i) That the persons applying are fit and proper persons;

(ii) That the welfare and best interests of the child will be promoted;

(iii) That consideration is given to the wishes of the child;

(iv) That any conditions imposed by the parents regarding religious practise are complied with.

[7] In this case no s 4 restrictions exist and the s 7 and s 8 consent issues have been properly dealt with.

[8] In respect of the s 11 factors:

(a) Although a social work report is yet to be completed, there would appear to be little doubt that Mr [Griffiths] and Ms [Richardson] are fit and proper persons of sufficient ability and means to adopt [Layla]. There is a 16-year history upon which they can rely in support of the proposition that they meet these criteria;

(b) The application for adoption is being pursued by Ms [Richardson] and Mr [Griffiths] with the full encouragement of [Layla], who appeared in support of the application. In every sense, other than legally, Ms [Richardson] and Mr [Griffiths] are her parents and have raised her as their child. Although now aged 18, I do not consider that the Court would have much difficulty in determining that [Layla]'s welfare and best interests would be promoted by the adoption, which would recognise in law the factual situation that has existed for [Layla] since she was a very young child;

(c) [Layla]'s wishes are very clear, and she is of such an age that in normal circumstances her wishes would be determinative;

(d) No religious condition has been imposed by [Layla]'s natural parents.

[9] However, to approach the application by looking at the suitability of the applicants, the welfare and best interests of [Layla], and the fact that she consents, would, although morally and pragmatically attractive, ignore the requirement that the applicants must meet the s 3 statutory criteria before those matters can be considered.

Because s 3 is not about the s 11 factors, I do not consider that the question to be answered by the Court can be conflated to the extent that those matters are used to help define the category of persons entitled to adopt. The way the Act is drawn the hurdle posed by step 1 must be met before steps 2,3 and 4 can be considered. Step 4 cannot be used to define, or add to, the definition of those entitled to adopt as part of step 1. If I am correct, this narrows the question to be answered by the Court, and must result in the deletion of any reference to the stable and committed parenting provided by Ms [Richardson] and Mr [Griffiths]. To approach it any other way would render the s 3 criteria nugatory.

Can Ms [Richardson] and Mr [Griffiths] who were married, but have now had their marriage dissolved, adopt [Layla]?

[10] Although Ms [Richardson] and Mr [Griffiths] were married, their marriage has long since been dissolved. Furthermore, both parties have remarried. Ms [Richardson] and Mr [Richardson] in 2011, and Mr [Griffiths] and Ms [Marshall] in 2016. Although Ms [Richardson] and Mr [Griffiths] no longer have any recognisable legal relationship, there is no dispute that they remain close friends and share a joint commitment to [Layla]'s ongoing care.

The law

[11] Section 3 of the Adoption Act provides:

> (1) Subject to the provisions of this Act, a Court may, upon an application made by any person whether domiciled in New Zealand or not, make an adoption order in respect of any child, whether domiciled in New Zealand or not.
>
> (2) An adoption order may be made on the application of 2 spouses jointly in respect of a child.
>
> (3) An adoption order may be made in respect of the adoption of a child by the mother or father of the child, either alone or jointly with his or her spouse.

[12] In *Re Application by AMM and KJO,*[1] a full bench of the High Court considered whether it was permissible to interpret the expression "spouse" in s 3 of the Adoption Act so as to include a man and a woman who were unmarried but in a stable and committed relationship. They determined that it could. In defining the ambit of the judgment, the High Court stated that AMM was not about "whether spouses can be interpreted to cover any other type of relationship, such as a same sex couple". The Court acknowledge that a favourable decision for a de facto couple might open the door for people in other forms of relationship to apply, but did not determine the issue which was reserved for another day.

[13] Another day arrived and in *Re Pierney*[2] the Court determined that the s 3 definition of a spouse could include a same sex couple in a de facto relationship. They were permitted to adopt.

[14] In *Re [case 1 name deleted]*[3] the Court made an adoption order in favour of two people who had been married, but had subsequently separated, with at least one of the parties having re-partnered. Allowing the adoption, the Court determined that although separated, the parties were still spouses and therefore the s 3 definition continued to apply.

[15] In each of the cases, the Court accepted a definition of the term "spouse" that was unlikely to have been intended in 1955. The changes that have occurred in society since the Adoption Act was passed were acknowledged, and the Court had regard to the New Zealand Bill of Rights Act, and the Human Rights Act, which prevent discrimination against parties on the grounds of marital status.

[16] Although the Act contains no definition of "spouse" it is not difficult to conclude that Parliament intended that the right to adopt be restricted to a man and women who were legally married to each other. This was accepted in *AMM* in which it was stated, "It is no surprise that the language within the Act suggests that "spouse" refers to married persons"[4].

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[1] *Re Application by AMM and KJO* to adopt a child [2010] NZFLR 629.
[2] *Re Pierney* [2016] NZFLR 53.
[3] *Re [case 1]* [2016] NZFC 3575.
[4] Ibid at 1 para [16].

[17] The High Court held that the Adoption Act plainly contemplated that a joint application would, and could, only be made by married persons. They further noted that the meaning of the term "spouse" had not particularly changed since the Act was passed, and was still ordinarily used to refer only to married persons. Consideration was given to whether the definition could be given a wider meaning pursuant to s 6 of the New Zealand Bill of Rights Act 1990. They adopted the approach of the majority of the Supreme Court in *R v Hansen,*[5] and paraphrased the approach given by Tipping J as follows:

(a) Ascertain Parliament's intended meaning of the word (here "spouses");

(b) Decide if that the meaning is apparently inconsistent with a relevant right or freedom (here the discrimination provisions of the New Zealand Bill of Rights Act 1990);

(c) Decide if an apparent inconsistency is a justified limit on the right in question. If so, no breach of New Zealand Bill of Rights Act 1990 exists;

(d) If the apparent inconsistency is not a justified limit, examine whether it is reasonably possible to give the word in question (spouse) a meaning consistent or less inconsistent with the relevant right or freedom; and

(e) If it is, such meaning must be adopted. If it is not, then s 4 of the Bill of Rights Act mandates that Parliament's intended meaning be adopted.

[18] Adopting this approach, the Court determined:

(a) That the word 'spouse" refers to married persons being a husband and a wife;

(b) That the Attorney General accepted that giving the word "spouse" such a limited meaning would be inconsistent with a protective right, namely

[5] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

freedom from discrimination. The High Court agreed and identified the discrimination as one based on marital status;

(c) The Attorney General also accepted that the inconsistency was not a justified limit, and the High Court agreed with that.

[19] The High Court then turned its mind as to whether it remained open to the Court to give the word "spouse" a different broader meaning than it would normally have and therefore eliminate or reduce the inconsistency with a fundamental right. In doing so the Court noted the uneasy relationship between ss 4 and 6 of BORA.

[20] Section 4 states:

> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

[21] Notwithstanding this, s 6 states:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[22] After carefully looking at the uneasy relationship between the two sections the High Court concluded that whilst freedom from discrimination is a fundamental tenant of our society, the Court must approach the s 6 exercise recognising that the principle of Parliamentary sovereignty underlies s 4 of the BORA. In dealing with the task at hand, the observation made by Blanchard J in *Hansen* seems helpful. He observed:

> [61] … In situations like the present, were the specific intention relating to an issue plainly within the contemplation of the legislators is clear, it is particularly important for that intention to be respected. Section 6 can only dictate the displacement of what appears to be the natural meaning of the provision in favour of another meaning that is genuinely open in light of both its text and its purpose.

[23] In *AMM* the Court determined that a decision to extend "spouses" to include a de facto couple would be quite manageable within the Act and would provide no great textual difficulty other than an occasional awkwardness of language. In reaching that conclusion the Court determined that a man and a woman in a de facto relationship which could be shown as "committed", was consistent with the purpose of the Act. For that reason, the Court reached the view that the word "spouse" could be given a different consistent meaning. The Court concluded that to interpret spouses as including de facto couples of the opposite sex, although not the meaning that was intended by s 3, was a meaning that was consistent with the purposes of the Act and one which was both workable within other parts of the Act, and not a strained meaning.

[24] The issue confronting the Court in *Re [case 1]* was whether a couple who had been married, but were no longer living together, could adopt a child. In that case counsel argued that the Court had extended the meaning of "spouse" to include de facto couples and couples of the same sex. The argument was that parents who were no longer in a romantically committed relationship, but were instead emotionally committed to raising children as co-parents, would be in an acceptable relationship for the purposes of s 3. Judge Riddell considered the commitment of the parents to raise the child jointly, which was notwithstanding their separation, palpable. She concluded that it would be unfair to the child if she were unable to enjoy the same legal status as her older natural brother who had been previously adopted by the applicants. Judge Riddell examined the implications for the child if the adoption order was not made, and concluded that the welfare and best interest of the child would be promoted by the adoption. However, despite the parties' separation they continued to meet the definition of spouse as defined in s 3, as they were married and although separated, their marriage had not been dissolved. Judge Riddell[6] found that their legal status was particularly relevant and said:

> [62] …The decision comes down to a simple legal principle. A spouse is a person married to another. That is regardless of separation. For Mr and Mrs [name deleted] they will continue to have the status of spouses until their marriage is dissolved. That is not stretching the legal definition in any sense. I consider the Court is not required to enquire about their separated status, unless it impacts on their ability to raise the child in question which everyone agrees it does not.

[6] Ibid 3 at [62]

[25] Judge Riddell went on to comment that if Mr and Mrs [name deleted] had obtained a dissolution her answer would have been different, but on the basis of their legal status as spouses, and the certainty that the adoption would promote the welfare and best interests of the child, she was satisfied that jurisdiction existed for the Court to make an order.

[26] In *Re Pierney* an application was made by two males who had been in a same sex de facto relationship for 10 years. They sought to adopt two children who had been born through a private surrogacy arrangement with the biological mother. Judge McHardy found that the term "spouse" was not limited to married couples of the opposite sex. He held that a wider interpretation could be given to the word "spouse" in the Adoption Act, so as to include de facto couples of the same sex. In reaching that decision he had regard to the Marriage (Definition of Marriage) Amendment Act 2013, which amended the Marriage Act 1955 so that persons of the same sex were now able to legally marry. Judge McHardy went on to say:[7]

> [14] I do not consider that there is any jurisdictional bar to the Court now making adoption orders in respect of a same sex de facto relationship, whether that be male or female.
>
> [15] I agree that, so there is consistency which the right not to be discriminated on, on grounds of marital status, it is also consistent with the right not to be discriminated against on the ground of sexual orientation which would occur if the Court were to continue to interpret the word "spouse" to simply include opposite sex de facto couples.

[27] In *R v [case 2 name deleted] (to adopt a child)*[8], Judge Coyle allowed an adoption by a same sex couple who had been in a de facto relationship for 21 years and had married six months prior to the order being made. Judge Coyle also relied on the Marriage (Definition of Marriage) Amendment Act, noting that marriage was defined as a union of two people regardless of their sexual orientation or gender identity. He concluded they were lawfully spouses in terms of s 3(2) of the Adoption Act.

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[7] Ibid 2 at [14] and [15]
[8] R v [case 2] [2015] NZFLR 87

[28] Whilst I take no issue with any of these decisions, the circumstances in each of the cases are different from Ms [Richardson]'s and Mr [Griffiths]'s. They were married and were until their dissolution in 2010, spouses as defined in the Act. However, it is 10 years ago since their separation, their marriage has been dissolved and each has re-married. The parties have no legal relationship, nor any ongoing claim against the other. In that sense, their relationship is quite different from either an opposite sex or same sex couple, who are married, or in a de facto relationship, or a married couple who are separated but whose marriage has not been dissolved. Although they remain friends and share a deep commitment to the parenting of [Layla], Mr [Griffiths] and Ms [Richardson] are legal strangers. In these circumstances can the Court make an order enabling them to adopt [Layla]? In determining this issue, the steps identified in *Hansen* should be examined.

Ascertain Parliament's intended meaning of the word "spouse"

[29] The Court's decisions confirm that when the Adoption Act was passed, Parliament clearly intended that the word "spouse" refer to a man and a woman who were married. Subsequently the Court has expanded the definition of "spouse" to include married and de facto couples of the opposite sex, and married and de facto couples of the same sex. Fundamental to the decisions made are findings that the law has changed to recognise an increased diversity of relationships, and that the making of an order in favour of two people in a committed relationship, no longer stretches the definition of "spouse".

[30] Having regard to the interpretations now given to the word "spouse", s 3(2) might read:

> An adoption order may be made on the application of 2 persons jointly who are married or in a civil union with each other, or are in a committed de facto relationship.

[31] That definition does not include parties whose marriage has been dissolved, those that are no longer in a committed relationship, parties who have never been in a relationship, or related parties jointly wanting to adopt i.e. two aunties jointly adopting a niece.

[32] In this case I am only concerned with parties whose marriage has been dissolved. I have no difficulty concluding that Parliament could never been intended that the meaning of 'spouse" could include to a couple who had separated, and whose relationship had irreconcilably broken down so that orders were obtained that they were no longer spouses.[9]

Decide if that the meaning is apparently inconsistent with a relevant right or freedom (here the discrimination provisions of the New Zealand Bill of Rights Act 1990)

[33] Section 19 of BORA provides, that everyone has the right of freedom from discrimination on the grounds set out in the Human Rights Act 1993. Section 21 of the Human Rights Act provides that the prohibited grounds of discrimination are:

(a) Marital status, which means being single; or

(b) Married, in a civil union or in a de facto relationship; or

(c) The surviving spouse of a marriage or surviving partner of a civil union or de facto relationship; or

(d) Separated from a spouse or civil union partner; or

(e) A party to a marriage or civil union that is now dissolved; or

(f) To a de facto relationship that is now ended.

[34] Ms [Richardson] and Mr [Griffiths] maintain that to prevent them from adopting [Layla] would be to discriminate against them on the grounds that their marriage has now been dissolved, in circumstances were, if they have remained together they would be able to adopt [Layla], where individually they would be entitled to adopt pursuant to s 3(1) of the Act, and where the only impediment to adoption is their marital status as parties to a dissolved marriage.

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[9] S 39 Family Proceedings Act 1980

[35] In *AMM*, the High Court was of the view that true discrimination did not lie in favouring individual applicants over applicants who were in a relationship, but on the basis of the parties' marital status, which is clearly a ground of discrimination pursuant to s 21 of the Human Rights Act. Using the same argument, and based on the same legislation, it is difficult not to conclude that the term "spouse", as I have re-defined it, plainly discriminates against Ms [Richardson] and Mr [Griffiths] based on their marital status, namely that their marriage has now been dissolved.

Decided if an apparent inconsistency is a justified limit on the right in question.

[36] In the 67 years that have passed since the Adoption Act came into force the nature of New Zealand families has changed dramatically. Although the norm might still be considered children being raised in a two-parent family of the opposite sex, there is an almost equal number of children being raised in one parent families. Many other family arrangements exist, including children raised by couples in same sex relationships, and by grandparents and whanau. Many examples exist of separated parents co-operatively parenting children in shared care arrangements. Many of those arrangements clearly have regard to the welfare and best interests of the children. It can no longer be assumed that any one type of family arrangement is better for children than another, with many examples of both good and bad family arrangements occurring across the broad spectrum of family types that now exist. To assume that one type of family arrangement is any better than another, ignores the fact that what is best for a child requires an individualised assessment of the particular child in his or her particular circumstances. Legislation that discriminates purely due to family type, cannot therefore be a justifiable limit on the right to freedom from discrimination, in this case on the grounds of marital status, namely dissolution of marriage.

If the apparent inconsistency is not a justified limit, examine whether it is reasonably possible to give the word in question (spouse) a meaning consistent or less inconsistent with a relevant right or freedom.

[37] In *AMM* the Court accepted that to extend the definition of spouse to include a de facto couple would be quite manageable within the Act, and would create no textual difficulty other than occasional awkwardness of language. A similar conclusion can

easily be drawn in respect of same sex couples, who can now legally marry, and de facto relationships which how have recognisable rights which cut across all aspects of their relationship. In *AMM*[10] the Court noted that it must be thought that the purposes of limiting joint applications to married couples was to ensure that the applicants were a man and a woman in a committed relationship. The traditional concept of the family unit being seen as central to the limitation.

[38] Other than in *[case 1],* where the parties continued to be legally spouses, the other decisions relied on an ongoing committed relationship between the applicants. In this case the applicants are not committed to each other and have not been so for 10 years. Their legal relationship has been terminated on the grounds of irreconcilable difference. Their only commitment is to the co-parenting of [Layla], who at 18 is now an adult, with the applicants having no rights of day-to-day care or guardianship.

[39] I have concluded that it is not reasonably possible to extend the definition of "spouses" to include parties who are neither in a legal nor committed relationship. To do so would be inconsistent with both the text and purpose of the Act, to such an extent that it would render s 3(2) nugatory, and would strain the meaning of spouse in a way that was never intended, and which is inconsistent with intention that adoption orders be made in favour of persons in committed relationships.

[40] In reaching that decision I also had regard to the consequences of a wider definition, being accepted. The impact would be that other classes of applicants, irrespective of their relationship with each other (if any), or the child, may be free to make an application for an adoption order. Clearly this was never intended by Parliament. To allow this to occur would be to torture the definition of "spouse" beyond what was intended by Parliament.

[41] This is a case in which the principle of Parliament sovereignty takes priority over s 6. To find otherwise would be to impose a meaning on s 3 not genuinely open to the Court in terms of either text or purpose. If Parliament chose to do so, s 3 could be amended, however, no such step has been taken.

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[10] Ibid 1 at [35]

[42] Although I wish a different decision could have been reached, I do not consider that as the law currently stands, any other conclusion is open to the Court.

If Ms [Richardson] and Mr [Griffiths] can adopt, does it make any difference that each of them has entered into a new relationship and married their new partner?

[43] In the circumstances, it is unnecessary for this question to be answered. The fact that both have remarried, simply re-enforces the conclusion that I have reached that the relationship between Ms [Richardson] and Mr [Griffiths] falls outside the definition of spouse as defined in the Act.

Conclusion

[44] Finally, I want to comment, that the decision I have reached is in no way a reflection of the importance of [Layla]'s relationship with Mr [Griffiths] and Ms [Richardson], who are in every way, other than in a strict legal sense, her parents. There is no doubt that they both love and care for [Layla] and that [Layla] knows and appreciate this, and legally wishes to be their daughter. If I had been able to make an adoption order in favour of them jointly, I would have done so. Although it is not what either party or [Layla] seeks, there remains no impediment to an adoption order being made in favour of one party.

Order

[45] Accordingly, I answer the question, "Can Ms [Richardson] and Mr [Griffiths], who were married, but have now had their marriage dissolved, adopt [Layla]? The answer is no. The application for an adoption order is accordingly declined.

G S Collin
Family Court Judge