

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

**NOTE: PURSUANT TO S 22A OF THE ADOPTION ACT 1955, ANY REPORT
OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF
THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE
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**IN THE FAMILY COURT
AT WAITAKERE**

**I TE KŌTI WHĀNAU
KI WAITĀKERE**

**FAM-2018-090-000269
[2019] NZFC 8464**

IN THE MATTER OF	THE ADOPTION ACT 1955
IN THE MATTER OF	AN APPLICATION BY [SIONE VAITAI] AND [ELILI VAITAI] TO ADOPT A FEMALE CHILD

Hearing:	15 October 2019
Appearances:	Z Wackenier for the Applicants M Casey QC as Counsel to Assist
Judgment:	18 October 2019

**RESERVED JUDGMENT OF JUDGE B R PIDWELL
(Reasons for making a final adoption order)**

[1] On 15 October I granted the application filed by [Sione] and [Elili Vaitai] to adopt [Tangaloa Atomi], a female child born at [location deleted] on [date deleted] 2018. I made a final order in the first instance, having been satisfied that special circumstances existed and made an order changing the child's name to include the applicants' surname as her surname.

[2] These are the reasons for me granting the application.

[3] The applicants filed their application to adopt [Tangaloa] after she had been placed in their care upon her birth. Her birth mother is [Anamalia Afu]. She is [a relative by marriage].

[4] Mr and Mrs [Vaitai] have [multiple] children. They were married in Tonga on [date deleted] 1990 and emigrated to New Zealand in 1999. They are permanent residents of New Zealand. Their [children] currently range in age from 28 to 15 years, and all live with them, contributing to the extended household. They also have some of their children's partners and children living with them as well.

[5] Mr and Mrs [Vaitai] and their extended family feel that [Tangaloa] is already part of their family, and sought formal orders to confirm the adoption and placement.

[6] In order for the Court to make an adoption order, it must be satisfied that the requirements of the Adoption Act 1995 are met. In this case, the only issue is whether Mr [Vaitai] meets the requirements of being a "fit and proper person" to have the role of providing for the day to day care of [Tangaloa] under s 11(a) of the Act, due to his criminal conviction.

[7] Both of [Tangaloa]'s birth parents have consented to the adoption. Ms [Afu] visited the applicants when she was eight months pregnant from Tonga. She asked them to care for her child as she did not have the means to care for her herself, and departed back to Tonga shortly after [Tangaloa] was born. Her pregnancy was unexpected and due to her age and the fact she was still attending school in Tonga, she was not prepared to raise the child.

[8] A child study report was requested from Tonga via the New Zealand Central Authority and subsequently provided by the Women and Children Crisis Centre in Tonga on 14 March 2019. Both of [Tangaloa]'s birth parents were interviewed. Her birth father, Mr [Foliaki] affirmed his agreement to the adoption, stating that he felt it was in the best interests of [Tangaloa]. He signed the necessary consent.

[9] Ms [Afu] and Mr [Foliaki] were married in [date deleted] 2018 and have had another child. However they have both confirmed that does not change their decision to adopt [Tangaloa] to the [Vaitai] family as they consider she is now part of that family and will enjoy the many benefits of growing up in New Zealand.

[10] Pursuant to s 3 of the Act, the applicants are able to make this application for adoption jointly as they are married to each other and domiciled in New Zealand. In addition, s 4 of the Act is satisfied as they have attained the age of 25 years and are both at least 20 years older than the child. [Tangaloa] is clearly a child under the Act due to her age.

[11] Before making any adoption order, s 11 of the Act requires that the Court must be satisfied of the following:

- (a) That every person who is applying for the order is a fit and proper person to have the role of providing day-to-day care for the child and of sufficient ability to bring up, maintain, and educate the child.
- (b) That the welfare and interests of the child will be promoted by the adoption, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child.
- (c) That any condition imposed by any parent or guardian of the child with respect to the religious denomination and practice of the applicants or any applicant or as to the religious denomination in which the applicants or applicant intend to bring up the child is being complied with.

Are the applicants fit and proper people to provide the role of day to day care?

[12] The Court received a report from Oranga Tamariki dated 25 March 2019 for the purpose of the adoption application. It is a comprehensive report and overwhelmingly positive, recording the views of the birth parents, the extended family members, cultural issues, financial and health issues, concluding that Mrs [Vaitai] is a fit and proper person but due to Mr [Vaitai]'s criminal conviction, left it for the Court to determine whether he fulfils the requirements of s 11(a) of the Act. The social worker noted the Ministry's view that Mr [Vaitai] is a fit and proper person to adopt in all respects with the exception of his conviction. The report is very positive but for the issue of Mr [Vaitai]'s criminal conviction and incarceration following the importation of a Class B controlled drug.

[13] The social worker however noted that despite the conviction, she did not consider Mr [Vaitai] posed any risk to [Tangaloa], had been open and honest with both the Court, the social worker and his family as a whole in relation to the offending and in all other respects supported the application. It identified no issues whatsoever with Mrs [Vaitai].

Mr [Vaitai]'s conviction

[14] On [date deleted] 2014 Mr [Vaitai] pleaded guilty to and was convicted of importation of a Class B drug namely pseudoephedrine. He was sentenced to a term of imprisonment of five years and five months, of which he served 22 months. He was released on [date deleted] 2016. The sentencing notes of His Honour Justice Woolford together with the decision of the Parole Board to release him upon his first application for parole on 20 July 2016 were provided.

[15] In October 2013 Mr [Vaitai] assisted in the importation of 250 kilograms of Contact NT which yields 100 kilograms of pseudoephedrine which is a pre-cursor to the manufacture methamphetamine. His role was not a primary role, but one that involved him because he was the director of a limited liability company which had a licence to operate in a customs-controlled area. He was given \$60,000 for his role in the offending, which enabled the drug to be imported. The High Court noted

Mr [Vaitai]’s age at the time, namely [over 45], that he had [multiple] children in his care and was a long-time member of the Mormon Church and a significant member of the Tongan community. The Court noted he had no previous conviction history and that the offending stood out as a major departure from his previous good character. He was assessed as being at low risk of reoffending and the offending was considered to be “a fall from grace”, and totally out of character. The Court had received 17 character references, including those from his children, his wife and nephews and noted they were “A testament to your performance as a father”.¹ The Court gave Mr [Vaitai] the full discount for his guilty plea, his full and frank confession at an early stage, his heart felt and genuine remorse and sentenced him to five years and five months imprisonment.

[16] In a similar vein, when Mr [Vaitai] came up before the Parole Board for the first time, they noted the support from his family, his community and the fact that this offending was his only offending. The Parole Board released him as it was satisfied that he was not at any undue risk of reoffending and imposed post release conditions until 31 July 2018.

[17] The Court was assisted by the appointment of Margaret Casey QC to make submissions on the factors the Court must consider when determining whether a person is “fit and proper” for the purpose of s 11(a) of the Adoption Act. She submits that there is no limitation to the kinds of factors to be taken into account when determining that assessment, noting that previous convictions were not per se disqualifying factors.²

[18] Ms Casey QC submits that an analysis of the cases where criminal convictions are considered within the context of a court’s determination of whether an applicant is a fit and proper person show that the threshold is not met when other issues, such as lack of honesty, possible immigration motivation, financial instability, concealment of birth identify, and a failure to disclose convictions to the consenting parents are in

¹ Sentencing Notes of Justice Woolford [citation deleted].

² Adoption application by H Palmerston North Family Court FAM-2011-54-180 25 November 2011 per Judge Binns.

issue. In addition, an unwillingness to accept responsibility for the offending or remorse is also relevant.

[19] The Court notes in addition, when criminal offending overrides other issues, it is often when it involves allegations of violence, sexual offending, or other actions which may impact negatively on the ability of a person to appropriately care for a child.³

[20] Ms Casey submits, and the Court endorses her analysis that there are a number of countervailing factors which the Court can consider which include:

- (a) That Mr [Vaitai] has fully disclosed to the Court his offending including all relevant information about the background to the offending and the formal Court decisions in relation to its determination and his release from prison.
- (b) His regret and remorse on a number of occasions.
- (c) The fact that his [multiple] children are aware of the offending and he has been open and honest to them in an effort to rebuild his life.
- (d) The fact this was his first offence, with a consistent refrain in the evidence that the offending was out of character for a man who had otherwise been a positive force within his family and his community over his lifetime.
- (e) The fact he was released on his first parole eligibility date.
- (f) The fact the birth mother knew of his conviction prior to her making her decision and giving her consent to the adoption.

³ For example, application by *IF and LF* Manukau DC FAM-2007-092-917 16 May 2008 per Judge Hikaka.

- (g) The fact that steps had been taken to ensure that the family finances are not compromised in the future by Mr [Vaitai] to ensure he is still able to maintain and educate [Tangaloa].

[21] The Court endorses Ms Casey's submission that s 11(a) operates as a form of "parental warrant of fitness", noting that parents must be safe and should meet an expected standard but endorsing Judge de Jong's comments that, "There is no such creature as a perfect parent".⁴

[22] Mr [Vaitai]'s criminal offending is a significant mistake he has made for which he has paid a significant price. It is certainly a factor that the Court must consider in its analysis of whether he meets the standard required for persons wanting to adopt a child. However it is one factor, and the countervailing factors as identified by Ms Casey QC, set out above, together with the love and support of his wider family, and the fact that he has not further offended, but has resumed an honest, hardworking, family focused life, committed to his community and church and the wellbeing of his wider family, satisfies me that he is a fit and proper person and indeed is and will continue to be a good father to [Tangaloa].

[23] The applicants jointly are experienced parents who have opened their home and their hearts to raise another child for no other reason but to provide her with a better life than her birth parents were able to offer. I am satisfied that the requirements of s 11 of the Act are met.

[24] The Court must also be satisfied that [Tangaloa]'s welfare and interest will be promoted by the adoption, with due consideration being given to her wishes, having regard to her age and understanding.⁵

[25] [Tangaloa] presents as a beautiful, healthy and well cared for child who is meeting all of her developmental milestones. There is no doubt that she is clearly attached to the applicants and their wider family who all play a role in caring for her

⁴ Application by *SV and VV* FAM-2010-4-1053 4/7/2011 per Judge de Jong.

⁵ Section 11(b).

within their busy household. The social worker's report is overwhelmingly positive of the home environment.

[26] She is placed within her cultural identity, with a link back to her birth parents. The adoption is an open one, with Mrs [Afu] maintaining contact with the birth parents, indeed attending their wedding. In those circumstances I am satisfied that the adoption is in her best interests and welfare.

[27] No religious conditions have been imposed by the birth parents which the Court needs to factor into account.⁶

[28] The adoption order is simply to make a legal reality of [Tangaloa]'s placement since her birth. I am satisfied that a final order should issue, as there is no requirement for there to be any ongoing monitoring of the placement, and [Tangaloa] is clearly attached to and settled within the [Vaitai] family.

[29] For those reasons, a final adoption order was issued on 15 October 2019. The words adoptive parents are not to be included in [Tangaloa]'s new birth certificate which is to issue to include [Vaitai] as her surname so her legal name is [Tangaloa Vaitai].

Signed at Waitakere this 18th day of October 2019, at 11am.

B R Pidwell
Family Court Judge

⁶ Section 11(c).