

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

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**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

**FAM-2018-004-000773
[2020] NZFC 8222**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[MAP KEM] Applicant
AND	[AREVA ONG] Respondent

Hearing: 16 September 2020

Appearances: M Datt for the Applicant
No appearance by or for the Respondent
L Gray as counsel to Assist

Judgment: 27 September 2020

**RESERVED JUDGMENT OF JUDGE T H DRUCE
[Paternity]**

Introduction

[1] The applicant seeks a declaration pursuant to s 10 Status of Children Act 1969 (“SCA”) that he is the father of [Sarit Kem] born in Cambodia on [date deleted] 2013.

[2] The application is supported by a statement signed by the respondent and witnessed by a Cambodian “attorney-at-law” confirming she is [Sarit]’s mother, that the applicant is [Sarit]’s father, and that she consents to his being declared at law to be [Sarit]’s father. She also confirms her “full consent” to the father taking [Sarit] from Cambodia to live permanently with him in New Zealand.

[3] The hearing proceeded before me by way of formal proof. The court has the benefit of written submissions from both counsel for the applicant and counsel to assist the court.

The parties’ evidence

[4] The applicant is a migrant to, and now citizen of, New Zealand. He is Cambodian by birth and ethnicity. He has New Zealand citizenship. He says he has holidayed back in Cambodia from time to time. He says he visited Cambodia from late December 2012 for 23 days and met the respondent through a friend of his. He describes her as his friend’s business partner. He says that they spent a lot of time together during the visit and believes he was the only person with whom she had a sexual relationship at the time. The respondent confirms that he was the only person with whom she was in a sexual relationship at the time.

[5] A month or so after his return to New Zealand, he says he had a phone call from the respondent saying she was pregnant. He says he supported her having their child but also said it was for her to make the final decision. He says he subsequently occasionally sent clothing and financial support for [Sarit] with friends when they were travelling back to Cambodia. He says he was financially unable to travel back “every year”. He provides no evidence of having travelled back to Cambodia until 2016 and there is no documentary evidence of this trip. There is documentary evidence from his passport confirming his arrival and departure from Cambodia in each of 2017, 2018 and 2019. He spent eight days in Cambodia in 2017, 17 days in 2018 and 25 days in 2019.

[6] During his last trip, from 24 November until 19 December 2019, he tried to have samples taken from both parties and [Sarit] for DNA testing. This was arranged

in advance through his lawyers. He says he pleaded with the respondent to co-operate but that she “refused outright and would not meet me to discuss anything about the DNA test”. His counsel, Ms Datt, who says she has experience with many such cases, confirms in her submissions that it will be very difficult for him to obtain official approval for [Sarit] to relocate from Cambodia to New Zealand with her father without the DNA evidence confirming [Sarit]’s genetic links with both of her parents.

The law

[7] Section 8 of the SCA provides various ways by which prima facie evidence of paternity is to be recognised by the court. The relevant provision for present purposes is s 8(2):

8 Evidence and proof of paternity

...

- (2) Any instrument signed by the mother of a child and by any person acknowledging that he is the father of the child shall, if executed as a deed or by each of those persons in the presence of a solicitor, be prima facie evidence that the person named as the father is the father of the child.

...

[8] The document dated 10 July 2018, signed by the respondent and witnessed by a legal attorney in Cambodia, is signed only by the respondent, but does otherwise qualify as prima facie evidence of the applicant’s paternity of [Sarit].

[9] The applicant also relies on a Certificate of Birth recording both parties as [Sarit]’s parents. This is issued by the “Registrar of Civil Status” [in Phnom Penh]. The question arises as to whether this document can be presumed to be what it purports to be. The court has no evidence as to whether, or not, Cambodia is a state party to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents made 05 October 1961. Therefore, putting that possibility to one side, does it come within s 141(3) of the Evidence Act 2006?

141 New Zealand and foreign official documents

...

(3) Subsection (4) applies to a document that purports—

...

(c) to have been printed or published by the authority of the legislative, executive, or judicial branch of the government of a foreign country; or

...

(4) If this subsection applies, the document is presumed, unless the contrary is proved, to be what it purports to be and to have been printed or published in the manner provided in subsection (3) and to have been published on the date on which it purports to have been published.

...

[10] The Certificate of Birth is issued under the national coat of arms of the Kingdom of Cambodia. While I have no submissions on the point, the certificate would appear to come within s 141(3)(c) being a document published by the authority of the Executive of the Cambodian Government. As I have no evidence to the contrary in rebuttal of the presumption, I accept the Certificate of Birth is what it purports to be. As is confirmed by the applicant, the Certificate of Birth evidences that [Sarit]'s birth was not registered until February 2017. The copy of certificate of birth filed in this court was issued on 06 November 2017.

[11] The onus of proof is on the balance of probabilities as provided for in s 10(6) of the SCA.

Findings

[12] This application is important to [Sarit] because, if granted, it will be conclusive evidence of the applicant being [Sarit]'s father. In turn, this will be important for [Sarit]'s future ability to relocate to New Zealand, be cared for by her father in New Zealand, and qualify for New Zealand citizenship.

[13] As early as November 2018, counsel to assist recommended that DNA parentage testing be undertaken. Plainly, DNA results would likely remove all doubt as to [Sarit]'s paternity. I am satisfied that both the applicant and a Cambodian friend of his, [Ry Sao], have endeavoured to persuade the mother to provide a sample for

testing. The father reports that he repeatedly tried to persuade her during his visit late last year. He explains that he made her aware her failure to provide a sample will likely block any possibility of [Sarit]'s parentage being accepted by Cambodian authorities and her being permitted to travel with the father to New Zealand. He reports her also saying: "why do you not trust me?" from which he inferred she felt offended that there should be any questioning of what both parties knew to be true.

[14] In evaluating this evidence, I am concerned that the mother's reported refusal to provide a sample is not consistent with her earlier expressed support for [Sarit] living with her father in New Zealand. If I accept the father's evidence, the respondent must fully appreciate that her refusal to provide a sample will defeat their shared hopes of [Sarit] joining her father in New Zealand.

[15] The father says [Sarit] has been living with one of his cousins since late 2019 as the respondent mother is not able to continue supporting her. In part, he links this with the fact that the mother has entered into a relationship with another man (which she told him about in late 2015) and his understanding that she is not able to continue supporting [Sarit] financially. He gave conflicting evidence saying, at one point, that the mother had abandoned [Sarit] to his cousin in 2019 and, at another point, that the mother was visiting her daughter from time to time (which would not be consistent with abandonment). It may be that this arises out of his own feelings about [Sarit]'s circumstances and/or some clumsy interpretation of his evidence. On balance, I find it more likely that the mother has not abandoned her daughter but has decided that [Sarit]'s needs are better met with the cousin.

[16] The applicant is plainly in a position where his paternity can be put beyond doubt by his simply having his daughter provide a sample along with his similarly providing his own sample. The mother's sample is not required. I am given to understand that this option was not pursued because samples from all three parties were seen as essential to meet the Cambodian Government's requirements. Nevertheless, the significant difficulties with the current evidence would melt away if DNA parentage testing was carried out and the results confirmed the genetic father-daughter link.

[17] Another of the difficulties is the unexplained delay of three years, five months in the registration of [Sarit]'s birth. When asked about this, the applicant surmised that the respondent must have had more important matters to deal with in her life than registering [Sarit]'s birth. I have no social fact evidence with which to assess the significance or otherwise of this delay. I do observe that the applicant has provided no direct personal knowledge of when [Sarit] was born. He provides no evidence of communications between the parties at the relevant time. At one point, he was translated as saying the mother phoned him the month or so after [Sarit]'s birth but, on further questioning, he confirmed that the mother's phone call to him was shortly after his return to New Zealand in early 2013 when she confirmed that she was pregnant.

[18] The date of birth is important to the father's case because the parties' sexual relationship was strictly limited to the 23 day period of the applicant's visit to Cambodia in late 2012/early 2013. On the present evidence, [Sarit] was born some 36 to 39 weeks after the date of conception but there is no evidence of the date of birth beyond the mother's account to the registration authorities. It is not known what corroborating documentation of date of birth such a delayed registration would have required. Nor is there any medical evidence as to the likely date of [Sarit]'s conception.

Conclusion

[19] [Sarit]'s Certificate of Birth and both parents' documentary acknowledgement of parentage establish a prima facie case that [Sarit] is the applicant's biological child. I am also satisfied that the father believes himself to be [Sarit]'s father.

[20] Yet, I am troubled by the fact that the father has been in, and continues to be in, circumstances where he is reasonably capable of obtaining DNA parentage test results. The court to date has not made a formal recommendation for parentage testing under s 54 of the Family Proceedings Act 1980, but counsel to assist clearly recommended that it be undertaken as long ago as 2018 and the father did travel to Cambodia late last year with all arrangements made so that, at least, he and [Sarit] could have provided DNA samples for testing and a report made available.

[21] I remind myself that the standard of proof is that the court be satisfied on the balance of probabilities. As the majority of the Supreme Court said in *Z v Dental Complaints Assessment Committee* at [101]:¹

...it is not the position that flexibility is “built into” the civil standard, thereby requiring greater satisfaction in some cases. Rather the quality of the evidence required to meet that fixed standard may differ in cogency, depending on what is at stake.

[22] The issue of [Sarit]’s paternity is of great importance to [Sarit]’s future personal and family identity, her nationality, and her citizenship. I have concluded that the importance of the issue requires the court to adjourn the hearing to enable the father to file DNA parentage evidence. The court is then better placed to determine the paternity issue.

[23] I take into account the applicant’s evidence that, since his arrival in New Zealand, he has worked in very low paid employment both as a [occupation deleted] and as a [occupation deleted] and that he has been in receipt of a WINZ caregiver’s benefit since 2017 caring for his two elderly parents. It does seem likely that he is entitled to legal aid, but the court is advised that his current lawyers do not accept legal aid work.

[24] A lengthy adjournment is therefore likely required to enable the applicant to obtain legal aid and then save sufficient monies for any overseas travel that he may be required to undertake to obtain the necessary samples. Whether he has to travel or not will depend on whether an extended family member will be able to provide the necessary identification of [Sarit].

[25] I am satisfied that an adjournment of up to one year is reasonable given the father’s very limited financial circumstances. Obviously, if he is granted legal aid and he is not required to travel to Cambodia, the parentage test report will be available much more speedily and the matter can come back for final determination.

Directions

¹ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.

[26] The court recommends, in terms of s 54 of the Family Proceedings Act 1980, that DNA parentage testing be carried out on the applicant and [Sarit].

[27] The court adjourns this proceeding until 30 September 2021 to enable the parentage testing to be carried out.

[28] Leave is reserved to the applicant to bring the proceedings back on when the parentage report is filed.

[29] Counsel to assist's appointment is discharged with thanks.

[30] Registrar to conduct review no later than 30 September 2021 and the file is to be referred to me in Chambers.

Judge TH Druce
Family Court Judge

Date of authentication: 27/09/2020
In an electronic form, authenticated electronically.