

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 SEE <https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/>

**IN THE FAMILY COURT
AT WELLINGTON**

**I TE KŌTI WHĀNAU
KI TE WHANGANUI-A-TARA**

**FAM-2020-085-000310
[2020] NZFC 7481**

IN THE MATTER OF	THE ADOPTION ACT 1955
BETWEEN	[SIMEONE PONTE] [IVAN PONTE] Applicants
AND	[ERICA PONTE] Child or Young Person the application is about

Hearing: 28 August 2020

Appearances: M Casey QC for the applicants by VMR
Applicants and child appear by VMR
Ms Kyle social worker for Oranga Tamariki

Judgment: 28 August 2020

ORAL JUDGMENT OF JUDGE M N E O'DWYER

[1] This application concerns [Erica Ponte] born on [date deleted] 2020 in Oregon, United States of America. She is now [under 20] days old.

[2] She appears in court in New Zealand by VMR from Oregon in the USA. She is accompanied by her parents, [Simeone Ponte], known as [Simeone], and [Ivan Ponte], known as [Ivan], who are a same sex couple.

[3] The applicants, [Simeone] and [Ivan], are both New Zealand citizens. Ms Casey QC is their lawyer and she appears from Auckland by VMR.

[4] Ms Kyle, the social worker, also appears by VMR. I am grateful for her attendance.

[5] This hearing has been convened urgently under the COVID-19 International Surrogacy Protocol. This Protocol has been developed to address the needs of newborn children who have been born overseas through approved surrogacy arrangements and who are unable to obtain passports and suitable visas to return to New Zealand speedily for adoption applications to be heard. This COVID-19 pandemic has caused significant delays overseas for children in circumstances like this and, of course, delays with flights.

[6] Under New Zealand law the applicants are not recognised as [Erica]'s legal parents until an adoption order is made. With the agreement of all agencies the Principal Family Court Judge has issued a protocol to enable hearings to take place urgently by this process.

[Erica].

[7] [Erica] was born following a gestational surrogacy arrangement using a donor and a surrogate. [Erica] is genetically related to one of her fathers. It is clear from the social work report and all the documents that have been filed in these proceedings that [Erica]'s parents have been through a long journey to have this child and to form a family.

Background

[8] I will now go into the background to this application and the legal steps that I must consider. It is clear from the affidavits filed by the applicants and the s 10 report

that the applicants have undertaken a long process to realise their hope of being parents and to bring [Erica] into this world. As they say in their affidavit:

- (a) “She is the much loved, much awaited and planned daughter of their long-term committed relationship.”

Pre-birth procedures

[9] [Erica], as I said, was born through a surrogacy arrangement. The surrogate, Ms [Linda Sancho], lives in Oregon in the USA. Ms [Sancho] has no genetic link to [Erica]. She and her husband, [Willis], have two children. They have developed a strong relationship with the applicant parents. This friendship has created a firm foundation for information sharing for [Erica] for the future so that she will know the story of her birth. I record that I have seen photographs showing the foundation of friendship between [Simeone] and [Ivan] and Ms [Sancho]’s family.

[10] A surrogacy agreement has been signed by Ms [Sancho] and the applicants according to the law in Oregon, USA and I note they had independent legal advice for that agreement. [Erica]’s birth certificate in the USA records the applicants as her legal parents following a pre-birth court order from the Circuit Court of the State for Oregon in accordance with the law of the State of Oregon. I have read those documents which has been filed in proceedings.

[11] In New Zealand the Minister of Immigration has provisionally confirmed that [Erica] is eligible for a visa to enable her to travel to New Zealand subject to certain conditions. The conditions include DNA testing and that the applicants file an adoption application in New Zealand. I accept that the applicant’s evidence in their affidavit of 24 August 2020 that they can satisfy all those requirements.

[12] [Simeone] and [Ivan] have now been in the USA since 11 July 2020. They travelled there early to the US approximately five weeks before [Erica]’s due date to ensure that isolation or quarantine requirements of the US could be satisfied. They also planned to have time with Ms [Sancho] to prepare for [Erica]’s birth and for the birth process and to be present at her birth.

[13] I have read in Ms Kyle's report and in the affidavit about the birth process. Both applicants were fully involved in the process and were present at the birth of their daughter. They were the first to hold her immediately on her birth and have cared for her tenderly ever since then.

[14] The applicants' visas to remain in the US expire on 8 October this year and they have flights booked to return to New Zealand on 12 September 2020. Whether this family can return to New Zealand on 12 September 2020 will depend on this order being made, then seeking registration of [Erica]'s birth and the production of an urgent New Zealand passport for [Erica] in San Francisco. I certainly hope that will happen.

Legal requirements

[15] I now look at the fundamental prerequisites for adoption. I have read that the applicants have been in a relationship for 18 years. They confirmed their commitment in a civil partnership in 2008 and they were married in New Zealand on [date deleted] 2013. They are both of an age that qualifies and, of course, [Erica] does too because she is a newborn baby. So those prerequisites in the Adoption Act 1955 are satisfied.

Adoption (Intercountry) Act 1997

[16] I turn to the Adoption (Intercountry) Act 1997. The Adoption (Intercountry) Act does not apply. I am very grateful to Ms Casey for her submissions. [Erica] is not habitually resident in Oregon. Her intended habitual residence has always been New Zealand where her parents are citizens and are settled. I am satisfied that her habitual residence is New Zealand and that the Adoption (Intercountry) Act does not apply.

Consent

[17] I turn to the issue of consent. I have seen the consents. They have been filed by the applicants, by Ms [Sancho] and her husband. They were notarized

appropriately in Oregon. I note that there is no requirement under the Status of Children Act 1969 for the donor to provide a consent.

Fit and proper persons

[18] I turn to the requirement that the applicants are fit and proper persons to adopt. I have received the s 10 report from Ms Kyle. I am grateful to Ms Kyle for the speed in which that report has been filed and the thoroughness of it. It has enabled this hearing to be held today. Ms Kyle has undertaken comprehensive enquiries and assessment. She has enjoyed a professional relationship with the applicants for five years on this journey with them to form this family. It has included personal visits, and all the investigations and requirements necessary for an adoption application to be considered in these special circumstances.

[19] The applicants have shared information about their background and respective families. Through those backgrounds [Erica] will have rich heritage. Through [Simeone] she will have Italian heritage and relationships with her Italian family who will nurture her throughout her life. Through [Ivan] she will have loving relationships through his family in [the United Kingdom] to whom [Ivan] is very close. She will have the opportunity to meet extended family members on both sides when the restrictions from COVID-19 have been managed internationally. I am sure that prior to that there will be very proud grandparents, aunts and uncles, on both sides who will enjoy every photograph and every piece of information that you will both send to them across the miles.

[20] The applicants have a stable home in [the South Island], a beautiful part of New Zealand, and they have financial security. They are both in good employment. They share close interests which is a bond for them. They have no health issues. It is clear from the social work report that [Simeone] and [Ivan] have a strong and healthy marriage. They are fit and proper persons to adopt this child.

Best interests

[21] I turn to best interests. Again, I am grateful to Ms Casey for her submissions. She submits eloquently that it is [Erica]'s best interests to be legally recorded within this family, to whom she is genetically related to through her father, and to her intended parents. She submits that it is in her best interests for her to have the legal security of an adoption order for all the consequences that will follow from that. She submits finally, that it is in her interest to return to New Zealand as soon as possible particularly because of the COVID-19 health risks.

[22] I accept Ms Casey's submissions and having reviewed the evidence and the social work report I wholeheartedly agree with those submissions.

[23] I have considered the issue of information regarding genetic parenting. I am confident from everything that I have read that [Erica]'s parents will engage in that discovery themselves and will provide information to her about her genetic heritage at a time when it is best for them as her guardians and parents, and best for her to be able to understand it. I have no doubt that information will be provided to her in a loving and sensitive manner by both parents.

Interim or Final Order

[24] The last matter to consider is whether an interim or final adoption order should be made today. I need to consider whether there are special circumstances in the exercise of my discretion, whether or not to make a final order at this first instance hearing. For that I have been assisted by Ms Kyle. The purpose of an interim adoption order is to first of all, allow a period of time for attachment and bonding to take place, but also to monitor how parenting is going in a placement. That is not necessary here. It is clear from the social work report that there is no question that the applicants are fully committed to their daughter and bonding and attachment is clearly happening. The parents are clearly capable, they are taking parenting advice and guidance as they care for their newborn. There is no need for on-going monitoring in this case.

[25] Ms Kyle has observed the applicants with [Erica] by WhatsApp. She comments that [Erica] seems to be a very settled baby, she is contently being held lovingly by each parent when she has been viewed by the social worker. She has observed that these parents are responsive to [Erica]'s cues, having good eye contact and being excited and loving parents to [Erica]. She has no doubts that they have excellent parenting capacity. Ms Kyle submits that there are special circumstances under s 5(b) in this case and she recommends that a final adoption order can be made at this hearing.

[26] I agree. I am satisfied that a final order should be made today for all the reasons that the social worker has so sensitively set out in her report. I also agree with Ms Casey's submissions that the social work report should be released to the parents. There is a very positive reason for that. It will form part of [Erica]'s birth story, her birth history, and it is an important document to be available for her for the future.

Order

[27] In those circumstances it simply remains for me to make the following order:

- (a) I make a final adoption order. [Erica]'s name on the order will be [Erica Ponte].
- (b) The social work report is to be released to her parents, the applicants.
- (c) I will invite Ms Casey to file a draft order for sealing as soon as possible.

[28] There is one final direction to ensure confidentiality. I direct that the information on this file is to be kept confidential and only available for release to the applicants as the parents of [Erica].

M N E O'Dwyer
Family Court Judge