

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 WELLINGTON**

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

**FAM-2020-085-000359
[2020] NZFC 8443**

IN THE MATTER OF	THE ADOPTION ACT 1955
BETWEEN	[EARNEST MOSS] [THOMAS SHUI] Applicants
AND	[DYLAN SHUI] Child or Young Person the application is about

Hearing:	25 September 2020
Appearances:	S Dalley for the Applicants K Kaur as Social Worker
Judgment:	25 September 2020

ORAL JUDGMENT OF JUDGE M N E O'DWYER

[1] These proceedings concern a child [Dylan Shui] born on [date deleted] 2020. [Dylan] was born through a process of gestational surrogacy and an egg donor.

[2] [Dylan] is genetically linked to Mr [Earnest Moss], who is one of the joint applicants today. Mr [Moss] is [Dylan]'s biological father. Mr [Thomas Shui] is Mr [Moss]'s partner. They jointly apply for an adoption order in respect to [Dylan].

[3] [Dylan] was born in [city deleted], USA. [Thomas] and [Earnest] have joined me by video link from [the city] for this hearing. The hearing has taken place in the Wellington Family Court. Also present by video link is Mr Dalley the applicants' solicitor, their lawyer and Ms Kaur the social worker from the specialist adoption section who has prepared the s 10 social work report.

[4] This process is as a result of the COVID-19 protocol for international surrogacy cases. It has been held as a matter of urgency. The process has been established for babies like [Dylan] who have been born overseas to New Zealand parents who wish to return home with their baby to New Zealand. Delays in the passport process due to COVID-19 has presented significant delays in obtaining a usual US passport. Consequently the Court has responded to this by establishing this protocol and this process.

[5] This case is an example of how efficiently it can be done to be able to join the applicants [Earnest] and [Thomas], their lawyer and the s 10 social worker to this hearing so quickly and so efficiently shows what can be done in difficult COVID-19 times.

[6] I now turn to the application. I have read the application and all the documents filed. What is clear from the application is that the prerequisites to adoption are made out. There are no restrictions that would prevent an adoption order being made.

[7] I will go through some of the legal requirements, the necessary ones. Firstly, this is a joint application from a de facto couple. This is permitted in New Zealand law and there is established case law to provide that adoption orders can be made jointly to a de facto couple.

[8] The Adoption (Intercountry) Act 1997 does not apply. That is relevant because normally when a child is born overseas the child's habitual residence is in the place of birth but in the case of international surrogacy it is recognised internationally that that child's habitual residence is the habitual residence of her or his commissioning parents.

[9] In this case the habitual residence of the applicants [Earnest] and [Thomas] is New Zealand. They are both New Zealand citizens. Their settled purpose is to return to New Zealand, that has always been their settled purpose. Therefore, [Dylan]'s habitual residence becomes the habitual residence of his parents. His habitual residence is therefore New Zealand and the Adoption Act 1955 therefore applies.

[10] The appropriate consents have been filed by Mr Dalley. They have been sighted also by the social worker. The social worker in her report has referred to the prerequisites, the copy of the surrogacy agreement contract, the DNA evidence of the genetic link between [Dylan] and Mr [Moss] and as I mentioned the consents from both the surrogate parent and her husband as required under the law.

[11] I turn to the need for an adoption order. I agree with Mr Dalley's submissions that it is in the interests of [Dylan] for an adoption order to be made. What flows from that in terms of welfare and best interests is for him to have a secure legal relationship with his parents [Thomas] and [Earnest]. The secure legal relationship underpins the family relationship that [Earnest] and [Thomas] have sought for him.

[12] Also, through an adoption order [Dylan] achieves New Zealand citizenship which naturally would flow because his parents [Earnest] and [Thomas] are New Zealand citizens, if an adoption order is made.

[13] I turn to the issue of fit and proper person which is a requirement in the Act. Mr [Shui] is of Chinese background and ethnicity. I have read about his history. [Thomas] came to New Zealand in 2001 and achieved New Zealand citizenship in 2005. His parents also have residency permits. They are often in New Zealand and I have read that his mother is intending to be in New Zealand to help with the care of [Dylan] when the family returns. [Dylan] therefore has a rich Chinese history that he will be able to enjoy and understand throughout his life. I have no doubt that he will be embraced by his Chinese family.

[14] Mr [Moss] comes from [the Lower North Island]. He grew up in [the Lower North Island]. He has a close family who also will provide support for [Dylan] as [Dylan] grows.

[15] Both [Thomas] and [Earnest] have shared interests and values. They both have good positions, Mr [Shui] as [profession deleted] and Mr [Moss] as [profession deleted]. They have financial security and a good home in [the Lower North Island]. They have close support and a resilient and strong relationship.

[16] It is important that they have considered the information throughout life that [Dylan] will benefit from knowing and that is information about his donor parent and also the surrogate. They have been through quite a journey with Ms [Shields]. They have shown empathy and sympathy and care for her. I have no doubt that that connection will be maintained sufficient to provide information to [Dylan] that will be part of his birth story.

[17] I have read in the social work report of the tender love and care that both [Earnest] and [Thomas] have given to [Dylan] since his birth. He was born [under 20] days ago. At the time of this hearing he is fast asleep because it is late at night in [the USA]. He is a beloved child who has been born following a long journey from [Earnest] and [Thomas] to create this family.

[18] Ms Kaur in her report speaks very highly of [Earnest] and [Thomas] and their love for [Dylan] and also their suitability to be parents, legally recognised as [Dylan]'s parents. She recommends a final order is made today and she would approve release of her report to the applicants.

[19] There is a good reason to release the report, that report contains important information about the journey that [Earnest] and [Thomas] have been on to reach this point, this point of achieving legal certainty for their son [Dylan]. I think it is important for them to have that report and for that to be part of [Dylan]'s life story too.

[20] I have not had the chance to see [Dylan], I hope one day that [Earnest] and [Thomas] will do the Court an honour and send us a photograph of this precious child for our sake and also for our records here in the Court.

[21] So it simply remains for me to say I have no hesitation in making a final adoption order today and in directing release of the s 10 report to the applicants for the

reasons that I have outlined, and I simply ask that Mr Dalley send to the Court as soon as he can a draft order for sealing.

[22] I hope that [Dylan], [Earnest] and [Thomas] will be able to come on their flight to New Zealand on 15 October. It will be a very, very happy day when they touch down on New Zealand soil. So thank you very much indeed.

M N E O'Dwyer
Family Court Judge