**NOTE: PURSUANT TO S 22A OF THE ADOPTION ACT 1955, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.**

**IN THE FAMILY COURT**
**AT NORTH SHORE**

**FAM-2015-044-000210**
**[2016] NZFC 1666**

IN THE MATTER OF The Adoption Act 1955

DIAN CLIFFORD
Applicant

Hearing: 16 November 2015

Appearances: Ms M Casey QC for the Applicant

Decision: 7 March 2016

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**RESERVED DECISION OF JUDGE MAUREEN SOUTHWICK QC**

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[1] On 16 November 2015, I granted a final adoption order in favour of the applicant in relation to twin children, Oliver and Suzy, both born on [date deleted] 2014.

[2] I indicated in the oral decision, delivered on that day, that I would later issue an amplified decision. This was because it had been brought to my notice that there had been discussion at policy level about the implications of adoption applications of the nature presented in this case.

[3] My decision of 16 November 2015 confirmed the following important factors:

- The report of the social worker (dated 15 June 2015) was a thorough report which recommended the making of a final adoption order in the first instance.
- Pursuant to s 11(a) and (b) of the Adoption Act 1955, I found that the applicant was a fit and proper person to have the role of providing day-to-day care of the children and that she had sufficient ability to bring up, maintain and educate the children.
- I found, in addition, that the welfare and best interests of these children would be promoted by their adoption by the applicant.
- At the time of the hearing, each child held a visitor's visa, which was due to expire in December 2015.
- The United States, in which country the children were born, recognised the applicant as being the parent of each child from the time of their birth.

[4] By way of background, the children were born in California, USA, as a result of a surrogacy arrangement. The applicant has no genetic connection to the children. Their conception and birth involved the engagement of a surrogate mother and anonymous egg and sperm donors.

[5] The applicant gave evidence that she intends to adopt an open and honest approach with the children, informing them of how they were created and how they came to be in her care. In accordance with this intention, the applicant has retained emails, pregnancy scans and profiles from the agency she dealt with.

[6] Prior to the surrogacy arrangements being made, the applicant had unsuccessfully attempted fertility treatment in NZ. The procedure carried out in the United States was conducted with care and detailed preliminary investigation. By virtue of the law in the United States, both the egg and sperm donors would normally remain anonymous. However, in this case, the egg donor has expressed some interest in being identified.

[7] The gestational surrogate mother, Ursella Hailey, was introduced to the applicant by a surrogacy agency in the United States. She and her husband were already the parents of three children. Neither Ursella nor her husband are biologically related to the twins. Both gave their unconditional consent to the adoption.

[8] Surrogacy arrangements are legal in the State of California. The Gestational Carrier Agreement entered into by Ursella, her husband and the applicant is a comprehensive document, signed in accordance with the law of that State. The applicant agreed to reimburse Ursella for her time, effort and the costs associated with carrying the twins.

[9] Prior to birth, an order was issued by the Sacramento County Court pursuant to the Uniform Parentage Act. The order was made by consent and directed that, at birth, it was the applicant who would be registered on the children's birth certificates as the sole parent. It was known they were to be brought to NZ.

[10] Both before and after the birth of the twins, the applicant has been open and frank with all agencies about the circumstances of the pregnancy and her involvement with the Californian Surrogacy and Egg Donor and Sperm Donor Agency. Relevant documentation has been thoroughly disclosed to CYFS and to Immigration New Zealand. The applicant was always aware of the fact, however, that this documentation alone would not be sufficient to enable her to return to New Zealand with the children. Although there have been other surrogacy cases involving the State of California (and, indeed, other countries), most of those cases concern children born to commissioning parents who have some genetic connection.

[11] On 9 December 2014, the Minister of Immigration agreed to grant a 12 month visitor visa for each of the children. The visa was subject to the following conditions, all of which were met:

(a) Supply of information in relation to the surrogacy arrangements.

(b) Evidence as to whether or not the children would have access to information about their genetic identity.

(c) Evidence that the adoption proceedings in New Zealand were underway.

(d) Evidence that Ursella and her husband had agreed to the children travelling to New Zealand to live here permanently.

[12] Insofar as genetic identity is concerned, it is clear from the evidence that there is an ongoing and open relationship between the applicant and the surrogate mother. In addition, as indicated above, it would appear that the egg donor has an intention to enable identification to occur in time.

**The Law - Discussion**

[13] The matters which required particular consideration by the Court are these:

(a) Does the Adoption (Inter-country) Act 1997 apply to this application?

(b) Has the gestational surrogate mother (and any qualifying partner) given valid consent?

(c) Is the applicant a fit and proper person to parent the child? (That matter, together with (d) and (e) hereunder have already been dealt with in my earlier decision).

(d) Will the children's welfare and best interests be promoted by the making of the adoption order?

(e) Should a final adoption order be made in the first instance?

[14] Given the fact that by virtue of Californian law, the applicant was named as the children's parent from the date of their birth, it could have appeared a simple matter to leave the United States and bring "her children" back to New Zealand.

[15] However, by operation of New Zealand law, children born as a result of assisted reproduction techniques, both here and outside the jurisdiction, have their parentage determined by the New Zealand Status of Children Act 1969. On the application of that legislation, the applicant is not recognised as the legal parent of the twins. New Zealand law would accordingly treat Ursella and her husband as the legal parents of the twins.

[16] Thus, the twins had no automatic right to enter New Zealand because the children would not be recognised as New Zealand citizens. The adoption process is therefore necessary.

**Adoption (Inter-country) Act**

[17] Section 10 of the Adoption Inter-country Act 1997 applies only where a child has been "habitually resident" in another contracting state. In such a case the adoption must first be approved by the New Zealand Central Authority. A critical aspect of the definition of "habitually resident" is consideration of the issue of intention.

[18] At no stage was it intended by any of the parties involved in this matter that these children would live anywhere other than in New Zealand. Hence, the law, as it has developed in relation to international surrogacy arrangements, is that where a child is born overseas pursuant to such an arrangement, that child is not deemed to be habitually resident in the overseas country in which he/she was born, given that there was never a settled purpose to reside in that overseas country.

[19] It is clear from this analysis, and the facts forming the background to the current application, that the Adoption (Inter-country) Act 1997 does not apply.

**Valid Consent**

[20] It cannot be disputed that valid consents have been provided by Ursella and her husband in compliance with the New Zealand Adoption Act (and in compliance with Californian law). These consents have been signed and witnessed by a Notary Public, as is required by this country's legislation.

[21] A further issue which requires consideration is whether s 25 of the New Zealand Adoption Act could create any barriers to making an adoption order. Section 25 provides as follows:

> **25 Prohibition of payments in consideration of adoption**
>
> *"(1) Except with the consent of the court, it shall not be lawful for any person to give or receive or agree to give or receive any payment or reward in consideration of the adoption or proposed adoption of a child or in consideration of the making of arrangements for an adoption or proposed adoption:*
>
> *(1A) Subsection (1) does not apply to the payment of the hospital and medical expenses of the confinement of the mother of a child if –*
>
> *(a) the expenses are incurred by virtue of the provision by a society or body of persons of hospital care (within the meaning of the Health and Disability Services (Safety) Act 2001); and*
>
> *(b) the payment is made by an applicant for an adoption order in respect of the child directly to the society or body; and*
>
> *(c) the amount paid has been approved in the particular instance, or is in accordance with a scale approved generally, by the chief executive of the Department of State responsible for the administration of the Health and Disability Services (Safety) Act 2001 …*"

[22] The parties entered into a legal "Gestational Carrier Agreement" as part of the surrogacy arrangement.

[23] That agreement provided in part:

> *"The parties warrant, and it is expressly understood, that this agreement in no manner constitutes payment for genetic material, a child or relinquishment of a child, or payment for any consents of any kind related to the finalisation of parental rights or adoption*".

[24] The agreement further provides that payments which are agreed to be made are solely to "*reimburse her* [the surrogate mother] *pain and suffering and pre-birth child support and living expenses incurred by herself and her family*". These are not payments for adoption and do not, in my view, fall within the disqualifying category

of "*payments in consideration of the adoption or proposed adoption of a child or in consideration of the making of arrangements for an adoption or proposed adoption*".

[25] Had the payment made been based upon some form of assessment of the value to the applicant of the ability to adopt the children produced by means of the surrogacy agreement, the position may have been different. In this case it was not. Rather, the payment was based upon an assessment of the financial impact upon the surrogate mother and her family and of the degree of pain and suffering she would endure.

[26] Finally, one of the tests which this Court must apply in considering an adoption application is whether there exist feasible alternatives to adoption which alternatives would better promote a particular child's welfare and interests.

[27] In this case, should adoption not occur, these children would find themselves in a stateless situation, being neither citizens of the United States nor of New Zealand. That result could not possibly promote the twins' best interests and welfare.

## Conclusion

[28] I have already dealt with the provisions of s 11 and s 14 of the Adoption Act in my earlier and oral decision.

[29] I am satisfied that the surrogacy arrangement which the applicant entered into met the provisions of the law of the State of California and provides no precluding elements in satisfying the provisions of the Adoption Act 1955. Furthermore, I find that the applicant met the required threshold in satisfying the qualifying provisions of the New Zealand Adoption Act 1955.

Maureen Southwick QC
**Family Court Judge**