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**IN THE FAMILY COURT
AT CHRISTCHURCH]**

**FAM-2015-009-000491
[2016] NZFC 7430**

IN THE MATTER OF THE ADOPTION ACT 1955

AND

IN THE MATTER OF An application by

 CARMEN SINCLAIR
 IVAN SINCLAIR

to adopt a child

Hearing: 30 August 2016

Appearances: Ms J Stringer for the Applicant
 Respondent Father - Self Representing
 Ms Burnhill for Ministry of Social Development

Judgment: 5 September 2016

**JUDGMENT OF JUDGE R J MURFITT
-Adoption Act 1955 s 8 dispensation with consent-**

Introduction

[1] Carmen Sinclair is the birth mother of Shannon born [date deleted] 2012. She is married to Ivan Sinclair and seeks to adopt the child in what is colloquially referred to as a step-parent adoption.

[2] Shannon's biological father is Woody Dalton who opposes the adoption and has refused to consent to it.

[3] This application primarily concerns the applicants' application to dispense with his consent under s 8 Adoption Act 1955. A subsequent issue also involves whether (assuming consent is dispensed with) an adoption order would best serve the welfare and best interests of the child.

Background

[4] Shannon was conceived in 2011 as a result of a casual encounter between Woody Dalton and Shannon's mother.

[5] Initially Shannon had relatively frequent access to his father, and by a parenting order made on 12 December 2012 by consent, Mr Dalton's contact was defined to occur each Monday and Wednesday for three hours between 5:00pm and 8:00pm and in a staged process on all weekend days, developing to alternate weekends for two overnights. This was varied in 2013 before the overnight contact was achieved, to occur only on daytimes each Monday and each Sunday. This occurred because Mr Dalton did not comply with the arrangement.

[6] Throughout this time however Mrs Sinclair (as she now is) enjoyed a healthy positive relationship with Woody Dalton's mother, Lizzy, and also Woody Dalton's grandmother, Tamia.

[7] They have maintained contact with Shannon throughout.

[8] On 4 December 2014 I myself dealt with a further variation of the parenting order to provide only for contact with Mr Dalton and with Shannon's paternal grandmother as agreed periodically between each of them and Mrs Sinclair. That reflected the extent to which Mr Dalton had failed to exercise the schedule contact according to the previous parenting orders, and also the extent to which Mrs Sinclair was committed to ensuring an ongoing relationship between Shannon and Lizzy Dalton. Mrs Sinclair's evidence is that throughout 2014 Mr Dalton had contact on perhaps five occasions.

[9] In the mean time she had met Ivan Sinclair in 2013. They married in 2014 and have had one child. They plan to have another.

[10] Lizzy Dalton had the care of Shannon for three weeks while Mr and Mrs Sinclair went on honeymoon overseas. This was partly due to Mrs Sinclair's concern that Woody Dalton would likely refuse any request she made for the issue of a passport. It transpired in Mr Dalton's evidence that she had previously refused the issue of a passport at his request.

[11] Each parent has a different account as to why contact arrangements collapsed, but agree that Mr Dalton has had no contact with Shannon since late July 2014. So, for half the child's life he has not known his biological father, but has known his biological paternal grandmother, and great grandmother, and from the evidence I have heard, his paternal aunt. Mr Sinclair has clearly become Shannon's psychological parent.

[12] Woody Dalton negotiated a voluntary child support payment with Mrs Sinclair. After six weeks he was in arrears of four weeks. A formula assessment was made under the Child Support Act. He has been irregular in meeting his obligations, and is significantly in arrears now. However, he has made partial payments generally as a result of enforcement or direct deduction from his income.

This application

[13] In April 2014 Mr and Mrs Sinclair decided to seek adoption of Shannon and took steps formally to achieve it.

[14] They themselves have both been raised in foster homes. Mrs Sinclair described in evidence how much she wished her birth mother had consented to her being adopted into her foster parents family. From her perspective, that would have greatly enhanced her sense of belonging, and improved her emotional and psychological well being.

[15] In those descriptions, she summed up the great benefits of adoption. Despite its current unfashionability with the medico/legal circles, adoption has the capacity to provide a child with an intact family, a sense of belonging and a sense of normality, without the multi-threaded complications of diverse relationships which demand the child's attention. There are of course many shortcomings associated with adoptions. It pretends to deny the existence of biological heritage. It interferes with sibling or half sibling relationships. It can create an untrue picture of a child's cultural or ethnic origins. For some children, adoption provides a safe, secure family environment in which a child may flourish and grow. For others, it leaves a sense of incompleteness, concerns of abandonment, and mystery about cultural or medical histories.

[16] In any event Mr Dalton was unwilling to consent to the adoption. He made this clear in a brutish and crude fashion, scrawling the words "no fucking way" over the adoption consent forms sent to him by Mrs Sinclair's lawyer, Ms Stringer.

[17] This application has been brought therefore to dispense with the consent of Mr Dalton for one of the grounds established in s 8. Primarily, the ground she relies on is that suggesting Mr Dalton has failed to exercise the duty and care of parenthood.

[18] Ms Hayley Wall is a social worker with the Ministry of Social Development. She has prepared a report, which does not support dispensing with Mr Dalton's consent, nor with the granting of an adoption order.

[19] She does however, consider Mr and Mrs Sinclair provide an entirely satisfactory upbringing, and life for Shannon. The Adoption Act requires a Court to be satisfied that the proposed adoptive parents are "fit and proper persons" for an adoption order to be made, and that particular test is easily passed by Mr and Mrs Sinclair.

[20] However, Ms Wall considers that Mr Dalton's conduct does not satisfy the test of failing to exercise the normal duties of parenthood. Even if he has so failed, then she considers adoption is inappropriate in circumstances where the applicants anticipate ongoing relationships between the child and extended paternal family members, and where orders under the Care of Children Act can adequately provide the security which Shannon needs. They provide an excellent home, an excellent family life, wholesome values and good role models for the children in their family.

The law

[21] Section 11 Adoption Act sets out the criteria which must be met before a Court can make an adoption order. It provides:

11 Restrictions on making of orders in respect of adoption

Before making any interim order or adoption order in respect of any child, the court shall be satisfied—

(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; and

(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; and

(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.

[22] As Judge C P Somerville observed in *P v C*¹ at 195:

“A number of conclusions can be drawn from the overall shape of the Act. If no ground can be made out for dispensing with consent and that consent is refused, the application to adopt cannot proceed no matter how meritorious.

There is an absolute right of veto given to that person with no power for the Court to review the exercise of that power or veto. Even when consent has been given or has been dispensed with, no order granting an adoption can be made without those three preconditions (set out above) being met.”

[23] Where a parent, such as Mr Dalton refuses to consent to an adoption, the Court has power to dispense with that consent if one of the grounds set out in s 81 of the Adoption Act are established. In this case, the ground Ms Stringer relies on is that set out in s 81(a).

[24] The relevant provision then provides:

“The Court may dispense with the consent of any parent or guardian to the adoption of a child in any of the following circumstances:

If the Court is satisfied that the parent or guardian has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child.”

[25] These terms have been considered by the Court of Appeal in *Director General of Social Welfare v L*². This judgment is still regarded as the torchlight guiding the interpretation of s 81(a). It emphasises a broad assessment of parenting responsibilities and a high threshold which must be achieved before a parent can be said to have failed to exercise the normal duty and care of parenthood. The Court said it is “not directed to isolated acts of misconduct or neglect on the part of the parent. It is implicit in the language “... has failed...” that a broad assessment over the whole of the life of the child down to the hearing before the Court is required”.

¹ *P v C* [2001] NZFLR 193

² [1990] NZFLR 125

[26] The issue of dispensation with parental consent is a fact specific enquiry, but there is no escaping the conclusion that depriving a parent of consent to the adoption out of a child is a very serious matter, which should not be lightly undertaken.³

Conclusion

[27] In this case, I am not satisfied the applicants have discharged the onus of establishing on the balance of probabilities that Woody Dalton qualifies as a parent who has failed to exercise the normal duty and care of parenthood in respect of Shannon.

[28] It is true that he has been negligent and substandard as a parent. He has failed to show initiative in seeking to have a day to day relationship with his child. He may well complain that Mrs Sinclair has been obstructive, but more importantly he has been lethargic in trying to establish a significant profile as a psychological parent in Shannon's life. Instead, he has stood back, so as to allow his mother and grandmother and his sister, to fulfil the important role of loving this child and showing him he is part of their extended family.

[29] He has however paid child support, even though reluctantly and inconsistently. Beyond that he has paid no contribution to the many financial needs a child has in their day to day survival.

[30] It is very true that he has demonstrated a poor example of fatherhood, and has displayed a lack of interest of the well being of his child. The best which can be said is that he has taken a "back seat" to avoid risking Shannon's relationship with his grandmother and great grandmother.

[31] None the less, although his parenting has been lethargic and substandard, I cannot classify it as grave enough to justify a description as a total failure to "exercise a normal duty in care of parenthood".

³ *H v S-B Palmerston North FAM 2011-54-180*

[32] He has indicated that he has no objection to Mr Sinclair having additional guardianship conferred on him, in that he sees no objection to Shannon moving to [location deleted]. That after all would enhance the child's ability to have an ongoing relationship with the paternal extended family.

[33] For her part, Mrs Sinclair has indicated her own ongoing intention that Shannon will continue to have a familial relationship with his paternal grandmother, and great grandmother and aunt. While not relevant to the question of dispensation with consent, these are factors which would have been quite significant in relation to considering whether adoption is in the best interests of the child. I do not need to address that question squarely however, because I am satisfied the applicants have not established a case for dispensing with Mr Dalton's consent.

[34] I have invited Ms Stringer to lodge without delay an application under the Guardianship Act addressing the question of Mr Sinclair's additional guardianship, and possibly the question of Shannon's future residence. Having dealt with this aspect of the case, I see it as appropriate for this application to be referred to me for case management when it is lodged.

R J Murfitt
Family Court Judge

Signed in Christchurch on 5 September 2016 at 2:25 pm