

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

**NOTE: PURSUANT TO S 22A OF THE ADOPTION ACT 1955, AND S 139 OF THE CARE OF CHILDREN ACT 2004, 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 NELSON**

**FAM-2017-042-000058  
[2018] NZFC 5919**

IN THE MATTER OF      THE ADOPTION ACT 1955  
  
BETWEEN                      [ALBERT MOFFATT]  
   [TABITHA MOFFATT]  
   Applicants

**FAM-2018-042-000227**

IN THE MATTER OF      THE CARE OF CHILDREN ACT 2004  
  
AND BETWEEN              [PRIMROSE PICKART]  
   Applicant  
  
AND                              [ALBERT MOFFATT]  
   [TABITHA MOFFATT]  
   [ELI PICKART]  
   Respondents

Hearing:                      3 August 2018

Appearances:              M L Harkness for the Applicants/Respondents [Moffatt]  
   Applicant [Pickart] appears in Person  
   Respondent [Pickart] appears in Person  
   M J Duggan as Counsel to Assist

Judgment:                    3 August 2018

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**ORAL JUDGMENT OF JUDGE R J RUSSELL**  
**[as to an adoption under s 3 Adoption Act 1955**  
**and as to a parenting order under s47 Care of Children Act 2004]**

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**Introduction**

[1] These are proceedings under the Adoption Act 1955 and also the Care of Children Act 2004 in respect of [Dorothy Pickart] and [Sarah Pickart]. [Dorothy] was born on [date deleted], and is aged 10 years. [Sarah] was born on [date deleted], and is aged 9 years.

[2] There is an application by the children's mother, [Tabitha Moffatt], and her husband, [Albert], for an adoption order under s 3 Adoption Act. There is also an application by the children's paternal grandmother, [Primrose Pickart], for leave to apply for a parenting order under the Care of Children Act and for an order specifying the terms of her ongoing contact with [Dorothy] and [Sarah]. There is no issue that the children are to remain in the day-to-day care of Mr and Mrs [Moffatt].

**Brief background**

[3] Mrs [Moffatt] has had the day-to-day care of the children since she and the children's biological father, [Jonas Pickart], separated in 2010/2011 when [Dorothy] was three and [Sarah] was aged one. He moved [overseas] May 2012 where he remained for a number of years. Whilst he was [overseas], he saw the children about once a year. Following his return to [location 1 deleted] he had some contact with the children arranged through his mother, Mrs [Pickart]. Since the adoption application was filed in February 2017, his contact with the children stopped. Mr [Pickart] continues to reside in [location 1 deleted] with his partner.

[4] The children's paternal grandmother, Mrs [Pickart] also lives in [location 1 deleted]. She has contact with the children every weekend, and it is accepted that she plays a very important part in the children's lives.

[5] Mr [Pickart] has provided his consent to the adoption application as the children's biological father. It seems the adoption application was his idea. He does not have any issues or concerns regarding Mr and Mrs [Moffatt]'s ability to provide for the children's physical, emotional and financial needs.

[6] Mr and Mrs [Moffatt] are committed to supporting an ongoing relationship between Mr [Pickart] and the children if this is what Mr [Pickart] wants to do. They are also committed to supporting an ongoing relationship between Mrs [Pickart] and her grandchildren. If the children want to see Mr [Pickart], then Mr and Mrs [Moffatt] consider this is best arranged through his mother, Mrs [Pickart].

### **Social work report**

[7] Following the filing of the adoption application, the file was referred to the Oranga Tamariki adoption unit for a report. Ms Newton is an experienced report writer for Oranga Tamariki in this field, and has written two reports for this case. I have had the benefit of reading her first report but, in accordance with the normal practice, the parties have not.

[8] In her first report which was submitted in July 2017, Ms Newton refers to the general background. She considers the history of Mrs [Moffatt] and Mr [Pickart]'s relationship, and Mr and Mrs [Moffatt]'s background, their relationship, and their personal and family backgrounds. She considers Mr [Pickart]'s position and his background. In particular, she notes Mr [Pickart] is keen for the children to have the stability and security they have with their mother and Mr [Moffatt]. Ms Newton enquired about Mr [Pickart]'s view of his loss of his guardianship rights and responsibilities, but he was clear that the adoption of his children was his preferred option.

[9] Ms Newton considered the position of [Dorothy] and [Sarah]. She spoke to them at their home after school. She noted they went to [school deleted] and both enjoyed school. The children impressed Ms Newton as being relaxed and confident although, due to their ages, they did not understand completely the significance of the adoption application and what it might mean for them. Both children told Ms Newton

they loved Mr [Moffatt] and wanted him to be their father. Ms Newton spoke to the children about their grandmother, Mrs [Pickart], and their view was continuing to spend time with her would “be fine”.

[10] Ms Newton considered Mrs [Pickart]’s background and position, and noted her anxiety about ensuring her contact with her grandchildren continued. This was very important to her. Ms Newton noted there was no antagonism between Mr and Mrs [Moffatt] and Mrs [Pickart], and there were some family occasions when they were all together at the same event. The issue of contact had been discussed with all of the adults. Mr and Mrs [Moffatt]s’ position accepted the children enjoyed seeing their grandmother, and wanted this to continue.

[11] In the summary to her first report, Ms Newton had no issue with Mr and Mrs [Moffatt] being fit and proper people to bring this application, and said all of the adults she spoke to were firmly of the opinion that an adoption was the preferred way to ensure the security of the children.

[12] Ms Newton went further and appended to her report a contact plan which she had prepared, and which all parties had signed, which set out the children’s arrangements to see Mrs [Pickart]. It was accepted, however, upon the making of an adoption order, this contact agreement could not have any legal effect.

[13] At my request Ms Newton prepared an addendum to her report which was circulated to all parties and counsel. She summarised much of what I have outlined. Ms Newton concluded that an adoption order was not essential in this case. She noted the emotional and physical security for the children was already well provided for and could be legally secured in other ways.

[14] I want to record that I have thanked Ms Newton today for all of the work she has done on this case.

**Counsel to assist**

[15] Ms Duggan was appointed as counsel to assist me because of the issues arising in this case, and the legal issues which need to be considered. In her report, Ms Duggan said she had decided against meeting the children, chiefly because it was difficult to assess what degree of influence they may have been under. She looked at the other legal options which were available, including that Mr [Moffatt] could be appointed as an additional guardian of the children, the children's surname could be changed to "[Moffatt]", and a parenting order could record the care arrangements for the children.

[16] Ms Duggan reported on her meetings with the parties, her consultations with Ms Newton, and went on to consider the relevant legal principles and case law applicable to this type of application, in particular the decision of Judge O'Dwyer in *[case 1 deleted]* and Judge Walsh in *Re JAN*.<sup>12</sup> Ms Duggan went on to consider the relevant factors when weighing up the benefits and disadvantages for [Dorothy] and [Sarah] of this adoption application. In the conclusion to her report she said, balancing all factors, she supported the adoption order being made.

[17] I want to record my thanks to Ms Duggan for the work she has done as counsel assisting me in this case.

### **The law**

[18] The Adoption Act 1955 sets out the jurisdiction to bring applications of this type. The application is made pursuant to s 3 of the Act, and the criteria to be considered is contained in s 11.

[19] Section 11(a) requires me to be satisfied the applicants are fit and proper people to bring an application. In this respect Ms Harkness, counsel for Mr and Mrs [Moffatt], submitted there is no issue about the fitness of Mr and Mrs [Moffatt] to continue in their role of providing for the day-to-day of the children, and that individually and as a couple they have been providing security and stability in a loving

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<sup>1</sup> *[Case 1]* FC Dunedin FAM-2009-009-3958, 24 November 2010.

<sup>2</sup> *Re JAN* [2013] NZFC 3188, [2013] NZFLR 1075.

family environment for most of the children's lives. Ms Harkness submitted Mr and Mrs [Moffatt] have sufficient ability to bring up, maintain, and educate the children.

[20] I accept completely these submissions. There is not, and never has been, any issue about whether Mr and Mrs [Moffatt] are fit and proper people to bring this application.

[21] Section 11(b) requires that I must be satisfied that the interests of the children will be promoted by the adoption. This requires an inquiry about the three issues which are set out by Judge O'Dwyer in *[case 1]* namely:

- (a) The benefits to the child of making an adoption order.
- (b) The disadvantages for a child if an adoption order is made.
- (c) The legal alternatives to making an adoption order.

*The benefits of an adoption order being made*

[22] Ms Harkness addressed the benefits to the children of the making of an adoption order in her submissions. She contends the benefits to the children are multifaceted:

- (a) The adoption will provide the children with psychological benefits of having Mr [Moffatt] as their father and, in that sense, there will be a full legal family and a sense of completeness for the children.
- (b) The children's individual identities and histories will be enriched by the making of the adoption order.
- (c) Formalising Mr [Moffatt]'s role as an adoptive parent will provide emotional, psychological, and financial security for the girls in the event that their mother predeceases him.

- (d) [Dorothy], in particular, requires a high level of security and certainty, and an adoption would go some way to providing both children with this.
- (e) There is agreement by the children's biological father, Mr [Pickart], to the adoption.
- (f) The children do not have cousins on their paternal side, but have cousins on Mr and Mrs [Moffatt]'s side of the family, and an adoption order would clarify these existing relationships with their step-cousins.
- (g) Finally, the children are positive about the adoption.

[23] I accept all of these submissions are correct, and these are positive benefits which would flow to the children following an adoption order being made. I should record I have spoken individually to both [Dorothy] and [Sarah] today. They are polite, pleasant, well-mannered children who have spoken to me about their schooling and their extracurricular activities. They confirmed to me that they know what this hearing is about, and they agree with and are supportive of the adoption order being made.

*The disadvantages of an adoption order being made*

[24] The second issue which I need to consider is the possible disadvantages of an adoption order being made. Ms Harkness and Ms Duggan both addressed this in their submissions. The main disadvantage is the severing of the legal relationship the children will have with their father but, more importantly, the potential severing of the weekly contact the children have with their paternal grandmother, Mrs [Pickart]. Ms Harkness submitted there is not any real risk of this occurring, as both Mr and Mrs [Moffatt] were committed to supporting this ongoing relationship, and they accept Mrs [Pickart] is an important and vital figure in the children's lives. Ms Harkness submitted this relationship is fully recognised and will continue to be supported by Mr and Mrs [Moffatt].

[25] This is the issue which has caused me to pause and reflect on this application. I immediately accept there is a good working relationship between Mrs [Pickart] and Mr and Mrs [Moffatt], and this is positive for the children and is to be encouraged. The Adoption Act was enacted in 1955. This was very much an era where “closed” adoptions were the norm. In those days children grew up having little or no knowledge of the fact that they were adopted, and who their biological parents were. This has changed over the past two decades or so, and there is much more emphasis now on openness, with children growing up having the knowledge of their family background and history rather than this being shielded from them.

[26] In this case, the parties accept the importance of this openness principle. This is reflected in the considerable amount of time the children have been spending each week with Mrs [Pickart]. I have said, in many cases, it often takes “a village to raise a child”, and “good grandparents can teach children much about life which their parents cannot.” They come from different generation, and have different life experiences which they can pass on and teach children about.

[27] I was concerned that the making of the order sought by Mr and Mrs [Moffatt] might lead to a severing of the children’s relationship with their grandmother. I accept this risk, at present, is remote, but have to acknowledge that relationships and circumstances can change.

[28] I was also concerned that refusing the adoption application may cause resentment to arise between Mr and Mrs [Moffatt] and Mrs [Pickart], and sour the good working relationship they have. If this occurred, the children would undoubtedly suffer as a consequence.

[29] Of these two risks I consider the second is probably greater than the first. Cessation of Mrs [Pickart] being able to spend time with the children is something which clearly troubled her in the period leading up to this hearing. It was an issue which also troubled me. At the pre-hearing conference this issue was explored between counsel and all parties, including Mr and Mrs [Pickart].

[30] One solution, which I asked the parties to consider, was to commence proceedings under the Care of Children Act and for a contact order to be made by consent immediately following the adoption order. This would enable the children to have the benefits of the adoption which have been submitted which I have identified, as well as legally securing the children's ability to have ongoing contact with their biological grandmother, Mrs [Pickart]. This means the orders I am now going to make under both Acts will meet all parties' expectations and concerns, and I think virtually eliminate the disadvantages of the making of an adoption order.

*The legal alternatives to the making of an adoption order*

[31] The third issue I need to consider are the legal alternatives to an adoption order. These have been identified as being additional guardianship orders appointing Mr [Moffatt] under s 27 Care of Children Act, changing the children's surname under the Births, Deaths, Marriages, and Relationships Registration Act 1995, and the making of a parenting order. I have considered all of those options.

**Conclusion**

[32] For the reasons I have outlined, I have reached the view that this adoption application can be granted, to be followed immediately by Care of Children Act orders securing the children's ongoing relationship with their grandmother, Mrs [Pickart]. This satisfies the provisions of s 11 in the circumstances of this particular case and is in the welfare and best interests of the children as required by s 4 Care of Children Act.

**Outcome and orders**

[33] Pursuant to s 3 Adoption Act 1955 I grant Mr and Mrs [Moffatt]'s application to adopt [Dorothy Pickart], born [date deleted], and [Sarah Pickart], born [date deleted]. I now make the adoption order for both children. Their surnames under the adoption order will be recorded as "[Moffatt]".

[34] I direct that the words “adoptive parents” are to appear on any new birth certificates which are obtained.

[35] Under the Care of Children Act 2004:

- (a) I grant to Mrs [Primrose Pickart] leave to bring her application.
- (b) By consent, I make a parenting order. Ms [Pickart] will have contact with the two children, [Dorothy] and [Sarah], each Sunday between 10.00 am and 5.00 pm, and on other days and times as are agreed.

*Guardianship understandings and agreements*

- (c) The following guardianship understandings and agreements are noted and are attached to the parenting order:
  - (i) The parties will be respectful of each other, and work co-operatively to ensure that the children have regular contact with Mrs [Pickart].
  - (ii) The parties agree that as the children age, the arrangements will change and they will agree to other contact days and times.
  - (iii) I note the consent memorandum provision that all parties agree that the care arrangements set out are safe and beneficial for the children.

*Counsel to assist*

[36] Ms Duggan’s appointment as counsel to assist me is now discontinued with the thanks of the Court.

R J Russell

Family Court Judge