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

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**IN THE FAMILY COURT**
**AT AUCKLAND**

**I TE KŌTI WHĀNAU**
**KI TĀMAKI MAKAURAU**

**FAM-2020-044-000227**
**[2021] NZFC 7810**

IN THE MATTER OF THE ADOPTION ACT 1955

AND

IN THE MATTER OF [CELESTE HAYDEN]
An application by

to adopt a child

Hearing: 14 July 2021

Appearances: J Zohrab for the Applicant
M Casey QC as Counsel to Assist

Judgment: 10 August 2021

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**RESERVED JUDGMENT OF JUDGE R VON KEISENBERG**
**[Reasons]**

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[1] This is an application by grandmother, [Celeste Hayden], to adopt her grandson, [(Travis)], born on [date deleted] 2004 in [location deleted], South Africa. [Travis]'s parents, mother [Leyla Beck] (the daughter of the applicant) and his biological father, [Adam Patricks], remain living in South Africa.

[2] At the conclusion of the hearing on 14 July, I indicated to counsel that I was satisfied there was clear evidence to form the view that [Travis] was habitually resident in New Zealand at the relevant time. However, I reserved this decision to allow an opportunity to give detailed reasons for reaching my conclusion.

**The Issue for Determination**

[3] The sole question for this court to determine in this hearing was the preliminary matter of whether [Travis] is habitually resident in New Zealand or in South Africa. If the court determined that [Travis] was habitually resident in New Zealand, then the Adoption Act 1955 (the Act) applied and this court has jurisdiction to deal with it. If, on the other hand, the court found that [Travis] is habitually resident in South Africa, then this court has no jurisdiction to consider the adoption application and s 10 of the Adoption (Intercountry) Act 1997 (AIA) applies. The matter is then referred to the New Zealand Central Authority. Section 10 of the AIA states:

> A child who is habitually resident in another Contracting State must not be entrusted to prospective adoptive parents who are habitually resident in New Zealand unless the New Zealand Central Authority has approved the decision.

**Background**

[4] [Travis] has been in the care of his grandmother, the applicant, for most of his life. The applicant deposes that when [Travis] was born, his mother [Leyla], lived with her and they raised [Travis] together. The applicant deposes that she was in effect, [Travis]'s primary caregiver for his first three years.

[5] In 2007, the applicant, a New Zealand citizen, returned to New Zealand with [Travis] in her care with the mother's consent. [Travis] attended early childhood kindergarten in the area of [location A] where the applicant still resides.

[6] In 2009, the applicant returned with [Travis] to South Africa to care for her terminally ill mother. During the period 2009-2011, [Travis] continued to reside with the applicant although [Leyla], his mother, moved in for a period while she was unemployed. [Travis] was then five and a half years old.

[7] In 2011, the applicant's mother passed away. It was the applicant's intention to return to New Zealand with [Travis], however, by this time, [Travis]'s mother [Leyla] was living with her then partner (who later became her husband). She decided that she now wished to retain [Travis] in her care. [Travis] then moved to [location B, South Africa], to live with his mother and her partner and the applicant returned to New Zealand.

[8] Shortly after the applicant returned to New Zealand, [Travis]'s mother placed him in the care of her husband's sister, [Monika and Kirk Butler] as they were struggling financially to care for him. [Travis] remained living with the [Butler] family in [location C, South Africa], from the age of 10-13.

[9] [Travis] reported to his grandmother that he was unhappy in the [Butlers'] care and eventually, [Travis]'s mother agreed to allow him to return to New Zealand to live with the applicant. [Travis] arrived in New Zealand in [date deleted] 2018.

[10] Several months later, in June 2018, the applicant applied for parenting and guardianship orders under the Care of Children Act 2004. At the same time, she applied to remove [Travis]'s parents as guardians. The court duly made orders appointing the applicant as [Travis]'s sole guardian and a parenting order was made giving her day-to-day care of him.

[11] The applicant deposes that [Travis] settled well in New Zealand in her care. In January of 2020, she decided to pursue an adoption order. She did so, she says, because she was aware that [Travis] was suffering from stress and anxiety about the uncertainty of his future in New Zealand.

[12] In May 2020, the applicant filed an application to adoption [Travis]. Standard directions were issued by the court for a social worker to file a report in respect of the

application. In 28 August 2020, [a social worker from Oranga Tamariki] filed her report. She opined that because [Travis] was only in New Zealand on a temporary visa, the initial view of Oranga Tamariki was that [Travis] could not be "considered habitually resident in New Zealand alongside the contributing factors of his biological mother and extended family members remaining resident in South Africa". It was their preliminary view that the adoption application fell within the jurisdiction of the Articles of the Hague Convention, contained in the AIA and that the matter should be dealt with by the New Zealand Central Authority. Oranga Tamariki asked the court to determine where [Travis]'s habitual residence is.

[13] The court appointed Ms Margaret Casey QC as counsel to assist the Court to report on the issue. The matter came before his Honour Judge Druce on 25 March 2021 following receipt of Ms Casey QC's report. His Honour determined that the issue of where was [Travis]'s habitual residence needed to be dealt with first.

[14] On 8 July 2021, shortly before the hearing which I presided over, the Chief Executive for Oranga Tamariki filed a brief memorandum in which they reported that they had reconsidered the issue of [Travis]'s habitual residence. The report stated that the New Zealand Central Authority had reassessed the issue and now considered there were valid reasons to assess [Travis]'s habitual residence as New Zealand. The effect of this was that if the Court agreed with their view, then the adoption application did not need to include an intercountry adoption component. Oranga Tamariki reported that the Central Authority also agreed there were grounds to consider that the adoption could be considered domestically under the Act, subject to the court's finding.

[15] They also reported that they had received a child study report from South Africa which was supportive of the adoption application proceeding.

**The law – where is [Travis]'s place of Habitual Residence?**

[16] By virtue of s 4 of the AIA, the United Nations Convention on intercountry adoption was adopted into New Zealand law. Article 2 of the Convention provides:

> The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State the start or in the State of origin.

[17] 'Habitual' is not defined in the AIA, nor in the Convention. Judge Muir, in *Spiegler v Spiegler*, commented:[1]

> Habitual is not defined in the Intercountry Adoption Act, nor in the Convention, but it is relevantly defined in the Shorter Oxford Dictionary as, "A settled disposition or tendency to act in a certain way especially one acquired by frequent repetition," and it is also defined as, "A condition of being accustomed to something, familiarity."

[18] In *Punter v Secretary for Justice*, the court confirmed that where a child is habitually resident will be decided on a case by case basis.[2] It is a "broad question of fact" which has the "flexibility" to respond to modern conditions. In cases such as this, the usual time the habitual residence is to be assessed is when an intention to adopt is formed.[3]

[19] In *Mitchell v Ketut*, Judge Turner stated:[4]

> The phrase "habitually resident" is not defined in the legislation. It is a factual inquiry, to be decided by reference to all of the circumstances of the case under consideration. It has been said that the phrase has "no particular legal magic". It is to be construed in the ordinary meaning of the words. The essence of 'habitual' is customary, constant, continual. The opposite of that is casual, temporary, or transient."

[20] In *Basingstoke v Groot*, the Court of Appeal stated the factors to be taken into account included:[5]

> [28] …settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state (including living and schooling arrangements), and cultural, social and economic integration. …

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[1] *Spiegler v Spiegler* [2020] NZFC 2872 at [12].
[2] *Punter v Secretary for Justice as the New Zealand Central Authority* [2004] 2 NZLR 28 (CA) at [3].
[3] *Re Application by PHB* FC Blenheim, FAM-2010-006-223, 22 June 2011.
[4] *Mitchell v Ketut* [2016] NZFC 6175 at [20].
[5] *Basingstoke v Groot* [2007] NZFLR 363, (2006) 26 FRNZ 707 CA at [28]–[29].

> [29] Any settled purpose does not have to be to live in a place indefinitely but can be for a limited period as long as there is intended to be a sufficient degree of continuity for it to be properly treated as settled…

[21] In *Re application by PHB*, the presiding Judge commented:[6]

> The object of the Convention on Intercountry Adoption is to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and in respect of the child's fundamental rights is recognised in international law.

[22] The Judge further noted that, "in Intercountry Adoption cases the precipitating event is the forming of the intention to adopt". She went on to say that "The purpose or intention to adopt can arise after the child has left the State of origin [in this case South Africa] but may not be connected with the departure from the State of origin".

[23] In many of these decisions, the focus for the court is the determination of the relevant time at which habitual residence should be assessed. Ms Casey QC summarised the possibilities for when [Travis]'s habitual residence could be assessed:[7]

(a) At the point at which he arrived in New Zealand in [date deleted] 2017;

(b) At the date at which the guardianship and parenting orders were made (July 2018);

(c) At the date of filing the application to adopt – the applicant's evidence was that she definitively decided to pursue an adoption in January 2020.[8]

[24] The applicant's case is that she applied for adoption of [Travis] so that he would have a sense of place and belonging in the family unit; that in reality she is his "mum"; that he will always be with her; and that she regards him as her son on the basis that he has been in her day-to-day care for the majority of his life.[9]

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[6] Above n 3 at [86].
[7] At [20].
[8] Affidavit of 23 November 2020 at [29].
[9] At [16].

[25] Her evidence was that after she obtained guardianship orders and parenting orders in 2018, their bond was growing day by day and in January 2020, she decided definitively to pursue an adoption order in respect of [Travis].

[26] Ms Zohrab, counsel for the applicant, in her written submissions, referred to the decision of *Re Mitchell Adoption* which sets out the relevant applicable principles.[10] Counsel submitted that in line with this authority, the relevant time for assessing habitual residence is when the intention to adopt is formed and steps taken to bring this into effect. Accordingly, she submitted that based on the applicant's evidence, the intention to adopt was formed in January 2020 after [Travis] had been living with the applicant in New Zealand for two years. That intention to adopt crystalized into action when she filed her application for adoption in May 2020.

[27] In support of her submission, she stated that in January 2020, [Travis] was habitually resident in New Zealand evidenced by the fact that he had been living in New Zealand since [date deleted] 2018, had been enrolled in school since 2018, and actively involved in many extracurricular activities, including being selected to play in the [sports tournament deleted] in the same year.

[28] Counsel submitted that the primary motive for an application for adoption was not for immigration purposes but accepts that an adoption order would have a positive effect should an order be granted.

**Reasons**

[28] The court was ably assisted with excellent submissions from both counsel on the issue of "habitual residence". Applying the applicable legal principles, I accept counsel for the applicant's submission that the time for assessing habitual residence in this case was when the intention to adopt by the applicant was formed and I have determined that this occurred in January 2020 in New Zealand.

[10] *Re Mitchell Adoption* [2016] NZFC 6175.

[29] Accordingly, I confirm my oral decision made on 14 July 2021 that [Travis]'s habitual residence is New Zealand and that the court has jurisdiction to make an adoption order under the Adoption Act 1955.

[30] That being the case, the adoption can now proceed. If it has not otherwise been directed, [the social worker in this matter] is to provide a s 10 report by 1 September 2021.

Signed at Auckland this 10th day of August 2021 at 4.00 pm.

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Judge R von Keisenberg
Family Court Judge

Date of authentication: 10/08/2021
In an electronic form, authenticated electronically.