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 SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2023-004-000727
[2023] NZFC 11507

IN THE MATTER OF	THE ADOPTION ACT 1955
BETWEEN	[AKASH RAJA] [CARINA PARDO VENEGAS] Applicants
AND	[ALINA RAJA] Child or Young Person the application is about

Hearing:	12 October 2023
Appearances:	J Wademan for the Applicants (via AVL) Ms Jones as Social Worker
Judgment:	12 October 2023

JUDGMENT OF JUDGE B R PIDWELL

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[1] I have in my court today a very special little girl who is nearly nine months born on [date deleted] 2023. She is here with parents [Carina Pardo Venegas] and [Akash Raja]. She was born as a result of a commercial surrogacy agreement in Tbilisi Georgia and is their genetic child. They have travelled to Georgia for her birth and

have returned to New Zealand. [Alina] has been in their care since she was born and is clearly thriving.

[2] Today is a happy day. It is the end of a long process for the applicants. My role is to align the applicants' legal relationship with their daughter with the biological one that already exists. That is because the current law in New Zealand, namely the Status of Children Act 1969 states that the woman who gives birth to the child is the child's presumptive mother, and her partner is the father, irrespective of laws in other countries and even birth certificates and orders in other countries. Therefore, we need to use the Adoption Act 1955 to create the legal relationship for the purpose of New Zealand law.

[3] I will proceed to do that now. The parties are asking to adopt [Alina] which seems a rather uncomfortable process for them as she is their biological child, but one that, as I said, needs to occur.

Jurisdiction

[4] In order for me to make an adoption order I need to be satisfied of a number of things. I am grateful for the submissions from Ms Wademan who is appearing as counsel for them. I also acknowledge the social worker and supervisor who are attending today who have prepared the s 10 report. It is dated 6 September 2023 and is a glowing lovely report.

[5] Firstly, I need to consider the jurisdictional aspects. This application has been accepted under the Family Court Protocol for the Adoption by New Zealand-based Intended Parents of Children Born by Surrogacy Overseas. However, we need not conduct this hearing remotely as [Alina] is already present in New Zealand.

[6] I need to consider whether the Adoption (Intercountry) Act 1997 applies in these circumstances. [Alina] was born in Georgia. The parties are New Zealand citizens and live here. They simply travelled to Georgia in order to be there for her birth and bring her home. It is clear that her habitual residence is clearly aligned with

theirs and there is, therefore, no need for me to consider the implications of the Adoption (Intercountry) Act. I am satisfied it does not apply.

[7] Turning now to the Adoption Act 1955, I need to be satisfied of a number of things. Firstly, that the applicants are spouses - they clearly are. They are married and are New Zealand citizens. [Alina] is their full genetic child. They have entered into a commercial surrogacy agreement in Georgia with [Sophie Meskhi] who gave birth to [Alina].

[8] The applicants are both over the age of 25 years and, therefore, are entitled to adopt her. [Alina] is certainly a child under the age of 20. Therefore, the jurisdictional requirements have been met.

Consent

[9] I turn now to the issue of consent. Section 7 (1) – (3) of the Act requires the woman who gives birth to the child and her legal husband (at the time of birth or conception or if he is a guardian), to provide written consent to the adoption. The document signifying the consent of the birth mother is not admissible in court unless it is signed 10 days after the child's birth.[1]

[10] Section 7(8) and (9) stipulate the requirements of the consent, stating it must be witnessed by an authorised person, who must also certify that they have personally explained the effect of the adoption order on the person giving the consent.

[11] I thank Ms Wademan for her memorandum clarifying the practical challenges in fulfilling the requirements of s 7(8) of the Act in the international surrogacy context when a child is born in Georgia.

[12] The relevant part of section 7(8) and (9) of the Act provide:

> *Except where it is given by the chief executive, a document signifying consent to an adoption shall not be admissible unless,—*

[1] Section 7(7).

(b) if given in any other country, it is witnessed by and sealed with the seal of office of a notary public or Commonwealth representative who exercises his office or functions in that country.

(9) Except where it is given by the chief executive, the form of the document signifying the consent to an adoption shall contain an explanation of the effect of an adoption order and shall have endorsed thereon a certificate by the witness that he has personally explained the effect of an adoption order to the person who is giving the consent.

[13] There is no New Zealand embassy in Georgia. The nearest embassy is Poland. It is therefore not possible or practical for a Commonwealth representative who is appraised of New Zealand law to witness a consent in Georgia for the purpose of a New Zealand adoption.

[14] The only other permitted option is for a notary public in Georgia to witness and certify the consent. The Notary Chamber of Georgia provides notary services in a similar vein to those of the New Zealand Society of Notaries,[2] namely "to officially witness signatures on legal documents, collect sworn statements, administer oaths and certify the authenticity of legal documents for use overseas."[3] They are neither qualified nor equipped to explain New Zealand adoption law to birth mothers. They can witness a signature to ensure it is authentic, nothing more.

[15] Georgia is a country with clear surrogacy laws which impose parentage on intended parents from birth. New Zealand parents who enter into surrogacy agreements with Georgian surrogates are faced with the inability to comply with s 7(8) if interpreted narrowly or restrictively. They have the option of asking the court to dispense with the consent of the surrogate under s 8 of the Act, but that requires an additional application and the court being satisfied that the birth mother has "abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood" after reasonable

[2] Main notary services - Notary Chamber of Georgia.
[3] New Zealand Society of Notaries (notarypublic.org.nz).

notice of the adoption application has been given.[4] Each of those factors have negative connotations, and fail to recognise the fact that surrogate is in fact and in law consenting. It is, in my view, quite disrespectful of her rights and role for the court to have to make a determination of abandonment or failing to exercise duties of parenthood in those circumstances.

[16] The purpose of s 7(8) is to ensure that a birth mother (i.e. surrogate in these cases) provides fully informed consent to the adoption process. The limited wording and options in s 7(8) were created by Parliament 68 years ago. Technology and science have developed exponentially in that time, yet no government has amended this piece of legislation.

[17] This court (supported by its rules) is required to provide a process which is fair, inexpensive, simple and as speedy as is consistent with justice, avoiding unnecessary formality, and in harmony with the purpose and spirit of the family law Acts it administers.[5] Judges have the ability to give directions to regulate the court's business, when matters are not expressly provided for in the rules.[6] The situation which befalls intended parents who engage in commercial surrogacy agreements in Georgia falls outside the contemplation of the legislatures at the time the Adoption Act was passed. The rules are silent. The court, therefore, is able to interpret the legislative requirements through a modern lens, ensuring that the substance of the law is preserved and honoured, but enabling a more robust modern process for the consent of the surrogate to be provided.

[18] Section 7(8)(a) provides:

> *(8) Except where it is given by the chief executive, a document signifying consent to an adoption shall not be admissible unless,—*
>
> > *(a) if given in New Zealand, it is witnessed by a District Court Judge, a Family Court Judge, a Family Court Associate, a Registrar of the*

[4] The applicants filed an application to dispense with consent due to these constraints, whilst also filing a document signed by the surrogate confirming her expressed consent. I determined in a pre trial ruling that it was unnecessary to consider the application to dispense with consent, noting I would give full reasons in this judgment.
[5] Family Court Rules 2002, r 3.
[6] Rules 15 and 16.

High Court or of the District Court, or a solicitor, or a Judge or Commissioner or Registrar of the Maori Land Court:

[19] If the consent is given in New Zealand, the requirements of the Act are met. Just where each person involved in the consent process physically is, is open for interpretation, if technology is used. It is open for the court to accept the situation where the consent taker (e.g. a lawyer) is in New Zealand, and the consent is elsewhere (e.g. in Georgia), receiving advice remotely using audio visual technology. That process has been used throughout the Covid-19 epidemic years, to witness other forms of documents e.g. wills and affidavits. I am unable to find any judicial comment which has found that process wanting in any way. The use of a New Zealand lawyer and technology will ensure that the surrogate receives the correct legal advice in accordance with New Zealand law. It will ensure that her rights and role are honoured and respected, together with the laws of Georgia, and the Verona Principles. It will also be in the child's best interest and welfare to provide a robust process to secure their parentage and identity, rather than for the court process be constrained by the thinking and forms of the 1950s.

[20] I accept Ms Wademan's submission that this interpretation could be used by the court and relied upon, if the following process was followed:

20.1 The consent document should be translated into Georgian and provided to the birth mother prior to the meeting with the New Zealand lawyer.

20.2 Arrangements should be made for a video call between the birth mother, New Zealand lawyer and interpreter no earlier than 10 days post birth;

20.3 During the video call if, following the explanation of the effect of an adoption order as set out in the Act, the New Zealand lawyer is satisfied that the birth mother appears to fully understand the effect of the adoption orders and that she wishes to consent to an order being made, the lawyer will:

20.3.1 Require the birth mother to show the lawyer the forms that she proposes to sign so that the lawyer is confident they are the same as the lawyer has in front of them.

20.3.2 The lawyer will then require the video camera at the birth mother's end to be angled such that she can see the birth mother signing the consent document.

> 20.3.3 The lawyer will then require the birth mother to send an image of the signed document to them electronically and will then complete the consent document in the usual fashion.
>
> 20.4 The lawyer will also file an affidavit confirming:
>
> 20.4.1 The quality of the video call was sufficient to enable the documents in the birth mother's possession and the birth mother to be clearly seen.
>
> 20.4.2 Who else, beyond the birth mother, was on the video call (for example the interpreter).
>
> 20.4.3 The process by which they received a copy of the signed consent from the birth mother (for example, by email) and that they are satisfied that the document they received was the document they witnessed being signed by AVL.

[21] In this case [Alina]'s gestational surrogate, [Sophie Meskhi], who is not genetically linked to [Alina] in any way, has signed a document which has been translated confirming her consent to the adoption process. The translation has been notarised. Her consent has been witnessed and under Georgian law once she gives birth to the child in her role as a surrogate, she has no legal relationship with it. In this case there was no biological relationship either. The surrogacy agreement sitting behind the court process underscores the consent provided.

[22] I am satisfied that the consent requirements have been met to my satisfaction in this case. An easier and more robust process would have been the one described above, which I endorse for future cases.

Fit and proper / Best interests and welfare

[23] I turn now to consider whether an adoption order is in [Alina]'s best interests and welfare, and whether the applicants are fit and proper people. The Court always turns to a social worker to make a recommendation on these matters. It is a rather uncomfortable enquiry for the Court to make, as it is a personal investigation into parents' lives in a situation when they are adopting their own biological child. But there are no issues in respect of the fact that these applicants are well equipped to be parents and are fit and proper people. They are assessed as such by the social worker, and I am wholly satisfied that they are. There is absolutely no issue that the adoption

order is in this child's best interests and welfare, she is their child, and the adoption order simply creates the legal scaffolding in New Zealand to confer parentage.

[24] In those circumstances I am satisfied that the adoption order should be made. The only question is whether I make it a temporary or a final order at the first instance. I am satisfied that there are special circumstances to justify a final order by virtue of the surrogacy process. There is no need for any monitoring by anyone and it is appropriate that the final order issue at the first instance.

[25] There will need to be a name change in respect of the birth certificate to include [Alina]'s mother's name as well. I direct that the birth certificate be issued with the name [Alina Raja Pardo], no hyphenation. The words "adoptive parents" are not to be on the birth certificate.

[26] I grant the application. I make a final adoption order in the first instance. I direct the social worker's report to be released to the applicants to form part of [Alina]'s birth story.

[27] Congratulations to you all.

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Judge B R Pidwell
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 08/11/2023