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-2023-004-000180
[2024] NZFC 3670

IN THE MATTER OF THE ADOPTION ACT 1955

AND

IN THE MATTER OF An application by

[RAYMOND THORNTON]
to adopt a child

Date: 30 October 2023

Appearances: M Casey KC for Applicant
A Hamilton for the Chief Executive (via AVL)
Z Lawson as Lawyer to Assist
J Butler as Social Worker

Judgment: 27 March 2024

JUDGMENT OF JUDGE A M MANUEL
FOLLOWING ORAL JUDGMENT OF 30 OCTOBER 2023 (REASONS)

Introduction

[1] On 30 October 2023 a final adoption order was made on the application of Mr [Thornton] to adopt [Penny Thornton][1] The reasons for making this order are explained in more detail in this judgment.

[2] The case had been set down for hearing on 24 May 2023 but was adjourned[2] because the documents filed raised concerns about whether s 11(b) of the Adoption Act 1955 (the AA) was met. This section requires the Court to be satisfied that the welfare and interests of the child will be promoted by the adoption. The concerns were over the lack of information potentially available to the child about her egg donor.

[3] [Penny] was born in the USA on [date deleted] 2022 via a commercial donor surrogacy agreement. She had been conceived with Mr [Thornton]'s sperm and eggs donated by an American donor initially identified to the Court only by her first name, [Anne]. [Penny]'s surrogate was Ms [Newman], and she was identified and gave her consent to the adoption order being made.[3]

[4] Mr [Thornton] had applied and been granted a "pre-birth order" from the local County Circuit Court on 29 July 2022. As a result he was recognised from birth as [Penny]'s legal guardian.

[5] Mr [Thornton] was pursuing adoption through the Family Court in New Zealand to secure New Zealand citizenship for [Penny]. He had built a life for himself in the USA and was residing in [location A], Maryland but he had been born and raised in [location B], New Zealand and had close family members in New Zealand. He was a citizen of New Zealand, the USA and the United Kingdom by descent.

Social worker's report and submissions for applicant

[6] The social worker's report was generally supportive of an adoption order being made but commented that:

> **Process:**
>
> Like other intending parents [Mr [Thornton]] did his best to ensure he had an appropriate match with both his surrogate and egg donor … He advised that

[1] *Re [Thornton]* [2023] NZFC 12018, 30 October 2023.
[2] *[Raymond Thornton]* FAM-2023-004-000180, 24 May 2023.
[3] Under s7 of the AA, the consent of the surrogate but not the egg donor is required before any adoption order is made.

his egg donor match is confidential. He was only willing to share her first name, [Anne]. [Mr [Thornton]] only knows the information provided by the agency about [Anne]. He has a record of both [Ms [Newman]'s] and [Anne]'s profile.

[Mr [Thornton]] was required to undertake a psychological assessment as part of this process as was [Ms [Newman]] and [Anne]. Part of this process was to also come to an agreement about their role in the pregnancy, birth and the surrogate's role after birth.

Egg donor-[Anne]:

…

[Mr [Thornton]] is aware that [Anne] has donated her eggs to others, which has resulted in two children. She also has two eggs frozen. [Mr [Thornton]] said there is no way he will know who his child is genetically related to. This information is not shared with others, who use the same donor. He has had some contact with [Anne] via the online agency system. He has not broached the prospect of email contact in the future with [Anne]. She has agreed to provide the required information for the adoption proceedings and any citizenship requirements. It appears the information sharing between [Anne] and [Mr [Thornton]] is finite. They have had a recent online exchange, whereby [Mr [Thornton]] shared some information about [Penny], and they discussed physical characteristics.

There seems little thought in this type of commercial process to the long term needs of the child, focusing more on the adult desire to be a parent. In this work, it is a challenge, unless someone is personally affected by adoption, to understand that a child may have a deep desire to have a connection to the person who they [are] genetically related to, and this is not fostered or supported by these commercial donor surrogacy arrangements. From our experience, there are parallels to the closed adoption era whereby many adopted children/adults suffer from ambiguous loss. This is described as –

"As a loss that occurs without a significant likelihood of reaching emotional closure or a clear understanding. This kind of loss leaves a person searching for answers, and thus complicates and delays the process of grieving, and often results in unresolved grief."

The impact on the child, due to the lack of connection to their genetic history and the life-long wonderings will be something that [Penny] and [Mr [Thornton]] are going to have to navigate.

[7] And in a memorandum in support of the application adoption, Mr [Thornton]'s lawyer submitted that:

…it is in the best interests of [Penny] to be legally connected to the parent who planned for her and to whom she is genetically related. **For [Penny], Mr [Thornton] is the only parent she knows, is intended to know and who already loves her**. An adoption order will ensure that outside the United States, her parental reality will align with the reality of her day to day life and emotional attachments.

(emphasis added)

Lawyer to assist

[8] After the case was adjourned, lawyer to assist was appointed to enquire and report on whether "the proposed adoption was in accordance with the rights of the child particularly identity, in relation to Tikanga, and international conventions ratified by this country.

Further documents from applicant

[9] Before lawyer to assist's report was received Mr [Thornton] filed a further affirmation and a further memorandum in support of his application.

[10] In his further affirmation Mr [Thornton] provided the egg donor's family name, her general location and confirmed that he had requested and received a signed copy of the egg donation agreement (the copy he held previously had referred to her only by her first name and her initials [AM]).

[11] He confirmed that from [Anne]'s profile he knew the colour of her hair and eyes, her height, her parents' ethnicity, her age and date of birth and her education history. From her psychological evaluation he had an insight into her motivation and "some aspects of her character and personality." He had a detailed health history for both her parents and her grandparents. He knew that she was a sibling and that her sibling did not have any medical conditions. He had chosen [Anne] as an egg donor in part because her profile indicated that she was comfortable with an open or semi-open egg donation agreement. He had signed an agreement styled as an "open egg donation agreement." The intention of the agreement was not to necessarily require the parties to have actual contact but to facilitate the exchange of information. The agency had established a portal where they were able to contact one another once a pregnancy was confirmed. He had started a line of communication and provided details. He stated that he sincerely hoped that communication would become "a natural and regular thing with [Anne] over time." He said he fully intended to share this information and [Anne]'s profile with [Penny] who would know the full story of her birth. He had a photo on the fridge of [Penny] being held by her surrogate with a photo of [Anne] alongside. He acknowledged that he needed to be given time to develop contact with [Anne] stating "I don't want to push her or appear too demanding and as a single father I don't want to do anything that looks as though I'm overstepping boundaries."

[12] He said he was surprised that the social worker had described his contact with the egg donor as "finite." In the further memorandum of counsel it was submitted that this was not an apt description and it could be better described as "a work in progress."

Report from lawyer to assist

[13] In the report from lawyer to assist, [Penny]'s right to information about her egg donor was contrasted with the position of children conceived with donated eggs or sperm in New Zealand. They had the right to specified information about the donor, while [Penny] did not.

[14] The specified identity information is set out in s 47 of the Human Assisted Reproductive Technology Act 2004 (HARTA) as follows:

> **47 providers must obtain and accept information about donors**
>
> (1) When a donor donates a donated embryo or a donated cell to or through a provider, the provider must ensure that the provider has obtained the following information about the donor or, as the case requires, about each donor:
>
> (a) the donor's name:
>
> (b) the donor's gender:
>
> (c) the donor's address:
>
> (d) the date, place, and country of the donor's birth:
>
> (e) the donor's height:
>
> (f) the colour of the donor's eyes and hair:
>
> (g) the donor's ethnicity and any relevant cultural affiliation:
>
> (h) in the case of a Māori donor, the donor's whanau, hapu, and iwi, to the extent that the donor is aware of those affiliations:
>
> (i) any aspects, considered significant by the provider, of the medical history of—
>
> (i) the donor; and
>
> (ii) the donor's parents and grandparents; and
>
> (iii) the donor's children (if any); and
>
> (iv) the donor's siblings (if any):
>
> (j) the donor's reasons for donating.

(2) The provider must accept any information that is offered by a donor that updates or corrects any of the information about the donor obtained under subsection (1).

(a) Identity information

[15] The further affirmation of Mr [Thornton] confirmed that almost all the s 47 information had been provided as follows:

Subsection in s 47 HARTA 2004	Donor information type	Does the Applicant have this information to provide to [Penny]?
(a)	the donor's name	Yes
(b)	the donor's gender	Yes
(c)	the donor's address	No - Physical address Yes - Email address and phone number
(d)	the date, place, and country of the donor's birth	Yes
(e)	the donor's height	Yes
(f)	the colour of the donor's eyes and hair	Yes
(g)	the donor's ethnicity and any relevant cultural affiliation	Yes
(h)	in the case of a Māori donor, the donor's whanau, hapu and iwi, to the extent that the donor is aware of those affiliations	N/A – Not a Māori donor
(i) (i)	any aspects, considered significant by the provider, of the medical history of the donor	Yes
(i)(ii)	any aspects, considered significant by the provider, of the medical history of the donor's parents and grandparents	Yes
(i)(iii)	any aspects, considered significant by the provider, of the medical history of the donor's children (if any)	No - Donor has donated eggs for another family and twins were born around the same time as [Penny].
(i)(iv)	any aspects, considered significant by the provider, of the medical history of the donor's siblings (if any)	Yes
(j)	donor's reasons for donating	Yes

[16] Lawyer to assist concluded that the identity information which the applicant had in his possession met all the requirements of s 47 with the exception of subs (i)(iii). Mr [Thornton] was aware that [Anne] had donated eggs to another family and twins had been born around the same time as [Penny].

[17] The donor agreement Mr [Thornton] entered into with [Anne] did not provide that Mr [Thornton] was entitled to medical information about any other children who had been conceived with [Anne]'s eggs. It would be possible however for Mr [Thornton] to request this information through the agency, which held the contact details of all the parties involved. The parent or parents of the twins may be open to providing medical information concerning the twins, possibly in exchange for medical information concerning [Penny].

[18] Both lawyer to assist and the lawyer for Mr [Thornton] submitted that in addition to s 47 of the HARTA identity information, the applicant had photographs and a detailed psychological evaluation of [Anne]. This information was surplus to the requirements of s 47. Mr [Thornton] had confirmed at paragraph 7 of his further affirmation that he fully intended to share all the identity information in his possession with [Penny] when she was older and had the ability to understand.

[19] If [Penny]'s conception had taken place in New Zealand, the New Zealand based treatment provider would be obliged under s 48 of the HARTA to provide the identity information in s 47 about [Anne] to the Registrar of Births, Deaths and Marriages. [Penny] would then be able to request the identity information (independently from her father) from the Registrar of Births, Deaths and Marriages under s 50 when she turned 18, or alternatively she could request access to the identity information from the Family Court under s 65 at the age of 16. These provisions were in place to ensure that donor-conceived children ultimately had access to donor identity information and they were not reliant on their parents for disclosure.

[20] In this case Mr [Thornton] had affirmed that he intended to provide all the identity information to [Penny]. The Court was reliant on his assurance.

(b) Right to information about donor siblings

[21] As stated, [Penny] has two half-siblings, with the identity information held by the agency, a Californian-based treatment provider. Had [Penny]'s conception taken

place through a New Zealand based provider she would be entitled under s 58 to request identity information about her donor's siblings from the Registrar of Births, Deaths and Marriages at the age of 18. The consent of the donor's siblings would be required before the information could be released. Donor siblings can refuse to identify themselves to each other.

[22] Given Mr [Thornton] had affirmed his intention to be open with [Penny] about [Anne]'s identity, he may also be supportive if [Penny] wished to seek identity information about her half-siblings, but as this information was not in his possession he would need to request it from the agency.

(c) Is the proposed adoption in accordance with Tikanga?

[23] In *Ellis v R* the Supreme Court of New Zealand held that Tikanga has been and will continue to be recognised in the development of the common law of New Zealand in cases where that is relevant.[4]

[24] Counsel to assist identified the most relevant Tikanga principles as whakapapa and whanaungatanga. Whilst lawyer to assist did not provide a detailed analysis of the meaning of these principles it was stated, broadly speaking, that whakapapa refers to genealogical connections and ancestral links which connect individuals and emphasises the importance of understanding and acknowledging one's roots, ancestors and relationship with others. Whanaungatanga refers to kinship, connectiveness and fostering relationships. It emphasises the importance of building and maintaining strong relationships within families, communities and wider society. It encourages co-operation, collaboration and mutual support.

[25] Lawyer to assist concluded that given the extent of information about [Anne] held by Mr [Thornton], and his affirmed intention to provide the information to [Penny], the proposed adoption was generally in accordance with the Tikanga principles of whakapapa and whangataunga. In time [Penny] would be provided with identity information about [Anne] including information about the genealogical and ancestral connections between her, [Anne], and [Anne]'s parents and siblings. She may also be able to contact [Anne] if she chose to and potentially develop a relationship with her as well as [Anne]'s parents and siblings.

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[4] *Ellis v R* [2022] NZSC 114.

[26] While there may be limitations on obtaining identity information about [Penny]'s half-siblings, there was not a complete prohibition on access to this information.

(d) International conventions ratified by New Zealand

[27] Lawyer to assist identified the United Nations Convention on the Rights of the Child (the Convention) as the only relevant international convention ratified by New Zealand. The relevant articles include:

(a) Article 7 - which provides that the child shall have the right, as far as possible, to know and be cared for by their parents.

(b) Article 8 - which provides that state parties shall respect the right of the child to preserve their identity.

(c) Article 9(3) - which provides that state parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

(d) Article 21 - which provides that state parties should ensure that the best interests of the child are the paramount consideration in adoption proceedings.

[28] The 'Verona Principles' are also applicable and relevantly provide as follows:[5]

> Principle 11: Protection of identity and access to origins
>
> 11.1 Every child should be able to enjoy and exercise their right to preserve their identity (*nationality, name and family relations*) with appropriate assistance and protection. The child's ability to preserve their identity, including their genetic, gestational and social origins, has an on-going, lifetime impact on the child and future generations, in particular from the perspective of the child's right to identity, health and cultural rights.
>
> 11.2 States have a duty to ensure that every child born through surrogacy has the opportunity to access information concerning their identity, including genetic, gestational and social origins. This should include access to information as an adult. States should assist in this process.
>
> 11.3 Surrogacy arrangements should only involve surrogate mothers who provide verified and accurate identifying information about themselves, and who agree that their identifying information may be transmitted to persons to whom they gave birth.

[5] Principles for the protection of the rights of the child born through surrogacy (Verona Principles). The International Social Service, 25 February 2021.

> 11.4 Human reproductive material in surrogacy should only be used from persons who provide verified and accurate identifying information about themselves, and who agree that their identifying information may be transmitted to persons with whom they have a genetic connection.
>
> 11.5 In instances where children are born through surrogacy, open surrogacy arrangements should be encouraged, in order to provide a safeguard for protection of identity rights and access to origins. States should therefore encourage education about the benefits of post birth contact between the child born through surrogacy, surrogate mother, intending parent(s) and extended family, persons providing reproductive material where such opportunities exist.
>
> 11.6 States should ensure rigorous collection and storage to preserve in perpetuity identity information relating to all surrogacy arrangements. States should clarify under what conditions identity information will be stored and kept up-to-date, who can access this information, and when and how this information can be accessed. This should include preservation of data when changes occur, such as when intermediaries close down.
>
> 11.7 States that permit surrogacy should establish and maintain registers and national records containing information about the genetic and gestational origins of children born through surrogacy, to which children can seek access, in accordance with the age and maturity of the child and subject to conditions set out in national legislation. States should appropriately train persons collecting, storing and facilitating identity information in the context of surrogacy.
>
> 11.8 Consistent with the best interests of the child, intending parent(s) undertaking surrogacy should ensure, from the earliest opportunity, the collection and preservation of all available information relevant to the child's identity, including all aspects of their origins.

[29] Lawyer to assist submitted that the proposed adoption was generally in accordance with the Convention because it would not unlawfully interfere with [Penny]'s rights to her identity, nationality or family relations. While there might be limitations on obtaining identity information about her half-siblings, there was not a complete prohibition on access to this information.

(e) Lawyer to assist's conclusion

[30] Lawyer to assist concluded that the proposed adoption was broadly speaking in accordance with [Penny]'s rights regarding identity, Tikanga and the Convention.

Findings, obiter dicta comments

[31] The information provided in the further affirmation and memorandum for Mr [Thornton] and the report from lawyer to assist was sufficient to satisfy this Court that s 11(6) of the AA was met.

[32] Adopted children benefit from knowledge and understanding of their birth parents and families. Where an adopted child is born as a result of a surrogacy arrangement, these considerations apply to egg and sperm donors and surrogates.

[33] Two academic articles about adoption (albeit not donor surrogacy arrangement adoption) are cited in support of this proposition as follows:[6]

(a) There is now considerable evidence that adopted children benefit from some knowledge and understanding of their birth family and antecedents, and that past practices, in which adoption was shrouded in secrecy, were detrimental to the wellbeing of adoptees as well as their birth parents (Brodzinsky, 2006; de Rosnay et al., 2015; Triseliotis, 1973).

> Several studies have shown that a sense of belonging and connectedness are key factors in enabling young people to make the transition from adolescence to adulthood (Chandler et al., 2003; Ward, 2011) …
>
> The secrecy surrounding traditional, closed adoption is now known to be damaging to adoptees' sense of self (Brodzinsky, 2006; Kenny et al., 2012). Data from the interviews show how transparency about their origins and continuing contact with birth family members enabled adoptees to develop a strong sense of identity as they made the transition from one family to another. … Those who had not had such basic connections could feel cut off… Not only did these adoptees feel they had 'missed out on finding out who I am', they also found they had insufficient information about their family medical history and their genetic inheritance.
> …
> Continuing contact with birth parents helped adoptees develop a strong sense of identity and understand where they had come from. This strengthened their sense of psychological permanence, enabling them to feel that they belonged to their past and their past relationships as well as to their present ones. It also prevented them from idealising their birth parents, helped them come to terms with their shortcomings, and decide whether they wished to continue with the relationship. There is only minimal evidence from this study to indicate that continuing post-adoption contact risks jeopardising adoptees' relationships with their adoptive parents or destabilising the placement (see also Neil et al., 2015).
>
> (footnotes omitted)

(b) Direct face-to-face post-adoption contact has the potential psychological benefits of allowing the child and their birth relatives to maintain their existing relationship, providing reassurance to the child and the birth parents about each other's welfare, helping the child to deal with issues of identity and loss, and helping the child manage effectively their dual connection to both their adoptive family and their birth family.

> …
> Few, if any, professionals now support the general principle of no post-adoption contact whatsoever.
> …
> 3. No contact post-adoption

[6]Harriet Ward and others "Post-adoption Contact and Relationships with Birth Family Members" in Outcomes of Open Adoption from Care (Palgrave Macmillan, Cham, 2022) 151; Richard Woolfson "The psychology of post-adoption contact" (2014) 59(5) Journal of the Law Society of Scotland).

> …
> There is substantial research evidence that no contact after adoption is psychologically unhealthy for the child because it blocks the child's need to discover their biological roots and to find out the reasons why their adoption took place. Adopted children who have no contact with their birth parents describe how this secrecy leaves them feeling that part of themselves is missing, that they are powerless and that they don't have the same rights as everyone else in society to access their own biological information. Furthermore, the strategy of no contact post-adoption can result in the child experiencing "genealogical bewilderment".
>
> There is also the risk that denial of the child's genetic background, and the corresponding failure to acknowledge its difference from the child's adoptive background, could have a negative impact on family communications. Where adopted children have no contact with their natural parents, they often experience identity conflicts which can lead to shame, embarrassment and loss of self-esteem, and they may worry they were given away because there is something wrong with them.
>
> (footnotes omitted)

[34] New Zealand case law concerning arrangements with surrogates and egg or sperm donors appears to have focused on the adoptive parents willingness and ability to be open with the child and encourage cultural connection and identity. This has tended to extend to information about their birth parent but not to contact with them.

[35] The issue of a child not having an opportunity to locate their biological mother was raised in the 2013 case of *P v P* where the Family Court held:[7]

> [15] The third matter is that the children will not have an opportunity to be able to locate their biological mother if in the future they wish to find out about their maternal genetic makeup given the anonymity in which the egg donation was undertaken. Ms Casey has addressed me on that this morning. She says that this is an issue in overseas surrogacy matters and it is a gap in the matters of this case, however the important thing is that the children are with their biological father and that they are in a family where they are all genetically linked. In the overall scheme of things it seems to me that this is not a factor that should stop any adoption order being made. It is a fact that in New Zealand it is possible if one wants to trace an egg donor but in India it is not possible, and that is nothing we can change in this Court.
>
> …
>
> [17] The applicants are committed to being open and transparent about the process. This is a unique situation for these young girls and as they grow older and once they are old enough to comprehend their parents will explain it to them. It would assist and to some degree perhaps help them overcome the issue of not being able to contact the egg donor, if the social worker's report of 11 January 2013 was to be provided to them for that purpose. It is extremely detailed and as such it is not a report that one could easily remember the details of. I therefore direct that the report of 11 January is released to the applicants for the purposes only of discussing it with or

[7] *P v P* [2013] NZFC 2344.

> showing to their girls when they are old enough and at their discretion to discuss the issue of their adoption and surrogacy.

[36] In the 2023 case of *[Re Chang]* the social worker and the lawyer for Oranga Tamariki identified the importance of establishing the ethnicity of the genetic mother and the Court held as follows:[8]

> [36] In counsel for Oranga Tamariki's submissions the Court is referred to New Zealand's ratification of the United Nations Convention on the Rights of Children (UNCROC). Specifically, Article 7 of UNCROC provides that the children shall have the right, as far as possible, to know and be cared for by his or her parents. Article 8 of UNCROC provides that state parties shall respect the right of children to preserve his or her identity. Article 9(3) provides that state parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the children's best interests. The Court is referred to the fact that the Ministry of Justice is considering a reform of the adoption law which echoes these principles. The submission is made that essentially the children have rights under UNCROC to know and have contact with their parents (as far as possible), know their identity, and preserve their identity. In this regard it is noted the egg donor is identified as being of "Brazilian ethnicity" in the s 10 report. This assignation of Brazilian is a nationality, not ethnicity. Although this is not a barrier to s 11(b) it may be something the applicants may be interested in exploring in informing their children.

[37] In the 2022 case of *[Re Shun]* the father did not know the egg donor and had lost contact with the surrogate. The surrogate mother's consent was dispensed with because she played no role in parenting the child. The Family Court Judge made an adoption order finding that:[9]

> [17] There is clearly the appropriate cultural connection as well. Mr [Shun] understands the importance to [Jia] of knowing his birth story. He has made a commitment to raise [Jia] knowing his special birth story, one that he will be proud of, I am sure. He will gain knowledge about his personal identity, that he was born of a surrogate in very special circumstances because of his father's love and commitment to bringing him into the world.
>
> [18] I have no doubts that Mr [Shun] will ensure that [Jia] does know his full birth story and be proud of it.

[38] A 2022 Law Commission report on surrogacy included discussion of Tikanga and a te ao Māori view of surrogacy in relation to Māori tamariki as follows:[10]

> 2.63 With these observations in mind, we suggest that the tikanga principles of whakapapa and whanaungatanga are of central importance to considering surrogacy from a te ao Māori perspective. We also suggest that the tikanga principles of tapu, mana, manaakitanga, kaitiakitanga and aroha are also likely to be relevant. We discuss these principles below. We do not suggest our

[8] *[Re Chang]* [2023] NZFC 6916.
[9] *[Re Shun]* [2022] NZFC 2980.
[10] Law Commission Te Kōpū Whāngai: He Arotake, Review of Surrogacy (NZLC 146, 2022).

> description of this tikanga is comprehensive, nor do we purport to set out specific tikanga practices. We give this explanation to underpin our later references to tikanga in support of the recommendations we make in this Report.
>
> …
>
> 2.85 It is said that mana, kaitiakitanga and rangatiratanga are all infused in the maintenance and enhancement of whakapapa. Mead has argued that ideally a new idea (which might include the modern practice of surrogacy) should maintain, enhance or improve mana and lift everybody who participates in the event.
>
> …
>
> 2.89 In this section, we have sought to highlight tikanga principles that we suggest are relevant in the context of surrogacy. How tikanga responds to surrogacy is a matter that requires further consideration by Māori, as we explain below. Nonetheless, we suggest that it is likely that tikanga imposes obligations on the parties to a surrogacy arrangement and their whānau to protect and care for surrogate-born tamariki Māori. The principles of whakapapa, whanaungatanga, manaakitanga, kaitiakitanga and aroha indicate this. Obligations may also fall on whānau to care for and enhance the mana of a surrogate and intended parents, given the responsibilities they have in relation to the surrogate-born child. *Complex questions may arise about the application of tikanga when not all parties involved in the creation of the child are Māori.*

[39] A mismatch between the Pakeha origins of the AA and Tikanga was described in a recent academic article as follows:[11]

> **Background Behind the Adoption Act**
>
> The 1955 Act reflects the 'complete (clean) break' theory. This theory states that all children are born a 'blank slate' and any 'shameful' genetic traits of the child could be defeated by a 'nurturing' upbringing. In effect, the Act provided that on adoption, all contact and knowledge of the child's biological parents was to be severed. Effectively, a child was treated as property – where all the legal rights over the child were conceded by the biological parents and transferred to the adopting parents. Family arrangements that did not conform to the above narrative were excluded from recognition at law by the Adoption Act 1955.
>
> **The stance of Māori Tikanga Within the Current Adoption Regime**
>
> The way some Māori view parenting is strikingly different from that provided for in the current adoption scheme. They do not view tamariki as property, but as taonga, a treasure which is to be treated with aroha (love) and whakaute (respect). Raising tamariki is viewed as a collective responsibility by whānau, hapū, and iwi, rather than the sole responsibility of the biological parents:
>
> "Māori view many homes but still one whānau".
>
> Consequently, the physical, social, and spiritual wellbeing of a child is attributed to this wider whānau.

[11] Jessica Macdonald and Maddie Story "The Adoption Act 1955 – The Statutory Guillotine from Tikanga and Whakaapa" (5 August 2020) Law for Change Canterbury www.lawforchange.co.nz.

> This view of parenting is reflected in Māori customary adoption arrangements, 'whāngai'. The taitamaiti is raised by mātua whāngai, whānau other than their biological parents. The matua whāngai and biological parents maintain an ongoing relationship with the taitamaiti to ensure that they "[do] not lose their culture, links with their birth parents or their rights of succession". The retention of this connection allows the tamaiti whāngai to develop a sense of identity, belonging, and connection with their birth heritage.
>
> The development of our identity begins from a young age. Having a strong sense of identity is something that brings tamariki comfort and security. If a taitamaiti has a clear sense of 'who they are', it makes it easier for them to make friendships and connect with others. The 'narrative identity theory' explains that humans construct identity off their coherent life story. For Māori, a large contributor to identity is their connection to their whakapapa and to the land. This is emphasised in the use of the pepeha at the beginning of a hui. Where tamariki are deprived of knowledge about their roots or excluded from lived cultural experiences there is a clear obstruction on the development of identity.
>
> (footnotes omitted)

[40] I was unable to find any discussion of the right to identity information from an egg donor in relation to Tikanga principles or te tiriti obligations. However there is broad discussion of the application of the Oranga Tamariki Act 1989 (OTA) in adoption decisions in the 2022 case *[Re Chapman]*, in which s 7AA of the OTA was applied to adoption as follows:[12]

> [33] [Valeria] is Māori pēpē subject to an application for an adoption order. To proceed with an adoption requires social workers employed by Oranga Tamariki to investigate the circumstances of her birth, her birth mother or birth father and the applicants' personal and family circumstances, family and financial circumstances. Adoption social workers establish and record [Valeria]'s adoption journey which is directly connected to birth, parents, and applicants. My view is by virtue of the involvement of social workers employed by Oranga Tamariki, I consider it appropriate that the principles contained in the Oranga Tamariki Act provide an overlayer which I must consider as I come to this application for an adoption order. It also gives effect and meaning to the principles of the Treaty of Waitangi, or Te Tiriti o Waitangi, mana tamaiti, the dignity and preservation of [Valeria], tamariki of [iwi deleted], but her own intrinsic self.
>
> [34] What I observe as that through the rope of connectedness to whānau, [Valeria] gains the knowledge and strength of her tupuna through whānau. I am going to make specific reference to previous decisions that you have heard discussed today, raised analysed by Mr Jefferson, by both judges Sharon Otene and Doogue J.
>
> [35] As you have heard, for my part, I think there are parallels in the considerations and the legal issues that they analysed that then have, as I say, a parallel with some of the legal issues that I consider in making an adoption order. I cannot see [Valeria] in isolation from her whānau. It may not be necessary that every adoption of a child or tamariki requires consideration of

[12] *[Re Chapman]* [2022] NZFC 6260.

> the principles of the Oranga Tamariki Act, it may be a view not held by all but, as I see it and accept, [Valeria], the tamariki who is at the heart of this application, and bearing in mind the profound legal relationships that are crafted in the making of an adoption order to honour the mana of [Valeria] and give effect to the principals [sic] of the Treaty of Waitangi, I have considered it appropriate to give consideration to the s 7AA principles.

[41] In the 2016 case *Re Bartha* the Family Court discussed the disconnect between the Pakeha concept of parents being legal guardians and the child being a child of whanau and hapu as follows:[13]

> [20] The effect of an adoption order is to create a new parent-child relationship between the adoptive parents and the child and to extinguish the relationship between the birth parents and the child. All other relationships are affected accordingly.
>
> [21] This reflects the more traditionally 'European' concept that responsibility for a child lies with the parents as legal guardians. This concept is inconsistent with traditional Maori concepts that a child is a child of the whanau and hapu. The Maori concept has been described thus:
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> The Maori child is not to be viewed in isolation, or even as part of nuclear family, but as a member of a wider kin group or hapu community that has traditionally exercised responsibility for the child's care and placement.
>
> [22] In commentary and case law dealing with the issue of the adoption of Maori children Dame Joan Metge's paper "Ko Te Wero – The Maori Challenge" in Family Court, Ten Years On (NZ Law Society, 1991) at 24-25 has been and continues to be frequently cited:
>
> …
>
> > In Maori thinking, children are not the exclusive possession of their parents. Indeed the ideas of possession and exclusion, separately and in association, outrage Maori sensibilities. Children belong to the whanau (and beyond that to the hapu and iwi) as members, not as possessions. They are taonga, highly valued "treasures" held collectively and in trust for future generations. In whanau which are functioning as they ought, parents are expected and expect to share the care and control of their children with other whanau members. Sometimes, especially with the eldest, this means relinquishing their daily care, for a short or long period, to a grandparent or other relative. Generally it means that other whanau members carry out the same functions as parents do, as occasion arises and in their presence as well as their absence.
>
> [23] In addition, the decision of the Full Court of the High Court in BP v D-GSW [1997] NZFLR 642 has made clear that the Adoption Act is "….to be interpreted as coloured by the principles of the Treaty of Waitangi" (at 646). The Court accepted the contention of counsel for the Maori appellant that:
>
> > the cultural background of the child is significant and that, in addition, the special position of a child within a Maori whanau, importing as it does not only cultural concepts but also concepts which are spiritual and which relate to the ancestral

[13] *Re Bartha* [2016] NZFC 7039 at [20]-[23].

> relationships and position of the child, must be kept in the forefront of the mind of those persons charged with the obligation of making decisions as to the future of the child. Ibid at 647.

[42] In *[Re Waller]*, a recent Family Court case commenting on the current state of Māori children and adoption, it was held that :[14]

> [5] One issue that I raised with counsel and, in part, with Ms [Fox] and Mr [Vaughan] is that raised by the case of *Barton-Prescott v Director-General of Social Welfare*.[15] That is, all Acts dealing with the status, future and control of children are to be interpreted as coloured by the principles of the Treaty of Waitangi.
>
> [6] [Tana] is clearly Māori. That is clearly supported by Ms [Fox] who is of [iwi deleted] descent. She and Mr [Vaughan] have provided, in their evidence before the Court, their plan which will be carefully managed with the assistance of a psychologist to inform [Tana] of his whakapapa and where he comes from, should they be able to discover that. They went on to say that while they do not have his whakapapa yet, they undertake to give him his reo Māori. [Tana]'s name will also give him a place to stand within [his iwi].
>
> [7] It is not often that the Court is asked these days to make adoption orders, so assessments as to fitness, being a fit and proper person and arrangements that promote the welfare and best interests of Māori children are not often discussed …

[43] Currently adoption law reform is underway and the AA has been described as an outdated piece of legislation which "no longer meets the needs of our society or reflects modern adoption best practice." Reform discussions have described the withholding of information, as prescribed by s 23, as morally defunct. Submitters were vocal about the right to identity and information and described how being refused access to adoption information had caused them to experience real harm.[16] The surrogacy report referred to above is part of this reform.

[44] The issue of a child having access to identity information and the opportunity to contact their birth parents (or egg or sperm donor or surrogate) is in tension with the rights of various parties to privacy under the existing AA. In *Re Adoption of S* the Family Court held that:[17]

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[14] *[Re Waller]* [2023] NZFC 7844
[15] *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179.
[16] Ministry of Justice *A new adoption system for Aotearoa New Zealand: Discussion Document* (Wellington, June 2022) at 52 – 54.
[17] *Re Adoption of* S [1996] NZFLR 552 (FC).

> It is nevertheless clear from the context of the Adoption Act 1955 (even as amended in 1985) that as a general rule adoption records are to be kept secret; that the exceptions to the rule are to be strictly limited; that the discretion of the Courts is not unfettered; and that the general policy of the [AA] to preserve the anonymity and confidentiality of the various persons affected by the adoptions should not be lightly eroded.

Dated at Auckland this day of

A M Manuel
Family Court Judge