Adoption and surrogacy in New Zealand

G W Stewart*

In September 1990, the District Court in Nelson delivered a judgment in respect of an application to adopt a child born pursuant to a surrogacy arrangement. That arrangement was the product of an advertisement by the prospective parents and subsequent negotiations between them and the responding surrogate mother. This casenote discusses the Court's approach to the issues raised by the Adoption Act 1955.

I INTRODUCTION

Although essentially a decision on an adoption application, the recent judgment of Judge P J McAloon in *Re P (adoption: surrogacy)*[1] demands attention for its treatment of the surrogacy aspect of this case. It is a judgment that is as important for what it does not say as much as for what it does.

II BACKGROUND

Mr and Mrs P were the applicants. Mrs P was medically unable to conceive children, and so the couple placed the following advertisement in the personal column of a Sunday newspaper:[2]

> Adoption. Nelson couple desperate for a child. Can you help.

M replied, and an arrangement was reached whereby M would conceive and carry Mr P's child (C). Conception was achieved by natural means in July 1986. In January 1987, with M 6 months pregnant, the parties entered into a written agreement which covered the matters of paternity, guardianship, maintenance and custody:

- Paternity: the agreement acknowledged Mr P as the child's father;
- Guardianship: it was agreed that Mr and Mrs P would be the child's guardians from birth. It was further agreed that M would relinquish guardianship rights from 7 days after the child's birth.
- Maintenance: it was agreed that Mr P would pay M $375 per week from 26 July (presumably the date of conception) until the birth of the child, a total of 40 weeks on the facts. Mr P would also pay all birth and legal expenses. No further or other payments would be required of Mr P.

---

* Lecturer in Law, Victoria University of Wellington.

1 [1990] NZFLR 385.

2 The advertisement is quoted in two different versions in the judgment. One omits the prefatory "Adoption". The advertisement contained that preface.

- Custody: M agreed to give custody of the child to Mr and Mrs P as soon as she received a specified doctor's certificate stating that no physical harm to the child would result from the child being put into the care and custody of Mr and Mrs P.

The agreement made no reference to the question of adoption. C was born in April 1987 at the home of Mr and Mrs P, and has remained in their custody since then. The birth certificate shows M as the birth mother and Mr P as the birth father. M signed a consent to adoption in November 1987.

III IMPORTANCE OF NATURAL CONCEPTION

The fact of natural conception eliminates the possibility of the application of the Status of Children Amendment Act 1987, and its presumptions regarding paternity in circumstances of conception resulting from certain medical procedures.[3] Accordingly, M's husband, should one exist,[4] would not be the presumed father. Nor would he be such under the Status of Children Act 1969, section 5, as there was "evidence to the contrary", namely the birth certificate showing Mr P as the father.[5] There was also the agreement signed by Mr P and M which, if signed before a solicitor, would be prima facie evidence of Mr P's paternity.[6] Even without the written agreement, then, M would be the natural and legal mother, and Mr P the natural and legal father. Accordingly, Mr P would be liable to maintain C,[7] and possibly also to meet the expenses of M's pregnancy.[8] The judgment does not refer to those points, but they support Judge McAloon's finding (below) that the payments were "maintenance properly so called".[9] In the absence of the written agreement, Mrs P would have no rights or obligations in respect of C.

IV PROCEEDINGS

In December 1987, in response to an application by Mr and Mrs P to adopt C, Judge Seeman made an interim adoption order. That order was not made final after the customary 6 months. In June 1989, the matter came before Judge McAloon, who ruled that the interim order had lapsed[10] and that a new application should be completed. That done, the matter returned to Judge McAloon in September 1990 for consideration.

---

3 Briefly, the 1987 Amendment Act provides that in the event of certain medical procedures, where conducted with the husband's consent, the husband, not the donor, shall be the father.

4 De jure or de facto: Status of Children Amendment Act 1987, s2.

5 Status of Children Act 1969, s8(1).

6 Above n 5, s8(2).

7 Family Proceedings Act 1980, s73 (1)(d) and/or (f).

8 Above n 7, s78(2).

9 Above n 1, 387.

10 Adoption Act 1955, s15(1)(c).

V ISSUES

Three provisions in the Adoption Act 1955 required Judge McAloon's attention: section 25 (prohibition of payments in consideration of adoption), section 26 (restriction upon advertisements), and section 11 (restrictions on making of orders in respect of adoption).

A Section 25

> Except with the consent of the Court, it shall not be lawful for any person to give or receive or agree to give or receive any payment or reward in consideration of the adoption or proposed adoption of a child or in consideration of the making of arrangements for an adoption or proposed adoption.

His Honour's judgment indicates that there were two matters to be considered in section 25. In dealing with them, the learned judge oscillated between a literal and a liberal interpretative approach to the document and the section under scrutiny. (See also the approach to the advertisement and section 26, below.) Although in this case the ends to that approach are to be welcomed, those means give rise to some reservations.

1 Does the payment relate to an adoption?

A literal interpretation of the written agreement was applied in respect of this issue. Payment in this case was covered by the written agreement of January 1987. Read literally, that agreement "contain[ed] no reference in any of its clauses to the possibility of an adoption".[11] Further, the learned judge was "prepared to regard the payments as maintenance properly so called",[12] rather than the price paid for an adoption. On those (related) grounds alone a ruling could have been made that there had been no breach of section 25, with no need to touch upon the second matter of the nature of the payment (see 2 below).

But quaere, is that literal interpretation necessarily valid or acceptable? Assuming the payment itself to be of the nature covered by section 25, is it realistic to suggest that it was not given at least in consideration of the making of arrangements for an adoption or a proposed adoption, if not in consideration of the adoption itself? It is clear from the advertisement that Mr and Mrs P intended or wished to eventually adopt. Could it not reasonably be inferred from the terms of the written agreement that an absolute shift in parenthood status from M to Mr and Mrs P was intended? Could it not also be inferred that a simple addition of guardians was not the ultimate aim of the parties? The tenor of the agreement indicates an intention to remove M from the legal picture, and to insert Mr and Mrs P. Simple guardianship and custody rearrangements would go some way towards that, but M would retain certain parental rights (eg in relation to inheritance law). In the circumstances, then, it is suggested that the agreement was drafted against a backdrop of adoption, and in substance could be read to constitute the preliminary steps

---

11 Above n 1, 387.
12 Above n 11.

to eventual adoption. Instead, the learned judge dwelt on the omission of any express reference to adoption in the agreement, a focus on form over substance which puts a premium on drafting skills.

It is submitted that, on the facts of this case, there could as easily have been a finding that section 25 had been breached, despite the fortunate or prudent omission in the agreement of any reference to adoption which provided the court with the opportunity to hold otherwise. Yet a situation such as that of M and Mr and Mrs P is not the type of mischief at which section 25 is aimed. It is not an instance of the ogre of commercial baby-farming. Punishment of the parties would serve no useful purpose. On that point, the effects of a breach of section 25 are discussed at 3 below.

2 What is the nature of the payment itself?

Judge McAloon noted that "the payments are referred to as maintenance and assuming that M was to live on such payments and to support her other children, one could not say that there was any element of 'profit' in the payment."[13] There appear to be two reasons for that focus on the profit aspect. First - although the judgment does not expressly refer to this reason - Mr P was liable to maintain C, and so payments which met that obligation would be acceptable. Payments in excess of that - ie "profit"? - need not be. Second, his Honour had "had particular regard to the judgment of Latey J in *Re an adoption application (surrogacy)* [1987] 2 All ER [826] where an actual payment of £5000 was accepted by the Judge. He concluded likewise that there was no element of 'profit' in such a payment."[14]

With respect, it is submitted that Latey J's concern was with the relationship between the payment and the adoption, not with the 'profitability' of the payment itself:[15]

> The first question ... is whether ... there has been "any payment or reward" within the meaning of [the Adoption Act 1958(UK)] s50 "for adoption"... [From the evidence, what] does come out strongly is that what was wanted was a baby and that Mr and Mrs A should have it from birth to care for and bring up. And that it was on this that they were all concentrating. It was only after the payments had been made and the baby was born that any of them began to turn their minds in any real sense to adoption and the legalities.

It is Judge McAloon's decision, with its evident reluctance to interpret section 25 literally, which introduces the profitability consideration into that provision. The reasons for this are understandable. Mr and Mrs P (like Mr and Mrs A in the English decision) presented a case ill-deserving of judicial condemnation. There would be no harm, indeed much benefit, to the child by the application being successful. A generous interpretation of the provision assists. It also, however, moves towards depriving the

---

13 Above n 11.

14 Above n 11. *Re An Adoption Application (surrogacy)* was a decision of the Family Division of the High Court, England. The facts of that case were almost identical to those of the New Zealand case.

15 *Re an adoption application (surrogacy)* [1987] 2 All ER 826, 830.

section of any effectiveness. With respect, it is suggested that a preferable approach, which would not dilute the provision, would be for the court to hold that a breach had occurred but to give the court's consent to it under the opening words of section 25.

Having introduced that profitability consideration, it is not clear whether the learned judge based this part of his decision on the fact that the agreement did not refer or relate to adoption, or on the fact that the payment was held not to be profitable. The distinction is important for future cases. This case indicates that adoption agreements involving profitable payments breach section 25, and it holds that non-profitable surrogacy agreements (with no reference to adoption; ie the agreement in the present case) do not. Further to that latter point, although the court did not expressly endorse such agreements ("the Court is not required to determine the validity of the surrogacy contract"),[16] his Honour did not seize the opportunity to voice adverse judicial comment regarding them. Such restraint in this seminal New Zealand decision in this area of the law must bode well for those agreements.

The question is left open, however, regarding the status of:

(i) adoption agreements involving a non-profitable payment; and
(ii) profitable surrogacy agreements (with no reference to adoption).

Given the interpretation of "payment or reward" as requiring an element of profit, it seems that the former would not breach section 25. And with no reference to adoption, the latter would in all likelihood fall outside the scope of the section. The next question is whether either is enforceable. If consent to the adoption was validly given and not subsequently validly withdrawn, the non-profitable adoption agreement should be enforceable, subject to the satisfaction of section 11. The enforceability of the profitable (and indeed the non-profitable) surrogacy agreement is less clear. Should either, or both, of those types of agreement be condoned; controlled; enforced; prohibited? Should prohibition, if that is to be considered, apply only to commercial surrogacy arrangements (as with the Surrogacy Arrangements Act 1985 (UK)) or to private arrangements also? If there is some alternative, fundamental policy decisions such as those should not lie in the courts' domain. The alternative of parliamentary intervention in this area would be welcomed to eliminate the uncertainty before the questions arise, as they surely will, before the courts.

3 Effect of a breach of section 25

It is clear that Judge McAloon did not consider that a breach of section 25 would necessarily be fatal to an adoption application. Sections 25 and 26 do not invalidate arrangements made in their breach; rather, they "only refer to determination of whether the applicants are fit and proper persons to have custody and that ... is a question for the Court to determine on the facts".[17] With respect, a brief exposition of this would have been most helpful; as it stands it raises some questions. For instance, what assumptions

---

16 Above n 1, 387.
17 Above n 16.

about fitness follow from a finding that an agreement breached (or did not breach) section 25? It is not immediately clear why applicants who pay large sums of money to facilitate an adoption should, for that reason alone, have their suitability questioned. The suggestion seems to be that fit and proper applicants do not need to pay, with the corollary that the unfit and improper do. Questions of propriety are addressed under section 11, however, and the present judgment's approach to section 25 fails to make clear the relationship between those two sections.

In any event, Latey J indicated his disposition to approve of an arrangement which breached the equivalent UK legislation, assuming the applicants to be fit and proper persons. Such approval is provided for in section 50(3) of the UK Act: "This section does not apply ... to any payment or reward authorised by the court to which an application for an adoption order in respect of a child is made." Similar, although less elaborate, provision for judicial approval exists in section 25 of the New Zealand Adoption Act: "Except with the consent of the Court, it shall not be lawful..." etc. Presumably, retrospective approval would be as readily forthcoming in the New Zealand context, assuming the applicants to be fit and proper persons. Provision for judicial approval arguably removes much of the force of section 25, but its purpose is made evident in this case. It stands to save arrangements, like those of M and Mr and Mrs P, which breach the section but do not deserve censure. It is submitted that a simpler finding in this case would have been one of a court-approved breach, rather than a strained finding of no breach at all. This point touches again upon the relationship between sections 11 and 25. Is court consent under section 25 necessary for section 11 purposes or simply to avoid an offence under section 25? This judgment implies the former. Indeed, it could have been because of the fear that a breach of section 25 might render the applicants unfit and improper custodians that the court drove itself to find no breach of that section.

B Section 26

> It shall not be lawful for any person ... to publish any advertisement indicating -
> ...
> (b) That any person desires to adopt a child; or
> (c) That any person or body of persons is willing to make arrangements for the adoption of a child.

On a literal reading of both the advertisement and the section, the former breaches the latter, and his Honour's discussion of the arguments to the contrary (which he accepted) is brief. Two points can, however, be taken from the judgment. First, "Counsel ... has made the submission that the advertisement did not fall within the ambit of the matters contemplated by s 26. Counsel commented that it would appear that the issue of surrogacy was not even contemplated when s 26 was enacted and that it is probably an inappropriate or even an outdated section in dealing with issues of surrogacy."[18] Judge McAloon appears to accept that submission. It must be inferred, then, that the advertisement deals with surrogacy. That, however, requires a very liberal

---

18 Above n 1, 388.

interpretation of the advertisement, which contrasts vividly (and inexplicably) with the literal approach earlier applied to the agreement. Second, even if the advertisement did breach section 26, such a breach would not necessarily invalidate an arrangement made pursuant to that advertisement; section 26 merely provides a penalty for that breach, should the authorities deem some imposition of penalty to be appropriate. Like section 25, section 26 "relates to the question of the suitability of Mr and Mrs P as adoptive parents".[19] That observation raises questions identical to those suggested above in respect of section 25. Unlike section 25, section 26 does not, except in relation to advertisements placed by groups caring for the welfare of children, make provision for judicial approval of advertisements which breach it. Consequently, there is greater impetus to find no breach of section 26 in deserving cases such as this one.

C Section 11

Before making an adoption order, the court must be satisfied that the applicant is a fit and proper person to have custody of the child and has the ability to bring up, maintain and educate the child, and that the welfare and interests of the child will be promoted by the adoption.

There was no question that the P's were fit and proper persons to adopt C. They had the means and ability to maintain C. Although they had previously had difficulties in being considered as suitable adopters through the more traditional channels, those difficulties related to health difficulties of Mrs P, health difficulties which had now passed, and to their ages, 38 and 39.[20] The Department of Social Welfare nevertheless reported favourably on this adoption application.

On the question of C's welfare and interests, his Honour referred to Speight J in *L* v *B*[21] as support for the proposition that in adoption matters the welfare of the child is the paramount consideration. That case is now superseded by *D-GSW* v *L*,[22] in the course of which Bisson J cast doubt on that very part of Speight J's judgment quoted by Judge McAloon. Speight J's opinion that "[the] principles that apply in guardianship and adoption cases are not different; the child's welfare is paramount" was addressed by Bisson J:[23]

> .."welfare" alone is not in my opinion the first and paramount consideration, as the Court must also, as required by s[11](b), be satisfied that the "interests" of the child will also be promoted by the adoption. The inclusion in s11(b) of the word "interests" as well as "welfare" indicates there is an extra dimension to adoption as opposed to guardianship

---

19 Above n 18.

20 "The [Adoption] Act places no upper age limit on adoptive applicants, but in practice, most [Department of Social Welfare] offices have an informal limit of 35 - 37". Adoption Practices Review Committee *Report to the Minister of Social Welfare* (Wellington August 1990) 69.

21 (1982) 1 NZFLR 232.

22 [1990] NZFLR 125.

23 *D-GSW* v *L* [1990] NZFLR 125, 137.

> and the consequences of an adoption order may relate more to the child's interests than to its welfare.[24]

His Honour Bisson J illustrated the difference as he saw it:[25]

> There may be cases where despite the "welfare" of the child being promoted, the "interests" of the child may not be promoted because, for example, in the particular circumstances for the child of the termination of the parent-child relationship under s16.

It is submitted that on the facts of the present case, even Bisson J's more stringent approach is nevertheless satisfied. Given that "irrespective of the outcome of this judgment, the child will continue to reside with Mr and Mrs P as has been envisaged by them and M",[26] the making of the adoption order would further C's welfare, and the "termination of the parent-child relationship under s16" (per Bisson J) would not be against C's interests. The order would merely formalise an accepted and continuing de facto situation.

VI CONCLUSION

While hard cases may make bad (unhelpful) law, it is no guarantee that easy cases make good (helpful) law. This was an easy case. Mr and Mrs P and M had, and continue to have, an open, friendly relationship. They "maintain comfortable contact with each other".[27] M regards C as the child of Mr and Mrs P. The surrogacy agreement covered the four main areas of potential dispute, and was honoured by all parties. Enforcement in the face of resistance from the surrogate mother was not an issue. The overwhelming aura of amicability surrounding this surrogacy arrangement distinguishes it immediately from the much publicised controversial and rancorous foreign precedents. One cannot question the justness of the decision of Judge McAloon, but the nature of the case - and, to a lesser extent, the forum - was such that the judgment does not provide a clear indication of the Family Courts' likely approach to those bitter surrogacy battles which will inevitably appear in future in New Zealand. The occurrence of the events leading to this decision indicates that this is now a distinct, not a distant, possibility. The case signals the pressing need for legislation to address the issues.

---

24 Two points should here be noted. First, Bisson J was alone, on a full bench of five Court of Appeal judges, in making that observation. Second, neither *L* v *B* nor *D-GSW* v *L* was directly relevant to the present case: they were cases dealing with dispensation of a parent's consent to adoption, and the question in the latter case was whether the child's welfare was the paramount consideration or simply a consideration which ranked alongside others, eg the interests of the non-consenting parent. Both were quite different from the present case in which parental consent was not in issue.

25 *D-GSW* v *L* [1990] NZFLR 125, 136 - 137.

26 Above n 1, 388.

27 Above n 1, 389.