

HONG KONG / JUDGMENT

Mrs B AND ANOTHER v. FRC AND ANOTHER

[2021] HKCFI 402

COURT

Court of First Instance

DECIDED

19 February 2021

CASE / FILE NUMBER

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HCMP 1722/2020

[2021] HKCFI 402 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO 1722 OF 2020

IN THE MATTER of C, , a girl, born on 2006, Minor and IN THE MATTER of Section 26 of the High Court Ordinance (Cap 4) and Order 90 of the Rules of the High Court (Cap 4A) and IN THE MATTER of the Guardianship of Minors Ordinance (Cap 13) and IN THE MATTER of the Adoption Ordinance (Cap 290)

Mrs B 1st Plaintiff Mr B 2nd plaintiff and FRC 1st Defendant FEAA 2nd Defendant

Before: Hon Au-Yeung J in Chambers (Not Open to the Public) Date of Hearing: 9 February 2021
Date of Judgment: 19 February 2021

J U D G M E N T

A. Introduction The Plaintiffs (Mr and Mrs B) are the guardians of C. The Defendants are C's birth parents. The Official Solicitor represents C. By this Originating Summons, Mr and Mrs B seek leave to make arrangements for C's adoption under section 23A of the Adoption Ordinance (Cap 290) ("AO"). The birth parents and the Official Solicitor support this application. An expedited suitability assessment report (dated 18 January 2021) was prepared by the Director of Social Welfare ("Director"), and another report (dated 19 January 2021) was prepared by the Official

Solicitor. Both reports are strongly supportive of the present application. B. Legal principles

Section 23A of the AO provides as follows: “Restriction on arranging adoption and placing of infant for adoption (1) Subject to subsections (2) and (3), no person other than— (a) the Director; (b) an accredited body acting under and in accordance with its accreditation; or (c) a person acting in pursuance of an order of the Court, shall make arrangements for the adoption of an infant, or place an infant for adoption. ... (5) For the purposes of this section, a person shall be deemed to make arrangements for the adoption of an infant if— (a) he enters into any agreement, or makes any arrangement, for the adoption of the infant by any other person where the adoption is effected, or is intended to be effected, in Hong Kong or in a place outside the People’s Republic of China; (b) he initiates or takes part in negotiations the purpose or effect of which is the conclusion of any agreement, or the making of any arrangement, as referred to in paragraph (a); or (c) he causes another person to do an act specified in paragraph (a) or (b).” (underline added) Accordingly, before taking any step relating to the adoption of a child, including seeking the formal consent of the parents, applicants are required to apply for prior authorisation under s.23A(1)(c) of the AO. Such an application should be made through the inherent jurisdiction by wardship proceedings to this Court. The test applied by the Court is the welfare test under s.3(1) of the Guardianship of Minors Ordinance, Cap 13 (“GMO”): *Re G (Wardship Proceedings: Adoption Application)* [2020] 4 HKLRD 276 at §§26 to 31 and 39. In determining best interests, a court may consider the UK’s ‘Adoption Checklist’ contained in s.1(4) Adoption and Children Act 2002: “(a) the child’s ascertainable wishes and feelings regarding the decision (considered in the light of the child’s age and understanding), (b) the child’s particular needs, (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person, (d) the child’s age, sex, background and any of the child’s characteristics which the court or agency considers relevant, (e) any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering, (f) the relationship which the child has with relatives, with any person who is a prospective adopter with whom the child is placed, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including— (i) the likelihood of any such relationship continuing and the value to the child of its doing so, (ii) the ability and willingness of any of the child’s relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child’s needs, (iii) the wishes and feelings of any of the child’s relatives, or of any such person, regarding the child.” C. Background C was born on 2006 in . The birth parents live in . They have children and C is the . The birth father is and the mother a housewife. When C was 3 months old, the birth parents were unable to care for C and entrusted her to the care of other relatives, in particular her paternal aunt and her husband (“Aunt” and “Uncle”, respectively). C calls them “mommy” and “daddy”. The Aunt and Uncle left for Hong Kong to work with Mr and Mrs B’s family, in 2006 and 2008 respectively, leaving C in the care of her paternal grandmother (who was nearly blind) and C’s cousin. Although the birth parents visited C frequently at that time, they did not have an active parental role in her life. At about the time of her 6th birthday, the birth father took C and her cousin to visit the Aunt and Uncle in Hong Kong. Mr and Mrs B realized that C did not have a capable adult to take care of her in and offered to arrange for her to study and live in Hong Kong. The birth parents signed a power of

attorney appointing Mr and Mrs B to be C's temporary guardians. Since then, C has been living in Hong Kong with Mr and Mrs B and the Aunt. She studies in the school run by Mr and Mrs B. Her application for permanent residency is currently being processed. The birthparents support this by providing successive powers of attorney to support Mr and Mrs B's guardianship over C. C is now aged 14, studying grade 9. She sees the birth parents when she is in on holiday. However, theirs is not a parent-child relationship. C is viewed as part of the extended family of the birth parents, who has a life in Hong Kong. C has adjusted well in the B family. She refers to Mr and Mrs B directly as Grandma and Grandpa (and calls them Mom and Dad when speaking to others), and treats their children as her siblings, aunts and uncles. She spends holidays and travels with them over the world and lives in their home. D. Mr and Mrs B Mr and Mrs B have been at all relevant times the proprietors of , and Mr B is a well-known and highly regarded . They are also the parents of adult children. Mr and Mrs B have been married for 36 years and have the same family goal of building up an intact and happy family. They have been committed guardians of C. They provide for her education, development, health and general well-being. C has become a member of their family in all but name. After taking care of C for 8 years, they want to apply for adoption of C to facilitate her full integration into the B family and would want her to enjoy the same privileges of being their legal child. E. C's views on the current application The reports of the Director and the Official Solicitor show that C understands the consequence of adoption and agrees to the intended adoption by Mr and Mrs B as their daughter. F. Views of relevant persons All the parties agree that it is in C's best interests to be adopted by Mr and Mrs B to protect her long-term welfare. In particular, the parties want to secure C's ability to study and live in the United States, by allowing her to become an American citizen. The Aunt and Uncle confirm that they are not in a position to provide for C a secure home or meet her needs, as they lodge at Mr and Mrs B's house. The Aunt has worked for Mr and Mrs B since 1992 and know them well. The Aunt is thankful for Mr and Mrs B's provisions and support to C and is happy to support the adoption. The Official Solicitor's report is glowingly supportive of the present application and confirms both the views of the child and the unconditional love of Mr and Mrs B towards C. The Director's report describes Mr and Mrs B as child-loving and have demonstrated their concerted efforts in C's study plan and care arrangement which are appropriate and conducive to C's development. The social worker also states that C is emotionally secure and has established a strong bonding with Mr and Mrs B and their family members. She has been leading a stable and happy life in the B family. The Director considers Mr and Mrs B to be suitable to adopt C. No one has paid or rewarded anyone for C to be in the care of at Mr and Mrs B. G. Analyses C has spent more than half of her life (8 years) in the care of Mr and Mrs B (well beyond the statutory requirement of 6 months under s.5(7)(a) of the AO). Mr and Mrs B are in substance her primary carers and parental figures. The quality of their care has been high and C has blossomed in the past 8 years. The bonding amongst them and the adult children is mutual. C has expressed her identity as a member of the B family. C would secure material benefits to her long-term welfare from being legally recognised as a child of Mr and Mrs B, in particular by allowing her to secure US citizenship and give her the same rights as Mr and Mrs B's natural children. It would enable Mr and Mrs B to make decisions in her best interests and ease C's ability to travel with them. There is no obvious detriment to C's welfare in exploring adoption as an option. Adoption would

not create any 'separation trauma' between C and the birth parents, as C has not actually been cared for by the birth parents since she was 3 months old. On the other hand, C's ties with her birth parents would not be severed as Mr and Mrs B encourage C to maintain contact with her birth family, as they have done in the past. Therefore, ceasing to be a member of the birth family legally would not have much adverse impact on C. In any event, requiring C to return to her birth parents at the age of 14 is unlikely to be in her best interests. To the contrary, all the adults and carers in her life so far, including the birth parents, consider adoption to be in her best interest. On Mr and Mrs B's side, they have sufficient health, ability and means to care for C. They have strong support from their community and their other children. They are very committed to the upbringing of C. C's views have been obtained. She is not confused with having 3 sets of "parents" – birth parents, Mr and Mrs B and the Aunt and Uncle. She is supportive of the idea of adoption. The Official Solicitor describes C as "mature, sincere, optimistic and responsive" (\$26 of her report). Given C's age and her level of understanding of the idea of adoption, her views should be given great weight. In my view, in truth and substance, the intended adoption is to formalize the status quo of C's care and residential arrangements, whilst giving her more benefits as the legal child of Mr and Mrs B with no detriment to her. Accordingly, adoption should be explored, and I give leave to Mr and Mrs B to make arrangements for the adoption of C pursuant to section 23A(1)(c) of the AO. The birth parents have been receiving pro bono legal service. Recognizing their lack of means, Mr and Mrs B have undertaken to the Court to pay for the birth parents' costs of this hearing at \$24,000. I am satisfied that this sum is paid out of good faith, to ensure that the birth parents have quality legal assistance for this hearing. I hasten to add that even just for this hearing, Mr Shaphan Marwah's team obviously have charged very generous fees in the light of the quality work. I accept the undertaking and approve the payment. H. Conclusion Upon the undertaking of the Plaintiffs to pay costs of \$24,000 to the Defendants for this hearing, which payment is approved by the Court, I order that: (1) C, a girl, born on 2006, do remain a ward of this Court during her minority or until further order. (2) The 1st and 2nd Plaintiffs be given leave to make arrangements for the adoption by them of C. I thank Mr Azan Marwah, Mr Shaphan Marwah and Ms Eunice Ip of the Official Solicitor's Office for their assistance. (Queeny Au-Yeung) Judge of the Court of First Instance High Court Mr Azan Marwah, instructed by Withers, for the 1st and 2nd Plaintiffs Mr Shaphan Marwah, instructed by Patricia Ho & Associates, for the 1st and 2nd Defendants Attendance of the Official Solicitor was excused

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