

HONG KONG / JUDGMENT

RE AN INFANT

COURT

Court of First Instance

DECIDED

11 February 1985

CASE / FILE NUMBER

HCA78/1982

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bjbj Headnote Adoption: adoption by mother and step-father; withholding of consent by natural father; nature of abandonment; unreasonableness; exercise of discretion in case of remarriage.
IN THE SUPREME COURT OF HONG KONG HIGH COURT ADOPTION CASE NO. 78 OF 1982

BETWEEN IN THE MATTER of an infant and IN THE MATTER of the Adoption Ordinance, Cap.
290

Coram : Deputy Judge Barnett in Chambers Date of hearing : 29th January and 4th February 1985
Dates of Judgment : 11th February, 1985.

J U D G M E N T

Background

The applicants for an adoption order in this case are the natural mother (the mother) and step-father of the child. The natural father (the father) does not consent to the making of an order, Both the mother and father have filed affirmations and have been cross-examined. The step-father has also given evidence. Mrs. Grace Yeung Phe Shiu-wan, an assistant social work officer of the Social Welfare Department, has formally produced the usual excellent investigation report. The mother and father married in 1968. They had 2 sons, one born on 20th May 1969 and one (whom I shall call the child and who is the subject of these proceedings) born on 28th May 1970. in 1974 the mother instituted divorce proceedings on the ground of the father s adultery. On 24th September 1975, the father was granted custody of the elder son and the mother custody of the child with a provision that the 2 boys should meet each Sunday. The decree was made absolute on 20th October 1978. In the meantime, the mother met and began cohabiting with the step-father. They married in September 1981. Since 1976 they have together brought up, educated and

maintained the child in, I am satisfied, a wholly admirable manner within their modest means. The 2 boys continued to meet weekly until probably 1978 when, in circumstances which are disputed, the weekly meetings ceased. The father has not seen the child since then. Upon their marriage in 1981, the applicants changed the child's name by deed poll to that of his step-father. However, when they attempted to change the name on the child's identity card, they found they could not do so. They commenced these proceedings for adoption. Grounds for adoption The applicants suggest adoption will be in the interest of the child because it will:

- (i) avoid embarrassment to the child who now has one name which he generally uses and another on his identity card; (ii) reinforce the stable home and strong attachment which they have; and (iii) ensure their property passes to the child on their death. The child himself is anxious for an adoption order to be made. He has always used the step-father's name. In 1981 upon application for a child identity card, he discovered he would have to use his father's name. He says this will be troublesome and inconvenient. Apart from that, he is not troubled by the situation. In relation to the change of a child's name, in *Re D (minors)* (1973) 3 All E.R. at p. 1007, Sir George Baker P said, it cannot by itself be a legitimate ground for adoption, or generally in the interest of the child. As to ground (iii), appropriate testamentary provision will remove any worries the applicants may have. The applicants and the child are in the same position as many families both in Hong Kong and elsewhere. Those families manage very well without the need for adoption. There is probably nothing very unusual about the present case. Nonetheless, taking the 3 grounds together, and taking into account the views of the child, it cannot be said that adoption will not be for his welfare, although the benefit is marginal. Consent I must consider therefore the father's position. In summary, he opposes the making of an adoption order because:
 - (i) the child is his own flesh and blood; (ii) the child and his elder brother will be confused if they have different names; and (iii) he would like to regain custody of the child, The applicants submit consent should be dispensed with because:
- (i) the father has abandoned the child (s. 6(1)(a)); or (ii) the consent is unreasonably withheld (so 6(1)(c)). Abandonment It is suggested that the father has abandoned the child because he has not seen or made any attempt to see the child since about 1978. Even if that is wholly correct, I do not think it constitutes abandonment as contemplated by s. 6(1)(a) of Cap. 290. That subsection seems to me clearly to be aimed at a parent who has shown himself or herself to be thoroughly unsatisfactory. It does not embrace a parent, like the father, who fails to enforce a right of access under a custody order made in matrimonial proceedings. Unreasonable withholding The father cuts a sorry figure. He has not seen the child since 1977 or 1978 when the mother moved to a new address which she admits she was unwilling to disclose. Apart from one enquiry of the mother's mother, when he was frightened of her attitude, and one or two other feeble efforts, the father has done nothing to try to enforce the provision of the custody order. The father was contacted in 1981 by a social worker of Social Welfare Department about the proposed adoption. Thereafter the social worker could not find him for 2 years. The father says he tried to locate the social worker but was unable

to do so. I do not believe him. The father has an illegitimate child by the woman with whom he committed adultery. Such is his concern for 'his own flesh and blood, he says he wants to obtain custody of this child, He has not seen this child since 1933. He does not know where this child lives. He has taken no action in the matter. He also intends to claim custody of the child. He has not yet done anything about it. The father's proposal to claim custody of 2 more children is totally unrealistic. There is no evidence that he will be able to support and look after them. He says the 3 children got on well together; there is no evidence the illegitimate brother ever met the other 2 brothers; the child says, and I believe him, that he does not remember his elder brother and does not particularly want to see him. In *Hitchcock v W.B. and Others* (1952) 2 All E.R., Devlin J., in dealing with s. 3(1)(c) of the Adoption Act 1950 (the wording of which is identical with s. 6(1)(c)) said, at p. 123: In my judgment, the test to be applied for the purpose of s. 3(1)(c) is this: Is the attitude of a father, in refusing his consent, unreasonable, i.e., is the father being unreasonable as a father? If it is possible to say that a father could reasonably come to the conclusion that his child ought not to be adopted, it seems to me impossible to hold that his consent is unreasonably withheld. The welfare of the child is, of course, of indirect importance, because a father who has no regard for the welfare of his child in reaching such a decision is not reasonable, but the child's welfare is no longer the sole test. The test that has to be directly applied is an inquiry into the attitude of the father, and that, I think, was not really disputed by counsel for the respondents. That being so, there are two questions that fall to be asked. The first and obvious one is: Is consent being refused whimsically or arbitrarily or not in good faith, because, if so, a fortiori it would be unreasonable. Is the father refusing his consent whimsically or arbitrarily or not in good faith? I was unimpressed by the father when he gave evidence. I do not believe him when he says that he is anxious to recover custody of the child and the child's illegitimate half-brother. I do not believe him when he says he was unable to contact the social worker for 2 years. Although the mother admits she kept her new address secret, I think the efforts made by the father to find the child since 1978 to be insincere. I do not accept that, in relation both to the child and to the illegitimate child, the father did not know what steps to take to find them and apply for custody - he had previously been legally aided, as he is now. I do not believe the father when he says that he has always loved the child very much nor his anger at changing the child's name. I was unimpressed by the father when he gave evidence. I do not believe him when he says that he is anxious to recover custody of the child and the child's illegitimate half-brother. I do not believe him when he says he was unable to contact the social worker for 2 years. Although the mother admits she kept her new address secret, I think the efforts made by the father to find the child since 1978 to be insincere. I do not accept that, in relation both to the child and to the illegitimate child, the father did not know what steps to take to find them and apply for custody - he had previously been legally aided, as he is now. I do not believe the father when he says that he has always loved the child very much nor his anger at changing the child's name. I find as a fact that the father is not honest in his objections. I do not believe he has an honest desire to remain. father of the child in law. I am satisfied that he is unreasonably withholding his consent. Dispensing with consent The question that remains therefore is

whether I should exercise my discretion under s. 6(1) and dispense with the father's consent, In Re B (a minor) (1975) 2 All E.R. 449, a case also involving adoption after remarriage, Sir George Baker P said, at p. 460: I accept the submission for the father that the discretion to dispense with consent should be even more sparingly used in the present type of case where there has been remarriage ... In the same case, Bagnall J. said, at p. 464: On the general issue I would desire to add a few further observations. There is a body of opinion that where there is a divorce followed by remarriage and a very young child, the best course for the child is to make a complete break and allow the child to be brought up exclusively as a member of the new family established by a parent and a step-parent. That this view has not found favour in these courts is clear from recent decisions of the Court of Appeal to which I need not refer. Nevertheless it may well be that where all parties are in agreement and the relevant parent consents, it can be established that adoption by a parent and the step-parent is for the welfare of the child. In such a case the other parent agrees, so to say, to disappear wholly from the child's life and to accept a change of the child's legal status. Even there I think that parents should hesitate long and think carefully before taking such an irrevocable step. Cases such as this, where the relevant parent refuses to consent to adoption, are quite different. The advantages which adoption may bring to the child can almost always be secured without a change in legal status. Where the application is made by a parent and a step-parent after divorce and remarriage, I am of the opinion that only in very rare and wholly exceptional cases will it be possible to say that adoption against the wishes of a present and expostulating parent is for the welfare of the child. I am likewise of opinion, where such an application is made, that again only in very rare and wholly exceptional cases should it be said that a father who says, I do not wish my son to become in law the son of another man is acting unreasonably. I think it is inadvisable that adoption applications in cases such as this should in any way be encouraged. Bagnall J. was, of course, speaking in the context of reasonableness. However, his remarks emphasise the reluctance of the courts to sanction adoption by a parent and step-parent, and make it clear that, even if all parties are in agreement, it must still be established that adoption is for the welfare of the child. As I have already said, any benefit to the child will be marginal. The applicants and the child are in a Position which is no different from that of many families who do not find it necessary to contemplate adoption. There is no compelling reason for an adoption order to be made. There is nothing very rare or exceptional about the case. In my judgment therefore this is not a case where I should exercise my discretion in favour of adoption. Consent is not dispensed with. The application is refused. The father, who is legally aided, has asked for costs should he be successful. However, in view of my findings, I do not think he should have his costs. Accordingly, unless application is made within 10 days, there will be no order as to costs between the parties. The father's own costs to be taxed. Liberty to apply. (N.J. Barnett) Deputy Judge of the High Court Mrs. M. Lau of Alfred Lau & Co. for father of infant Mr. Kwan of Anthony Kwan & Co. for Applicants Mrs. Grace Yeung of Social Welfare Department for infant

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