

IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM: FROST, J.

Wednesday,

29th July, 1970.

IN RE A.B. (AN INFANT)

1970
July 28th
and 29th
PORT MORESBY
Frost, J.

In this application for the adoption of a child under the Adoption of Children Ordinance 1968, a question has arisen as to the effect of Section 22(1) and Section 23(3) of the Ordinance. The relevant provisions are as follows :-

22(1) For the purposes of an application by a person under this Ordinance for an adoption order in respect of a child, a consent to the adoption of the child given by a person in accordance with the law of a State or of another Territory of the Commonwealth that would be an effective consent under that law if the application had been made in that State or Territory under that law is an effective consent for the purposes of the application under this Ordinance.

(2) For the purposes of Subsection (1) of this section, a certificate by the prescribed authority of a State or of another Territory of the Commonwealth that a consent to the adoption of a child given in that State or Territory would be an effective consent under the law of the State or Territory is evidence of that fact.

23(1) The Court may refuse to make an adoption order in reliance on a consent given or purporting to have been given by a person (other than the child) if it appears to the Court that -

- (a) the consent was not given in accordance with this Ordinance;
- (b) the consent was obtained by fraud, duress or other improper means;
- (c) the instrument of consent has been altered in a material particular without authority; or
- (d) the person giving or purporting to give the consent was not, on the date of the instrument of consent, in a fit condition to give the consent or did not understand the nature of the consent.

(2) The Court shall not make an adoption order in reliance on an instrument of consent signed by the mother of the child before the birth of the child.

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(3) The Court shall not make an adoption order in reliance of an instrument of consent signed by the mother of the child on, or within seven days after, the day on which the child was born unless it is proved that, at the time when the instrument was signed, the mother was in a fit condition to give the consent.

(4)

The applicants rely on a consent to the adoption by the child's natural mother given in accordance with the law of New South Wales which, by reason of the certificate given by the Director of Child Welfare of that State, I am satisfied would be an effective consent under the law of New South Wales if this application had been made in New South Wales.

The point of the case is that the mother's consent was given less than seven days after the birth of the child, so that if Section 23(3) applies, proof of the mother's fitness is required, but a lesser period of three days is provided for under Section 31(3) of the Adoption of Children Act 1965 of New South Wales, and there was a sufficient compliance without proof of the mother's fitness under the law of that State.

In several previous applications where the same point has arisen, I have required proof by affidavit of the mother's fitness, but Mr. Wright has ably argued that if a consent to the adoption of the child is shown to be an effective consent under Section 22(1), then it is unnecessary for the applicants to show compliance with Section 23(3).

I have taken time to consider this matter, and I have come to the conclusion that Mr. Wright's submission is sound. I consider that in enacting Section 22(1) the Legislature was intending to take into account that applications would be made for the adoption of children born in the various states of Australia where the legislative requirements for the consent to the adoption of a child may vary, and to make convenient provision therefor.

I consider that for a consent to be an effective consent by a person in accordance with the law of a State, it would have to be shown that at the date of that consent, it was sufficient for a

Court to act upon without proof of the mother's fitness to give a consent, and that the Legislature did not intend under Section 23(3) to derogate from the efficacy of a consent which had met the requirements of the law of the State in that respect. It is significant that there is no provision that Section 22(1) should be subject to Section 23(3). In my opinion, the proper construction of these Sections is that Section 23(3) should be read down so that it applies only to applications for an adoption order for children where the instruments of consent are signed within the Territory or elsewhere if Section 22(1) is not relied on.

I have considered sub-section (2) of Section 23 which is in the same wide terms as sub-section (3) and which would seem, by reason of the subject matter, to have been intended by the Legislature to apply to all applications for adoption. However that sub-section, in my opinion, was enacted *ex abundanti cautela* because a consent given before the birth of a child could not be said to be a consent to the adoption of a child in being, which surely must be required under both Section 18(1) and Section 22(1). Further, a similar provision is to be found in the corresponding legislation of the States of New South Wales, Queensland, Victoria and South Australia (which are the only State Statutes available to me), and I assume, as the legislation for the Commonwealth is uniform, in the other States and Territories, so that in practice there could not be an effective consent under Section 22(1) if the consent was given by the mother before the birth of the child.

Consequently, I consider that the effect of sub-section (2) does not require a wider operation to be given to sub-section (3) than the construction which I have preferred. I should also add that sub-section (1) gives the Court an overriding discretion in all cases whether the consent relied on purports to be an effective consent under Section 22(1) or otherwise, but as this meaning is to be gathered from the words used in sub-section(1) that sub-section also cannot affect the construction of sub-section (3).

Accordingly being satisfied that this is otherwise a proper case for an order to be made, I shall make an order for the child's adoption.

Solicitors for the Applicants : Craig Kirke & Pratt.