

IN THE MATTER OF: THE ADOPTION ACT 1958 (UK)

AND

IN THE MATTER OF: TYSON TOGOMIRO (an Infant)

AND

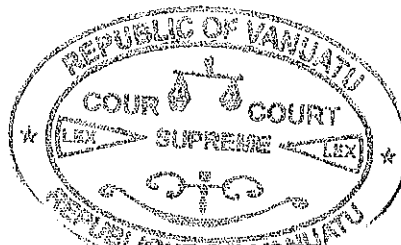
IN THE MATTER OF: NIKAYLA STALINE (an Infant)

RULING

1. In these separate applications **Jason Rakau** the sole applicant who appeared in person seeks to adopt the 5 year old son and 6 year old daughter (hereafter "*the infants*") of his common law partner **Patricia Stafford**. Although the application states they are married, no marriage certificate was provided and both parties confirm that they are not legally married but have been living in a stable "*de facto*" relationship since the end of 2007. They also have a child from their relationship.
2. The necessary consents are attached to the application. From the infants biological father and from their mother who verbally confirmed her consent when she appeared in support of the application. The mother of the infants expressed her concern however, at potentially losing her parental rights as the mother of the infants. She was agreeable to the application "... *because we live together and wish to complete our family*". However she would like to have her parental rights reserved in the event that her relationship with the applicant came to an end. If I may say so there are other less problematic ways of completing one's family.
3. Legal adoption in Vanuatu is governed by the provisions of the **Adoption Act 1958 (UK)** as adapted and applied to the circumstance prevailing in Vanuatu. For present purposes reference is made to the following relevant provisions:

"1. (1) Subject to the provisions of this Act, the court may, upon an application made in the prescribed manner by a person domiciled in Vanuatu, make an order (in this Act referred to as an adoption order) authorizing the applicant to adopt an infant.

(2) An adoption order may be made on the application of two spouses authorizing them jointly to adopt an infant; but



an adoption order shall not in any other case be made authorizing more than one person to adopt an infant.

(3) An adoption order may be made authorizing the adoption of an infant by the mother or father of the infant, either alone or jointly with her or his spouse.

(4) ...

(5) An adoption order shall not be made (in Vanuatu) unless the applicant and the infant reside in Vanuatu subject however to section twelve of this Act.

2. (1) Subject to subsection (2) of this section, an adoption order shall not be made in respect of an infant unless the applicant –

(a) is the mother or father of the infant;

(b) is a relative of the infant, and has attained the age of twenty-one years; or

(c) has attained the age of twenty-five years.

(2) An adoption order may be made in respect of an infant on the joint application of two spouses –

(a) if either of the applicants is the mother or father of the infant; or

(b) if the condition set out in paragraph (b) or paragraph (c) of subsection (1) of this section is satisfied in the case of one of the applicants, and the other of them has attained the age of twenty-one years.

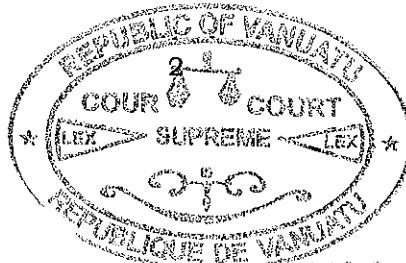
(3) An adoption order shall not be made in respect of an infant who is a female in favour of a sole applicant who is a male, unless the court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order.

4. (1) Subject to section five of this Act, an adoption order shall not be made –

(a) in any case, except with the consent of every person who a parent or guardian of the infant;

(b) on the application of one of two spouses, except with the consent of the other spouse;

(2) The consent of any person to the making of an adoption order in pursuance of an application (not being the consent of the infant) may be given (either unconditionally or subject to conditions with respect to the religious persuasion in which the infant is proposed to be brought up) without knowing the identity of the applicant for the order.



(3) ...

5. (1) The court may dispense with any consent required by paragraph (a) of subsection (1) of section four of this Act if it is satisfied that the person whose consent is to be dispensed with -

- (a) has abandoned, neglected or persistently ill-treated the infant; or
- (b) cannot be found or is incapable of giving his consent or is withholding his consent unreasonably.

(2) If the court is satisfied that any person whose consent is required by the said paragraph (a) has persistently failed without reasonable cause to discharge the obligations of a parent or guardian of the infant, the court may dispense with his consent whether or not it is satisfied of the matters mentioned in subsection (1) of this section.

(3) Where a person who has given his consent to the making of an adoption order without knowing the identity of the applicant therefor subsequently withdraws his consent on the ground only that he does not know the identity of the applicant, his consent shall be deemed for the purposes of this section to be unreasonably withheld.

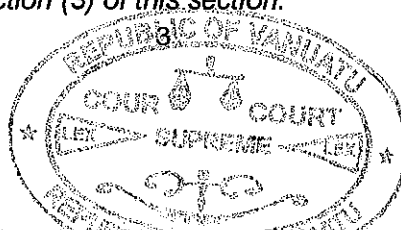
(4) The court may dispense with the consent of the spouse of an applicant for an adoption order if it is satisfied that the person whose consent is to be dispensed with cannot be found or is incapable of giving his consent or that the spouses have separated and are living apart and that the separation is likely to be permanent.

[(5) (Applies to Scotland)]

6. (1) Where a parent or guardian of an infant does not attend in the proceedings on an application for an adoption order for the purpose of giving his consent to the making of the order, then, subject to subsection (2) of this section, a document signifying his consent to the making of such an order shall, if the person in whose favour the order is to be made is named in the document or (where the identity of that person is not known to the consenting party) is distinguished therein in the prescribed manner, be admissible as evidence of that consent, whether the document is executed before or after the commencement of the proceedings; and where any such document is attested as mentioned in subsection (3) of this section, it shall be admissible as aforesaid without further proof of the signature of the person by whom it is executed.

(2) A document signifying the consent of the mother of an infant shall not be admissible under this section unless -

- (a) the infant is at least six weeks old on the date of the execution of the document; and
- (b) the document is attested on that date as mentioned in subsection (3) of this section.



(3) ...

7. (1) *The court before making an adoption order shall be satisfied –*

(a) *that every person whose consent is necessary under this Act, and whose consent is not dispensed with, has consented to and understands the nature and effect of the adoption order for which application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights;*

(b) *that the order if made will be for the welfare of the infant; and*

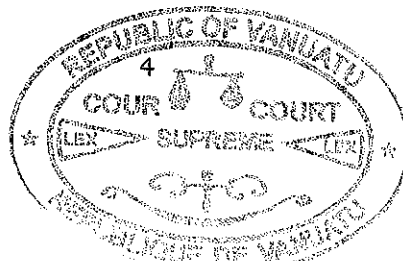
(c) *that the applicant has not received or agreed to receive, and that no person has made or given or agreed to make or give to the applicant, any payment or other reward in consideration of the adoption except such as the court may sanction.*

(2) *In determining whether an adoption order if made will be for the welfare of the infant, the court shall have regard (among other things) to the health of the applicant, as evidenced, in such cases as may be prescribed, by the certificate of a fully registered medical practitioner, and shall give due consideration to the wishes of the infant, having regard to his age and understanding.*

(3) *The court in an adoption order may impose such terms and conditions as the court may think fit, and in particular may require the adopter by bond or otherwise to make for the infant such provision (if any) as in the opinion of the court is just and expedient."*

4. From the foregoing provisions it is clear that an adoption order is not a right but a privilege within the discretion of the Court to grant or deny having regard to the law, the applicant(s), the consent(s) required, the absence of any form of inducement, reward or consideration, the wishes of the infant and last, but by no means least, whether "*the (adoption) order if made will be for the welfare of the infant*".

5. It is also clear from the above that the law makes a special exception for the parent of an infant to adopt the infant "... *either alone or jointly with her or his spouse*" [see: **Section 1 (3)** above]. Unfortunately, the **Adoption Act** does not define who is a "spouse" for the purposes of the Act. It does however authorize adoption by spouses either on a "*joint application*" [see: **Section 2 (2)** read with **Section 13 (2)**] or where only one of the spouses applies, "... *with the consent of the other spouse*" [see: **Section 4 (1) (b)**]. Clearly then, the Act assumes a close relationship exists between "*spouses*", such that, they may jointly apply for an adoption order and where only one spouse is the applicant, parental duties (*via* an adoption order) may not be imposed on the other 'spouse' without his or her consent. Who then is a "spouse"?



6. A "spouse" is defined in **Black's Law Dictionary** (7th edn) as: "one's husband or wife by lawful marriage, a married person".
7. **Section 13 (1)** of the **Matrimonial Causes Act** [CAP. 192] also provides some assistance in understanding the meaning of the term 'spouse' when it states:

"When any married person has been continually absent from the other spouse for a period of 7 years or more ... such other spouse may petition the Court for a decree of presumption of death and dissolution of the marriage."

8. Clearly a "spouse" is a "married person" capable of petitioning the Court "... for a decree of ... dissolution of ... marriage". [see: **Section 5 (b)** of the **Matrimonial Causes Act** [CAP. 192] and a "marriage" may be described as the voluntary union of a man and a woman publicly celebrated before a District Registrar or duly authorized minister of religion and registered under the **Civil Status (Registration) Act** [CAP. 61]. [see: The provisions of the **Marriage Act** [CAP. 60] and the **Control of Marriage Act** [CAP. 45].
9. Given the legal meaning of a "spouse", even though the applicant is living in a "defacto" relationship with the mother of the infants neither of them is a "spouse" for the purposes of the **Adoption Act**. In this regard although the application appears to have been signed by the infants' mother, her particulars are not filled in as a second applicant as would be expected if she was a joint applicant. The applicant must therefore be treated as a single male applicant.
10. In this latter regard although the biological parents of both infants have consented to the adoption, **section 2** of the **Adoption Act** expressly prohibits the adoption "unless the applicant" is either (i) the "father of the infant" or (ii) a "relative of the infant" who has attained 21 years or (iii) being neither of the above, has attained 25 years of age. It is common ground that the applicant falls into the third category in so far as he was born on 1st January 1982 and was therefore 28 years of age at the date of application. He is therefore *prima facie* eligible to adopt the infants.
11. However, **subsection 3** of **section 2** expressly prohibits the making of an adoption order "... of an infant who is female in favour of a sole applicant who is male unless the court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order."
12. In the present case there is no reason to doubt the applicant's genuine desire to adopt both infants who he has been living with and caring for since 2007 when he began a relationship with their mother. He has clearly grown close to both infants and wishes to become their legally registered father and give them both his surname. That is perfectly understandable,



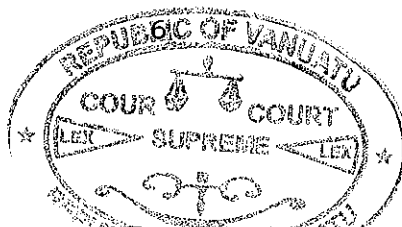
but, does it amount to a "special circumstance" in the case of the female infant to justify this Court making an adoption order in the applicant's favour? I regret that the applicant's wishes and personal circumstances are not a sufficient basis to warrant this court taking such an "exceptional measure" in the case of the female infant. Accordingly, the application is denied in so far as it relates to the female infant.

13. There is no similar impediment to the adoption of the male infant by the applicant and, were it not for the reservations expressed by the male infant's mother, I would have granted the application.
14. Having said that, the unusual albeit wholly understandable request of the infant's mother requires closer examination not the least because of the provisions of **section 13** of the **Adoption Act** which states [so far as relevant for present purposes]:

"(1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents ... of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a guardian and ... to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid ... the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.

(2) In any case where two spouses are the adopters, the spouses shall in respect of the matters aforesaid, and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children, stand to each other and to the infant in the same relation as they would have stood if they had been the lawful father and mother of the infant and the infant shall stand to them in the same relation as to a lawful father and mother....."

15. In brief, upon the grant of an adoption order all parental rights, duties and obligations are by law vested in the adoptive parent(s) to the exclusion of the natural parent(s) of the infant and the adopted infant shall be treated thereafter, as if he or she was "a child born to the adopter in lawful wedlock". In other words, the effect of the adoption order in this case, would be to permanently extinguish the parental rights of the mother of the infants in favour of the applicant.
16. Such a consequence is plainly at odds with the not unreasonable reservations and wishes openly expressed by the mother of the infants and which fundamentally undermines her purported consent to the application. Does such a reservation enable the court to dispense with the mother's consent pursuant to **section 5** of the **Adoption Act**? In my considered view




it does not nor is there any evidence whatsoever to support the specific grounds mentioned in the section for dispensing with a parent's consent.

17. Furthermore and in terms of **section 7 (1) (a) & (b)** of the Act I am not satisfied that when the mother of the infants agreed to the application, she fully understood the permanent legal consequences of an adoption order. Nor am I satisfied, in such circumstances, that an adoption order "... *if made will be for the welfare of the infant(s)*". Indeed, there are strong contra-indicators in the evidence.
18. Unfortunately the law of adoption as it presently exists ONLY authorizes a "*non-parent*" to adopt the infant child of his or her partner (for want of a better description), if and only if, they are legally married and a joint application for adoption is made or the partner (as the applicant's "*spouse*") consents to it.
19. Accordingly the application in its present form must be and is hereby dismissed. I recognize that the dismissal of the application is an unfortunate "*set-back*" but, as already explained, the marriage of the applicant and the mother of the infants would considerably assist a further application by the applicant (as a "*spouse*") to adopt both infants.

DATED AT PORT VILA, this 11th day of October, 2013.

BY THE COURT


D. V. FATIAKI
Judge.

