

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
FAMILY DIVISION
FILE NO. 2017/FAM/ADN/00546

BETWEEN

IN THE MATTER OF
The Adoption of Children Act (Chapter 131)

In Re S (an infant)

Before: The Honourable Madam Justice Donna D. Newton

Appearances: Ms Syneisha Bootle for the Applicants
Mr Kenny Thompson on behalf of the Attorney General

Hearing date: 19th September 20018

Judgment: 24th October 2019

JUDGMENT

NEWTON, J:

1. On October 2019 I delivered an oral decision in this matter refusing the grant of an adoption order for the reason that I found too many inconsistencies in the evidence. I have been requested to put my reasons in writing and I now do so.
2. The Applicants who are the biological mother of the infant and her husband, applied pursuant to the Adoption of Children Act to adopt the infant herein. At the date of the filing of the Originating Summons, 6th October 2017, they were 36 years and 45 years old respectively. The infant was 16 years, two months shy of her 17th birthday.
3. It is important to note the chronology of events in this matter.
 - October 2017 the Originating Summons, Supporting Affidavits and Statement were filed,
 - February 2018 Order granted *Amending* the Originating Summons and Appointing the Guardian Ad Litem
 - February 2018 the Statement was *Amended*
 - July 2018 the Guardian Ad Litem's Report was filed
 - August 2018 the Guardian Ad Litem's Report was *Amended*
 - August 2018 Second Affidavit of Mrs McPhee filed
 - September 2018 the Originating Summons was *Re-Amended* (without leave)
 - September 2018 Application was heard and adjourned for submissions and decision
 - October 2019 oral decision given.

The Applicants

4. The Applicants, Mr and Mrs McPhee, Bahamian and Jamaican nationals respectively were married in Jamaica in April 2010. According to the

Guardian Ad Litem's Report (The Report) Mr McPhee, is a self-employed fisherman earning approximately \$1,000 per week while Mrs McPhee is a security guard with Atlantis earning \$356 a week. Mr McPhee by his affidavit, said he assumed the role of father of the infant since 2008 when he started dating the infant's mother, adding that he had been taking care of her (the infant) financially for nine years prior to the filing of the Petition. It is not clear whether the infant was in The Bahamas during the time Mr McPhee refers to or whether she was in Jamaica. However, his affidavit also stated that

“On arrival to The Bahamas in 2013, she (infant) attended The L.W. Young Junior High School.”

5. According to Mrs McPhee, in her Second Affidavit filed August 2018, a year after their marriage the Immigration Department deported her to Jamaica because they had received an adverse report regarding her. This claim, she said, was never substantiated. She did not speak to whether or not the infant was deported along with her. She remained in Jamaica for two years before returning with the infant in 2013 with the assistance of Mr McPhee and in 2014 she was granted a residential spousal permit. She also said that she is currently undertaking studies at the University of The Bahamas leading to a nursing career. I note here that no documentary evidence was produced confirming Mrs McPhee's or the infant's immigration status in The Bahamas.
6. The only evidence that the infant was returned to Jamaica with her mother is contained in the Amended Report of the Guardian ad Litem (the Amended Report). However, no evidence was given from whom this evidence was obtained.
7. Mrs McPhee explained further that they suffered a financial setback as a result of the separation and therefore they were not able to afford the cost of the adoption in 2013, however they are now in a better financial position to afford it, hence the application in October 2017.

8. The couple has one minor child together and Mr McPhee is the biological father of four adult children from a previous marriage, one of whom resides with them.
9. In her supporting affidavit, Mrs McPhee indicated that her husband is the only father the infant **“has ever known”**. This statement I find is contradicted by the Amended Report where it is spelt out that the mother and the infant were residing with the biological father for two years while in Jamaica. It further explained that when the biological father was contacted regarding his consent to the adoption he said,
“he speaks to his daughter whenever possible, but he is unable to assist her financially”.
10. This leaves me to believe that there existed some sort of relationship with his daughter and not as Mrs McPhee would imply by her statement that there was never any relationship between the two of them, when she says that her husband is the only father the infant knows.

The Infant

11. The application commenced showing the Infant having been born on 12th December 2001. It was further referred to as 12th December 2000 and finally corrected by an Amendment to the Statement in February 2018 to reflect the date as stated on the birth certificate as 6th December 2000. Ordinarily I would have considered this merely typographical errors, but with the conflicting dates (as discussed later) as to when the infant commenced residing with the applicants in The Bahamas, I feel that I am bound to look at this circumspectly.

The Law

12. The effect of an adoption order is two-fold. *The Adoption of Children Act* extinguishes all rights, duties, obligations and liabilities of the parents and vests all such rights in the adopted parents as though the child was born to the adopted parents in lawful wedlock. Additionally under *Section 4 of the Bahamas Nationality Act* where the adopted parent is a citizen of The Bahamas on adoption the child becomes a citizen. Hence if granted the child will take on the Bahamian citizenship of Mr McPhee.

13. The child's welfare ought to be the paramount consideration when any determination is made respecting any child by virtue to *Section 3 of the Child Protection Act, (The Act)*.

14. When determining any question relative to the welfare of the infant *The Act* obligates the court to consider several factors. These factors include the wishes of the child, the physical, emotional and educational needs of the child, any changes in the child's circumstances, the age, sex, background, and any harm the child has suffered or is at the risk of suffering.

15. In addition to these factors, the court's approach in welfare cases was outlined by Hollings J, in *Re H (a Minor) 1992*, where he explained that:

“It must treat welfare as the first consideration, outweighing any one factor but not all factors. If the court considers on the evidence and information before it that the true motive of the application is based upon the desire to achieve nationality and the right of abode rather than the general welfare of the minor then an adoption should not be made. If on the other hand part of the motive - or it may be at least as much- is to achieve real emotional or psychological, social and legal benefit of adoption then an adoption order may be proper, notwithstanding that this has the effect of overriding an immigration decision or even an immigration rule. In every case it is a matter of balancing welfare against public policy, and the wider implications of

the public policy aspect the less weight may be attached to the aspect of the welfare of the particular individual”.

16. In considering welfare, I ought also take into account the period of minority, and in so doing I note the decision of *Osadebay Sr. J (as he then was)* in **Re L and C Minors 1999** that where the period of minority is short then the welfare factor carries less weight. In **W (A Minor) Adoption: Non-Patrial (1986) Fam. 54** the minority period was 10 months and the court held that the infant did not need adoption to ensure his welfare from childhood to adulthood.

17. In the case of **re K (A Minor) (1995) Fam. 38** the Court of Appeal considered a two stage approach in dealing with such cases. First the true motive for the adoption must be determined and only if it was satisfied that it was not to obtain citizenship then it ought to proceed to the second stage which is to carry out a balancing act between the infant’s welfare and public policy.

18. *Hobhouse, LJ* in **Re K (A Minor) 1995 Fam. 38** approving **Cross J** in **re A. (An Infant) 1963 1 WLR** likened the court’s function in these applications to those of the Immigration Minister, a function, he said, which was not intended by the legislatures.

19. Although the authorities require the court to take into account the length of time before adulthood, the court is also required to consider all the circumstances of the case.

20. *Hobhouse, LJ* on the question of welfare explained further that,

“The court must evaluate what will best serve the need to safeguard and promote the welfare of the child throughout its childhood and take this

aspect into account as the primary consideration in deciding whether or not to make the adoption order.

“Where the child is young”, he said, “the judge’s evaluation of this aspect is likely to be determinative and it would have to be a strong consideration of public policy which would displace it. Where.....the welfare issue is negligible, it may be difficult for the applicant for the adoption order to find grounds which are sufficient to counterbalance the public policy considerations of not allowing a right of entry or abode to be acquired....”

21. He pointed out that the judge must consider the substance of the position when he is being asked to make an adoption order which will have the effect of granting nationality. He said further,

22. *“There are many factors which will form part of circumstances which the judge has to take into account which can be described as potential benefits to the child and which arise from a combination of establishing a parental relationship (emphasis mine) with the proposed adopter and from the ability to continue to live in this country with the adopter. The status benefits for the child continue after it has become an adult; some emotional and psychological benefits will probably also continue. But the parental responsibilities will cease and it may well be that the only substantial lasting advantages are the acquisition of the right to live in this country with the proposed adopter”.*

23. Counsel for the Applicants urged the court to consider the facts of this case which are to promote the welfare of the child and to give her a sense of true belonging. She said the infant’s welfare ought to be safeguarded throughout her childhood. She submitted that the paramount reason for the application is the welfare of the infant and that citizenship is secondary to the true motive.

24. Relying on the decision of **Hollings J**, *supra* she submitted that it would be harsh, if not illogical, after this “*lapse of time*”, to reject the application on the ground that so little time of her childhood remains. I must point out here that the lapse of time prior to the infant attaining the age of majority is squarely on the shoulders of the applicants, having filed the application initially some 14 months prior to her 18th birthday. In addition, the subsequent amendments, the latest being one month prior to the hearing and three months prior to her 18th birthday, all contribute to the referred “*lapse of time*” herein.
25. She distinguished this case from **Re A (an Infant) 1963** in that, in the instant case the parents stand in loco parentis to the infant and there was a genuine bond between Mr McPhee and the infant that developed from them interacting and living together as a family. No evidence was produced to enable me to find that this was the case.
26. Counsel submitted that the grant of the adoption order will not open the floodgates and that refusal of the adoption order will mentally and emotionally affect the infant.
27. Counsel on behalf of the Attorney General denied that this case is unique and opined that the infant is approaching the age of majority and the Applicants are therefore seeking citizenship through the adoption process rather than through the Immigration Department. This he submitted is an attempt to circumvent the Immigration laws of The Bahamas, hence the true motive is citizenship. In these circumstances, he submitted, there is no genuine need for adoption and the application should therefore be dismissed.

Analysis

28. As mentioned, the primary consideration in adoption is what will it take to safeguard and promote the welfare of this child throughout her childhood

and into adult hood. This factor is no longer relevant, the infant having already attained the age of majority.

29. There are numerous conflicting evidence regarding when Mr McPhee would have commenced his role as a father. Mr McPhee said he provided financially for her since 2008. The Report of February 2018 said that the infant was residing with the applicants since she was 10 years old, which would have been in 2010. However the Amended Report in July 2018 says she was residing with the applicants since 2013. Counsel for the Applicants in her submissions said the infant was residing with them since she was 9 years old (2009).

30 .Apart from Mr and Mrs McPhee's evidence that he played a father's role in her life and that he provided for her financially there is no other evidence supporting Mr McPhee's actions. The Reports have no independent evidence of the role Mr McPhee played. They appear to be identical to the Statement and the Affidavits of the Applicants. None of the persons who provided references on the Applicants referred to any interaction with Mr McPhee and the infant, no school record was produced to determine his involvement with her education, if any. The only evidence is from the Applicants themselves and that is, that he loved her and provided for her financially. No evidence was produced to cause me to conclude that there is any emotional attachment between the infant and Mr McPhee and that a parental relationship was established.

31. The Report stated that the child wishes to be adopted by her mother's husband whom she calls "daddy". The applicants are providing physically but no evidence was produced to assist me in determining whether the emotional needs of the child are being met.

32. Again, no evidence was put forth as to any other change in circumstances that may affect the adoption apart from the fact that by the time this decision was given the infant was an adult.
33. Based on the many amendments to the documents in this matter it seems to me that the Applicants were aware that the infant's age of majority was imminent and therefore rushed to make the application. There are too many unanswered questions in addition to the numerous discrepancies as mentioned. I am not satisfied that if an adoption order is granted in this matter that it will serve the welfare of the infant.
34. The minority period in this case is very short, less three months (from the close of trial) therefore, the welfare factor carries little weight when it is balanced against the public policy considerations.
35. The only apparent benefit from the granting of the adoption order is the acquisition of citizenship.
36. Taking into account all the circumstances of this case it appears to me that the true motive is to achieve citizenship rather than serve the minor's general welfare and for this reason the application is denied.

DONNA D. NEWTON

Justice