



28/3/03

Kellock

1
2 IN CHAMBERS
3
4 IN THE GRAND COURT OF THE CAYMAN ISLAND
5
6 CAUSE NO: 4 OF 2003
7

8 IN THE MATTER of the Adoption of Children Law (1996 Revision);
9 the Adoption of Children Regulations (1996 Revision) and
10 the Adoption of Children Rules (1996 Revision)
11 AND IN THE MATTER OF Merry Cristina Romero Hernandez (dob 21/8/02)
12
13

14 BETWEEN:
15
16 (1) 100
17 (2) 101
18
19
20
21

Plaintiffs

- and -

22 (1) MERRY CRISTINA ROMERO HERNANDEZ
23 (2) GELIN YOLIBETH ROMERO HERNANDEZ
24
25
26

Respondents

27 **Before:** Mr. Justice Kellock
28
29 **Date:** 26.3.2003
30

31 **Appearances:**
32 Ms. Susan Lockloy for the Crown.
33 Mr. James Chapman of Boxalls for the plaintiffs
34
35
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38

REASONS FOR JUDGMENT

39 By summons dated February 18th 2003 and made returnable March 25th, the plaintiffs
40 seek, inter alia, an order pursuant to the provisions of section 9 (1) of the Adoption of
41 Children Law (“The Law”) authorising the plaintiffs to adopt the first respondent (“the

1 child"). The second respondent is the child's mother. The child was made a respondent
2 because the Adoption of Children Rules ("the Rules") so require.

3 The Rules also require the appointment of a *guardian ad litem* for the child. Accordingly
4 Sherri Ann Boddan-Cowan who attended the hearing is appointed the child's guardian
5 *nunc pro tunc* effective as of March 25th 2003. It was also attended by the plaintiffs, the
6 respondents and Pastor Reinaldo Dracket (an interpreter) as the respondent's mother is
7 Spanish speaking.

8
9 The Facts

10 The plaintiffs, I will call them Mr. and Mrs. A, were married on June 23^d 1985 and have
11 been happily married ever since. Mrs. A was unable to conceive a child and eventually
12 decided to apply to the Adoption Board (a statutory body created by the Law). They did
13 so on September 18th 2001.

14 Between November 2001 and February 2002 representatives of the Board visited the
15 couple's home, interviewed them and collected information relevant to the Board's
16 determination as to whether they would be suitable parents for an adopted child.

17 The Board's report and conclusion is before me and indicates that Mr. and Mrs. A are not
18 only suitable but from a child's point of view they are desirable parents. Accordingly the
19 Chairman of the Board wrote to them on July 17th 2002 as follows:

20 "This is to inform you that at the meeting held on 16th July 2002, the Adoption
21 Board approved your application to become prospective adopters.
22 As we have not been able so far to identify a suitable child within the Cayman
23 Islands, the Board will endeavour to assist you in every way to make contact with
24 creditable overseas agencies in an effort to do so.
25 We wish to take this opportunity to extend to you our sincere congratulations".

1 Unfortunately the Board was unable to locate a child for the couple and they contacted
2 several adoption agencies in the U.S.A. A Russian child was identified but the necessary
3 arrangements could not be made.

4 In the fall of 2002 the couple heard of a child in Honduras through the mother's sister.
5 The child (the First Respondent) was born in Honduras on August 21st 2002. Mr. and
6 Mrs. A arranged for the mother and child to come to Grand Cayman. The couple "fell
7 madly in love" with the child and decided to adopt her. The child has been under their
8 care and control since November 1st 2002.

9 Mrs. A states that the couple went immediately to the Adoption Board seeking the
10 appropriate forms. For some reason the Board would not give them the forms. As a result
11 they retained a firm of attorneys (Boxalls). Boxalls entered into correspondence with the
12 Board which eventually led to an attendance by the mother at the Department of Social
13 Services and the completion by her of certain forms after the contents thereof were
14 explained to her by Mr. Drackett, and Mr. Ebanks (another translator).

15 On February 26th 2003 the Chief Immigration Officer extended permission for the mother
16 and child to reside in the Cayman Islands for the purpose of the adoption proceedings.

17 On February 24th 2003 Boxalls forwarded a copy of the Originating Summons (returnable
18 March 25th 2003) to the Adoption Board requesting that the Board lodge the forms that
19 the Rules required the Board to provide, (Form C to the Rules and D to the Regulations).
20 Form D to the Regulations was not filed until the day before the hearing (March 24th
21 2003) and Form C has not been filed. Earlier on February 24th 2003 the Chairman of the
22 Board advised Boxalls that Form D to the Regulations, which had been completed, had
23 been invalidated by the striking out of a portion of it. It is the altered document that the

1 Board ultimately decided to lodge with the Court, the day before the date fixed for the
2 hearing. A copy of the form is annexed to these reasons. I will return to it in due course.
3 Ms. Look Loy attended at the opening of the hearing seeking to have the Adoption Board
4 added as a party and seeking an adjournment of the hearing. Ms. Look Loy took the
5 position on behalf of the Board that the Court could not make the adoption sought in the
6 circumstances because the child was under the jurisdiction of the Board. For the Reasons
7 set out below I declined Ms. Look Loy's requests and she retired from the hearing.

8
9 The Law
10 In June of last year I delivered Reasons for Judgment in an adoption case (reported at
11 2002 CLR 325).

12 I expressed the view then that the Law (including the Regulations and Rules) was poorly
13 drafted and created confusion as to the steps that persons seeking to adopt children should
14 follow. In my opinion the Law created two distinct scenarios, ie:

15 Scenario 1

16 “where the adopter (the person proposing to adopt) seeks a child to adopt and the
17 Adoption Board (which is created in section 3 of the Law) acts as the arranger
18 and places the child with the adopter pursuant to sections 5 and 6 of the Law.
19

20 Scenario 2

21 “where the adopter already has the child in his or her care”.
22

23 I described the latter situation as a *de facto* adoption simply to indicate that the steps
24 which might lead to the making of an adoption order had not been taken or completed

1 and an adoption order made. Once an adoption order is made the adoption becomes a *de*
2 *jure* adoption.
3 As a result I held that the Court was not bound by the opinions of the Adoption Board in
4 scenario 2 adoptions.
5
6 In deciding whether an adoption order should be made in this case I have re-examined the
7 Law and found no reason to depart from the conclusions reached last June.
8 As mentioned earlier, the plaintiffs in this case applied to the Adoption Board in
9 September 2001 and they were advised by letter from the Chairman of the Board dated
10 July 16th 2002 that the Board had approved their application to be prospective adopters.
11 Unfortunately the Adoption Board was unable to find a suitable child and the Board did
12 not place a child under the plaintiff's care. More particularly the Board had nothing to do
13 with the plaintiffs' assuming the care of the first respondent.
14 The plaintiffs were fortunate enough to hear about the child in Honduras through the
15 mother's sister and arranged for the mother and child to come to Grand Cayman.
16 The plaintiffs then sought to obtain the appropriate forms from the Adoption Board but
17 these were not forthcoming until the plaintiffs retained Counsel.
18 However, the Board, continues to refuse to provide Form C to the Rules which by section
19 3 (3) of the Rules, the Board seems to have a positive obligation to "odge in the Court". I
20 will return to that document in due course. In addition the Board took the position that
21 Form D to the Regulations had been altered by the plaintiffs or their attorneys and as a
22 result the Form had been invalidated. I will return to this question as well.

1 These forms are provided for by the Regulations and Rules which are both schedules to
2 the Act. Unfortunately, the Regulations include Forms A, B, C, and D and the Rules
3 include, *inter alia*, Forms A, B, C, and D but the “Regulation Forms” are entirely
4 different from the “Rules Forms” although they are designated by the same letters.
5

6 Despite the provisions of the Regulations regarding forms, there can be no doubt that it is
7 the Court and the Court alone which the Legislature has vested with jurisdiction to make
8 an adoption order in light of the substance of each case and that is so whether the
9 adoption is a scenario 1 or a scenario 2 adoption.

10 Sections 9 through 14 of the Law provide for that jurisdiction and prescribe the
11 circumstances in which an adoption order may or may not be made.

12 None of the provisions of those sections (or any other provision of the Law) contemplate,
13 let alone require any forms or the consent or approval of the Adoption Board as a
14 condition precedent to the making of an adoption order. As I have said the Law makes it
15 clear that is the Court alone which must decide whether the necessary criteria have been
16 met and whether or not an application has substantive merit.

17
18 The genesis of the Adoption Board’s jurisdiction on the other hand seems to be sections
19 4, 5 and 6 of the Law.

20 By section 4(1) it is an offence for anyone to take part in:

21 “arranging an adoption for gain or reward” or “taking part in the management or
22 control of a body of persons other than the Board which exists wholly or in part
23 for the purpose of making arrangements for the adoption of children”
24
25
26

1 Section 4(2) defines:

2
3 “making arrangements for the adoption of children”, and provides that anyone
4 who makes or facilitates such arrangements is deemed to “make arrangements for
5 the adoption of a child”.
6

7 Section 4(2) does not itself create an offence and it does not by itself prohibit anyone
8 from making arrangements for the adoption of children.

9 The prohibited activities are those and only those described in section 4(1). The
10 prohibited activities are limited to making of adoption arrangements for “gain or reward”
11 or taking part in the management or control of an adoption agency other than the
12 Adoption Board.
13

14 The creation of the Board by section 3 of the Law and the prohibitions provided for in
15 section 4 are quite plainly intended to make sure that the Board will be the sole adoption
16 agency in the Cayman Islands and that no-one whether acting alone or with others can
17 carry on the business of making adoption arrangements. However there is no doubt that
18 unless adoption arrangements are undertaken for gain, everyone is free to engage in that
19 activity for their own benefit or the benefit of others providing that they are not managing
20 or controlling an adoption agency.

21 Accordingly the arrangements made by the plaintiffs with respect to the child were and
22 are entirely lawful.
23

24 The Board sought to intervene in this application at the very last minute on the basis that
25 the plaintiffs had opted to pursue a scenario 1 approach by reason of their application to
26 the Board in September 2001.

1 Ms. Lockloy founded that this submission on section 6(1) of the Law.

2 Section 6 provides; as follows:

3 6(1) Where arrangements are made by the Board for the adoption of a child, an
4 application to the Court for an adoption order in respect of the child shall
5 not be made by the adopter until the expiration of a period of three months
6 from the date upon which the child is delivered into the care and
7 possession of the adopter pursuant to the arrangements and, at any time
8 during that period-

9
10 (a) the adopter may give notice in writing to the Board of his intention not
11 to adopt the child; or

12 (b) the Board may cause notice in writing to be given to the adopter of its
13 intention not to allow the child to remain in the care and possession of
14 the adopter,
15

16 and where a notice is so given, the adopter shall, within seven days of the date on
17 which the notice was given, cause the child to be returned to the Board for the
18 purpose of restoring the child to the parents or guardian.
19

20 (2) The Board shall appoint one or more persons whose duty shall be to keep
21 the child under close supervision during the said period of three months in
22 accordance with the Regulations.
23

24 (3) If, at the expiration of the said period of three months, no notice has been
25 given as aforesaid, the adopter shall, within three months from the date
26 upon which that period so expired, apply to the Court for an adoption
27 order in respect of the child or shall give notice in writing to the Board of
28 his intention not to apply for such an order, and, where notice is so given
29 or where an application for an adoption order in respect of the child is
30 refused by the Court, the adopter shall, within seven days of the date on
31 which the notice was given or of the date upon which the application is so
32 refused, as the case may be, cause the child to be returned to the Board for
33 the purpose of restoring the child to the parents or guardian.
34

35 (4) Whoever contravenes this section is guilty of an offence and liable, on
36 summary conviction, to a fine of one hundred dollars and to imprisonment
37 of six months, and the Court by which the offender is convicted may order
38 a child in respect of whom the offence is committed to be returned to his
39 parents or guardian or to the Board.
40
41
42

1 Ms. Lockloy argued that the plaintiff's September 2001 application and the Board's
2 investigation as to whether the plaintiffs were suitable adopters somehow constituted an
3 irrevocable decision by them to pursue a scenario 1 adoption and that prevented them
4 from subsequently pursuing a scenario 2 application.
5 She attempted to bolster this submission by reference to the definition in section 4(2) of
6 the Law entirely ignoring the provisions of section 4(1).
7 She sought to use the language of section 4(2) in order to support the submission that
8 arrangements had been made by the Board for the adoption of the child in this case and as
9 a result sections 6 and 7 applied to the plaintiffs' application and as a result the child was
10 under the Board's control. I do not agree.
11

12 Section 6(1) is intended to do no more than provide the Board with sufficient time to
13 assess whether or not an adopter is suitable and whether an adoption order would or
14 would not be in the best interests of the child, and the section presupposes that the child
15 has been delivered into the adopter's care by the Board. In this case the child was not
16 placed with the plaintiffs by the Board (ie she was not "delivered into the care and
17 possession of the adopter") by the Board and section 6(1) can have no application in this
18 case.
19

20 The Board's ability to prevent an adoption order being made (in circumstances which, in
21 the Board's opinion make an adoption undesirable) stems entirely from the Board's right
22 to require the adopters to return the child to the Board and that right is limited to children
23 which the Board has delivered into the adopter's care in the first place.

1 The Adoption Board has no right to the care or control of the first respondent and no right
2 to place her or remove her from the plaintiff's care.

3 Neither the Law, the Regulations nor the Rules contemplate that the Adoption Board will
4 be a party to any application to the Court for an Adoption Order. As I observed in the
5 2002 decision (at paragraph 20) there is no provision in the Law, the Regulations or the
6 Rules for the Board to make its views known to the Court as a required element of the
7 exercise of the Court's jurisdiction.

8 Section 6 of the Law assumes that if the Court refuses to make an Adoption Order in a
9 scenario 1 case the child will be returned to the Board as is the case when the Board has
10 decided during the three month probation period that it will not allow the child to remain
11 in the care of the adopter. If the Law was based upon the assumption that only children
12 placed by the Board under the provisions of section 6(1) could be adopted, then there
13 would be no possibility that any child in the position of the first respondent could be
14 adopted unless the plaintiffs, turned the child over to the Adoption Board for a *scintilla*
15 *juris* and the Board then delivered the child back to the adopters. If that was the
16 Legislature's intention, it could have and should have been explicitly stated in clear
17 language. In my opinion the Law is not founded on that premise and does not prohibit
18 this application.

19
20 It may also be said that the provisions of the Regulations and the Rules are difficult to
21 apply to children who have not been in the custody of the Board.

22 While regulation and rules are normally regarded as subordinate legislation to be
23 interpreted in the light of the provisions of the enabling statute in this case both the

1 Regulations and the Rules are prescribed by the statute (the Law) (although the
2 Regulations may be varied by the Governor and the Rules, by the Chief Justice).
3 The Law including the Regulations and the Rules must be construed as a whole and
4 meaning given to all of their provisions if at all possible. The issue therefore, is whether
5 the Law read as a whole including the Regulations and Rules somehow prevents the
6 plaintiffs from succeeding and requires them (and all other adopters) to seek to adopt
7 only children placed in their care by the Adoption Board.
8 I do not accept that such is the case and I note that the Legislature has not seen fit to
9 amend the Law as a result of my earlier opinion.
10 As I have noted section 4 does not prevent, and therefore is not intended to prevent
11 people from taking children into their care in the manner that the plaintiffs took the child
12 in care in this case or in the 2002 case.
13 Why should the Adoption Board be vested with power to prevent any and all adoption
14 applications from reaching the Court for adjudication. The Board can decline to place
15 children with would-be adopters and can give notice that a child placed by the Board
16 must be returned to the Board. The Law does not require the Board to give anyone any
17 reasons for such action and the Board might act quite arbitrarily.
18 It is completely unclear whether or not section 7 of the Law, which contemplates an
19 appeal to a judge in chambers from decisions of the Board is intended to apply to any
20 decisions or actions of the Board under section 6. Arguably section 7 only applies to the
21 cases where the Board has declined to place a child with a would-be adopter in the first
22 place but the section does not say so in clear language. In any event once an adoption
23 application is made in respect of a child over which the Board has no control there is no

1 provision in the legislation for the Board to make any decisions or even
2 recommendations.

3 The Law requires that the Court must be satisfied that an adoption order will be for the
4 welfare of the child. While many of the provisions of the Law, Regulations and Rules
5 are difficult to apply to scenario 2 cases I cannot accept that the legislation can be
6 interpreted as prohibiting them.

7 Chapter 10 of Maxwell on Interpretation of Statutes (12th ed. 1976 – the only one
8 available to me) is entitled “Construction Most Agreeable To Justice and Reason”.

9 Part I of that chapter is entitled “Presumption Against Intending What is Inconvenient
10 or Unreasonable” and at page 203 the editors state.

11 “Not only are unreasonable or artificial or anomalous constructions to be avoided:
12 it appears to be an assumption (often unspoken) of the Courts that where two
13 possible constructions present themselves the more reasonable one is to be
14 chosen”.

15
16 (see also 44(1) Hals. 4th ed. para. 1480)

17
18 Lord Westbury said many years ago that statutes should be interpreted so as to respect
19 personal rights (*Malsh v Secretary of State for India* (1863) 10 HLC 367).

20 If the legislature intended to give the Adoption Board an absolute monopoly over all
21 adoptions and efforts to adopt children in the Cayman Islands it could very easily have
22 said so in the Law. Not only is such a provision absent from the law but section 4(1)
23 explicitly and clearly provides otherwise leaving the plaintiffs (and others like them) to
24 exercise their right to make adoption arrangements.

25 These rights are subject only to the requirement for the approval of the Court under the

26 Law as it exists today. Given the court’s jurisdiction and the criteria prescribed by the

27 Law for the exercise of that jurisdiction there is no reason to search for inferences that the

1 Law intended the Board to have a monopoly on adoption or is entitled in some other
2 indirect way to prevent the plaintiffs from presenting a proper case to the Court and
3 obtaining the appropriate order. In my opinion such a conclusion cannot and should not
4 be reached in the absence of clear language.

5
6 The Regulations and Rules

7 Section 3 of the Regulations purports to require that “Every person desirous of adopting a
8 child shall first make an application to the Board...” The Regulation then requires a
9 Form A, a Form B and a Form D. There can be little doubt that the Regulations
10 contemplate the use of these Forms in scenario 1 adoptions.

11 In particular Form D is entitled:

12 “Certificate of Receipt of Memorandum to be Furnished to Board by Parent or
13 Guardian Proposing to Place Child at Disposition of Board”

14
15 In this case the words “Proposing to Place Child at Disposition of Board” were deleted
16 (see the document attached to these reasons). That was done simply because those words
17 did not properly describe the circumstances of this adoption. I note further that the title to
18 the form (quoted above) adds nothing to the body of the form which certifies that the
19 mother (the first respondent) understands the implications of the adoption in respect of
20 her rights as the child’s natural mother. An alteration to the title to the form does not in
21 any way affect the substance of it and certainly would not invalidate it. In any event this
22 Form D is not required by the Court as a condition precedent to the making of an
23 Adoption Order. It may be helpful in deciding whether the provisions of section 10(4) of
24 the Law have been met but those requirements can be met in other ways. The Court is
25 not limited to reliance on Form D.

1
2 The provisions of the Rules regulate the procedure to be followed in applications to the
3 Court.

4 I note that Form A to the Rules seems to have made provision for the adoption of
5 children who were in the care of adopters when the Law was first enacted and this
6 circumstance is called a "*de facto*" adoption. It is possible that the rules in their entirety
7 were drafted on the false assumption that there would not be de facto adoptions after the
8 Law came into force. Nevertheless the plaintiffs complied with the Rules.

9 The plaintiffs have provided the documents which the rules required them to provide.

10 The only document which the Rules contemplate that the Court will have which it does
11 not have is the Form C to the Rules. The obligation to provide that document is the
12 obligation of the Board not he plaintiffs. In any event the Court has all of the information
13 such a form would contain and there is therefore no need to order the Board to provide it.

14 The Board's failure to co-operate cannot prevent the Court from exercising its
15 jurisdiction.

16 As I have said it is possible that the Rules are based or may be based on the assumption
17 that most if not all adoptions will be adoptions of children placed by the Board. That, as
18 I have found, is a false assumption and the Rules cannot constitute a prohibition which
19 section 4 of the Law does not.

20 The plaintiffs are entitled under the Law to make this application and they are entitled to
21 have the Court determine it on its merits.

22 I am satisfied that service on the father should be dispensed with (he is unknown).

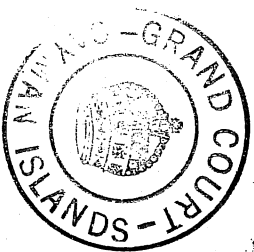
23 I am satisfied that the mother has given an informed consent.

1 She did so in writing and again in my presence and I have no doubt whatever that it was
2 an informed consent. I also have no doubt that the proposed adoption is for the welfare
3 of the child. In the result the plaintiffs' application succeeds and the order sought will be
4 made. I may be spoken to as to the language and content of the formal order.

5
6
7
8 Hon. Mr. Justice Kellock

9
10 Dated the 26th day of March 2003.
11

12
Released Mar 28/03



THE ADOPTION OF CHILDREN LAW (Revised)

FIRST SCHEDULE

FORM D

FIRST APPENDIX

CERTIFICATE OF RECEIPT OF MEMORANDUM

TO BE FURNISHED TO BOARD

BY

PARENT OR GUARDIAN

To the Adoption Board:

I hereby certify that I received from the Adoption Board a memorandum Form C. headed "*Adoption of Children Law (Revised)*" from which I have detached this form of acknowledgment that I have read the memorandum and understand it and agree to the terms thereof.

Signature _____

Name _____

Address _____

Date _____

Relationship to child: Mother

Before: _____

(Justice of the Peace)

Date: _____