MR. Sisifa

07/01/16
Summons filed.

IN THE SUPREME COURT OF TONGA
FAMILY JURISDICTION
NUKU'ALOFA REGISTRY **FA 137 of 2015**

IN THE MATTER OF ***The Guardianship Act 2004***

AND IN THE MATTER OF *an application by* ***Mikaele Pupungatoa and Mrs Janie Marie Fonua*** *for Legal Guardianship Order.*

AND IN THE MATTER OF *the child a male born 18th June 2015.*

BEFORE THE HONOURABLE JUSTICE CATO

JUDGMENT DECLINING APPLICATION

1. The Applicants, husband and wife (who appeared in person on this application, her husband remaining in Australia) are both permanent residents of Australia. The male Applicant had been born in Tonga and educated in Tonga but is now a permanent resident of Australia. The female Applicant is a New Zealand citizen but had received her schooling in Australia where she had lived for many years. The Applicants were married in 17th October, 2009 in New South Wales and have no children. Both reside in Sydney. The male Applicant is aged 38 and the female Applicant is aged 41. Both the Applicant are in well-paying employment in Australia; the male applicant being a glazier with an income AUD $67,000 per annum.

The female applicant is employed as a products complaints coordinator and earns $65,000 per year. They rent accommodation and are saving for a house to purchase. The accommodation, in a report provided to the Court, was considered to be suitable for the child should he be allowed to reside in Australia.

2. The child is about 5 months old. He was born legitimate, the natural mother being aged 30 and the natural father being 31. They have been married since 2006, and have four other children, 3 boys and one girl, the ages of the children being 9, 6, 4 and two. Both consent to the application and believe it is in the best interest of the child that the Applicants raise him. They had agreed to give a previous child to the applicants, however, because the child was a girl they had wanted to keep her. They are more than willing they said to have the Applicants bring up this male child. Both parents are employed in Tonga. There is no suggestion in this Application that the natural parents themselves are unable to care for this child through economic hardship or for any other reason.

3. The Guardian Ad Litem report supported the application which had support also from a Minister of religion and others. However, I had my concerns on reading the Guardian Ad Litem report that this application was in order, and asked that further consideration be given principally to two issues which I considered reflected adversely on it. Mr Kefu later appeared on this Application which was adjourned for couple of days for consideration of the issues that concerned me.

4. The two matters which concerned me were the uncertain state of the child's acceptance by Australian immigration authorities for entry into Australia. This had been an issue of concern also to the authors of a Confidential home assessment report on the Applicants which was a lengthy document running to several pages that was filed with the Application. The authors, social workers, had advised the applicant to seek an independent report as to whether the child was likely to be able to immigrate into Australia, but they had not done so stating that they had relied on other Tongans' experiences, they having children come to live they maintained in similar circumstances. There had been some consideration given by the Applicants to obtaining multiple entry visas which would mean that the child would need to leave Australia returning at the end of three months for four years before he could apply for Australian residency. The authors of this report did not think this was a very good suggestion and canvassed with the Applicants the possibility of their coming to Tonga should the child not gain entry to Australia. Both said they would be prepared to relocate to Tonga. I note, however, in doing so both would be foregoing quite remunerative employment. The Guardian Ad Litem report had not addressed this important issue so I requested this matter be further considered by a senior Crown counsel.

5. Even more fundamentally, however, was the problem that granting the application would mean that this child was separated from his young siblings and from a family

environment in Tonga, and, in circumstances where there was no evidence that the parents and any extended family would be unable to provide for the child. A similar issue was considered by the Court of Appeal recently in Tonga in the case of Saavedra v Solicitor - General (AC 1 of 2013, 17th April 2013)[1] where the Court of Appeal upheld the decision of Scott CJ to reject an application by American citizens (non-Tongans) to adopt a male child and take the child to the United States on the ground that there was a caregiver available in Tonga for the child, his grandmother, although the mother had consented to adoption. The child had been cared for by his grandmother for about five years and he did not want to go with the female Applicant. In that case, Scott CJ had granted an adoption order of a younger female child to the Applicants, his reason being that the natural parents and extended family in Tonga could not look after both children. The Court of Appeal observed, in upholding the decision of Scott CJ, that the best interests of the child was the paramount consideration, 'in adoption, including inter-country adoptions, and indeed in other cases involving children." Tonga, the Court observed was a party to the United Nations Convention on the Rights of the Child, Article 41 of which provides;

> "(b) Recognize that inter-country adoption may be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any

[1] Subsequently, circumstances changed, and a further application for adoption brought by the same applicant was successful.

suitable manner be cared for in the child's country of origin."

6. In my view, the same considerations apply where the Application is for a Guardianship order to remove a child from Tonga. Where a child has been born legitimate under Tongan law, that child is not able to be adopted, however, in a suitable case a Guardianship order may be made, under the Guardianship Act for the Applicant to have custody of the child. In this case, the Applicants had been unable to have children and the relationship of the female Applicant and the natural mother and her mother had influenced the Applicants to proceed to seek guardianship of this child, which both natural parents had supported. In my view, this application met, however, with the difficulty that there was no evidence that the natural parents and extended family were unable to adequately care for the child, and to allow him to leave Tongan would be to separate him from his siblings and Tonga, indefinitely. This issue had not been addressed in the guardian ad litem report and so I had sought further information on this aspect, also.

7. Mr Kefu appeared on the second occasion. He was unable to provide further information on the immigration issue, which had troubled Australian social workers and concerned me, also. Whilst I might have deferred the case to have ascertained or received further information and evidence from Australian immigration or other Australian source such as the High Commission as to the child's prospects of success on gaining entry into Australia were a Guardianship order to have been made, the Application in my view failed more fundamentally because there was no evidence that the child could not be adequately cared for by his parents in Tonga. Mr Kefu did not suggest otherwise.

8. Thus, whilst the Applicants, who are plainly desirous of having a child to care for and no doubt would be able to provide well for him, I do not think, following Saavedra, that it would be in the best interests of this child to be removed from Tonga, from his four other young siblings and also from the care of his natural parents and extended family in Tonga, there being no evidence that they were unable to provide for his needs.

DATED: 4th January **2016**

SUPREME COURT TONGA

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