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**IN THE SUPREME COURT OF TONGA
FAMILY JURISDICTION
NUKU'ALOFA REGISTRY**

FA 105 of 2015

There is an order prohibiting publication of any details of this judgment which identify the applicants, the subject child or the natural mother

**IN THE MATTER OF The Maintenance of Illegitimate Children
Act Cap. 30**

**AND
IN THE MATTER OF an application by Vaitulala Leger and
Velmer Ann Leger for Letters of Adoption**

**AND
IN THE MATTER OF Victoria Rolein Nakita Leger, a female
child born on 9 February 2013**

BEFORE LORD CHIEF JUSTICE PAULSEN

**Heard: 15 March 2016
Decision: 16 March 2016**

Appearance: Mr. S. Tu'utafaiva for the Applicants

RULING

[1] The applicants apply for Letters of Adoption in respect of the female child, Victoria Rolein Nakita Leger, born 9 February 2013 ('Victoria'). The Solicitor General was appointed Guardian ad Litem and has prepared a report dated 3 November 2015. The Solicitor General recommends that the Letters of Adoption be granted on the grounds that it is in Victoria's best interest.

[2] This application was heard on 15 March 2016, at which time the applicants advised that they were due to return to New Zealand on 18 March 2016 and I advised that I was also to travel on 16 March 2016. This ruling is made in consideration of these time constraints.

The Applicants

[3] The applicants were married in New Zealand on 7 July 2010 and have no children. The male applicant is Tongan and is 28 years of age. He is the brother of Victoria's mother. The female applicant is 39 years of age and is a New Zealand citizen. She has a Tongan mother and a Māori father. She speaks Tongan and Te Reo Māori and English.

[4] Both applicants are currently employed in New Zealand. The female applicant is employed in the Sales Department of Shop Direct and earns NZD\$90,534.00 per annum. The male applicant earns a minimum of NZD\$1,200.00 per week working as a building painter for Coad Contracts and also installs vehicle stereos on a casual basis for NZD\$200.00 per installation.

[5] The applicants rent accommodation in Auckland which they share with the female applicant's cousin, her husband and their child. In the home assessment report, attached to the Guardian ad Litem's Report, the applicants' home was considered to be safe and secure and highly suitable for raising Victoria.

[6] The applicants are members of the Catholic Church and are involved within the Tongan community in Auckland. They have stated that they call the natural mother on a daily basis to speak with Victoria.

The Natural Mother

[7] The natural mother supports the application. Like many Tongan mothers who come to this Court she believes that Victoria will have a better life if she is taken and raised overseas. She believes the applicants genuinely love Victoria which I accept.

[8] When the natural mother became pregnant, she and the applicants agreed that they would take care of the child as they were unable to have children of their own and the natural mother was not married.

[9] The natural mother has been employed but is no longer in paid employment. It seems that she gave up her employment late last year because she did not wish to work night shifts, which is what her employment required. She was at that time earning TOP\$200.00 per week.

[10] The natural mother has stated that the natural father has never been involved in Victoria's upbringing.

The Child

- [11] Victoria is an illegitimate child and is currently three years old. She is familiar with the applicants. The natural mother moved to New Zealand to live with the applicants in preparation for her birth and Victoria was born in New Zealand and was named and customarily adopted by the applicants. She lived with her natural mother and the applicants until she was three months old. When she was two years old, Victoria again was taken to New Zealand to live with the applicants for a period of six months. During this time, the natural mother remained in Tonga and the applicants were her primary caregivers. Although Victoria's maternal grandmother also travelled to New Zealand, she lived elsewhere.
- [12] At all other times, Victoria has lived in her maternal grandfather's residence at Popua, Nuku'alofa, Tonga, with her natural mother, her grandparents and other relatives. There are currently ten people living in the Popua property. I am told that only one of those living in the household has employment and that it is on a casual basis.
- [13] The applicants have travelled to Tonga to see Victoria and they send approximately TOP\$200.00 per fortnight to the natural mother to assist in meeting Victoria's expenses and other needs. The natural mother confirmed that all expenses have been paid, and decisions involving Victoria have been made, by the applicants.

Importantly, they both speak the Tongan language and for the male applicant it is a first language. At the Hearing the female applicant also stated that they were considering enrolling Victoria in a Tongan preschool.

[18] Similarly, there does not seem any reason to doubt that Victoria's connection to her Tongan family will be severed as the male applicant is her uncle and closely related to the persons with whom the natural mother is living. I am told that he has a large family in Auckland also, providing another source of familial connection.

[19] On the face of it there is an argument that granting Letters of Adoption is in the best interests of Victoria, which is what the applicant and their Counsel contend.

Inter-Country Adoption

[20] However, that is not an end of the matter as this Court is bound by the Court of Appeal decision of *Saavedra*, which held that where an application for Letters of Adoption involves an inter-country adoption, as it does in the present case, it "should be approved only when all other means of caring for a child in Tonga have been exhausted" (at [5]). Accordingly, an inter-country adoption is only to be granted as "a measure of last resort" (at [5]).

The Law

- [14] The primary consideration of the Court in determining whether to grant Letters of Adoption is whether it is in the best interests of the child (*Hatch v Solicitor General* [2010] Tonga LR 177 and *Saavedra v Solicitor General* [2013] TOCA 7 (CA) confirming the principle in United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, Treaty Series, vol. 1577, p.3. Article 21).
- [15] Both the natural mother and the applicants are of the view that Victoria will have a better life in New Zealand and greater opportunities to obtain an education. The applicants are clearly in a more financially secure position than the natural mother or any of the family she lives with here in Tonga.
- [16] The applicants have ensured that their accommodation is safe, secure and generally suitable for a child. The effort to which the applicants have gone to prepare their home, and in particular a bedroom, for Victoria is evident from the home assessment report and pictures of the applicants' residence. It is clear that the applicants have a genuine desire for Victoria to live with them.
- [17] This is not a case where the granting of Letters of Adoption would sever Victoria's links to her Tongan culture, language and heritage. Both applicants are of Tongan descent and maintain strong ties to the Catholic Church and the Tongan community in Auckland.

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[21] On the facts presented to the Court, I am not satisfied that the grant of Letters of Adoption is the last resort to provide for Victoria's care. Except for the period totalling approximately nine months during which Victoria lived in New Zealand with the applicants, she has resided at Popua with her natural mother, grandparents and other relatives. There was no suggestion that she was not well cared for. While the applicants do send the family money, no evidence was presented to suggest that the natural mother and her family could not support Victoria without this assistance. On the information before the Court the grounds for granting Letters of Adoption are not made out.

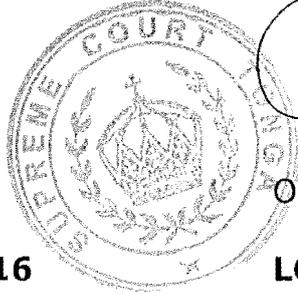
[22] A large number of the applications that come before this Court for Letters of Adoption or Legal Guardianship Orders are from overseas applicants. While this Court is bound by *Saavedra*, the facts of this case, and others like it, raise an issue as to whether the apparently inflexible approach to be taken to inter-country applications is necessarily in the best interest of the child or is consistent with Tongan culture and values. Might the principle in *Saavedra* lead to outcomes that are contrary to the overarching principle it seeks to promote? In this Court's experience there may well be cases (of which this case is arguably an example), where the best interests of the child might be better served by the granting of Letters of Adoption despite the fact that the child has care options here in Tonga. If there is to be a change in the law however it is a matter for consideration by the Court of Appeal.

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Result

[23] Not without reservations, the application for Letters of Adoption is dismissed.



O.G. Paulsen
O.G. Paulsen

NUKU'ALOFA: 16 March 2016

LORD CHIEF JUSTICE