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

FA 124 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 Guardianship Act 2004

AND

IN THE MATTER OF an application by **Samiuela Haulani Funaki and **Lilieta Taumafa Funaki** for a **Legal Guardianship Order****

AND

IN THE MATTER OF **Victoria Salutatorian Vailahi, a female child born on **20 May 2010****

BEFORE LORD CHIEF JUSTICE PAULSEN

Heard: 19 April 2016

Decision: 22 April 2016

Appearance: Mr. K. Piukala for the Applicants

RULING

[1] The applicants apply for a Legal Guardianship Order in respect of the female child, Victoria Salutatorian Vailahi, born 20 May 2010 ('Victoria'). On 9 September 2015, the Solicitor-General was appointed as the Guardian ad Litem to represent the interests of Victoria and prepare a report for the Court's consideration. In the report dated 6 January 2016 the Guardian ad Litem recommended that the granting of a Legal Guardianship Order was in Victoria's best interests.

recd 26/04/16
HHC

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- [2] This is an application for an inter-country adoption. Upon receipt of the Guardian ad Litem's report I issued a minute pointing out that the application faced a formidable hurdle in light of the decision of the Court of Appeal in *Saavedra v Solicitor General* [2013] Tonga LR 60 and I suggested that the application could be brought on for legal argument which would determine the issue of the application of *Saavedra* without the applicants incurring the cost of travel to Tonga. I did not want the applicants to incur the cost of travel if their application was going to necessarily fail. The applicants did not pursue that option and the Guardian ad Litem requested that the application be heard urgently during the second week of April as the applicants intended to travel from their home in New Zealand to Tonga. A hearing date of 20 April 2016 was given but on 6 April 2016 further correspondence was sent to the Court by the Guardian ad Litem requesting that the hearing date of 20 April 2016 be vacated and a new hearing date be entered for 19 April 2016 as a change in the female applicant's travel plans meant that she would be leaving Tonga on that date.
- [3] In the letter of 6 April 2016 the Court was also advised in response to the matter raised in my minute of 15 January 2016 (which it appears was incorrectly understood by the applicants to be solely a concern that there was no evidence that Victoria would be allowed by New Zealand Immigration to travel and live in New Zealand on the strength of a Legal Guardianship Order) that having secured a Legal Guardianship Order in this Court the applicants intended to then apply to adopt Victoria in New Zealand. In a further minute of 8 April 2016 I noted that whether the applicants' intentions in this

regard strengthened their application was a matter upon which I would expect legal argument.

- [4] It was against this background that the application came before me on 19 April 2016. The hearing was attended by the applicants, Victoria's natural mother and father, Victoria, Mr. Kelepi Piukala as counsel for the applicants and Mr Finau for the Guardian ad Litem.

The child

- [5] Victoria was born at Vaiola Hospital, Tofoa, Tongatapu on 5 May 2010 and is now almost 6 years of age. She is a legitimate child and has lived with her natural parents and four siblings for her entire life. Although Victoria was not attending school at the time the Guardian ad Litem's report was prepared, I am told she is now at school.
- [6] The Guardian ad Litem advised that Victoria is aware of the application and is happy about it as she sees the applicants at least once a year when they travel to Tonga from New Zealand, and she has a close relationship with them. During the hearing I attempted in the presence of the female applicant and others (including Ms Salt a Court interpreter) to speak with Victoria but she became upset and she would not speak at all. She is clearly a very shy and sensitive child.

The applicants

- [7] The applicants were both born and brought up in Tonga but were married in Wellington, New Zealand on 14 July 2005 and currently reside in Aranui, Christchurch, New Zealand. The female applicant and the natural father are siblings, so the female applicant is Victoria's aunt. The applicants have no children of their own.
- [8] The female applicant is 35 years of age and has full-time employment with Triton Hearing Ltd as an Accountant and Payroll officer. She also buys and sells items online, although the details of the goods and any income earned from this practice is not known. The male applicant is 38 years of age and works in a part-time construction position. He also operates Pasifika Growers Limited, a business which imports and exports containers of goods between New Zealand and Tonga.
- [9] The applicants live in modest rental accommodation in Aranui. The Guardian ad Litem is of the view that the applicants' home was a comfortable and safe home environment for Victoria. This recommendation was based on the home assessment report, a copy of which was provided to me by the Guardian ad Litem at the commencement of the hearing.
- [10] The applicants are active members of the Mormon Church and intend to raise Victoria in the same faith.

[11] The applicants have stated that they travel to Tonga once or sometimes twice a year to see Victoria, their last visit being in December 2015. During the hearing I was informed by the female applicant that she currently provides financial assistance to her brother's family by way of supermarket credit for groceries and sending other sums of money to the family as required, which is used for school costs for Victoria and her four siblings. The female applicant stated that if the Legal Guardianship Order is granted they intend to focus their financial assistance primarily on raising Victoria and will provide money to the natural parents less regularly and only when required.

[12] The applicants make this application for a Legal Guardianship Order of Victoria as they have been unable to have a child of their own and wish to raise Victoria in New Zealand where they believe she will have greater educational opportunities and ultimately a better life. They say in addition that if Victoria grows up in New Zealand she will in time be able to provide financially for her family here in Tonga.

[13] The applicants say that they love Victoria. I accept that their love for Victoria is genuine. It was also obvious to me that they have a deep and to date unfulfilled desire to have a family of their own

The natural parents

[14] The natural mother is 40 years of age and is employed as a cleaner at Liahona High School earning approximately TOP\$200.00 per

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fortnight. The natural father is 36 years of age and is also employed at Liahona High School to paint and maintain the school buildings, earning approximately TOP\$200.00 per week.

[15] The natural parents were married on 25 July 1998 and have a total of five children. All five children have lived with the natural parents since birth, and Victoria's siblings all attend school or study at a tertiary institute. During the hearing I was advised by the natural mother that Victoria is very close to all her siblings.

[16] When the natural mother was pregnant with Victoria, the natural parents and the applicants entered into an arrangement whereby if the child was a girl, the applicants would name the child and eventually adopt her.

The Law

[17] It is clear that Tongan law requires that the overarching principle to be applied by the Court in considering an application for Letters of Adoption or a Legal Guardianship Order is whether to do so is in the best interests of the subject child. (*Saavedra (supra)* confirming the principle in the United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, Treaty Series, vol. 1577, p.3. Article 21; *In re: Application for Legal Guardianship Order for T* [2015] TOSC 2; *In re: Application for Guardianship Order Pupungatoa and Fonua* [2016] TOSC 1). In many of the applications that come before this Court, of which this is one, the desire of the applicants to have or increase the number of children

in their family is a major driving influence in the decision to apply to the Court for a Legal Guardianship Order or Letters of Adoption. The desires of applicants are not the focus of this Courts enquiry and all I am concerned with is what is in the best interests of Victoria.

[18] The Court of Appeal has stated plainly in *Saavedra* that where the granting of Letters of Adoption would remove a child from Tonga, that such an order should only be issued where "all other means of caring for a child in Tonga have been exhausted" (*Saavedra* at [5]). This Court has applied the same principle to applications for the grant of Legal Guardianship Orders (*Re Pupungatoa and Fonua* at [6]).

[19] On the evidence presented to me at the hearing of this matter, there are perfectly suitable means to care for Victoria here in Tonga with her own family and I am of the clear view that that it would not be in Victoria's best interests to make the Legal Guardianship Order.

[20] Victoria has lived with her natural parents and four older siblings for the entirety of her life. When I enquired of the natural mother as to Victoria's relationship with her siblings, I was advised that Victoria shares close relationships with all her brothers and sisters.

[21] Although the natural parents advised the Court that Victoria could speak English as she had been taught it by her siblings, I was unable to speak with Victoria during the hearing to ascertain this for myself and given the natural parents firm and understandable

preference for speaking in the Tongan language I maintain reservations as to whether this is in fact the case.

[22] Victoria presented as a shy child of five, who has only recently commenced her schooling. In these circumstances and regardless that Victoria has some familiarity with the applicants, I am of the view that Victoria would experience significant dislocation if she were to move to New Zealand with the applicants, particularly in terms of language and schooling, and without the strong familial connections that she has with her parents and siblings to support her.

[23] Although the applicants appear to be in a more secure financial position as compared to Victoria's natural parents this is a relative matter. The applicants are not wealthy and live in rental accommodation in one of the poorer suburbs of Christchurch. There was no evidence to satisfy me that in terms of her education and future life prospects Victoria can expect to do better being raised by the applicants than with her family here in Tonga. Although the applicants have provided regular financial assistance to the family, Victoria has lived with her natural parents and four siblings for the entirety of her life and she has clearly been suitably cared for up to this point in time and there is no reason to suspect that this will not continue in my view. It appears to me that her family circumstances are better than are enjoyed by many in Tonga.

[24] As I noted, in the letter of 6 April 2016 the Guardian ad Litem advised that the applicants intended to apply to adopt Victoria

under New Zealand law if granted the Legal Guardianship Order. At the hearing the applicants advised that they had made enquiries in this regard, but did not provide any further evidence as to their prospects of success in such an application. Even if I considered that the applicants might be successful in an application to adopt Victoria in New Zealand it would not alter my view of this application. To grant a Legal Guardianship Order in these circumstances would result in an ultimate outcome which is clearly contrary to the Court of Appeal's position in *Saavedra* and would be using this Court to circumvent the Law of Tonga. That is not an approach this Court can condone.

[25] I feel much sympathy for the applicants who as I have said are genuine in their love of Victoria and in their desire for a family. I accept that they believe that Victoria will ultimately be better off living with them in New Zealand and for that reason I took time to consider this application further before arriving at my decision. However I should say that upon reflection this was not an application that in my view was finely balanced.

[26] It is clear in my view that Victoria's best interests are served by remaining in Tonga with her family and I would have arrived at the result to decline the application notwithstanding *Saavedra*.

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Result

[27] The application for a Legal Guardianship Order in respect of Victoria is dismissed.



A handwritten signature in black ink, appearing to read "O.G. Paulsen", is written over the right side of the seal.

O.G. Paulsen

NUKU'ALOFA: 22 April 2016

LORD CHIEF JUSTICE