

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

*Sca, file & Upload*

*Solicitor General*

*[Signature]*  
*12/12/17*

**FA 122 of 2017**

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**The publication of any identifying particulars of persons concerned with this application is prohibited.**

**IN THE MATTER OF**

**The Guardianship Act 2004**

**AND**

**IN THE MATTER OF**

an application by **Sisilia Ate Tu'iha'angana** for a Legal Guardianship Order.

**AND**

**IN THE MATTER OF**

**Salprna Paea Avenue Fisi'iniu Tupou** a female child born on 7 March 2006 and **Glenda Fisi'iniu Tupou** a female child on 20 June 2007

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Heard: 30 November and 11 December 2017**

**Decision: 12 December 2017**

**Appearances: Miss. T Kafa for the Guardian ad Litem  
The Natural Parents in person (on 30 November)  
The Applicant in person (on 11 December)**

**RULING**

1. The applicant seeks a legal guardianship order in respect of two female children. The application is opposed by the guardian ad litem on the ground that it is not in the best interests of the children to make the order.

*recd 12/12/17*  
*[Signature]*

2. The application came before me on the recent circuit to Vava'u but the applicant did not appear. The applicant resides in New Zealand but had travelled to Tonga. She was aware of the hearing date of the application but had gone to Ha'apai.
3. I saw the natural parents and the two children in Vava'u and then adjourned the application to hear from the applicant in Nuku'alofa. The applicant appeared before me in support of her application on 11 December 2017 in Nuku'alofa.

**The facts**

4. The subject children are Salprna and Glenda Tupou who are aged 11 and 10 respectively. They are the legitimate children of Heilala and Ma'ata Tupou. There are six children of the family. In addition to Salprna and Glenda there are four older boys. The children attend school. Salprna is in form 1 of Neiafu Middle School. Glenda is in class 5 at Ha'alaufuli Government Primary School. They are apparently good students but could not speak English to me.
5. Salprna and Glenda have lived with their parents and siblings all their lives. They seemed healthy, happy and well adjusted children, although shy.
6. Mr. Tupou is 44 years old and a farmer. He grows subsistence crops and also kava which he sells. Mrs. Tupou is 43 years old and earns money weaving mats.
7. The applicant is a 68 year old Tongan woman who has lived in New Zealand since the 1980's and is now a citizen of that country. She was not sure exactly when she moved to New Zealand and said that

she went to look after her mother who only recently died. She married once but is divorced. She has no natural children of her own.

8. The applicant is unemployed and lives in a state house and receives a pension of about \$700 per fortnight. She already has five customarily adopted children. They are all adults. I understand that two of them live with her and they contribute financially.
9. Mr. Tupou is the nephew of the applicant and also her godson. The applicant agreed to customarily adopt Salprna when she was about four years old and she has contributed financially for her. However, Mr. & Mrs Tupou did not agree to this application or to put Salprna in the applicant's care until around 2015. At that time they also agreed to include Glenda in this application because they did not want her to feel left out.
10. The applicant has never met Salprna or Glenda in person. Although in her affidavit she says she visited Tonga regularly she has never travelled to Vava'u to get to know the children. The applicant's direct contact with the children has therefore been limited to telephone calls.
11. It was a surprise to me that on this visit to Tonga, knowing that her application was to be heard in Vava'u, the applicant chose to travel to Ha'apai. She has come back to Tongatapu and is here for another five days. She has made no plans to visit with the children.
12. I do not accept her explanation that she could not travel to Vava'u because the aircrafts were full, having travelled there and back myself on aircraft that were not full.

13. The natural parents support the application because they say they have difficulty supporting their family financially and believe that the applicant can educate the children in New Zealand. Mr. Tupou said that he has been able to afford to educate only one of his sons.
14. I asked the natural parents whether they would still support the making of a legal guardianship order if the children could not obtain permanent residence in New Zealand. Mr. Tupou said he would not and the application should be cancelled. Mrs. Tupou said she would still support the application.
15. The applicant says that she is making this application because Mr. & Mrs Tupou have asked her to take the children and provide them with an education in New Zealand. She has made no enquiries about suitable schools in New Zealand. She does not know and does not appear to have made enquires as to whether the making of a legal guardianship order will allow the children to live in New Zealand. She says that she will in due course look to adopt the children and has apparently spoken to a lawyer about that.

**Discussion**

16. The best interests of Salprna and Glenda are my paramount consideration. I accept that this application is genuine. I accept also that the natural parents believe that the making of a legal guardianship order will benefit the children. Notwithstanding that, and by a substantial margin, I consider that it is not in the childrens' interests to make a legal guardianship order and I decline to do so. My reasons are the following.

17. The applicant has not satisfied me that she is capable of raising the children. The applicant is an elderly woman. There is no evidence as to the state of her health except that she has acknowledged to having high blood pressure. There does not appear to have been any consideration of what will happen to the children if the applicant becomes ill or dies. Realistically given her age these possibilities must be considered.
18. The children are young but in a few years will be teenagers. There is a very large age gap between the applicant and the children. Having observed and spoken to the applicant I am not satisfied that she will be able to cope with their normal demands. This will only get more difficult as the applicant and the children get older.
19. The applicant does not have sufficient means to raise the children. She is unemployed and lives in a state house. In a New Zealand setting her pension of \$700 a fortnight is unlikely to be sufficient to meet her own basic needs let alone the needs of two children. Although I am told that her customarily adopted children contribute money to the household there is no way of knowing how long that will last.
20. The applicant has not given consideration to the most fundamental issues affecting the children such as what the childrens' needs will be, what school they should attend that will cater for their needs and whether they will be able to gain permanent residence in New Zealand. When I raised this with her the applicant said that she thought she would first see whether the application was granted and then look into these matters. That is not an acceptable approach.

Before making a legal guardianship order the Court must be satisfied that the applicant has made proper provision for the children's care.

21. I do not believe that the children will adjust well to being displaced and taken to New Zealand. They have strong roots in Tonga. They have lived their whole lives with their parents, who they are clearly bonded to, and their siblings. They are both shy and they do not speak English. I consider it inappropriate and could do harm to their emotional welfare to have their connection with their family and home effectively severed so as to travel and live permanently in a new and strange country where the only language they know is not commonly spoken and to live with someone they do not know.
22. It must be emphasised that the children do not and could not have any significant emotional bond with the applicant when she has never met them in person. The applicant has not demonstrated to me that she has an emotional bond to them either.
23. The natural parent's reasons for supporting the application are that they struggle financially and they believe the children will get a better education in New Zealand. I appreciate it cannot be easy to raise six children on a limited income but the fact is that the natural parents have raised their children to date and from my observation of Salprna and Glenda they have done so very successfully.
24. I do not accept that the pursuit of educational opportunities is of itself a sufficient reason for the making a legal guardianship order. I agree with the guardian ad litem that taking children to New Zealand is no guarantee of a better education or a better future. Of course many children educated in Tonga succeed academically. There are

programs and scholarships available in Tonga to pay for the costs of education. In this case the applicant says she is sending significant sums to support the girls far in excess of what their school fees would be in any event.

25. Finally, the applicant has said that she will apply to adopt the children in New Zealand. The children are not in need of a substitute family and the only justification for such an application could be so that they gain permanent residence in New Zealand. There is no evidence as to the likelihood of an adoption order being granted and given the childrens' circumstances I consider it unlikely that such an application would be viewed favourably.
26. In my view there is simply no need for a legal guardianship order to be made and the making of an order will not be in the best interests of the children.

**Result**

- 26 The applicant's application for a legal guardianship order is refused.

**NUKU'ALOFA: 12 December 2017**

**LORD CHIEF JUSTICE**

