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23/01/18

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IN THE SUPREME COURT OF TONGA **FA 210 of 2016**
FAMILY JURISDICTION
NUKU'ALOFA REGISTRY

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

AND
IN THE MATTER OF An application by **Kelefi Efa Vunga** and **Paea 'I Takaunove Vunga** for Legal Guardianship Order.

AND
IN THE MATTER OF the child named **Clef Efa Paea 'I Auckland Vunga Fakahua**, a male child born on **22 August 2012**.

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: **Miss S Aleamotu'a for Guardian ad Litem on 16 August 2017**
 Miss T Kafa for Guardian ad Litem on 15 January 2018

Date of Hearing: **16 August 2017 and 15 January 2018**
Date of Ruling: **17 January 2018**

RULING

- [1] This is an application for a legal guardianship order made by Mr. Kelefi and Mrs. Paea Vunga in respect of a five year old male child, Clef Fakahua (Clef). Clef is a legitimate child of Mr. Ofo and Mrs. Lupe Fakahua (the natural parents).
- [2] The applicants were both born and raised in Tonga but they now reside permanently in New Zealand and intend to take

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Clef to live with them in New Zealand. This is therefore an inter-country application.

[3] When the application first came before me on 16 August 2017 I heard from Counsel for the Guardian ad Litem, the applicants and the natural father. I also had an opportunity to observe Clef. Clef's mother had travelled to the United States of America and did not attend the hearing. I adjourned the hearing so that I could hear from her also. She appeared before me, along with Counsel for the Guardian ad Litem, on 15 January 2018.

[4] The natural parents support the application. The Guardian ad Litem has expressed reservations and has not supported it. The Guardian ad Litem is of the view that Clef is well provided for in all respects in Tonga and that it is not in his best interests to be removed from his family. For the reasons that follow I agree with that assessment and will not make the legal guardianship order.

The applicants

[5] The male applicant is Clef's uncle (the brother of the natural mother).

[6] The applicants are 44 and 35 years old respectively. They were married in 2007. Both were born and raised in Tonga but they now live permanently in New Zealand. The male applicant has lived in New Zealand for 17 years and the female applicant for 10 years. They own a home at Mangere, New Zealand. They are both employed and I accept for the purposes of this application that they have the financial ability to raise Clef.

- [7] The case that was presented to me was that since their marriage the applicants have not been able to have children. I am told that after attempts to have their own child were unsuccessful they asked if they could adopt a child from the natural parents and the natural parents agreed. When Clef was born in 2012 the applicants named him and since then they have made some financial contributions towards his upbringing and they have visited with him. The applicants did not however make an application for a legal guardianship order until 2016. I am dealing with this application on the basis that the facts are as I have just outlined them. I have noted however that in a letter submitted with the application Reverend Goll Manukia has stated that the applicants have adopted another child. This directly contradicts what I have been told by the applicants but I am giving them the benefit of the doubt that Reverend Manukia may be incorrect. I would add that if the applicants have adopted another child this would not in my view have advanced their case or changed my opinion as to the result of this application.
- [8] I am satisfied that the applicants are of good character. They have no previous criminal convictions, are members of the Methodist Church and have produced references which I have considered.
- [9] The applicants say that the reasons they wish the Court to make a legal guardianship order are that they consider Clef to be their son and they have planned their future with him. They said that they will be extremely disappointed if they are not granted a legal guardianship order and would consider relocating to Tonga if that was

necessary to have Clef in their care. They also said that they believe that they can give Clef a better upbringing, education and opportunities in New Zealand.

- [10] When I raised the issue of whether the making of a legal guardianship order would allow Clef to obtain residency in New Zealand I was told that the applicants intend to make an application to adopt Clef in New Zealand.

The natural parents

- [11] The natural parents are aged 42 and 35 years old. They have been married since 2002 and have five children of their marriage, including Clef. The children are aged between 14 and 1 year. Clef is the fourth child.
- [12] The natural father is employed as a seasonal fruit picker and the natural mother tells me that they also get financial support from the applicants and other family members who live overseas. The natural parents are financially stable and well able to support their family.
- [13] When I asked the natural mother why she supported the applicants' application she told me that she feels sorry for her brother that he has no children and she wants Clef to look after her brother when he is old.

Clef

- [14] When I saw Clef in my chambers he appeared happy and healthy although typically shy. He is too young to understand the nature of this application.

[15] Clef has just finished kindergarten. I understand that at kindergarten children get an introduction to the English language but Clef does not have any functional English language skills.

[16] Clef is enrolled next year at Ocean of Light International School which is a well known private school dedicated to high educational standards. I am also told by the natural mother that Clef has close relationships with all of his siblings.

The law

[17] In deciding whether to grant a legal guardianship order the Court's paramount consideration is whether the making of the order is in the best interests of the child.

[18] That this is an inter-country application adds an additional dimension. Inter-country applications have in recent years been the subject of rulings by the Court of Appeal. In *Saavedra v Solicitor General* [2013] Tonga LR 60 the Court of Appeal held that an inter-country application should not be granted unless all other means for a child's care in Tonga have been exhausted. However the Court explained its decision further in *Leger v Solicitor General* [2016] Tonga LR 411 where the Court said at [16]:

[16] The specific provisions of Article 21 cannot have been intended to displace the paramount requirement to have regard for the child's best interests. That is also the way *Saavedra* should be read. In the circumstances of that case the interests of the child were plainly best served by his remaining

in Tonga. But in cases such as the present, where an inter-country adoption carries distinct benefits for the child and none of the disadvantages normally associated with a move to another country, in particular the loss of family ties and the child's inheritance of Tongan culture and language, the interests of the child are likely to favour approval of the application. The fact that satisfactory care arrangements are available in Tonga will always be a factor to be considered, and will often be decisive. The importance to a child of retaining and fostering ties with his or her culture, heritage and language cannot be overstated. Ultimately, however, a judgment must be made which is informed by all of the factors which bear on the best interests of the child...

- [19] There are three aspects of this present application which concern me. First, granting this application would mean that Clef is separated from his parents and his siblings with whom he has close relationships. If he was moved to New Zealand Clef's most important relationships would be changed forever. Clef would become an only child without the companionship of siblings. He would face considerable challenges adapting to a new country, environment, culture and people. I can see no justification for disrupting Clef's life in such a fundamental and possibly detrimental way when there is absolutely no reason to do so to provide for his care or maintenance.
- [20] Not only that, whilst the applicants are Tongan and have connections with the Tongan community in New Zealand

the lifestyle and culture of New Zealand is very different than it is here in Tonga. Clef would inevitably lose aspects of his heritage and his culture if taken to New Zealand.

- [21] This takes me to the second aspect of concern. The reasons advanced in support of the application focus primarily on the applicants' needs and not on Clef's best interests. Whilst it is entirely understandable that the applicants want a child and that the natural mother wants her brother to be cared for in his later years these are not matters that have a great deal of bearing on what is in Clef's best interests.
- [22] It is suggested that Clef will have a better education and greater opportunities in New Zealand. I have said on a number of occasions in other cases that I do not accept what appears to be a common view amongst applicants that children are necessarily better off being raised in countries like New Zealand and Australia. I certainly do not accept it in a case such as this where Clef's parents are financially stable and intend to send him to a very good private school here in Tonga.
- [23] The third aspect of concern is the uncertainty as to whether Clef will be able to enter and live permanently in New Zealand. It is very common that overseas applicants for legal guardianship orders have given no consideration to this issue. They often expect the Court to make an order on the basis that they will address (if they can) immigration issues at some later time. This puts matters the wrong way around. I do not accept that the Court should make a legal guardianship order in favour of

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applicants unless it can be satisfied that they can fulfil their day to day responsibilities and obligations as guardians of the child.

[24] In this case the male applicant suggested to me that they would apply for an adoption order in respect of Clef in New Zealand but there is no certainty that such an order would be granted. The applicants also said that they would consider relocating to Tonga if that was necessary but they have lived in New Zealand a long time now and are well settled there and I consider it unlikely that they would relocate. In any event, if the applicants do relocate to Tonga they will be able to re-apply for guardianship of Clef at that time.

[25] For these reasons, while the applicants are desirous of raising Clef and capable of doing so I am of the very firm view that it would not be in Clef's best interests to grant this application.

Result

[26] The applicants' application for a legal guardianship order is dismissed.



NUKU'ALOFA: 17 January 2018 Lord Chief Justice