

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

Solicitor General
R 07/02/19
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FA 112 of 2018

IN THE MATTER OF **The Maintenance of Illegitimate Children Act**

AND

IN THE MATTER OF

1. S M T, male, born on 9 May 2006
2. M T, female, born on 1 October 2002
3. S N T, male, born on 2 November 2003

AND

IN THE MATTER OF **an application for Letters of Adoption by Mr. and Mrs T**

BEFORE LORD CHIEF JUSTICE PAULSEN

Hearing : **On the papers**
Date of Ruling : **5 February 2019**

Counsel : **Mrs F. Vaihu for the applicants**

RULING

The application

- [1] This is an application for Letters of Adoption in respect of three children who are now by my reckoning aged 16, 15 and 12 years.
- [2] The application is unusual because the applicants are the natural parents of the children. The children were all born whilst the applicants were living together as man and wife but unmarried. They are therefore illegitimate children of the applicants. The applicants married in 2015 shortly after the male applicant divorced his previous wife. The applicants' marriage does not however serve to legitimate their children because of the effect of s. 3(2) of the Legitimacy Act.

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- [3] The application and affidavits in support of it are insubstantial and do not explain the thinking behind the application except to the limited extent that the applicants' joint affidavit states that the applicants want to 'regularize our relationship to [the children] by making this move'.
- [4] After considering the application I asked the Registrar to write to the applicants' Counsel, Mrs. Vaihu, and request submissions in support of the Court making an order 'in respect of applicants applying to adopt their own children'. The Registrar duly emailed Ms. Vaihu on 14 June 2018 and she responded on 26 June 2018 referring me to ss. 16(2) and (3) of the Maintenance of Illegitimate Children Act (the Act) as the source of the Court's power, and stating that the purpose of the application was to remove the children's illegitimate status on their birth certificates.
- [5] After receiving those very brief submissions I had the Registrar email Ms. Vaihu again and ask whether she would like to have a hearing to address me further on the application. That email was sent on 27 June 2018 but it was not until 25 January 2019 that Mrs Vaihu responded that the Court should make a decision on the papers.

Discussion

- [6] Section 15(1) of the Act provides:

An illegitimate child under the age of 21 years may, with the consent of the mother, be adopted by another person.

- [7] Section 16 (1) provides:

Any person desiring to adopt an illegitimate person shall apply to the Supreme Court for Letters of Adoption.

- [8] I have not been referred to any case where the Court has granted Letters of Adoption to both natural parents of a child and I have not come across such a case in my research.
- [9] In *An Application for Adoption of K* (Unreported, Supreme Court, FA 65 of 2011, 24 August 2012) Chief Justice Scott heard an application by the natural mother of K and her new husband (who was not the father of the child) to adopt K. Scott CJ was concerned whether the Court had the power to make such an order because of the words 'be adopted by another person' in s. 15(1) and heard submissions on the point. Counsel argued that upon the marriage of the natural mother to a man other than K's father the child became part of a new

family and in those circumstances the adoption was not simply by ‘another person’ for the purposes of section 15(1) of the Act but to the mother and step-father jointly.

[10] Scott CJ granted Letters of Adoption. At [7] of his ruling he said:

As, I see it, there is everything to be said in favour of this type of application which should be encouraged. In my view it cannot have been the legislature’s intention to prevent such an obviously beneficial arrangement. I agree with the interpretation advanced by Mrs. Tupou and supported by the Solicitor General.

[11] The Chief Justice did not explain why, as a matter of interpretation, he accepted the argument advanced by Counsel as to the meaning of the words ‘another person’ in s. 15(1). Rather, it appears that he took a pragmatic approach consistent with his stated view that the granting of Letters of Adoption was, in that case, an ‘obviously beneficial arrangement’. It can be readily inferred that he meant by this that the best interests of K would be served by providing the child with security, certainty and a sense of belonging within the new family unit of K’s mother and her husband. This Court has followed that approach in other cases.

[12] This case is of a different type as there is no intention to create a new family unit. The applicants have together raised the subject children from birth. It cannot be said that the granting of Letters of Adoption is necessary to provide the children with love, care, protection and security within a new family environment.

[13] In a number of cases I have emphasised that adoption generally involves the total substitution of new parents for existing parents, the fundamental purpose of which is to provide a child, who cannot or will not be provided by his or her own parents, with a permanent and secure family life (*Re Latani* (Unreported, Supreme Court, FA 146 of 2016, 21 February 2017)).

[14] In *Re Holani* [2015] Tonga LR 56, 58 at [9] and [12] I said:

The proper purpose of adoption is to assist the development of or confirm the existence of, a genuine parent-child relationship between the child and the applicants. This might be, for instance, because the natural parents do not want the child or because they cannot provide a suitable family environment for it...

I do not consider that it is proper for the Court to legally sever or distort existing family relationships other than in pursuit of a genuine parenting purpose....

[15] More eloquently Judge Adams in *Re Henderson* [2014] NZFC 8754 at [35] (referred to in *Family Law in New Zealand*, 7th Ed at 625) said in a New Zealand context:

Adoption is a legal fiction that changes names, deems fresh relationships, and constructs the frame of a new family. Its essence is dislocation, but dislocation that supports a better opportunity.

- [16] The only reason advanced in support of the granting of Letters of Adoption in this case is that the applicants want to remove the illegitimate status of the children from their birth certificates. Three points can be made about this. First, why this is considered beneficial to the children is not explained. It is not suggested that the granting of Letters of Adoption will confer on the children any benefits in law whatsoever.
- [17] Secondly, whilst it is not suggested in this case, I cannot perceive of a case where the Court would participate in a deception and grant Letters of Adoption to hide from a subject child the true circumstances of his/her birth.
- [18] Thirdly, in so far as the intention in this case is simply to remove (for whatever reason) the statement on the children's birth certificates that they are illegitimate children, the perceived advantage is more imagined than real. If the Court were to grant Letters of Adoption new birth certificates will issue for each child in a form that makes it plain that the registration was made following the grant of Letters of Adoption and that the subject child was therefore necessarily born illegitimate.
- [19] This application is not consistent with the purposes for which the power to grant Letters of Adoption is conferred upon the Court. In addition the granting of Letters of Adoption would not, on what is before me, confer any benefits upon the children and cannot be said to be in their best interests.

Result

- [20] The application for Letters of Adoption in respect of the three children is refused.

DATED: 5 February 2019.




O.G. Paulsen
LORD CHIEF JUSTICE