

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

FA 129 of 2017

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

AND

IN THE MATTER OF an application by **Desmond Noel Carter** and **Sosefina
Palusi** for **Letters of Adoption.**

AND

IN THE MATTER OF **Irene Molly Carter**, female, born on **19 March 2014.**

BEFORE HON. JUSTICE NIU IN CHAMBERS

RULING

[1] I give my ruling in writing in respect of this application because the guardian ad litem appears not to wish to make a recommendation in favour of the application. I have decided to grant the letters of adoption and these are my reasons.

Applicants are now the parents

[2] The applicants are Mr. Carter and Ms. Palusi. They are not married but they have lived together as if they are for over 20 years. They have already had a son born to them in 2002 and he is now 16 years old, and they have lived with and have raised him as his parents up to now. Since the birth of the child which is the subject of this application in 2014, the applicants have similarly raised her as her parents up to now.

Customary adoptions done

- [3] The applicants have thereby, as a couple living together as husband and wife, customarily adopted these 2 children as their own children as if they have been born to them legitimately as a lawfully married couple ever since the two children were born. And they have done that with the consent of the natural parents of the son, who are themselves, in respect of the boy and with the consent of the mother of the illegitimate daughter, who is Mrs. Palusi herself. They have thereby adopted these two children in accordance with the custom of Tonga, a custom which has been practised in Tonga from time immemorial. (The cabin boy William Mariner, was so adopted by the Chief of Ha'apai, Finau, in 1806, after the ship, Porto Prince, was captured there.)

Marriage not required

- [4] It is not a requirement of the adoption law or custom of Tonga that the adoptive parent or parents be lawfully married or be lawfully married to each other. There is no such provision in the law. What is impliedly required is that the adoptive parents, if they are a couple, be in a stable relationship, such that they would be sure to provide a stable home for the child or children. And the applicants have properly shown that they are such a stable couple. And even if a couple are now lawfully married to each other, it is not a guarantee that they will remain together in future, unlike what the applicants have already demonstrated. But what will be an advantage for the child in the present case is that the male applicant, Mr. Carter, is tied to the child in some legal and binding way, because Mr. Carter is the person with the means to provide for her maintenance and education. And that legal and binding way is the grant of letters of adoption to him under Part III of the Maintenance of Illegitimate Children Act, such as he and the mother have applied for in this application. There is everything to be gained and it is in the best interests of the child that those letters of adoption are now granted to the applicants.
- [5] The reason is this: If the application of the applicants for letters of adoption is declined and Mr. Carter now dies, neither Ms. Palusi nor the child has any claim to any part of Mr. Carter's estate for the purpose of providing any maintenance or for the education of the child at all. But if the letters of adoption are now

granted, Mr. Carter and his estate will be sure to provide those for the child. That is the legal and binding way by which the child is assured to be so provided.

Mr. Carter is “another person”

- [6] The provisions of S.15 (1) of Part III of the Act provide that an “illegitimate child under the age of 21 years may, with the consent of its mother, be adopted by another person”. I consider that although the mother of the child is one of the two applicants, the child is in fact being adopted in the present case by Mr. Carter, who is no doubt “another person” from the mother herself. I do not consider that such an adoption, as is done in the present case, is unlawful or that it is contrary to or is in breach of S.15 (1) at all.

Ms. Palusi has become “another person”

- [7] I also further consider that the mother, Mrs. Palusi, has already become the de facto wife of Mr. Carter and that she, together with Mr. Carter, have become “another person” for, the purpose of adoption of the child as their (Mr. Carter’s and Ms. Palusi’s) child. Although she had the child on her own without Mr. Carter, she had it at the time that she had already established her status with Mr. Carter, such that Mr. Carter was able to accept and he has accepted that the child be his as well. He has done that by accepting the child as his daughter and treating her as his daughter, and having had his name as her father (wrongly) inserted in her birth certificate as if he is the natural father.

Culturally unacceptable?

- [8] The guardian ad litem is of the view that a de facto relationship (such as that of Mr. Carter and Ms. Palusi) is still very much unacceptable in Tonga because of Tonga’s Christian values and principles. However, she qualified that statement by admitting that such relationship is now being practised in Tonga. If it was unacceptable it would not have been practised in Tonga. The reason that it is practised in Tonga is because it is now acceptable in Tonga (otherwise it would not have been practised). However, be that as it may, Mr. Carter and Ms. Palusi have made this application for the purpose of facilitating the migration of the child with Ms. Palusi to Australia, in order that they live together with Mr. Carter, who is a New Zealander, as a family in Australia, where such practice is not unacceptable.

Orders

[9] For the foregoing reasons, I order that:

- (a) Letters of adoption be granted to the applicants in respect of the child.
- (b) A new birth certificate be re-issued for the child in the adopted form showing the applicants as the parents of the child.



A handwritten signature in black ink, appearing to read "L. M. Niu".

L. M. Niu

J U D G E

NUKU'ALOFA: 18 February 2019.