

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

FA 139 of 2017

IN THE MATTER OF Section 44 of the Evidence Act

AND

IN THE MATTER OF a child known as 'Ilaisipa Tokilupe Salamasina
'Eva 'I Toafa Vavae Malupo, female, born on 25
November 2009.

Hearing: On the papers
Date of Ruling: 1 May 2019

RULING

- [1] The applicant is Lasale Malupo Tupou. She was married to 'Ifalame Siale on 17 December 1992. She separated from him in 2007. On 25 November 2009 the applicant gave birth to a daughter by her then partner Saimone Vavae Lavulo. She obtained a decree absolute dissolving her marriage on 16 December 2009.
- [2] The applicant applies pursuant to s. 44 of the Evidence Act for an order declaring her daughter illegitimate. She also requests that:
 - (a) Her daughter be registered with the surname Lavulo; and
 - (b) That Saimone Vavae Lavulo be inserted in the Register of Births as the father of the child.

- [3] Saimone Vavae Lavulo has filed an affidavit in support of the application.
- [4] I am satisfied that the grounds for making an order under s. 44 of the Evidence Act declaring the child illegitimate are made out. It is not necessary for me to set out the evidence. This ruling is concerned with the further orders sought in paragraphs [2](a) and (b) above.
- [5] It has been the practice of the Court when making an order under s. 44 of the Evidence Act to direct that an illegitimate child be registered with the biological father's surname in cases where both the mother and the biological father have requested it.
- [6] However, in *Re Application by Liti and Lauti* (Unreported, FA 33 of 2019, 28 March 2019, Niu J) the Judge did not allow the subject children to bear the surname of their biological father. Contrary to the wishes of the parents he required the children to be registered under the surname of their mother. At the request of counsel he gave written reasons for his decision on 28 March 2019. I have carefully considered those reasons and respectfully cannot agree with them.
- [7] The premises upon which the Judge proceeded are set out in paragraphs 1 and 2 of the ruling where he states:
- [1] A father of an illegitimate child has no right over or in respect of the child. He only has liability and responsibility to provide for or maintain the child.
- [2] The child is also deprived, by law, of any right to the father's properties including allotments and leases, and including his surname. He or she must only have the mother's surname.
- [8] Whilst it is correct that an illegitimate child is by law deprived of certain rights to property, I have found no authority, and nothing in the Judge's ruling, to support the findings that an illegitimate child is deprived of the use of his/her father's surname or that the child must only take the mother's surname.
- [9] The Judge's findings are not consistent with the common law, which recognises the parents' rights to name their child whatever they want.

- [10] The findings are also not consistent with the rights of children recognised in Articles 7 and 8 of the United Nations Convention on the Rights of the Child (to which Tonga is a signatory). Articles 7 and 8 provide:

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

(emphasis added)

- [11] At paragraphs 8 and 9 of his ruling, the Judge expressed the view that the intention of the Legislature was that an illegitimate child be registered only under the surname of its mother so that no one was misled that it was a legitimate child. I do not accept that analysis. Regardless of the name under which the child is registered its status as illegitimate is recorded on its birth certificate.

- [12] I consider that the Judge was wrong to find that an illegitimate child must be registered under its mother's surname.

- [13] I also consider that in future cases the Court should not as a matter of course make any direction as to the name under which a child is to be first registered. On applications under s. 44 the Court should declare the subject child as illegitimate or dismiss the application, but otherwise has no part to play in the registration process.

Result

- [14] There shall be an Order under s. 44 of the Evidence Act and s 6(1) of the Registrar General's Births, Deaths and Marriages Regulations that the child named on its certificate of live birth as **'Ilaisipa Tokilupe Salamsina 'Eva 'I Toafa Vavae Malupo**, female, born on 25 November 2009 be registered as illegitimate.

[15] I make no further orders.

NUKU'ALOFA: 1 May 2019.




O.G. Paulsen
LORD CHIEF JUSTICE