

5. The Adoption of illegitimate children is covered by the Maintenance of Illegitimate Children Act Section 16 (1) give the right to any person to apply to the Supreme Court to adopt an illegitimate person Section 15 (1), however, state

(1) "An illegitimate child under the age of 21 years may, with the CONSENT of the mother be adopted by "ANOTHER PERSON".

6. In FA 65/2011 Application by Mr & Mrs J for the adoption of an illegitimate child of Mrs J Chief Justice Scott ruled (24 August 2012) that;

[6] once the mother of an illegitimate child marries a man who is not the father of the child, her status changes. She is no longer a femme sole who under the provisions of the section 4 of the Guardianship Act 2004 is the sole guardian of the child. Now that she is a married woman the child has in fact become part of a new family. In these circumstances the adoption is not simply by "another person" but by "the mother and step father jointly"

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

As I see it, there is everything to be said to be in favour of this type of application which should be encouraged. In my view it cannot have been the legislatures intention to prevent such obviously beneficial arrangements"

7. In FA 112 of 2018, Application by Mr and Mrs T for Letters of Adoption, the applicants were the natural parents of the children who were all born whilst the applicants were living together as man and wife but unmarried. The applicants married in 2015 shortly after the male applicant divorced his previous wife. The applicants' marriage does not however serve to legitimate the children because of the effect of section 3(2) of the Legitimacy Act.

8. LCJ Paulsen referred to the decision by LCJ Scott above and said –

“(11) The Chief Justice did not explain why, as matter of interpretation he accepted the argument advanced by Counsel as to the meaning of the words "another person" in section 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"

(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 child 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 by environment"

(19) This application is not consistent with the purposes for which the power to grant Letters of Adoption is conferred on the Court"

(20) The application for Letters of Adoption in respect of the three children is refused.

9. It can be taken from this that the decision to refuse was based on the fact not only that there was no new family unit or benefits for the children but it was unnecessary and legally unsound.
10. In FA 123 of 2020, an application by Mr and Mrs H for Letters of Adoption in respect of the child. The child was 17 years old and the natural mother of the child is the female applicant.
11. The child was born illegitimate. The male applicant is not the child's biological father. The applicants married approximately a year after the birth of the child. They have also since had five children of their own.
12. In that case;

“LCJ Whitten stated [10], the purpose of the application is not explained save that in their joint affidavit, the applicants describe their intention as being to make the child “feel inclusive” of their family.

13. LCJ Whitten goes on to say:

[12] “With respect, I prefer and agree with the approach taken by Paulsen LCJ to that taken by Scott C.J.”

[13] A plain reading of s.15 (1) makes clear that an illegitimate child may only be adopted by a person other than his or her natural mother. The concept of a natural mother applying to become effectively as adoptive mother is a non sequitur and contrary to the Act. It is not something that could sensibly be expected to have been Parliament's intention.

[14] Further, in my view, the proposition advanced in an Application for Adoption of K that by marrying, the natural mother and her new husband somehow become “another person” for the purpose of s.15 strains the interpretation of the relevant words beyond their logical limits.

[15] In this case, and largely for the reasons expressed by Paulsen LCJ, the application for Letters of Adoption in favour of the natural mother are unnecessary and legally unsound.

[16] However, the application by the male applicant stands in a different light. I see no difficulty in granting Letters of Adoption to Mr H thereby making him legally the child's adoptive father. He is ‘another person’. He has the natural mother's consent to become the child's adoptive father. In my opinion such a result still serves the best interests of the child by formally recognizing him as a member of the applicant's family and provides the child and Mr H the benefit of legally recognized father-son relationship.

14. The result was that the application by Mrs H was dismissed and Letters of Adoption was granted in favour of Mr H as the child's adoptive father.

15. In FA 183/2020 an application by 'Aivinihu Topiese Tauvaka and Finau Motulalo Tauvaka for Letters of Adoption of Cachey Leete Tria, Justice Niu made the latest ruling on 1 March 2021 on the right of the natural mother to jointly adopt her illegitimate child with her husband.
16. His Honour noted and discussed the three cases mentioned above of Mr and Mrs J, where the couple lived with child for 7 years, Mr and Mrs T it was 16 years and in Mr and Mrs H it was 17 years. He pointed out that whereas in Mr and Mrs J both applicants were jointly granted letters of Adoption of the child, the natural mother in Mr and Mrs H was granted nothing. Her then half share over the child was removed and was granted to the husband alone.
17. With respect this leads us away from the core issue under s.15 (1) that the consent of the natural mother is for the adoption by ANOTHER PERSON.
18. His Honour asks the question what happens if the husband takes the child and deserts the mother? Can she complain, or has she divested herself of all her rights by agreeing to the adoption of the child by the husband?
19. I suggest that this concern is something that if a complaint is made, will be decided on what is in the best interest of the child.
20. His Honour then expressed the thought that the legislature had not intended that s.15 (1) was to be applied in a way that would deprive the natural mother of her right over the child if she married and raises the child with her husband, because that would be detrimental to the child.
21. I do not see what detrimental effect to the child will happen if the natural mother's right is taken away. The applicants have lived together with the child for 8 years with no problem. If a problem occurs and complaint made, then it will be decided on the best interest of the child.
22. He considers that the Legislature had intended that the mother should continue to be a joint adoptive parent of the child, as implied customarily adopted, in order that the best interests of the child is maintained.
23. It is difficult to accept this reasoning where s.15 (1) clearly state that the adoption is to be by ANOTHER PERSON. The idea that the natural mother can become the adoptive mother is a misnomer or a non sequitur and contrary to the Act and it is not something that would sensibly be expected to have been Parliament's intention as stated by Whitten LCJ in H.
24. Two ways to remedy this, His Honour say is to follow the way Scott LCJ had done in Mr and Mrs J that when the mother and her husband apply for letters of Adoption, then jointly they become 'another person' for the purpose of s.15 (1).
25. The decision of Scott C.J in Mr and Mrs T that by making a joint application, the natural mother and her husband become ANOTHER PERSON is as Whitten LCJ in H state, strains the interpretation of the relevant words beyond their logical limits.

26. The other way Justice Niu says, is to interpret s.15(1) as if the words “or another person jointly with the mother “were added to S.15 (1).
27. He concluded that he would be justified in interpreting the words, “by another person” in s.15(1) as meaning by another person or by another person jointly with the mother”.
28. He therefore granted the application for Letters of Adoption to both applicants.
29. With respect, I do not agree with Justice Niu in the addition of “or by another person jointly with the mother “to s.15(1) as this changes the whole meaning and intent of the legislature that the consent of the natural mother is for the adoption of her child by ANOTHER PERSON. If change is required as stated by Justice Niu, it will need to be done by the Legislature.
30. The Guardian Ad Litem filed her report on 29 April 2021 supports the application, although the report does not contain any reference to, or consideration of the legal ramification of the female applicant being the child’s natural mother.
31. When the hearing in chambers was called on 11May 2021. I asked the Guardian Ad Litem to file a written opinion on the conflicting decisions of the natural mother adopting her child jointly with her husband.
32. On 17 May 2021, Ms Leotrina Macomber for the Guardian Ad Litem filed her submissions. She considered the conflicting cases and agrees that the male applicant is “another person” within s.15 (1).
33. Further, she submits that when the natural mother consented to the application for Letters of Adoption of the child she was consenting to the sharing of her legal right as the natural mother with the male applicant who has no existing legal right over the child. She was not giving up her legal right completely as a natural mother would have done in a normal application but she was agreeing to share her legal right with the male applicant to continue co-parenting the child and the child to bear the male applicant’s surname.
34. One can see why Ms Macomber say that when the natural mother consented to the application for Letters of Adoption of the child, that she was consenting to the sharing of her legal rights over the child with her husband because in their joint affidavit they say-

[7] We believe that it is the child’s best interest that we legally adopt her as our own so that (she) could officially be registered as ours.

[9] I, Tisiola (natural mother) (give) total consent that we legally adopt the child so that she could have our last name and to show that we are her parents.
35. What is missing here, however, is the fact that the natural mother can never be the adoptive mother and neither can she be involved as jointly adopting the child with her

husband. As we will see later on, her wishes in para [7] and [8] will still be accomplished without her involvement in the Letters of Adoption.

36. Ms Macomber also submits that if Letters of Adoption were granted in favour of the male applicant, it would not be contrary to the child's best interest because the male applicant has been a father figure to her for over 8 years now. The male applicant and the natural mother are the only parents she knows.

37. In conclusion, Ms Macomber for the Guardian Ad Litem submits that;

- (1). The application for the Letters of Adoption be amended where by the male applicant is made the sole applicant.
- (2). Similar to the order of Whitten LCJ in Mr and Mrs H for Letters of Adoption that the Court orders that a new birth certificate be prepared which will continue to show the natural mother as the child's natural mother but will show the male applicant as her adopted father and that the child's surname as requested by the applicants will have added to it their surname and
- (3). The said application for Letters of Adoption over the child be granted to male applicant only.

38. I do not think it necessary to seek amendment to the application and all I need to do is to make a decision on the application that has been filed.

39. This case is the same as H that was decided by Whitten LCJ. The natural mother and her husband applied for Letters of Adoption in respect of the child who was born on 11 June 2009. The natural mother and her husband married on 15 January 2013 and the child has been with them since their marriage.

40. The case turns on the legal interpretation of "ANOTHER PERSON" in s.15(1) of the Maintenance of Illegitimate Children Act.

41. The meaning is clear and it does not include the addition and extension decided by Scott CJ – that they natural mother and her husband can be "another person" in term of s.15(1). Neither does it include the additional words to s.15(1) decided by Niu J.

42. Both Paulsen LCJ and Whitten LCJ gave reasons why the application for letter of adoption in favour of the natural mother are unnecessary and legally unsound and I have taken this into account in the judgement.

43. However, the application by the male applicant stand in a different light as stated by Whitten LCJ as he is "another person" and Letters of Adoption can be made to him. Such a result still serves the interests of the child by formally recognizing him as a member of the applicant's family and provides the child and Mr H the benefit of a legally recognized father-son relationship.

RESULT

44. For the reasons given above, I make the following Orders;

1. That the application by Mrs Tisiola Paea Taulafo is dismissed.
2. That the application by Mr 'Ofa Paea He Lotu Taulafo for Letters of Adoption of the child of Mele Latai Meiha'amoā is granted.
3. That a new birth certificate be prepared for the child which will show Mrs Taulafo as the natural mother and Mr Taulafo as the adoptive father.
4. That the child's surname be that of the applicants and recorded as Mele Latai Taulafo.

NUKU'ALOFA: 10 June 2021




Tupou J
ACTING JUDGE