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21/01/21

IN THE MATTER OF The **Maintenance of Illegitimate Children Act** ("the Act")

AND An application by **Mr and Mrs H** for **Letters of Adoption** in respect of the child named herein as "**SF**" ("the child").

REASONS FOR JUDGMENT

1. The applicants in this matter seek Letters of Adoption in respect of the child. The child is presently 17 years of age. The natural mother of the child is the female applicant.
2. 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 and have raised him since. They have also since had five children of their own.
3. The application was supported by a separate affidavit by the female applicant in which she deposed, among other things, that she understood that if legal adoption of her son was successful, it would result in "permanently depriving her of her sole parental rights".
4. Section 15(1) of the *Maintenance of Illegitimate Children Act* ("the Act") provides:

15 Illegitimate person may be adopted

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

...

5. Section 16 provides, in terms, that any person desiring to adopt an illegitimate person shall apply to the Supreme Court for Letters of Adoption and that the Court may refuse to grant Letters of Adoption to any person whom it may considers not fit or proper.

6. In *re Application for Letters of Adoption by Mr and Mrs T* [2019] TOSC 3, the applicants were the natural parents of three children who were born at a time when the applicants were unmarried. After they married, they applied for Letters of Adoption in respect of their own children. There, Paulsen LCJ observed that:
- (a) the applicants' marriage did not serve to legitimate their children because of the effect of s. 3(2) of the *Legitimacy Act*;
 - (b) the stated purpose of the application was the belief that Letters of Adoption pursuant to s.16 of the Act would have the effect of removing the children's illegitimate status on their birth certificates;
 - (c) his Honour had not been referred to, and was not aware of, any previous cases in which the Court had granted Letters of Adoption to both natural parents of a child.
7. However, Paulsen LCJ referred to a decision similar to the instant case. In *An Application for Adoption of K*,¹ Chief Justice Scott granted an application by the natural mother of the child and her new husband (who was not father of the child) on the basis of his Honour's acceptance of a submission that upon the marriage of the natural mother to a man other than the child'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 s.15(1) of the Act but to the mother and step-father jointly. Paulsen LCJ noted that Scott CJ "did not explain why, as a matter of interpretation, he accepted that argument and that it appeared that his Honour "took a pragmatic approach consistent with his stated view that the granting of Letters of Adoption was, in that case, an obviously beneficial arrangement".
8. Paulsen LCJ opined:

"[11] 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

¹ Unreported, Supreme Court, FA 65 of 2011, 24 August 2012.

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 Latai (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:

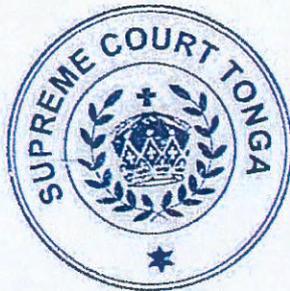
'Adoption is a legal fiction that changes names, deems fresh relationships, and constructs the frame of a new family. Its essence is dislocation, but dislocation that supports a better opportunity.'

9. Paulsen LCJ refused the application before him for reasons which included:
 - (a) the application was not consistent with the purposes for which the power to grant Letters of Adoption is conferred upon the Court;
 - (b) there was no explanation as to why the removal of the children's illegitimate status from their birth certificates might be considered beneficial to them;
 - (c) it was not suggested that the granting of Letters of Adoption would confer on the children any benefits in law whatsoever;
 - (d) based on the material before the Court, the granting of Letters of Adoption would not confer any benefits upon the children and could not therefore be said to be in their best interests;

- (e) the perceived advantage of removing their illegitimate status from the children's birth certificates was more imagined than real because if the Court were to grant Letters of Adoption, a new birth certificate would be issued for each child in a form that would make plain that the registration was made following the grant of Letters of Adoption so that the subject child was therefore necessarily born illegitimate; and
 - (f) his Honour could not 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.
10. In the present case, 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.
 11. The Guardian ad Litem supports the application, although the report does not contain any reference to, or consideration of, the legal ramifications of the female applicant being the child's natural mother.
 12. With respect, I prefer, and agree with, the approach taken by Paulsen LCJ to that taken by Scott CJ.
 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 an adoptive mother is a *non sequitur*, and contrary to the Act. It is not something which 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 purposes 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 recognising him as a member of the applicants' family and provides the child and Mr H the benefit of a legally recognised father-son relationship.
17. For those reasons, I dismissed the application by Mrs H and granted letters of adoption in favour of Mr H as the child's adoptive father. Further, I ordered that a new birth certificate be prepared which will continue to show Mrs H as the child's natural mother but will show Mr H as his adoptive father and that the child's surname, as requested by the applicants, will have added to it their surname.

NUKU'ALOFA
20 January 2021



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC
LORD CHIEF JUSTICE