

**IN THE SUPREME COURT OF TONGA
FAMILY JURISDICTION
NEIAFU REGISTRY**

FA 183 of 2020

Solicitor General
For Lotiwa
Scan + upload +
File 25/03/21

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

Malia,
Please refer
to Lani
to close
file.
Malo,
Lm.

AND
IN THE MATTER OF an application by '**Aivinihu Topiese Tauvaka**
and **Finau Motulalo Tauvaka** for **Letters of
Adoption.**

AND
IN THE MATTER OF **Cachey Leete To'ia**, female, born on **25 April
2005.**

BEFORE HON. JUSTICE NIU IN CHAMBERS

Counsel : Ms. L. Tonga for applicants.
 Ms. Madeleine Lavemai for Guardian ad Litem

Hearing : 3 March 2021.

Submissions : by Ms. Lavemai on 5 March 2021.

Ruling : 10 March 2021.

RULING

The application

- [1] The applicants are 'Aivinihu Tauvaka ('Aivini), the husband, and Finau Tauvaka (Finau), the wife. They were married on 18 August 2011. At the time of their marriage, 'Aivini was 39 years old, a bachelor, and Finau was 36 years old, a spinster, but she had already given birth, illegitimately, to a daughter, Cachey Leete To'ia, (To'ia being Finau's maiden surname) on 25 April 2005 (the child).

- [2] The child's birth certificate gives the particulars of her birth (at Ngu Hospital, Neiafu, Vava'u) and of her mother and that she was born illegitimately, but does not show any particular of her father. She had always lived with and was brought up by her mother. When her mother married 'Aivini, 'Aivini and the mother lived with her and they brought her up as their daughter up to now.
- [3] The applicants had their own daughter born to them, after their marriage, in 2012 and that child is now 9 years old, so that they have been living together with the two children for 9 years now.
- [4] The child is now 15 years old and she is in form 5 in Mizpah High School and she likes Economics, English and Tongan language, and she enjoys sports, and hopes to be a teacher one day. She knows that 'Aivini is not her natural father but she loves and accepts him as if he is his natural father.
- [5] On 25 September 2020, Finau, the mother, said on oath and signed, her affidavit in support of their joint application (with 'Aivini) to adopt the child, paragraphs 5 to 9 of which are as follows:
- "5. That my husband, Mr. 'Aivinihu Topiese Tauvaka and I, since our marriage on 18th August 2011, had been living together with the child and we jointly have full parental responsibilities over the child.
 6. That in 2017 my husband proposed to me that we adopt the child, which I accepted and considered it appropriate in the best interest of the child and our family.
 7. That I know and understand that my husband treated and loved the child as his own daughter and the elder of the children of our family.
 8. That I hereby confirm my consent to the adoption application by my husband and I of the child.
 9. That I understand the meaning of an adoption order and its effect, in my case, is that I still maintain my right as natural mother, and together with my husband, we have all parental rights and responsibilities over the child."
- [6] The application was filed on 26 October 2020 and the guardian ad litem filed her report on the application of 2 March 2021. In that

report, the guardian concluded and submitted that the Court grant the Letters of Adoption applied for.

- [7] The hearing was held on 3 March 2021 in chambers where only the applicants and the child and their second child, but without their counsel, Ms. Tonga, attending, and counsel, Ms. Lavemai, who had prepared and signed the report for the guardian ad litem, also attended.
- [8] I pointed out to counsel that there were two Court decisions of which I was aware which were of the view that an adoption order could not be validly made in favour of the natural mother and her husband, but that it could only be made in favour of her husband. I asked her if she would make submissions in respect of those decisions and in respect of another Court decision of which I was aware which had approved the joint adoption by the mother and her husband.
- [9] Counsel filed her submissions on 5 March 2021. She submitted, after citing and referring to all three decisions, that this application be treated in the same way as the Court decided in the two cases, namely, that the name of the mother be deleted from the application so that the application be only in and that of the husband, and that Letters of Adoption be granted only in favour of the husband.

The three cases

- [10] The three cases to which I have referred were all decisions of the Supreme Court and they are as follows:
- (a) **FA65/2011 Application of Mr. & Mr. J (per Scott CJ) Decided 24 August 2012.**
- (1) The child had resided with the applicants since 2005. The child was nearly 10 years old by 24 August 2012 when the Court decided the application. The guardian ad litem recommended that the Letters of Adoption be granted.
- (2) Because the provisions of S.15 (1) of the Maintenance of Illegitimate Children Act provide that "An illegitimate child under the age of 21 may, with the consent of its mother, be adopted **by another person**", the Chief Justice invited Mrs. Tupou who appeared as counsel for the applicants to file submissions and Mrs. Tupou filed those and served a copy thereof on the Solicitor

General at the time, Mr. Kefu, who was the guardian ad litem.

- (3) Mrs. Tupou submitted that once the mother of an illegitimate child marries a man who is not the father of the child, her status changes. She was no longer the sole guardian of the child as is provided under S.4 of the Guardianship Act 2004. The child thereby becomes part of a new family so that the adoption was not an adoption by the mother but an adoption by the mother and step father jointly.
- (4) Mr. Kefu, as Solicitor General, attended and stated that he had considered Mrs. Tupou's submissions and that he supported them.
- (5) The Chief Justice agreed with both counsel and he concluded:

"7. 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."

(b) FA112/2018 Application of Mr. & Mrs T (per Paulsen LCJ) Decided 5 February 2019.

- (1) The husband was still married to his first wife when he began living with the mother and had 3 children born to them, before he divorced his first wife and married the mother. The marriage did not legitimate the 3 children because S.3(2) of the Legitimacy Act prohibits it. The 3 children remained illegitimate. They were 16, 15 and 12 years old by February 2019.
- (2) The applicants stated in their application that they wanted to regularise their relationship to the children by making the application. The Lord Chief Justice requested that counsel for the applicants, Mrs. Vaihu, provide submissions as to the power of the Court to grant an adoption whereby the applicants would adopt their own children. Mrs. Vaihu responded that the

Court's power were in S.16(2) and (3) of the Maintenance of Illegitimate Children Act and stated that the purpose of the application was to remove the children's illegitimate status which appeared on their birth certificates.

- (3) The Lord Chief Justice conveyed to Mrs Vaihu an invitation to attend and make oral submissions and be heard on the matter but Mrs Vaihu declined and requested that the decision be made on the papers.
- (4) Thereupon Lord Chief Justice Paulsen decided:
 - (i) that the "obviously beneficial arrangement" which Chief Justice Scott had found in the case of Mr & Mrs J could readily be inferred as serving the best interests of the child in that case because it provided the child with security, certainty and a sense of belonging within the new family unit of the mother and her husband, an approach which the Court had followed in other cases;
 - (ii) but that this case was different because there was no intention to create a new family unit because the applicants had been raising the 3 children ever since they were born, and therefore it could not be said that the granting of the Letters of Adoption sought was necessary to provide the children with love, care, protection and security within a new family unit;
 - (iii) that adoption generally involved the total substitution of new parents for existing parents for the fundamental purpose of providing a child (who cannot or will not be provided by his or her own parents) with a permanent and secure family life;
 - (iv) that the proper purpose of adoption was to assist the development of or confirm the existence of, a genuine parent-child relationship between the child and the applicants;
 - (v) that it was not proper for the Court to legally sever or to distort existing family relationships

other than in pursuit of a genuine parenting purpose;

(vi) that adoption was a legal fiction that changed names, deemed fresh relationships and constructed the frame of a new family – that its essence was dislocation, but dislocation that supported a better opportunity;

(vii) that because the only reason advanced by the applicants for the adoption of the 3 children was so that their illegitimate status could be removed from their birth certificates, he said that –

- no reason was advanced or explained as to why such removal of illegitimate status would be of benefit to the children because such removal did not confer on them any benefit in law whatsoever;
- the Court may be perceived to participate in a deception to hide from the children the true circumstances of their births; and
- if the adoption was granted, the illegitimate status would be removed from their birth certificates, but it would be replaced with Letters of Adoption instead, which would mean that the children were born illegitimately, so that the grant of the letters of adoption would not achieve the desired result of the application.

Accordingly, he found that application was not consistent with the purposes for which Letters of Adoption were intended by the Act and that, if granted, the Letters of Adoption would confer no benefits on the children and therefore could not be said to be in their best interests. He refused the application.

(c) **FA 123/2020 Application of Mr. & Mrs. H (per Whitten LCJ) Decided 20 January 2021.**

(1) The mother illegitimately gave birth to the child and she kept and raised the child for a year before she married her husband, who was not the father of the child. They then had 5 children of their own, with

whom they raised the child, as all their children. The child was 17 years old.

- (2) In their joint application for letters of adoption of the child, however, they simply described their intention for the application, as being "to make the child feel inclusive of their family".
- (3) The guardian ad litem supported the application but made no comment or consideration as to the legal ramifications of the mother being an applicant.
- (4) Lord Chief Justice Whitten preferred and agreed with the approach taken by Paulsen LCJ in **re Mr & Mrs T** rather than that taken by Scott CJ in **re Mr & Mrs J**. He said that a plain reading of S.15(1) made it clear that an illegitimate child might only be adopted by a person other than his or her own natural mother. He said that the concept of a natural mother applying to become effectively an adoptive mother was a **non sequitur**, and contrary to the Act. It was not something which sensibly be expected to have been Parliament's intention.
- (5) Furthermore, he said that the proposition advanced in **Mr and Mrs J** that by marrying, the natural mother and her husband somehow became "another person" for the purposes of S.15, strained the interpretation of the relevant words beyond their logical limits.
- (6) Accordingly, he found that application for Letters of Adoption in favour of the natural mother was unnecessary and legally unsound, but that the application of the husband was correct because he was "another person", and that he had the consent of the natural mother that he become the child's adoptive father. He said that such result still served the best interests of the child because it formally recognised him as a member of the applicants' family, and it provided the child and the husband with the benefit of a legally recognised father and son relationship.
- (7) He therefore dismissed the mother's application and granted the husband's application and directed that the child's new birth certificate show the name of the

husband be shown as the child's adoptive father, and that the child's surname be the applicant's surname.

Consideration

Exclusive rights of mother

[11] In considering the provisions of S.15(1) of the Act and the decisions in the three cases, I first consider the rights, the exclusive rights, of the mother to and over her illegitimate child or children. S.15(1) confirms that. She, the mother, is the only person who can give permission for the adoption of her child. It provides as follows:

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

[12] That exclusive right may only be superseded if the mother has abandoned, neglected or persistently ill-treated the child, or if she cannot be found, or if she is incapable of giving her consent or if she unreasonably withholds her consent. Subsection (2) provides that the Court may dispense with her consent if any of those is the case.

[13] But if she is not any of those cases, she has exclusive right over the child.

[14] The Act provides for her rights to complain and for the Magistrate Court to order that the father of the illegitimate child be registered in the register of births as the father of the child and to order him to pay her maintenance for the child.

[15] The Act also provides in S.2 (5) that where the mother and father of the illegitimate child reside as man and wife no affiliation (or paternity) order or maintenance order may be made against the father, unless they separate and he fails to provide maintenance for the child.

[16] Whereas in the Act provisions are made for other persons to act for the mother to seek orders of paternity and or maintenance of the child, no provision is made that any other person has any right in respect of the child except the mother.

[17] That exclusive right of the mother had been judicially decided to be so in the case of **Re Lolesio (A minor) (1911)** Vol. 1 Tonga LR 14, well before the Act was enacted in 1926.

The headnote reads:

"An application for the custody of an illegitimate child (boy) aged 13½ years. When the child was 3 or 4 years old his mother gave him into the care of the applicant who thereafter cared for and looked after him, until he was taken away by one Kama the boy's grandfather, his father's father, shortly before the hearing. The boy's mother died when the boy was about 6 years old.

HELD: The grandfather had no right to the custody and that the boy should be returned to the applicant."

In giving the decision of the Court, Skeen CJ stated:

"The boy is illegitimate and the mother has "pule". The father has no power, and therefore the grandfather has none. He has no succession rights under his father. The law does not recognise the father. The mother gave the boy to Soakimi (the applicant); he is the man who has control of the boy. The father has not given one penny, till the boy commences to get big he takes no notice of him. He is in the wrong. Order of the Court: Lolesio will return to Soakimi and will obey him in all things; if not Soakimi can punish him and Lolesio can complain to the Court if he is ill-treated. Kama (grandfather) Paini and Mailau are warned to leave the boy alone. No fees charged."

That law has not been changed up to now, not even by the Act. In effect the Act confirmed it.

Transfer of exclusive right

[18] There are two ways by which that exclusive right of the mother may end, other than by her decease:

- (a) when she marries the father of the child **and** that marriage legitimates the child. If the marriage does not legitimate the child (because of the provisions of S.3(2) of the Legitimacy Act – namely, because one of them was lawfully married to another person at the time of birth of the child), the child remains illegitimate and the mother continues to have the exclusive right over it, despite the father being her husband; and
- (b) when the child is adopted, either customarily, or by grant of letters of adoption under the Act.

-
- [19] In an adoption, the mother transfers her exclusive right to the adoptive parent or parents so that she no longer has that exclusive right. That happens in grants of letters of adoption under the Act or when she hands over the child to the adoptive parents in a customary adoption.
- [20] Where the mother marries the father but the marriage does not legitimate the child, and the mother and father continue to live together with the child, it may be impliedly and properly said that the mother has thereby handed the child to themselves to be the adoptive parents of the child by customary adoption.
- [21] That is common in Tonga and the three cases I have referred to confirm it. In **Mr & Mrs J's case**, the couple lived with the child for 7 years. In **Mr & Mrs T**, it was 16 years and in **Mr & Mrs H** it was 17 years.
- [22] But whereas in **Mr & Mrs J** both parents, that is, the natural mother and the step father, were both jointly granted the letters of adoption over the child, the natural mother in **Mr & Mrs H** was granted nothing. Her then half share of right over the child was removed from her and was granted to her husband instead by letters of adoption granted to the husband alone.
- [23] The question then arises, 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 her husband? Or did she?
- [24] I do not think that the Legislature had intended that S.15(1) was to be applied in a way that would deprive the natural mother of an illegitimate child of her right over child if she is married and raises the child with her husband, and they adopt the child as their own, because that would be detrimental to the child.
- [25] I consider that the Legislature had intended that the mother should continue to be a joint adoptive parent of the child, as impliedly customarily adopted, in order that the best interests of the child is maintained, rather than to have it disrupted, by the grant of the letters of adoption to only the husband instead.

Remedy

- [26] It is therefore clear that if the words of S.15(1) were to be applied literally, no natural mother can be a joint adoptive parent, and it is clear that that could not have been the intention of the Legislature when it enacted S.15(1) with the words "by another person" in it.

[27] One remedy is the way in which Scott CJ interpreted those words, as suggested by counsel, Mrs. Tupou and supported by the Solicitor General, Mr. Kefu, namely, that when the natural mother became married, she became, together with her husband "another person" for the purposes of S.15(1).

[28] The other remedy is to interpret it as if the words "or by another person jointly with its mother" were added to the existing words, so that S.15 (1) would read:

"15 (1) An illegitimate child under the age of 21 years may, with the consent of its mother, be adopted by another person **or by another person jointly with its mother.**"

[29] There is authority for the Court to add those words to S.15 (1) if, without them, the ordinary sense of the words of the section would lead to some repugnancy or inconsistency, as it is the case with the present provision of S.15 (1). In *Tu'ipulotu v Kavaonuku* (1938) Vol. 11 Tonga LR 143, the Privy Council (of Tonga), per Stuart CJ, held that the Court had the power to insert the word "only" into the provisions of clause 67 of the Constitution in order that it clarified the provisions of that clause. That word has formed part of that clause ever since. It reads as follows:

"67. It shall be lawful for **only** the nobles of the Legislative Assembly to discuss or vote upon laws relating to the King or the Royal Family or the titles and inheritances of the nobles and after any such bill has been passed three times by a majority of the nobles of the Legislative Assembly it shall be submitted to the King for his sanction."

[30] In making that decision, the Privy Council stated, at page 146:

"In construing statutes the ordinary sense is adhered to unless that would lead to some repugnancy or inconsistency. In such case the grammatical or ordinary sense of the words may be modified, so as to avoid the defect, but no further."

And further on it stated:

"Maxwell at page 132 says: 'One presumption is that the Legislature does not intend to make alteration in the law beyond what it specifically declares. '"

- [31] I read that second statement as consistent with the intention of the Legislature when it enacted S.15 (1) that it did not intend to make alteration to existing rights of mothers to their illegitimate children if such children were formally adopted by them and their husbands. The Legislature did not intend that the mothers were to be deprived of their rights to adopt their own children customarily, or formally by grant of letters of adoption, when jointly made with their husbands, because such adoption was beneficial for the children.
- [32] When I consider that the Court could validly add a word to a clause in the Constitution to clarify its meaning, I do not consider that it matters that an interpretation of S.15 (1) may be said to be strained in order that its proper meaning is made clear.

Conclusion

- [33] I therefore consider that I would be justified in interpreting the words "by another person" in S.15 (1) of the Maintenance of Illegitimate Children Act as meaning "by another person or by another person jointly with its mother".
- [34] Accordingly, I conclude that the application of the husband and the natural mother in the present case is in accordance with S.15 (1), and that it is in the best interests of the child.

Orders

- [35] I therefore make the following orders:
- (a) Letters of Adoption are granted to **'Aivinihu Topiese Tauvaka** and **Finau Motulalo Tauvaka** in respect of the child, **Cachey Leete To'ia**, female, born 25 April 2005, but who shall forthwith be named **'Apolonia Cachey Tauvaka**.
 - (b) A new birth certificate of the child in her said new name shall be issued showing the applicants as her parents.



A handwritten signature in black ink, appearing to be "Niu J", written over the seal.

Niu J

J U D G E

NEIAFU: 10 March 2021.