

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

ATTORNEY GENERAL'S OFFICE	
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FA 64 of 2022

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IN THE MATTER OF

The Maintenance of Illegitimate Children
2004

AND IN THE MATTER OF

An application by Mr. F for Letters of Adoption

AND IN THE MATTER OF

FFALL, a male child, born on 14 January 2005.

RULING ON APPLICATION FOR LETTERS OF ADOPTION

BEFORE JUSTICE P. TUPOU KC

Hearing: 22 September, 2022

1. This is an application for letters of adoption of *FFALL*, a male child born on 14 January, 2005.
2. *FFALL* was born illegitimate. The applicant married *FFALL*'s birth mother on 11 December, 2008 and they have raised him since.
3. The letter of application and the affidavits filed in support of the application clearly identified them on the intituling as male and female applicants.
4. The Guardian ad litem's initial report dealt with the application on the basis that the male applicant was the sole applicant and because there was further inconsistent material in the papers such as, the family was residing at Veitongo and the town officer of Ma`ufanga stating the family were residing at Houmakelikao, Ma`ufanga, the report

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stating the child was attending school in ‘Eua but not mentioned in the supporting affidavits by the applicant or the birth mother; one of the referees referred to the child as a “baby” when the child is now 17 years old, I set the matter down for mention.

5. On 30 August, 2022, the matter was called and the said issues were raised. The Guardian ad litem filed a supplementary report. She confirmed that the applicants agreed for the application to proceed with the male applicant only, that the family now live at Veitongo, the child had only travelled to ‘Eua for school early this year when the schools in Tongatapu were closed due to the covid-19 lock-downs but he has returned to the family; and that the town officer was indeed referring to the child in this application.
6. The Guardian ad litem supported the application and referred me to the following decisions;

- a) *In re Application for Letters of Adoption by Mr. and Mrs. H* [2021] TOSC3. In this application the birth mother jointly applied with her husband to adopt her child. Whitten QC, LCJ adopted Paulsen LCJ’s approach *In re Application for Letters of Adoption by Mr. and Mrs. T* [2019] TOSC 3 and opined;

“[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 would 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 Letter of Adoption in favour of the natural mother are unnecessary and legally unsound.”

The application by the natural mother was dismissed and the application by the male applicant was granted and an order was made for a new birth certificate to be issued retaining the natural mother’s name on the child’s birth certificate as mother and to show the adoptive father’s name as the father.

- b) *An Application by Tisiola Paea Taulafo and ‘Ofa He Lotu Taulafo for Letters of Adoption [2021] TOSC 102.* This was also an application by the birth mother and her husband (who was not the birth father) to adopt her child. Tupou AJ agreed with Paulsen LCJ and Whitten QC LCJ’s position and said; *“The case turns on the legal interpretation of “ANOTHER PERSON” in s.15(1) of the Maintenance of Illegitimate Children Act. The meaning is clear and it does not include the addition and extension decided by Scott CJ - that the 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.”*

His Honour, dismissed the application by the birth mother and granted the application by her husband, the male applicant and as in *In re Application for Letters of Adoption by Mr. and Mrs. H*, he ordered a new birth certificate for the child maintaining the mother’s name and inserting the applicant’s name as the adoptive father.

7. Here, there is only one applicant, *Mr. F* and to a large extent the cases I have been referred to are irrelevant except for the purposes of considering whether to adopt the approach of retaining the natural mother’s name on *FFAL*’s birth certificate or not.

8. Admittedly, with respect, I struggle to reconcile¹ the efficacy in law of retaining the natural mother's name on the birth certificate with the concept that a natural mother;
 - a) cannot adopt her illegitimate child and therefore cannot be an applicant;
 - b) is required to surrender her parental rights over the said child² in favour of "another person"; and
 - c) that other person (if successful) by virtue of s.16 of the Maintenance of Illegitimate Children Act becomes the guardian of the said child to her exclusion.
9. For an application where a married couple are adopting a child and neither of them is the natural mother. The child's new birth certificate will show the applicants names as mother and father.
10. Logically, in this present case, where the mother is not an applicant and has surrendered her parental rights and by law her husband becomes the sole legal guardian, *FFAL*'s new birth certificate should only record his name as the father. I ask myself if this something that could have been intended by Parliament? I would think, not.
11. The predictable reality though, is it not, that in cases such as this, the natural mother, notwithstanding surrendering her parental rights and giving up guardianship in favour of her husband, will, in fact, remain and continue to exercise parental care, guardianship and undoubtedly rights over the adopted child. It is farcical to assume otherwise.
12. Further, here, the applicant and the natural mother have children from their union. They live together and naturally share legal guardianship over them. But in the case of *FFALL*, legal guardianship will be vested in the applicant alone. Is it possible that this

¹ But do not disagree, as later explained in this ruling

² Practice Direction 1 of 2019

was the intention of Parliament for a child like *FFAL* and a family like *Mrs. and Mr. F* here? I do not believe so.

11. The cases I have been referred to by the Guardian ad litem and the instant case, in my mind, signal perhaps a societal shift in attitude regarding the care of illegitimate children. From being placed, principally, under the care of maternal grandparents or relatives when the natural mother married, to a growing acceptance of responsibility by spouses to care for and make such child a part of his and the natural mother's family unit.
12. Such a positive shift combined with the varied approaches taken by this court in like applications, in my view, provide a timely opportunity to review the current legislation or for the enactment of a dedicated legislation to deal fully with the intricate issues adoption involves.
13. The UK³, New Zealand⁴, Fiji⁵ and most of our Pacific neighbours have dedicated legislation covering the wide range of issues that arise in adoptions, including provisions that allow for natural parents to adopt a child born out of wedlock with their spouse.
14. For a country where adoptions are culturally and socially common, it is highly appropriate for Tonga to have legislation in place to deal with all of the relevant and often complex issues that arise in such applications.
15. Returning to the present case, the position is that *Mr. F* is the sole applicant. I have considered the natural mother's consent, the letters in support of the application from the town officer of Ma'ufanga and the Superintendent Minister of the Mo'ui Fo'ou 'Ia

³ Adoption Act 1958, (s.1(3), s.2(a),) adopted by Kiribati and Vanuatu

⁴ Adoption Act 1955, (s.3(3) and 4(c)) adopted by Niue

⁵ Adoption Act 2020, s.9(5)

Kalaisi Church, the guardian ad litem report and the statements made by the natural mother and the child to the guardian ad litem. I have also seen *FFALL* in private this morning and I am satisfied that the applicant is a fit and proper person to be granted Letters of Adoption to *FFALL*.

16. In my meeting with *FFALL*, he also told me that he would like for this application to be granted so that he will carry the same surname as his siblings so that they are “one” and expressed his wish for his natural mother’s name to be retained on his birth certificate.
17. *FFAL* has for 17 years held a birth certificate with an unnamed father. I do not consider it in his best interest to have an unnamed mother as a result of my granting this application. For that reason, together with *FFALL*’s wish and for consistency, I adopt the approach taken in *Application for Letters of Adoption by Mr. and Mrs. H* and order a new birth certificate which will continue to show *Mrs. F* as the child’s natural mother and *Mr. F* as his father and the child’s name be changed and recorded as **Francis Faivaola ‘Amanaki Lelei Latu Finau**.

Nuku’alofa: 23 September, 2022



A handwritten signature in blue ink, appearing to read "P. Tupou", is written over a light blue circular stamp.

P. Tupou KC
J U D G E