

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

Solicitor General
Sean + Ab
13/03/15
FA 100 of 2014

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

**AND
IN THE MATTER OF** an application by 'Atomi Ma'ake Holani and
Mele Holani for Letters of Adoption.

**AND
IN THE MATTER OF** the child named Manu'opea Holani, a female
child born on 11 December 1998.

BEFORE LORD CHIEF JUSTICE PAULSEN

Heard : 3 March 2015

**Appearances : Ms S Fineanganofu for the Guardian ad Litem
'Atomi Ma'ake Holani in person**

RULING

[1] The applicants, 'Atomi Ma'ake Holani and Mele Sakumi Holani, are seeking to adopt Manu'opea Holani, a female Tongan child who is 16 years old and was born on 11 December 1998. The male applicant is Manu'opea's uncle.

[2] The applicants have been married for 45 years and have 5 children of their marriage. It appears that they are aged 71 and 74 years respectively. The applicants have for many years resided in New Zealand although they were both born and raised in Tonga. If the

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application is granted the applicants intend to have Manu'opea live with them in New Zealand on a permanent basis.

[3] The application is supported by Manu'opea's mother and also by Manu'opea herself. I understand that the natural father has nothing to do with Manu'opea's upbringing. Manu'opea's mother says in her affidavit, that the applicants offer Manu'opea 'better upbringing, better education, better church teachings and good discipline'. Although she has never been to New Zealand Manu'opea told me that she believes New Zealand offers her a better future and that she will be able to get a good job and earn money to help her family in Tonga.

[4] The Solicitor General has provided a report as Guardian ad Litem dated 10 February 2015 and has taken the position that he leaves it to the discretion of the Court to decide whether to grant or deny the application.

[5] The paramount consideration in adoption cases is whether the proposed adoption is in the best interests of the child. *Hatch v Solicitor-General* [2010] Tonga LR 177 and *Saavedra v Solicitor General* [2013] TOCA 7. I have formed the clear view that it is not in the best interests of Manu'opea to grant the application. My reasons are set out below.

The child

[6] Manu'opea is an illegitimate child. Until she was about 12 years old she lived with her grandmother. When her grandmother died she went to live with her mother, her stepfather and four siblings. She appears to be a well adjusted child. Her relationships with her immediate

family members are happy and secure. I asked her about her stepfather. She gets on well with him. The mother says the stepfather treats Manu'opea well.

[7] Manu'opea is in her fourth year at Liahona Middle School and she does well in her studies. She has some knowledge of English but could not speak to me directly other than with the assistance of a translator.

[8] Whilst there is some conflict between what is in the affidavits, on the one hand, and what is in the Guardian ad Litem's report and what I was told at the hearing, on the other, I find that the idea of the applicants adopting Manu'opea was first raised in 2014. Before that Manu'opea had some contact with the applicants on their visits to Tonga. Manu'opea told me that she had never lived with the applicants except when they visited Tonga and stayed with her family. She said that had occurred only once but other evidence would suggest more visits had occurred than that.

The purpose of adoption

[9] Adoption involves the substitution of new parents for existing ones. It benefits the child by providing it with a permanent substitute family where it is necessary to do so. 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. That might be, for instance, because the natural parents do not want the child or because they cannot provide a suitable family environment for it.

[10] The mother, who is 36 years old, is unemployed. The applicants say that she does not have enough income to provide for her family and this is a reason they should be allowed to adopt Manu'opea. I note that in her affidavit the mother says only that it is desirable that Manu'opea be with the applicants. There is no evidence about the stepfather's employment or what income is available to the family. What is clear to me is that throughout her life Manu'opea has been well cared for and there is no reason to believe that anything will change in that regard.

[11] This is not a case where the mother does not want Manu'opea or cannot provide for her. She clearly loves Manu'opea and it could never be suggested that she does not want her as a daughter. She has provided for Manu'opea very well to date. In my view, the purpose of this application is not to create a genuine parent-child relationship between Manu'opea and the applicants and she is not in need of new parents. The purpose is to provide a means by which Manu'opea may reside in New Zealand and take the benefits that it is perceived New Zealand will offer her by way of education and employment.

[12] 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 and would refuse the application on this ground.

Inter county adoption

[13] The application is also one for inter-country adoption. In *Saavedra v Solicitor General* the Court of Appeal, in reliance upon Article 21 of the United Nations Convention on the Rights of the Child, stated at [5]:

Consequently, inter-country adoption should be approved only when all other means of caring for a child in Tonga have been exhausted. It is a measure that the Committee on the Rights of the Child has described as "a measure of last resort" ...

[14] There can be no suggestion here that this proposed adoption is a matter of last resort or that all other means of caring for Manu'opea in Tonga have been exhausted. Manu'opea has a suitable home in Tonga. On this ground too I would refuse the application.

Do the applicants have the ability to provide for Manu'opea?

[15] Counsel for the Guardian ad Litem noted that this is an unusual case because of the ages of the applicants and the large age gap between them and Manu'opea. The female applicant is 58 years older than Manu'opea and the male applicant is 55 years older than Manu'opea. These are factors that the Court has taken into account in other cases in deciding whether to grant or refuse an application for adoption. In *re Funganitao* [2011] TOSC 6; FA 152 of 2010 (27 October 2011) Chief Justice Scott said at [7]:

Thirdly, the female applicant is 60 years older than the child and her husband is only slightly younger. It appears that neither of the applicants is working and that they are dependent on welfare benefits. Where there is a very great age gap between the child and the applicants there must be concern that adoption is not really in the best interests of the child.

[16] It has been the practice in Tonga for some years to require that applicants for adoption spend at least 6 months with the child to allow a proper assessment to be made of the relationship between them. This is not an unyielding rule or a precondition to an adoption order being made. *Hatch v Solicitor General*. There are features of this case, such as the ages of the applicants and the inter-country nature of the application, which mean that even if there were no other impediments, I would not make an adoption order until Manu'opea had lived with the applicants for a reasonable period. This would ensure that she is able to settle down happily with the applicants and that the applicants prove themselves suitable persons to be responsible for her care. There has not been such a period of living together.

[17] Furthermore, I have very real doubts about the ability of the applicants to provide care for Manu'opea. This is not only because of their ages. The female applicant did not appear before me in support of the application because she was having medical treatment in New Zealand. I was told that she has had a medical condition for over a year and has had a tumor removed from her stomach. The male applicant said that her most recent appointment, that prevented her from travelling to Tonga, was for a 'check up'. Given the female applicant's age this is a serious matter and I am not prepared to assume that she is fit to care for Manu'opea in the absence of clear medical evidence.

[18] As in *re Funganitao* the applicants are of modest means. They are both on superannuation and get other benefits from the New Zealand

government upon which they support themselves. They also have four other family members living with them.

[19] It appears to me also that little, if any, consideration has been given to what would become of Manu'opea should one or both of the applicants fall ill or die. This must realistically be considered in this case. When I raised the matter I was told that the male applicant has a daughter who could look after Manu'opea but I have no information about that daughter's circumstances or her willingness, and indeed ability, to care for Manu'opea if that was needed.

Other factors

[20] It also concerns me that whilst the major impetus for this application is said to be the educational and employment opportunities that New Zealand will offer Manu'opea, a move to New Zealand might well prejudice her future prospects. She has never been to New Zealand and there will be substantial dislocation for her socially and culturally.

[21] Furthermore, her continued educational success may well influence the employment opportunities available to her for the rest of her life. She does not have a firm grasp of the English language to the extent that she could converse with me. I consider that, however well intentioned the applicants are, putting Manu'opea into a New Zealand school environment, where lessons are conducted largely in English, would put her at risk of failure at a crucial time in her life.

[22] I have not overlooked that Manu'opea is of an age where she is able to make decisions for herself. She wants the adoption order to be made.

Despite giving her wishes full weight I am not satisfied that it is in her interests to accede to them.

The result

[23] For the reason set out above I am not satisfied that it is in Manu'opea's best interests to make the adoption order that is sought. This is because I consider:

[23.1] The application, although well meaning and genuine, has not been made for a proper purpose;

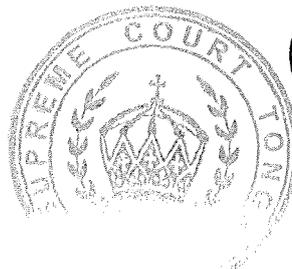
[23.2] The application is for inter-country adoption and is not necessary to provide a home for Manu'opea as a matter of last resort;

[23.3] The applicants have not satisfied me that they are capable of caring for and maintaining Manu'opea;

[23.4] That the social and cultural dislocation and the damage to Manu'opea's educational prospects outweigh the opportunities available to her by a move to New Zealand.

[24] Accordingly the application for the issue of Letters of Adoption is refused.

NUKU'ALOFA: 11 March 2015



A handwritten signature in black ink, appearing to read "O.G. Paulsen".

**O.G. Paulsen
CHIEF JUSTICE**