

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

FA 35 of 2013

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24/02/15

IN THE MATTER OF THE GUARDIANSHIP ACT 2004

AND

IN THE MATTER OF an application by *Mr and Mrs L* for Legal Guardianship Order.

AND

IN THE MATTER OF the child *T*, male, born on **6 June 2001**.

JUDGMENT

1. The applicants apply for a Legal Guardianship Order in respect of the male child, *T*, born 6 June 2001 ('Tevita'). On 12 June 2013 the Solicitor-General was appointed Guardian ad Litem to represent the interests of Tevita. The Guardian ad Litem prepared a report that was received on 21 January 2015. The Guardian ad Litem concluded that it was in the best interests of Tevita that the Legal Guardianship Order be made.
2. On 23 January 2015 the Court received a request from the applicants for an urgent hearing as they are permanent residents in the United States of America and intended to return home from Tonga, where they were staying with Tevita and his family, on Saturday, 24 January 2015. I convened a hearing during the afternoon of Friday, 23 January 2015. It was attended by the applicants, Tevita's parents, Tevita and also Ms Lutui of Crown Law for the Guardian ad Litem. I took the opportunity to

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ask questions of all who attended and then reserved my decision indicating to the applicants that the application raised issues which I needed to consider further.

3. Tevita is 13 years old and is a Tongan national born at the Vaiola Hospital, Tofoa, Tongatapu. He is a legitimate child and the second of four children born to his parents during their marriage. The children of the family are aged between 15 and 10 years. Tevita has lived with his parents and siblings all his life. His parents are dedicated and loving. He is a happy child. Tevita presently attends Form 2 at Tonga College where he is said to be a top student. He clearly has some understanding and use of the English language but not to the extent that he could converse with me other than through a translator. He understood the nature of the application and was happy about it because he wants to travel with the applicants and live in the United States. He told me that one day he wants to be a doctor.
4. The applicants were married on 22 March 2007 at Niutoua, Tongatapu. They have no children of their own. The male applicant is 47 years old and the female applicant is 42 years old. They were both born and raised in Tonga but are now citizens of the United States. The male applicant is the brother of Tevita's mother and thus has a blood relationship with Tevita. He is Tevita's uncle. I am told that the applicants are in paid employment and appear to be financially secure.

On the information I have their collective incomes exceed \$US100,000 per year. They rent a home for \$1,000 a month and have vehicles. They impress as a stable couple in a good relationship and are in all respects suitable parents. They are also committed members of the United Methodist Church. Their application has been supported by the Rev. Dr M Niponi Finau of the Moreno Valley United Methodist Church. He describes them as a most dependable and honest couple and fully supports the application.

5. The applicants advise me that there is a large Tongan community where they live with which they regularly associate.
6. Tevita's mother and the male applicant are close. I was told that when Tevita was born he was ill and the male applicant provided medicine for his care and that Tevita was named after the male applicant. The mother said that as God had not given her brother a child she wished to do so.
7. The possibility of the male applicant 'adopting' Tevita was raised in around June 2007 while he was visiting Tonga. The applicants both travel regularly between the United States and Tonga and have for years been providing remittances on a monthly basis to support not only Tevita but also the rest of the family. But it is clear that the applicants have a special interest in Tevita and it is said that they have,

for instance, been involved in decisions regarding his studies, although as Tevita is only in Form 2 one cannot regard such involvement as being particularly consequential.

8. The male applicant said the reason why the application has been made is that he has no children of his own and he wants Tevita to join him and his wife as their son in the United States and live permanently there. Whilst the fact that the applicants have no children of their own is clearly a significant factor in play here I have no doubt that they and Tevita's parents genuinely believe that there are more opportunities for Tevita in the United States than in Tonga and that it is in his best interests that he be given the opportunity to live there with the applicants.
9. In their application and in speaking to me at the hearing the applicants referred to 'adopting' Tevita but it must be remembered that that is not what they are applying for. They have applied for a Guardianship Order. Adoption and Guardianship are not the same thing. In general terms adoption is a process where in law the natural parent/s of a child are replaced by adopting parent/s. Adoption creates the status of legal parenthood, ensures parenthood permanency and creates new rights of succession. Guardianship is a different and less permanent legal status. The Guardianship Act 2004 relevantly defines guardianship as '... the custody of a person and the right of control, which includes

rights, powers and duties in respect of that child and his upbringing...". A 'child' is a person under 18 years of age. Whilst the Act prohibits a parent being deprived of guardianship except if they are unfit for 'grave reason' that is not the case with respect to the removal of a guardian that is not a parent (section 9 and 10). The Court has the power to vary or discharge a Guardianship Order at any time (section 13) and determine disputes between guardians on such basis as it considers is in the best interests of the child (section 11). Relevantly too, guardianship does not carry automatic rights to succession as between the guardian and the child in the same manner as adoption.

10. The Court's jurisdiction to make a guardianship order is conferred by section 3 which provides:
 - (1) The court shall have jurisdiction where –
 - (a) Any question of guardianship, custody and access arises in any proceedings before the court; or
 - (b) The child who is the subject of the application or order is domiciled or resident in Tonga
 - (c) Notwithstanding the provisions of subsection (1) the court may decline to make an order under this Act if it is not in the interest of the child'

11. Section 7 sets out the powers of the court as follows –
 - (1) The court shall have power to make or revoke a guardianship order.
 - (2) The court may, in respect of a child, appoint a guardian as sole guardian or in addition to any other guardian.
 - (3) The court shall have the power to appoint a *guardian ad litem* in respect of a child in guardianship proceedings.
12. The Court also has the power to make a guardianship order in favour of a person who has had customary adoption of a child (section 6).
13. The paramount consideration that the Court must take into account in determining whether to make a Legal Guardianship Order (as in all of the cases involving the care of children) is whether the proposed course of action, is in the best interests of the child. Tonga is party to the United Nations Convention on the Rights of the Child whose guiding principle is that paramount consideration. *Saavedra v Solicitor General* [2013] TOCA 7 (CA).
14. In determining what is in the best interests of a child the Court is often faced with a difficult balancing exercise of competing considerations. This was evident from *Application by Saavedra* [2012] TOSC 64 where Scott CJ allowed the inter-country adoption of a 1 year old Tongan child

by an American couple but refused to allow them to adopt that child's 5 year 7 month old brother. The Judge noted that while he did not doubt that the applicants were in a better position to offer the child a higher standard of living, of upbringing and of education the material well-being of a child was just one of a number of factors to be taken into account. He noted that international experience noted that inter-country adoption should only be considered if the Court is satisfied that the child cannot be cared for properly in the country of its birth [at 19]. The case before me is not one of inter-country adoption but it shares some of the same features to the extent that the intention here is to remove Tevita from his country of birth and his parents on a permanent basis. For that reason it also raises some of the same concerns as faced the Court in *Saveedra*. Those concerns include, amongst others, the right of a child to be cared for by his or her parents and the right to preserve his or her identity, nationality, and other family relations.

15. The applicants and Tevita's parents genuinely consider that Tevita will have a better life in the United States than in Tonga. That is no doubt a commonly held belief but there is little evidence to support it. I can readily accept that, generally speaking, there is a higher standard of living in the United States than in Tonga but it does not follow that Tevita will have a better life in the United States for that reason. Given Tevita's age decisions will need to be made for his secondary education and potentially for his tertiary education in due course. At the moment

he is a top student but given his limited English language skills his level of achievement may slip in an environment where lessons are entirely in English. It is important to remember that it is only through mastery of the common language that one can truly assimilate into and fully benefit from the society in which one lives. Furthermore, while there are undoubtedly many options for tertiary education in the United States there is nothing before me that gives me any level of comfort that Tevita will be able to take advantage of them. Also it might well be the case that there are equal and more accessible options available for Tevita's education in Tonga or closer to home in the Pacific Region.

16. Counting against the application also is the potential for Tevita to suffer emotional distress and dislocation as a result of the separation from his family with whom he has lived for his entire life.
17. There was little evidence before me either as to the likelihood of Tevita being granted permanent residence in the United States. The applicants had looked into that matter and believed that an application for residence would be granted to him but that does not mean of course that they are correct. On this occasion I am prepared to assume that their belief is well founded but in future cases some evidence will be expected that the child will be admitted permanent entry into the country to which he/she is being taken to live.

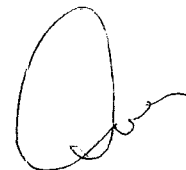
18. There are considerations of a more positive nature that support the granting of the application. Tevita has expressed a clear preference to move to the United States and discounts the possibility that he will greatly miss his immediate family. While I think he will miss his family he is a child who in my assessment is capable of forming his own views and I should give them due weight.
19. Tevita has a close bond with the applicants and it appears that the possibility of him moving to the United States has been known to him for some years. He has had time to consider that possibility and the implications of it and he is keen to go. The making of the orders sought will make real what has been intended for some time.
20. I consider it relevant that whilst there is no suggestion of this being a customary adoption it is intended to serve the same aims including the maintenance and enhancement of family links which is a positive motive.
21. Tevita is related to the male applicant and the applicants regularly travel to Tonga. If Tevita does move to the United States his ties to his family will not be totally served and there seems little doubt that he will return to Tonga from time to time with the applicants and stay with his family. Culturally too Tevita will retain links with Tonga through membership of the Methodist Church and as part of the Tonga community that exists where the applicants live.

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22. Important too in my assessment is the fact that in making the Order sought I will not deprive Tevita's parents of their status as his legal parents or as guardians and the Order will always be subject to review in the event that a change of circumstances makes that desirable.
23. Furthermore, the applicants have advised me that it will take some time for an application to have Tevita reside in the United States to be processed. It could be that the application will take 18 months or more. In that time Tevita will remain in Tonga with his parents and siblings and so will have progressed in his education and in his mastery of the English language. One can also assume that with the passage of some more time the risk of emotional distress through separation from his parents and sibling will be less significant.
24. On balance I have concluded that it is in the best interests of Tevita to grant the application and I make an order accordingly.

Dated: 2 February 2015.



CHIEF JUSTICE