

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

FA 22 of 2013

Solicitor General
SISIFA / MACCOMBER
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12/27/06/13

IN THE MATTER OF THE GUARDIANSHIP ACT 2004.

AND

IN THE MATTER OF AN APPLICATION BY HALANGAHU AND
'ATELAITE FIFITA.

Mr S.V. Fa'otusia for the Applicants

Mr S. Sisifa for the Guardian ad litem

REASONS FOR ORDER

- [1] On 20 March 2013 I ordered that the child P., born on 20 December 1999, be returned to the custody care and control of her mother. I now give my reasons for making that Order.
- [2] P.'s parents were married in 1997 in Los Angeles, California, USA. The mother was and remains a US citizen while the father was a Tongan citizen. After the birth of P. the mother and father decided to remove to Tonga and they settled in Tonga in 2002.
- [3] According to the mother's affidavit sworn on 13 March 2013, the father began assaulting her and this led to her return to the U.S.A. in 2007. She left child P. and her two other children, both older than P. with the father.
- [4] In January 2012 the father died and the three children were taken into the care of the father's elder brother, the first Applicant.

- [5] It appears that the two elder children moved away from the Applicant's home following violent incidents. They eventually returned to the USA at about the time this application was made.
- [6] The application, which is an application for the custody of child P. by her uncle and aunt come before this Court in an unusual way. On the afternoon of Saturday 9 March I was informed that an application for the return of the child to them had been made in the Magistrates' Court after the child had been removed from their control. It was arranged that the Acting Solicitor General, Mr Sisifa, would appear in the Magistrates' Court and request that the matters be transferred to this Court. The Magistrate readily agreed.
- [7] At 7pm on Saturday evening the Applicants, the child, Mr Sisifa and Inspector Salote Tonga of the Tonga Police Service all appeared before me. The Solicitor-General was appointed Guardian ad Litem and was asked to prepare a report for the Court. With the agreement of all concerned the child was taken into the temporary care of Inspector Tonga.
- [8] On 20 March the matter came back to me. By this time Mr Sisifa had prepared and filed two reports, copies of which were made available to the Applicants. Mr Fa'otusia sent a message to the Court accepting the reports and their conclusion. He only asked that the child be allowed to spend some time with the Applicants before returning to her mother in the U.S.A. The male Applicant, who appeared in person, told me that he accepted this outcome.

[9] I explained to the parties that the position in law in Tonga is that all children are subject to the supervisory jurisdiction of the Court exercising, on behalf of the Crown, the function of *parens patriae*. In the absence of difficulty, the natural parents of legitimate children are presumed to have the right to exercise the normal care and control over their children which is their accepted privilege. It is only where one or both of the parents has been shown not to have the ability adequately to care for the child that the Court considers intervention. It is only if no other solution is available that the Court will order a natural parent to forfeit the rights to care and control of the child.

[10] According to the reports prepared by Mr Sisifa, which followed an interview with the mother and consideration of a reference provided by an independent person of repute, there was nothing to suggest that the mother was not in a position to provide suitable and adequate care for all her three children, including P. In these circumstances there was a presumption that P. should return to her mother, rather than remain with the Applicants.

[11] It should be remembered that Section 15 of the Act provides that the welfare of the child should be the paramount consideration. Section 15 also requires to Court to takes into account the wishes of the child. In private interview with the Court, child P. expressed the wish to return to the USA.

[12] In all the circumstances I dismissed the application and ordered the child to be returned to her mother as soon as possible.

[13] I have already referred to the unusual way in which this matter come before the Court and I wish to particularise some of the circumstances with a view to preventing their recurrence.

[14] According to paragraphs 25 and 26 of the first report dated 11 March 2013:

"the Applicants informed the Guardian ad litem that on about 8 March 2013 the child went with the female Applicant and her daughter to do some errands...when they returned home an aunt informed the child that a teacher had come home and asked her to come over and complete an English project. The child then walked with the Applicant's 12 year old son...to St Andrew's College.

A little while after the Applicant's son returned without the child. The Applicants waited for hours before approaching the school principal. The principal informed them that there was [no] school that day and no one had come into school. The Applicants began to get worried and found out that the child was in the care of Inspector Salote".

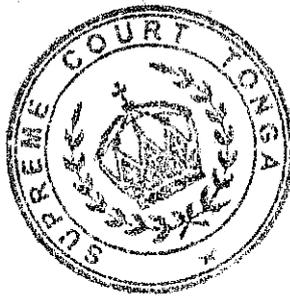
[15] From what I was told on 9 and 20 March, it seems that an US Embassy in Suva Consular official named Sulieta arrived in Tonga a few days prior to 9 March having obtained air-line tickets for the three children to travel to the USA. After arranging that the two elder children would go with her, she sought the assistance of one or more teachers at St Andrew's College and the police to remove the child from her carers, the Applicants, by a process of deception. At no stage has any application been made to the

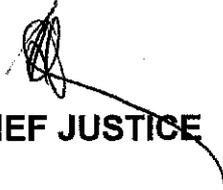
Court either by the mother, or on the mother's behalf by the US Embassy or anyone else.

[16] This child is a dual citizen of Tonga and the United States. She was lawfully resident within Tonga and in the lawful care of the Applicants. In my view the procedure adopted by the US authorities, if it has been correctly described to me, was wholly improper and unacceptable and should never be repeated. A copy of these reasons is to be supplied by the Chief Registrar of the Supreme Court to the Minister of Justice for such further action by him as may be thought appropriate.

[17] In conclusion I record my appreciation of the exemplary manner in which this matter was handled by Crown Law Office and, in particular, Mr Sisifa.

DATED: 22 MARCH 2013.




CHIEF JUSTICE