

*family Judgment file*

*Solicitor General*

*R*  
*12/02/13*

**IN THE SUPREME COURT OF TONGA**

**FAMILY JURISDICTION**

**NUKU'ALOFA REGISTRY**

**FA 39 of 2011**

**IN THE MATTER OF**

**THE GUARDIANSHIP ACT 2004**

**AND**

**IN THE MATTER OF**

an application by **TOHOA APORO  
TAHINURUA** for a guardianship order in  
respect of child **M**

**BEFORE LORD CHIEF JUSTICE SCOTT**

**Ms. 'Atiola for the Guardian ad litem  
K. Piukala for the Applicant**

**DECISION**

- [1] Child M was born on 6 January 2011. He is the legitimate younger son of Molisi and 'Ana Vaifo'ou aged 38 and 35 who also have three other children, two daughters and a son.
- [2] According to an affidavit sworn by Mr & Mrs Vaifo'ou they first met the Applicant in September 2010. On that occasion he became aware that Mrs. Vaifo'ou was expecting a child. The Applicant who is a citizen of the Cook Islands and New Zealand then returned to New Zealand.

- [3] In December 2010 the Applicant again visited Mr & Mrs Vaifo'ou and on this occasion he asked for their consent to giving him the legal guardianship of the child when he was born. They agreed.
- [4] On 7 January 2011 when M was only one day old the Applicant took him from his parents and has been looking after him, with short interruptions, ever since.
- [5] On 28 April 2011 the Applicant filed this application for an order appointing him the sole guardian of the child pursuant to the provisions of section 7(2) of the Act.
- [6] On 16 May 2011 the Solicitor General was appointed guardian ad litem of the child but for reasons which are not clear the report prepared on the Solicitor General's behalf was not filed in the Supreme Court until 8 August 2012. Such delays are unnecessary and should be avoided.
- [7] In support of his application the Applicant filed three references which describe him as honest, reliable, caring, quiet, friendly, well-liked and God-fearing. According to Miss Singer, who states that she has known the Applicant for seven years, he lives with his sister. He is 40 years of age.
- [8] The Applicant is presently residing in Tonga with a visitor's visa but it is not disputed that his intention, if the application is granted, is to take the child back with him to New Zealand.

[9] The guardian ad litem's report did not recommend that the application be granted. The principal grounds for reaching this conclusion were that the Applicant is living in New Zealand in a same sex civil union with a partner of four years. The partner is not a party to the application but is understood to be supportive. The partner seems to be the principal bread-winner of the union although the Applicant also works part-time.

[10] Mr. Piukala very strongly emphasized the material benefits that an up-bringing in New Zealand could offer in comparison to the prospects in Tonga. He stressed the higher standard of living and the superior health and education systems. In his submission this child would be far better off going to New Zealand with the Applicant.

[11] Although I found the Applicant to be a likeable person and have no doubt that he has the fine character ascribed to him by his referees, I also find that the application faces two major difficulties.

[12] In two recent decisions *Saavedra* FA71 & 72 of 2012 and *Matheny* FA121 of 2011 I explained that Tonga is a party to the United Nation's Convention on the rights of the Child. Article 21(b) of this Convention provides that:

“inter country adoption may be considered as an alternative means of children's care, if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin.”

- [13] What has happened in this case is that the child's parents have simply given the child away to this Applicant without any steps at all having been taken to see whether he could be cared for locally. The child's mother, who only attended one of the four hearings, told me that she had three other children and was living with her parents. It seems she may not get on very well with her parents in law. She did not suggest any exceptional difficulty preventing her from looking after the child, her youngest.
- [14] The second major problem is the Applicant's sexual orientation. In Tonga the law still prohibits carnal knowledge between consenting adults of the same sex. No court would entrust a very young child into the care of a person whose life-style carries with it a very real risk of prosecution.
- [15] In my view the granting of an order allowing this application would run contrary to Tongan culture, religious persuasion and laws.
- [16] It seems from their affidavit in support sworn on 26 April 2011 that the parents of the child were under the impression that once de facto control of the child had been given to the Applicant, the appointment of the Applicant as guardian was almost a formality. That understanding of the situation is quite incorrect. It is the Court, not the natural parents, which will decide where the future custody of the child shall lie.

[17] I have same sympathy with the Applicant whose motives, I am sure, are pure. For the reasons given however this application is refused and the child must be returned to his parents forthwith.



**NUKU'ALOFA: 8 February 2013**

**CHIEF JUSTICE**