

IN THE SUPREME COURT OF TONGA

REGISTRAR GENERAL JURISDICTION

NUKU'ALOFA REGISTRY

NO. FA 121 of 2011

IN THE MATTER OF :

THE MAINTENANCE OF ILLEGITIMATE CHILDREN ACT

AND

IN THE MATTER OF :

an application by *Mr Jason Richard Matheny & Mrs Melissa Margaret Matheny* for Letters of Adoption.

AND

IN THE MATTER OF :

KALOLAINE ROSLYNA GILNY ANDREA ZANIAH LAMASITA TO'A born on 20 September 2011

AND

IN THE MATTER OF :

WILLIAM WAIOURU MATHENY MAUSIA born on 13 October 2011.

Ms J. L. Lutui for the Guardian ad litem

Mr T. Fakahua for the Applicants Melissa Margaret Matheny and Jason Richard Matheny.

### ORDER

- [1] The applicants, Mr and Mrs Matheny are seeking to adopt these two young children who were born illegitimately in Tonga in September and October 2011.
- [2] On 28 October 2011 the Solicitor General was appointed the childrens' Guardian ad Litem and a report was prepared and filed on 8 November 2011.

Counsel Juliana Lafaiali'i – Lutui recommended that letters of adoption as sought by the applicants be granted.

- [3] Kalalaine's mother is aged 20. The father of the child was said to be a married man who has emigrated to the United States with his family. The mother is unemployed and living with her sister.
- [4] William's mother is aged 24. At about the time the child was born his father who was living in a de-facto relationship with his mother, left her. It appears that the mother is attempting to complete a course at the Tonga Institute of Higher Education.
- [5] The applicants, both members of the Church of Latter Day Saints, live at Highland, Utah, USA. According to their affidavits they were married in 1991, have four children of their own aged 19, 16, 15 and 10 and have adopted another child, aged 7. Mr Matheny holds a Master's degree in Business. He is aged 42 and is in settled, gainful employment. Mrs Matheny is a registered nurse who presently stays at home. Among other papers filed in support of the application is an "International Adoption Homestudy" prepared by Families for Children which is stated to be a licenced Child Placement Agency.
- [6] According to the Homestudy the applicants "are enthusiastic about sharing their love and resources with more children. They have abundant means to successfully adopt and parent them. We find them to be a compassionate, competent couple who can offer additional children a wonderful home and family life".
- [7] The Agency states that the applicants "have met the requirements necessary for adoption in Utah and the United States of America". The Agency further agrees to provide post-adoption supervision of the applicants who are willing

to make themselves and their prospective adopted children available to an Agency Social Worker to manage any necessary post – Adoption Services.

- [8] As emerges clearly from the papers the applicants came to Tonga in search of two babies to adopt. On their second visit they were able to make contact with the natural mothers and to obtain their consent for the adoption.
- [9] It is also clear beyond doubt that the applicants are able to offer the children a secure family environment and a high quality upbringing. By contrast the natural mothers feel able to sever all connections with their own children whose future with them is quite uncertain.
- [10] When the applications first came before me for directions I raised the two matters which caused me concern. These are:
- (a) the requirements of the United Nations Convention on the Rights of the Child (which has been ratified by Tonga) and
  - (b) the fact that the applicants are both described as "Caucasians" while the children are both full Tongans.
- [11] Article 21 (b) of the Convention recognises 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".
- [12] All Pacific Island countries widely practice customary adoption, usually within extended families. The custom is particularly well-established in Tonga and is even recognized in law : the Guardianship Act 2004. Very often customary

adoptions are formalized by legal adoption or guardianship orders but this is not always the case.

- [13] I asked Crown Counsel what alternatives to the proposed adoptions had been considered but was told that since the decision to offer for adoption to the applicants had been taken, no other options had been explored.
- (14) At one time anyone suggesting that the ethnicity of the child or prospective parents was a factor to be considered was regarded as having uttered some form of secular blasphemy but in recent years, particularly in New Zealand (with which Tonga has close ties) there has been a growing recognition that the removal of children from one ethnic environment and their placement in another without the possibility of ever establishing contact with their blood relations can cause problems.
- (15) In the present case I have had to ask myself whether these concerns should outweigh the clear advantages which adoption holds for the children whose welfare is the paramount consideration.
- [16] I was told that since the decisions to offer for adoption had been taken in September and October 2011 the children have been in the care of a child minder, that they are no longer in contact with their mothers (whom they would of course not recognise) and that they have been visited Mrs Matheny who has travelled to Tonga for that purpose. The applicants are paying the child-minder and supporting the children.
- [17] I think it right to make it clear that Tonga does not prefer to export its children. As recognised by the Convention, the better practice is for children to be locally placed. In this case, however, the Guardian ad Litem recommended adoption before any investigation of the alternatives was undertaken.

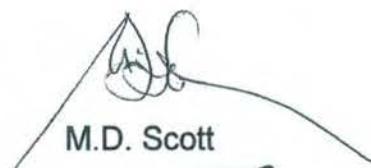
[18] It is also relevant that the Church of Jesus Christ of Latter Day Saints has a major presence in Tonga and has many thousands of Tongan members. There is therefore a real link between the applicants and the country in which the children were born.

[19] In all the circumstances I am satisfied that I should grant the applicants the Orders they seek. This decision must however not be taken as any form of precedent. The particular circumstances of each case will determine its outcome.

Result : Adoption orders as prayed.

DATED: 22 February 2012.



  
M.D. Scott  
CHIEF JUSTICE