

IN THE SUPREME COURT OF TONGA

FAMILY JURISDICTION

NUKU'ALOFA REGISTRY

FA 71 & 72 of 2012

IN THE MATTER OF : THE MAINTENANCE OF ILLEGITIMATE
CHILDREN ACT;

AND

IN THE MATTER OF : An application by Omar Francisco Saavedra
and Jenifer Michelle Saavedra for Letters of
Adoption

AND

IN THE MATTER OF : MALIA KATA born on 28 November 2011

AND

IN THE MATTER OF : SIMA 'OTUVALU KATA born on 16 May 2007

Ms. Rose L. Kautoke for the Guardian ad Litem

T. Fakahua for the Applicants

DECISION

[1] The Applicants are seeking to adopt two Tongan children now aged 1 and 5 years 7 months respectively.

[2] The younger child is a girl while the elder is a boy. Their mother Milika 'I-Vailahi 'Aunofa To Mei Langi Kata is aged 24 and gives her

occupation as "domestic duties." The identities of the two different fathers was not revealed.

- [3] The Applicants are aged 29 and 31. According to a homestudy report prepared in May and June 2012 by Families for Children, a licensed Child Placement Agency, they were married in 2006 but as yet have no children. Both are in permanent employment and are active members of the Mormon faith. After interview with both Applicants they were approved and recommended as adoptive parents "to one of two healthy children from Tonga six years or younger at the time of referral."
- [4] It appears that there may have been some indirect connection between the Applicants and Mr. & Mrs. Matheny whose application to adopt two young Tongan children was granted in February 2012. According to the Applicants, they arrived in Tonga on about 8 May 2012 and made contact with the natural mother two days later. The natural mother immediately agreed to the proposed adoption of Malia. The Applicants took Malia away on that day since when she has never lived with her mother.
- [5] Although the subsequent events are not entirely clear it appears that about four days after taking Malia from her mother the Applicants returned to their home in the United States of America. Before returning they again approached the natural mother and asked for her agreement to adopt Sima also. The natural mother agreed and Sima's care and control were relinquished to a friend of the Applicants, resident in Tonga.

- [6] It seems that Mrs. Saavedra returned to Tonga in July 2012 and has spent a substantial amount of the time since in the company of the children. The male Applicant, however, only seems to have spent four days in Tonga and has never appeared at any of the three hearings of this application.
- [7] A Guardian ad Litem report was prepared by Ms. Kautoke in September 2012. Ms. Kautoke observed that "it seems as though the natural mother wants to get rid of her children." "She drinks, smokes and believes it is not good for the children. She also informed me that the Applicants are in a better position to care for the children despite knowing them for a few months only."
- [8] While Ms. Kautoke did not doubt that "the Applicants are loving and genuine people and simply wish to adopt the children and offer them a better life" she was however "hesitant to recommend that Letters of Adoption be granted until the Applicants fulfil the six month requirement." In paragraph 8 of the Report, Ms. Kautoke recorded that she observed Sima to be attached to his mother and that when asked whether he wanted to go with Mrs. Saavedra he said that he did not.
- [9] The six month period referred to by Ms. Kautoke was considered by the Court of Appeal in *Hatch & Anr v Solicitor General* [2010] To. L.R 177 and by this Court in *re Hatch & Hatch* [FA 75,76 & 77 of 2010]. The Supreme Court explained that the "six month rule" was not an inflexible requirement, particularly in the case of very young children who might never have come to know their natural mothers. The requirement that the Applicants were sufficiently acquainted with the

children they were proposing to adopt is only one aspect of the Court's duty to enquire whether the proposed adoption is in the best interests of the child.

[10] On 15 November the applications were called before me for directions only. In view of the reservations exposed by Ms. Kautoke and the fact that the proposed adoptions were by non-Tongans in no way related to the children who were proposing to take them overseas, I referred to the particular concerns which I held in this type of case and which were explained in *re Matheny & Matheny* [FA 121 of 2011]. Mrs. Saavedra questioned the accuracy of the report prepared by Ms. Kautoke. She told me that she loved both children, whereas the natural mother was not a good mother, took drugs and asked the Applicants for money. The application was adjourned to 27 November for Mr. Fakahua to consider the concerns to which I had referred and for the natural mother and the children to attend.

[11] On 27 November Ms. Katoa appeared for the Guardian ad Litem. She advised me that she was seeking an adjournment "to make a further assessment of the suitability of the Applicants." Before granting the application and adjourning the matter to 12 December for continuation I asked the natural mother about her background and circumstances.

[12] On 23 November, after I had expressed the view (referred to in *Matheny*) that inter-country adoption, at any rate to applicants who were not related in any way to the children, should only:

"be considered as an alternative...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" (see United Nations Convention on the Rights of the Child – Article 21 (b)).

the natural mother filed a second affidavit in which she deposed:

"I wish to confirm on oath that there is no other close relative or member of my family to take care upon the 2 children." and

"[When] Sima was born and he was living with my mother at Houma and when I gave birth to Malia Kata I stayed with her and I never lived together with Sima and my mother."

"...when my mother returned Sima...we had a conversation with Jenifer Saavedra as the adoption process was already executed and I requested they adopted Sima as well..."

[13] In answer to my questions, the natural mother told me that she had nine brothers and sisters, all living in Tonga, that her mother is aged 52 and remarried in 2004, following which she gave birth to two further children. The natural mother told me that she is living with an aunt at Ma'ufanga. The aunt is a widow with two children now aged 38 and 42, both married.

[14] On 11 December a second Report was filed by Ms. Kautoke. No further report had been requested by the Court and the further report did not add to the information already supplied as to the "suitability of the Applicants."

[15] It was evident from the second report that Mrs. Saavedra had again met with Ms. Kautoke whom she had told me on 15 November was unwilling to meet with her again. In my view this was an unsatisfactory

development. I do not think it proper for applicants to make further oral representations in private to agents of the Guardian ad Litem during part heard proceedings.

[16] Ms. Kautoke's further submissions were that:

- [i] the Applicants and the application were suitable and appropriate;
- [ii] the children are now familiar with the applicants whom they have come to recognize as their parents. They have been living with the female applicant for almost six months now and are attached to her. The older child Sima is quickly picking up the English language and is beginning to speak and understand it;
- [iii] the natural mother is single and has no stable source of income. "She has confirmed that there is no other person in her family capable of caring for the children";
- [iv] "inter-country adoption is not discouraged, but should be an alternative means for proper placement of children when the child cannot be placed under the care of any person or family in Tonga."

[17] Mr. Fakahua endorsed these submissions and asked for the adoption orders sought.

[18] On several occasions during the hearings I was assured that the Applicants were in a position to offer the children a better standard of living, of upbringing and of education. I do not doubt that this is the case but the material well-being of children is only one of a number of

important considerations which must be taken into account before concluding where the child's best interests lie.

[19] As already pointed out, international experience, embodied in the Convention of the Rights of the Child, suggests 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 his birth.

[20] Having seen and heard the natural mother, I do not accept that Sima cannot continue to be looked after perfectly acceptably within the natural mother's extended family. He is now coming up to six years old, for the first five years of which he apparently lived with his grandmother and, as late as September 2012 was still very attached to his mother and did not want to go on the aeroplane with Mrs. Saveedra. I consider the fact that the Applicants are non-Tongans and that he would be taken to an environment quite different from that which he has known all his life to be relevant. It appears that he hardly knows the male applicant, his proposed future father.

[21] These considerations have much less force in the case of Malia who is only just over 12 months old and who has been living with Mrs. Saveedra since last May.

[22] I accept that the natural mother, whose marriage plans have apparently foundered, is not able properly to look after both her children. I also find that looking after two illegitimate children of the natural mother imposes an unfair and unacceptable burden on her extended family. I do not however accept that she and they are not able to offer the required standard of care to Sima.

[23] In *Matheny*, with some reluctance, I granted the adoption orders in respect of two young children, both just a few months old. I stated that I thought it right to make clear that Tonga does not prefer to export its children. While I do not doubt the Applicants' bona fides I am not attracted to a procedure by which applicants arrive from overseas, immediately relieve the natural parents of their children and in this way create a de facto adoption even before application is made to the Court. The financial advantage possessed by many overseas applicants must not be overlooked.

[24] Ordinarily, the Court will seek to avoid splitting siblings. In this case however, the children have different fathers and Malia hardly knows her mother. I am satisfied that it is in the best interests of Malia that I make the adoption order sought. In the case of Sima, however, I am not so satisfied and accordingly the adoption order in his case is refused. By operation of law (Guardianship Act 2004 – Section 4 (2)(a)) the natural mother will remain the sole guardian of this child, and he must be returned to her care as soon as possible.

Dated: 14 December 2012



**E. Takataka
13 December 2012**