IN THE COURT OF APPEAL OF TONGA

FAMILY JURISDICTION

NUKU'ALOFA REGISTRY APPEAL NO. AC 19 of 2010

BETWEEN : 1. PENINA HATCH

2. JAY DEAN HATCH

Appellants

AND : SOLICITOR GENERAL C/-CROWN LAW DEPARMENT

Respondent

Coram : Burchett J, Salmon J, Moore J

Counsel : Mr Fakahua for the Appellant

Ms Lavekei'aho for the Respondent

Date of Hearing : 7 October 2010.

Date of Judgment: 8 October 2010.

JUDGMENT OF THE COURT

[1] This is an appeal against orders made by the Supreme Court of 24 June 2010 dismissing applications by the appellants for letters of adoption of two infants (one born 18 May 2010 (male) and the other born 8 June 2010 (male)) and one young child (born 15 July 2005 (female)) and orders made the following day refusing, in effect, to reconsider the orders made the preceding day. The applications were made under The Maintenance of Illegitimate Children Act (Cap 30).

[2] The appellants are a husband and wife and, we understand, citizens of the United States. They are certainly residents of that country. The second appellant is of Tongan heritage. In support of each application the appellants filed an affidavit from the second appellant which annexed amongst other things, an undated report of a United States licensed child protection agency, "Families for Children", dealing with the financial, social and family circumstances of the appellants and addressing their capacity and ability to parent the children for which adoption was sought. The affidavits and the reports are deficient in ways we discuss later in these reasons.

[3] We can move quickly to what we view as the central issue in the appeal. The primary judge clearly indicated in the orders he made, that the applications were dismissed because the children had not been with the appellants for 6 months. While his Honour did not publish reasons, the terms in which the orders were expressed clearly disclose a view that it was

a precondition to granting letters of adoption, that the appellants must have spent 6 months with the children.

[4] The decision was plainly a discretionary one. However, in our opinion, the exercise of the discretion by the primary judge miscarried by the apparent application of a rigid and inflexible rule. His Honour spoke of "the required 6 months" in his orders and also that the "applicant(s) must have all three children with her for 6 months". His Honour did not appear to consider whether a lesser period was appropriate (at least in relation to one of the children) given the second appellant's relationship with one of the mothers and her child.

[5] The need for an applicant for adoption to have cared for the child for six months is intended to allow a proper assessment of the relationship between them. So much is apparent from the statement dated 8 May 2000 issued by the Chief Justice entitled "Re: Adoption Cases". The Chief Justice noted that:

> "The court will only grant letters of adoption after the applicants have had the care of the infant for a period that is sufficient to allow a proper assessment of the relationship between them. In most cases that would be at least six months and this requirement will only be waived in exceptional cases and for good reason."

[6] We understand that this statement of the Chief Justice was based on his Honour's careful consideration of practices in England which, while then

influenced by specific and complex statutory provisions, provided guidance for the Courts in the Kingdom of Tonga.

[7] The position in England on the question of whether it was necessary for the child to have lived with the adopters can be illustrated, for example, in the discussion par. 658 of Vol.24 of Halsbury's Laws of England, 4th edition and, as to the adoption of children from abroad, the discussion in par 655 of that volume and footnote 6 in particular. Generally there was a need for the child and adopters to have lived together though the period depended on the age of the child.

[8] The purpose of such provisions was described by Buckley J in *Re M (an infant)* [1964] 2 All ER 1017 at 1023 as being "to give the court an opportunity of satisfying itself that the infant has settled down happily with both the applicants and that both the applicants are likely to prove suitable persons to be in a parental relationship to the infant". In England, laws in the past have prohibited the removal of infants. They have prevented parties living overseas removing an infant in order to have continuous care and control of the infant for a specified period to satisfy then prevailing English adoption laws: see *Re M (an infant)* [1973] 1 All ER 852. That continuous care and control had to be in England : see *Re W (an infant)* [1962] 2 All ER 875.

[9] In this appeal we propose to set aside the orders made by the trial judge and remit the matter to the Chief Justice of the Supreme Court. The Chief Justice may think there should be a review of the practices in the Supreme Court about the adoption of Tongan children born in the Kingdom

and whose adoption is sought by persons living permanently outside the Kingdom. We hasten to add that we are not, in following this course, suggesting there need be such a review or that the existing position would change as a result of a review if it was to take place. Nor are we suggesting that these particular applications have to be determined by the Chief Justice. These are all matters for the Chief Justice to determine.

[10] We conclude by referring to three particular matters arising in the present applications which, in our opinion, need to be addressed by the appellants before any further hearing takes place. We raised them with the appellants' counsel at the hearing of the appeal.

[11] The first is that the affidavit of the second appellant did not address the question of whether there had been any payments to the mother and, if so, in what amount. This is required, for obvious reasons, by clause 2(A)(viii) of Practice Note No.3 of 1992.

[12] The second is that the reports prepared by "Families for Children" referred to at the beginning of these reasons address the position in relation to the adoption of one child by the appellants or the adoption of two children by them. What the reports do not address is the position if the appellants were to adopt three children. Obviously there may be a material difference in the appellants' capacity to provide and care for three adopted children on the one hand and one or two adopted children on the other.

[13] The third is that the second appellant is described in those reports as a "professional parent" and her employer is described as "Professional

Parent". She is recorded as earning $72,313 for this work. Having regard to parts of the report this may simply be a reference to work she does caring at her home for "two mentally challenged female adults" (as described in the reports). However what this income is for should be clarified as should its source.

[14] We allow the appeal, set aside the orders of the trial judge and remit the matter to the Supreme Court in order that the Chief Justice can give such further directions as he deems necessary for the further hearing of the appellants' applications. We make no order as to costs.

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Burchett J

COURT OF APPEAL TONGA

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Salmon J

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Moore J