

TUILETUFUGA (SHERUDY) v TUILETUFUGA (FA'APALO)
AND WEAVER (CONSTANCE)

Supreme Court Apia
24, 29 August 1979
Nicholson CJ

INFANTS AND CHILDREN (Custody) - Welfare of child of paramount importance: vide s 3 Infants Ordinance 1961 - Decree of divorce granted wife on uncontested petition and custody of 5-year-old son of the marriage awarded father pursuant to s 24 Divorce and Matrimonial Causes Ordinance 1961 - At the date of the proceedings the boy had been living with his father and the co-respondent in their home in Western Samoa for over a year while the mother was working in Hawaii - Father and co-respondent living as husband and wife with one child of their own and expecting a second and intending to marry as soon as divorce finalised - Father regularly employed and able to offer a full family life supported by his de facto wife and a large Samoan family - Mother, a national of Fiji, with an uncertain future as to her place of residence - Court concluding that, although normally the mother should have the custody of a child of tender years, in this case there were counter-balancing factors in favour of granting custody to the father.

APPLICATION for provision for custody of infant son of the marriage pursuant to s 24 of the Divorce and Matrimonial Causes Ordinance 1961.

Kruse for petitioner.
Nickells for respondent.

Cur adv vult

NICHOLSON CJ. This is an uncontested petition for divorce based upon the grounds of adultery. I have already pronounced a decree in divorce upon that ground but the residual question of custody of the only child of the marriage remains, application having been made in the body of the petition for provision for custody in terms of section 24 of the Divorce and Matrimonial Causes Ordinance 1961 which reads:-

Custody of Children - In any proceedings for divorce, or nullity of marriage, or judicial separation, the Court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the Court.

The evidence shows that the petitioner (hereinafter termed "the

wife"), who is a national of Fiji, was married to the respondent (hereinafter termed "the husband"), a national of Western Samoa, on the 7th December, 1973 at Apia. The parties cohabited at Apia, and the only child of the marriage Lyle, a boy, was born on the 12th June, 1974 in Apia. At some stage after this the parties cohabited in Fiji. In January of 1977, the parties agreed to separate and the husband returned to Western Samoa.

During their stay in Fiji, the husband was subjected to the embarrassment of being unable to obtain a work permit, and as a result he had been forced to remain at home looking after the child with the support of his mother-in-law while his wife went out to work to support the family. It appears that this problem was one of the causes of the separation, since the wife at that time was unwilling to leave Fiji. After his return to Western Samoa in January of 1977, the husband met the co-respondent Miss Weaver and a de facto relationship was formed, which eventually resulted in the birth of a child to Miss Weaver in May of 1978. Meanwhile, in January of 1978, the wife came back to Western Samoa with the child and lived with her sister and her sister's family. On the 25th of May, 1978, the wife went to Hawaii leaving the child in the care of the husband. She did not return to Western Samoa until the 17th of June, 1979, and since her return has seen the child at intervals. The child is still residing with his father.

There are no serious allegations of bad parenthood on the part of either of the parties involved in these proceedings. There has been mention made of the fact that Lyle is not attending school at present, but his father has arranged for him to attend a primary school temporarily for the third term of 1979, and he has been enrolled for Apia Primary School for the beginning of 1980. Mention has been made by the wife that Lyle's clothing is not always clean, but the allegation has not been pressed, and overall it appears from the evidence before me that both parents concede that the other is a good parent, and that it is not a question of the unfitness of either parent to look after the child.

The wife's situation is that she is resident in Western Samoa on a six months' permit. She hopes and believes that she will be successful in applying for Western Samoan citizenship, that she has a permanent home with her sister, who lives in a large home, but with a number of other members of the family. By standards in Western Samoa, living conditions there would, in my view, be adequate for a child of the station in life of Lyle. The wife was cross-examined about her stay in Hawaii, and she made it clear that she had remained in Hawaii for over a year mainly for the purpose of working and accumulating sufficient funds to launch these divorce proceedings. She was unable to give the Court any particular motive for wishing to obtain a divorce at this stage, as she indicates that she has no particular emotional attachment to any other man. The husband's position is that he and Miss Weaver are still living as husband and wife.

Miss Weaver gave evidence. She is a United States citizen and impressed the Court as being a warm and motherly type of young woman, who stated that she had become extremely fond of Lyle since she began looking after him in July of 1978 when she returned from the United States after giving birth to her own child. She is emphatic that she treats both the children equally, that she has come to regard Lyle as her own child, and that she is willing to undertake permanently the responsibility of bringing him up. Her own child and Lyle are very fond of each other, she said.

The evidence also shows that the wife and the husband and Miss Weaver are working full time and that whichever of the parties obtains custody will be obliged during part of the day to place Lyle in the care of relatives. From the evidence before me, it appears that both sets of relatives can reasonably manage this, although on balance it would seem that it would be easier for the husband's mother with the assistance she has in the house to look after Lyle than it would be for the wife's sister's family to do so. Lyle, of course, will be attending school, so that he would be in the care of someone other

than the wife, or the husband, for only comparatively short periods during afternoons of the school week, until 4.30 p.m. when both parents finish work.

It must be said at once that in custody cases, in terms of section 3 of the Infants Ordinance 1961 the Court, in deciding any question of custody or upbringing of the child, "shall regard the welfare of the child as the first and paramount importance." It must be accepted, too, that in custody cases, the mother of a child of tender years would normally be the person to whom custody would be awarded, all other factors being equal. From the wife's point of view, the advantages which she can offer Lyle in terms of his welfare, are that she is his mother and that he is only five years of age, and that she has a reasonable home to offer him. The disadvantages from which she suffers in the eyes of the Court are, first, that the child has not been in her custody since May of 1978 when she went to Hawaii, that she chose to remain in Hawaii for the purposes of paying for these proceedings, which, in the circumstances, appears to me to suggest a less than adequate concern for the welfare of Lyle, as well as an admission that the husband can provide adequately for the child. In addition, there remains the question of whether or not she can be a permanent resident of this country, or whether she will be forced to return to Fiji. Finally, although she denies that she has any intention of returning to Hawaii, I have gained the impression from the evidence as a whole that she entertains the intention of going to Hawaii again to live and presumably taking Lyle with her. The Court would be concerned that the child's welfare might not be well served by being removed from his familiar surroundings in Western Samoa to Hawaii. Removal to Fiji would be less of a disadvantage since the wife's family would presumably be about him there.

The husband impressed me as being a sincere father with the best interests of Lyle at heart. In favour of himself and Miss Weaver, it must be said that he offers a full family life to Lyle with two persons in the position of parents as well as the support of a large Samoan family. He is in regular employment, the present accommodation in a flat is just adequate (but it may not be adequate for long since Miss Weaver is expecting a second child). Lyle is settled in the surroundings of this family and has been since July of 1978, and, of course, the Court would need strong reasons for disturbing this arrangement at this stage. The disadvantages which I see in the husband's position are that he and Miss Weaver are living in an adulterous situation, although they intend to marry now that a decree in divorce has been pronounced and the husband has had to acknowledge that while Lyle was in the wife's care in Fiji and the husband was back here in Western Samoa, he made no attempt to provide maintenance for the child. Indeed the wife concedes that she did not ask him to do so.

Bearing in mind all of these factors, I come to the conclusion that Lyle's best interest will be served by remaining in the care of his father, supported as he is in this family situation by his de facto wife. I accept that Lyle is happily settled in the family and has been since July of 1978 and in spite of the "mother principle" that I referred to earlier, I conclude that that is outweighed by the other factors that I have mentioned. Again, I am concerned that if Lyle is given into the care of the wife, she has an uncertain future ahead of her. She does not know whether she will be remaining in Western Samoa, or whether she will return to Fiji, and indeed I am satisfied that there is a strong possibility that she may move to Hawaii. Given this uncertainty, I feel that the best interests of the child would be served by his remaining with his father, who has permanent residence in this country, and who, I am satisfied, has no intention of leaving this country in the near future.

To sum up, I conclude that the husband and Miss Weaver can offer a much more stable and satisfactory family environment for Lyle, one to which he has become well used, than the wife can provide as matters stand. I therefore decline the petitioner's application for custody, and exercising the powers conferred on me by section 24 I order that

Lyle be in the custody of the respondent, reserving reasonable access to the petitioner. I reserve leave to the parties to apply to the Court to define the terms of access for the petitioner if that should be necessary.

I make no order as to costs.