

IN THE SUPREME COURT OF SAMOA

HELD AT APIA

MISC.20384

IN THE MATTER of the Infants Ordinance
1961(Part II):

A N D

IN THE MATTER of the appeal by SOU
PAPASEEA FOO CHONG
Taxi Driver and VITA FOO
CHONG, Nurse both of
Alafua, natural parents of
MOSE SOU JUNIOR against
the decision of His Workship
LESATELE RAPI VAAI date
23rd February 1998 refusing to
Discharge Order of Adoption
date 27th January 1997:

Counsel: R T Faaiuso in support of motion to discharge order of adoption
G Latu for respondent

Hearing: 8 May 1998

Reasons for
Decision: 14 May 1998

REASONS FOR DECISION OF SAPOLU, CJ

This case is about an application made to the Magistrates Court to discharge an order of adoption in respect of a male infant, named Mose, who was born on 23 January 1994.

By way of background, Mose's natural parents have five children. The two eldest children are New Zealand citizens; the next two children are twins already attending school in New Zealand; the youngest is Mose. In 1996 Mose's natural parents wanted to apply for New Zealand citizenship for themselves, their twins and Mose. So towards the end of 1996 they applied to the New Zealand High Commission in Apia for New Zealand citizenship for themselves and their three children. It is said that Mose's natural parents were told by the New Zealand High Commission in Apia that under its policy they were entitled to apply for New Zealand citizenship for themselves and only two of their three children. Mose's natural parents then went and saw a lawyer who advised them that the best thing to do was to adopt out one of their three children.

Because Mose's twin siblings were already attending school in New Zealand and it was considered best not to separate the twins, Mose's natural parents decided that Mose was the one to be adopted out. In effect little Mose, who was only two years old at the time, became the sacrificial lamb in order to facilitate the application by his natural parents and twin siblings for New Zealand citizenship.

In January 1997, Mose's maternal uncle and his wife made an application to the Magistrates Court to adopt Mose. The natural parents filed their written consent in support of that application. From the application for an adoption order and supporting documents, it is clear that the applicants and Mose's natural parents were saying that it was in the best interests and welfare of Mose that he should be adopted by the applicants. The learned Magistrate who dealt with the application for an adoption order granted it and Mose became legally adopted by his maternal uncle and wife. Mose was three years old at the time.

Now, what was not mentioned in the application for adoption was the real reason for the application; it was to facilitate the application by Mose's natural parents and twin siblings for New Zealand citizenship. So the application for Mose's adoption was based on legal advice, mainly for the convenience of Mose's natural parents and twin siblings rather than any best interests or welfare of Mose.

It is not clear whether Mose's natural parents and twin siblings were granted New Zealand citizenship. But after the application for adoption was granted, a Samoan passport and a visitor's permit for New Zealand were obtained for Mose so that he could travel to New Zealand with his natural parents and twin siblings. His family could not leave him behind in Samoa because of their deep natural love and affection for him. Mose was only three years old and the youngest in the family. His natural parents could not bear the thought of leaving their youngest child behind in Samoa when he was so young.

Because Mose was not a New Zealand citizen and had travelled to New Zealand on a visitor's permit, it meant he could not stay in New Zealand permanently. After one extension of his visa, he had to return to Samoa. His natural father returned with him while his natural mother stayed in New Zealand to look after her children who were attending school in New Zealand. Mose is now living with his natural father in Samoa.

On 5 February 1998, Mose's natural parents made application to the Magistrates Court to discharge the adoption order that was made in January 1997. It appears from that application that Mose at all times had been in the custody of his natural parents who have been looking after and taking care of him. The adoptive parents have never actually had the

care and custody of him. The adoption that was done was really for convenience to enable Mose's natural parents and twin siblings, who were already attending school in New Zealand, to apply for New Zealand citizenship. Mose's best interests and welfare were not the true reasons for the application to adopt him out.

The learned Magistrate who dealt with the application to discharge the order of adoption denied it. He considered the application to be an abuse of the principles governing the adoption of children. Present counsel for Mose's natural parents is challenging the Magistrate's decision before this Court. He was not involved in the application for adoption made in 1997.

• Section 11 of the Infants Ordinance 1961 which governs the variation or discharge of an adoption order provides:

"1. The Court may in its discretion vary or discharge an order of adoption subject "to such terms and conditions as it thinks fit.

"2. Upon an order of adoption being discharged then subject to the conditions, if "any, named in the discharging order the infants and its natural parents shall be "deemed for all purposes to be restored to the same position inter se as existed "immediately before the order of adoption was made.

"Provided that the discharge of the order of adoption shall not affect anything "lawfully done or the consequences of anything unlawfully done while the order of "adoption was in force."

As to the exercise of the Court's discretion in respect of an application to discharge an order of adoption, Mr Faaiuasoo in support of these proceedings referred to the observations of Myers CJ in *In re H (an infant) [1944] NZLR 367, 370* where it was said that the

discretion should be exercised with the greatest care, and an order of adoption should not be discharged lightly. Both counsel in this case, were also in agreement that the best interests and welfare of the child is an important consideration in the exercise of the Court's discretion whether to discharge an order of adoption. On that basis both counsel were also in agreement that on the facts of this case the order of adoption should be discharged.

It is clear that the application for the adoption of Mose by his maternal uncle and his wife was for the purpose of facilitating an application for New Zealand citizenship by Mose's natural parents and his twin siblings rather than to serve Mose's best interests and welfare. That purpose was not disclosed in the application for an adoption order. The whole impression conveyed in that application and the supporting documents was that it was in the best interests and welfare of Mose that he be adopted by his maternal uncle and his wife. On that basis the application for an adoption order was a misrepresentation to the Court. Just over a year after the adoption order was granted, Mose's natural parents applied for a discharge of that order. One can clearly understand the attitude of the learned Magistrate when he denied the application stating that it was an abuse of the principles governing the adoption of children.

However, I am of the respectful view that Mose, who was only three years at the time of the adoption, and who is now four years old, was too young to know what has been going on. He did not know that he had been made a sacrificial lamb so that his natural parents could apply for New Zealand citizenship. He also did not know that he had to be

excluded from his family's application for New Zealand citizenship so that his twin siblings, older than him, could stand a better chance of obtaining New Zealand citizenship and so be able to continue with their schooling in New Zealand. In other words this innocent child had nothing to do with the application for his adoption or the application to discharge the adoption order that was granted in respect of him. Mr Faaiuso, counsel in support of these proceedings, argued that little Mose should not suffer or pay for any errors of his natural or adoptive parents. If that happens, the law will be penalising the wrong person. Counsel further submitted that Mose's natural parents were in a desperate situation and in the circumstances had to do what they did. I do not need to consider that submission in this case.

Even though Mr Latu was critical of Mose's natural and adoptive parents because of what they did, he also agreed that their 'sins' should not be visited upon this innocent four year old child. I agree with both counsel that Mose should not be adversely affected because of the errors or 'sins' of his natural or adoptive parents. Both counsel were also in agreement that the interests and welfare of a child are relevant considerations in deciding a motion to discharge an order of adoption. I accept that too. But I do not wish to be understood that this Court would condone an abuse of the principles governing the adoption of children. Such abuse must not happen. If it happens the remedy should be found somewhere in the law.

In the circumstances of this case, the order of adoption that was granted in respect of the male child, Mose, on 29 January 1997 is discharged.

There will be no order as to costs.

T.M. Sapote
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CHIEF JUSTICE

Solicitors:

Richard's Law Firm, Tamaligi, in support of motion to discharge order of adoption
Attorney-General's Office, Apia, for respondent