

IN THE SUPREME COURT OF FIJI

000222 Civil Jurisdiction

Action No. 33 of 1984

IN THE MATTER OF BRIAN NITIN  
NAIDU, A MINOR

AND IN THE MATTER OF AN  
APPLICATION BY ANAND MASIH  
PRAKASH PURSUANT TO SECTION  
20 OF THE SUPREME COURT ACT  
TO BE APPOINTED GUARDIAN  
OF THE SAID MINOR

Mr. I. Khan for the Applicant

D E C I S I O N

The applicant applied by summons on the 10th October, 1984 for an order that he be appointed legal guardian of an infant Brian Nitin Naidu aged 4 years (hereinafter called the said minor).

The application does not disclose under what authority the application is made and the Supreme Court Registry has treated the application as initiating a Probate Action.

After adjourning the application on two occasions to enable Mr. Khan to inform the Court as to what rule or Act has application, he on the third occasion referred to section 20 of the Supreme Court Act which is as follows:-

" The Court shall have all and singular the powers and authorities of the Lord High Chancellor of England, with full liberty to appoint and control guardians of infants and their estates, and also keepers of the person and estates of such persons as being of unsound mind are unable to govern themselves and their estates."

While that section refers to appointment and control of guardians I am in some doubt as to whether the section was, as regards infants, intended to cover wards of court or whether it extends to cover an application such as the instant one.

Order 91 Rules of the Supreme Court refers to proceedings relating to an infant where he is a party to an action. The court has jurisdiction to appoint a guardian ad litem. The notes to Order 91 do refer to appointment of a guardian for an infant who has lost both parents as in the present case but it appears to me that the rule is designed to deal with applications arising out of statutory provisions in England which have no parallel in Fiji.

The Guardianship of Minors Act 1971 (Imp.) consolidates certain enactments relating to guardianship and custody of minors i.e. principally the Guardianship of Infants Acts 1886 and 1925 and the Guardianship and Maintenance of Infants Act 1951.

Under section 5 of the 1971 Act the Court has power to appoint a guardian for a minor having no parent.

We have no legislation in Fiji which specifically gives this Court power to appoint a guardian merely on the ground that the child is an orphan. There is a Juveniles Act which has provisions regarding custody charge and care of juveniles but that Act makes no provisions regarding guardianship.

Mr. Khan also referred to section 18 of the Supreme Court Act which is as follows:

" The Supreme Court shall, within Fiji, and subject as in this Act mentioned, possess and exercise all the jurisdiction, powers and authorities which are for the time being vested in or capable of being exercised by Her Majesty's High Court of Justice in England."

There is no doubt the High Court of Justice in England has jurisdiction to appoint guardians but if that jurisdiction is conferred on the Court solely by an enactment which has no application in Fiji, can this Court by virtue of section 18 assume that jurisdiction? The answer is not free from doubt. Section 22 of the Supreme Court Act may have application but ascertaining what the legal position was in England prior to the 2nd day of January, 1875 on the question of appointment of a Guardian could prove a difficult and tedious task.

If this application were a defended matter I would have the assistance of counsel. I do not consider I am called on to undertake the task of research in this instance. If I am satisfied that the appointment of the applicant is for the benefit of the said minor I will accept that section 20 of the Supreme Court Act should be interpreted broadly as conferring power on the Court to appoint the applicant the guardian of the said minor.

So far as the benefit of the said minor is concerned his own mother in her last will did everything but appoint the applicant the guardian of her infant son.

The applicant is her brother and she left all her estate to him in trust for her son to provide for his maintenance and education. She clearly considered her brother a suitable person and had the matter of guardianship of her son been raised by the solicitors who prepared her will she would no doubt have appointed him guardian in her will. The trusts indicate that the mother expected her brother to have custody of her child.

I make the following order:

I do hereby appoint Mr. Anand Masih Prakash father's name Deo Dass of Togo, Nadi, Farmer, guardian of the said minor Brian Nitin Naidu during his infancy or until further order.

Mr. Khan should now draw up a formal order adopting Form No. 163 in Volume 21 of Atkins Court Forms Second Edition and have it sealed.

I have amended the heading to this action which should be followed in drawing up the order.

The Registry may also consider re-numbering these proceedings under the Civil Jurisdiction under which jurisdiction the order has been made.

*R. G. Q. Kermode*  
(R.G.Q. Kermode)  
Acting Chief Justice

Suva,

*27<sup>th</sup> November, 1984.*