



\* Also reported in [1993] Tonga LR 1

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MALCOLM EDWARD WHYTE and LONINASA KOSENA FUNAKI  
or WHYTE (formerly known as KUILA KAILAHI)

DALGETY J.

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Edwards and Vaihu for the prospective Adoptive Parents.  
Solicitor - General as Guardian ad Litem to the prospective  
Adoptive Children.

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Hearing : 28th October, 3rd and 7th December 1992.  
Judgment : 18th January 1993.

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J U D G M E N T

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1. : The female applicant Loninasa Whyte between 1974 and 1986, and while unwed, gave birth in the Kingdom of Tonga to six illegitimate children. Three separate fathers were involved. Mr Whyte was not one of them. Mrs Whyte cared for all her children until she left in about March 1990 for New Zealand of which country

she is now a permanent resident. She married Malcolm Whyte in New Zealand on 21st March 1991. Both of them have now applied to adopt Mrs Whyte's illegitimate children with a view to setting up home with them in New Zealand. Since March 1990 the children have remain in Tonga under the care of a relative.

2. : I have heard the evidence of Mr and Mrs Whyte as also considered the Report prepared for the Guardian ad Litem by Miss Aleamotu'a, and on that basis was well satisfied that the proposed adoption would be in the best interests of the children. In the past Mrs Whyte has proved herself to be a good and caring mother, often under very difficult circumstances, and I have every confidence that she will remain so in the future. The children's present circumstances are wholly unsatisfactory. All six of them live in their maternal uncle's three-bedroom home at Lapaha, together with eight of his nine children, and his brother; another relative and his children are semi-permanent residents there. The children miss their mother and she ok them. They wish to be re-united with her. This is also her wish. Because of her intervening marriage to a New Zealand citizen she wishes the children to join her there but this they cannot do until an Adoption Order has been made. If she had to leave New Zealand to return to her children in Tonga, her husband would probably not accompany her. He has well paid employment in New Zealand and has no guarantee of similar remunerative work in Tonga. He was unwilling to leave New Zealand. The Whyte's marriage is a happy and stable one, all the more so since the birth of their son Mathew on 30th March 1992. The children in Tonga are assured of a warm welcome and a happy life with their new family in New Zealand. At the moment the Whyte's do not have adequate accommodation for their children but have promised to obtain rented accommodation of adequate size as an interim measure and thereafter to apply for suitable state housing.

3. : The difficulty in this case has been Mr Whyte. The Department of Social Welfare by Report dated 10th November 1992 declined to recommend that an Adoption Order be granted. I well understand their reservations and appreciate their assistance in producing for the Court a very informative and well reasoned report. Despite the cost involved both Mr and Mrs Whyte attended the Adoption Hearing at Nuku'alofa in person, accompanied by Counsel. Mr. Whyte spoke frankly about his criminal past and his former addiction to alcoholic liquor. His candour was necessary, for without it this application would certainly have failed.
4. : As it is I am satisfied that drink no longer features in Mr. Whyte's life and that neither his wife nor Mrs Whyte's children are in any danger of physical harm at the hands of Mr Whyte. He genuinely wants to do his best by Mrs Whyte's children whom he has now met and although his intellectual appreciation of the problems of adopting a "ready made" family is modest, I do believe that at a practical level he will act as a supportive parent. In any event he is now married to the children's mother who satisfied me that she had a proper appreciation of her children's needs and how to cope therewith.
5. : A further problem in this case has been that Mr Whyte has so far taken no part in caring for any of Mrs Whyte's children. Normally such a period of care is necessary before the Court is in a position to make a proper judgment as to whether or not an adoption order is in the best interests of the children. Although no period is specified in the Maintenance of Illegitimate Children Act (cap.30). or Practice Note 03/92 on Adoption Applications, it is unlikely that the Court will be able to make a decision until both prospective adoptive parents

*Cap. 114 s. 10.*

have cared for the child or children to be adopted for a continuous period of several months : mandated periods of between six and twelve months are not uncommon in other Commonwealth jurisdictions. In Tonga the Supreme Court has a welcome discretion. <sup>27</sup> ~~3~~ months is probably an adequate period given the closeness of Tongan society although shorter periods may be appropriate if justification exists for curtailing the period to less than six months. This case however is wholly exceptional and I am persuaded that it is not adverse to the interests of the children to grant the adoption now sought notwithstanding that Mr Whyte has never had any of the children in his care for any length of time.

6. : Accordingly I shall make an ORDER in the following terms -

IT IS ORDERED AND ADJUDGED THAT Malcolm Edward Whyte and Loninasa Kosenā Funaki or Whyte (formerly known as Kuila Kailahi) be granted leave to adopt

- (i) - MIKI WHYTE (female, born 16th July 1986); <sup>19</sup>
- (ii) - TONGA'AEHAU WHYTE (male, born 7th August 1984); <sup>21</sup>
- (iii) - 'OFA WHYTE (male, born 14th November 1981); <sup>24</sup>
- (iv) - KAMILO FE'OFA'AKI-KI-MULI WHYTE (male, born 16th July 1980); <sup>25</sup>
- (v) - TALINGI TUPUVALE WHYTE (male, born 25th February 1977); and <sup>28</sup>
- (vi) - KALONIKAKALA WHYTE (female, born 29 December 1974). <sup>31</sup>

*Ranney R. J. J.*

NUKU'ALOFA, 18th January 1993.