

**BETWEEN** : 'ANA MANU FINAU : *Applicant*

**AND** : PASIMI FINAU : *First Respondent*

**AND** : PAULA & FAI'ANA FINAU : *Second Respondent*

**BEFORE HON JUSTICE FINNIGAN**

**Counsel:** Mrs Vaihu for applicant,  
Mr Fakahua for respondent,  
Ms S Tupou Guardian ad Litem

**Date of Hearing** : 19 August & 6 September 1999; final submissions received 8 September 1999

**Date of Judgment:** 23 September 1999

**JUDGMENT OF FINNIGAN, J**

This is an application by a mother for orders of custody and maintenance for the two children of herself and the first respondent. Pursuant to an interim order made on 19 August, the children presently live with the first respondent and the second respondents, who are his parents.

It is important for the welfare of these two children that a final order should be made without undue delay. Therefore it was agreed at the second hearing that a decision would be made on the papers after all parties had had a full opportunity to file affidavits and to file submissions. That has now occurred. I am in a position to make a clear decision on the merits, bearing in mind as the paramount consideration the interests of the two children.

I have assessed the relative merits of the homes offered for these children by their mother and by their father and grandparents. I have considered the relative merits of the custodial environments that each party is offering. The information I have is in the affidavits that have been filed on behalf of each party and by the Guardian ad Litem on behalf of the children. In reaching my conclusion, I have been greatly assisted by the submissions that were filed by each counsel. I have taken all the affidavits and the submissions into account.

My conclusion needs be stated only briefly, and should be issued without delay. It seems to me that the three respondents have taken the law, and the children, into their own hands. They say that they did this because their main concern has been the security of the children from a stranger man who they say usually slept at the house while the children were there. They had other concerns as well. There have been arguments about these in the presence of the children. It is not for them to remove the children from their home. It was wrong in particular for them to take the children for access then refuse to return them. Rather they should have been guided by what is in the best interests of the children. Surely the better thing for them to do was to come before the Court as an independent body. The Court is bound by the law to decide what is in the best interests of the children.

As it happens, it was the mother of the children who brought the case to Court. In doing so she did not put the whole of her story to the Court. Even now, she has not told in her affidavits the full story about the relationship from which her youngest child was born. The court does not have full information from her about the influence, if any, that this man will have on the children should they resume living in her custody. She has not even stated whether he is a regular visitor, or where he lives. She has stated only that she is careful not to sleep with a man when the children can see.

It took the probing of the Guardian ad Litem, who is the lawyer representing the children, to bring out the full story. This, as it happens, is not detrimental to the mother.

The view that I take is that young children such as these may generally be better cared for in the custody of their mother. This would be so even if the father may be able to offer the same level of care and a more comfortable environment. However, if there is something in the mother's way of life that is shown to be detrimental to their welfare, then the children may be better in their father's care. In the present case, the father and his parents have been taking and keeping and returning the children, with no thought to guide them but what they think is best for these children at the time. There is little to justify that in my opinion.

In the present case, the mother's situation is materially poorer than that of the father, but both parents depend on others to provide them with a home. In the custody of their mother I am satisfied their environment will be no less stable and loving than it was before the mother became pregnant to another man. I have now had the facts, particularly the facts of the new child's paternity and the mother's relationship with the father of that child put before me. I am satisfied that the material needs of the children will be provided for, if both parties continue as they have in the past, and if the grandparents continue to demonstrate their love by providing as they have in the past. I see no justification for the taking of these two children by the father and his parents.

### **ORDERS**

There will be a final order for custody, directing that the two children of the parties will return and live in the custody of their mother the applicant. Reasonable access is reserved for their father the respondent, and in particular the children may live with their father on weekends but then must attend school each Monday and Friday. Access may be arranged at other times and particularly during school holidays, by agreement between the mother and the father. The Court will make further orders if either party applies.

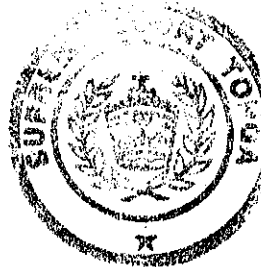
There is an order for maintenance directing the father to pay to the mother for the support of each of the two children a sum to be agreed between them, but if no agreement is reached, then the Court will fix the amount on application by either party.

There is an order for costs following the event. The respondents must pay the applicant's costs, to be agreed or taxed.

**COMMENTS**

The Guardian ad Litem is thanked for her thorough work and her assistance. Counsel for the parties will I hope now advise the parties that the welfare of these two children is paramount. The Court will expect all the parties to do their sincere best to show their love for these children, and keep their own disputes for a time and place apart.

NUKU'ALOFA, 23 September 1999



*D. J. [Signature]*  
JUDGE