

10 **Samita v Samita**

Supreme Court, Nuku'alofa
 Martin CJ
 Family case No.10/91

6 & 7 March 1991

20 *Children - custody of - their welfare paramount*
Custody of children - basic principles - welfare of children paramount
Custody - guiding principles on change of country of residence.

The Applicant father, remarried and resident in New Zealand, applied for custody of the four children, aged then 11 years down to 6 years, from the mother who had remained in Tonga with the children.

HELD:

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1. The paramount consideration was the welfare of the children.
 2. The children knew Tonga, but not New Zealand.
 3. The basic principles in determining custody unless there were strong reasons to the contrary, were (a) young children should remain with their mother and (b) young children should not be separated from their brothers and sisters.
 4. The possibility of a better education in New Zealand did not outweigh the advantages of remaining together with their mother.
 5. Father's application refused; mother granted custody

Counsel for the Applicant : Mr S. Etika

40 Counsel for the Respondent : Mrs P. Taufateau

Judgment:

Sonasi Samita and Suliana Samita were married on 21st January 1980 and had 4 children:

- 'Inoke, now aged 11;
- 'Otile, now aged 9;
- 'Oliveto, now aged 8; and
- Makalita, now aged 6.

50 The marriage broke up in late 1986. In January 1987 Sonasi went to New Zealand where he has remained until last December. He is now a permanent resident. Suliana remained in Tonga with the children. After Sonasi left, Suliana remained with his parents until she formed a relationship with another man and was asked to leave. The children remained with the grandparents but during 1990 they were gradually weaned away to live with their mother. Since the separation she has had two other children.

Sonasi took divorce proceedings in New Zealand and obtained a decree in undefended proceedings on 23rd August 1980. He has now remarried, to another Tongan. Suliana has not remarried and has no immediate plans to do so.

60 Sonasi came to Tonga in December 1990 and saw the children for the first time in 4 years. Encouraged by their mother, the children have been very happy to see him. He now applies for custody, which Suliana opposes.

The parents are very reasonable and pleasant people and each clearly has the best interests of the children at heart. They disagree however about what is best for them.

70 Sonasi's parents and Suliana live in the same street about 100 yards from each other. The two older children in particular have become very close to his mother, whom the Guardian ad Litem describes as "a very loving and warm person". Suliana goes out to work (she has to since she has received no maintenance for the children for some time) and her mother looks after the children when she is not there. They live in a large house with 6 bedrooms with her parents, brothers and sisters. Her brothers in New Zealand send her money to help with the cost of the children.

80 Sonasi lives with his new wife in a flat in Auckland where there would be plenty of room for the children. If the children join them, they have agreed to delay having any children of their own for 2 or 3 years to allow time for them to settle in. They live in a community where there are several Tongan children and friends. They both go out to work, but his new wife is prepared to work part time. Sonasi works on permanent night shift so could be available when required during school terms. It is not clear what arrangements would be made in school holidays, but I have no doubt that the children would be well cared for. The children have not yet met Sonasi's new wife, although they have spoken to her by telephone.

Sonasi is concerned in particular about the children's education. He thinks that they would do better in New Zealand schools. They are not doing particularly well at school, and are reported to be absent frequently which has been explained by "illness". Suliana acknowledges this problem, and thinks that it is partly because of the freedom the children have to come and go between her home and that of Sonasi's parents, who are less strict. She would prefer the children to remain with her throughout the week during the school term, and visit the grandparents at weekends. She sees the advantage of education in New Zealand, but thinks that they are too young to go there yet.

90 Enquiries of the immigration authorities show that, if Sonasi is granted custody,

permission will be granted for the children to join him in New Zealand.

The first consideration, and the paramount consideration, is the welfare of the children. I am satisfied that they would receive ample love and care in either home. There would be benefits if they go to New Zealand. They would have a better material standard of living, and probably a better education once the language problem has been overcome. They would not be removed from their Tongan culture, living with Tongan parents in a community where there are many Tongans.

100 But they would be taken away from the home they know into an alien environment; they would be taken from the mother on whom they still depend to a stepmother whom they do not know. I agree with Suliana that they are too young for that. There are two basic principles in determining matters of this nature, that unless there are strong reasons to the contrary:

(i) young children should remain with their mother; and

(ii) young children should not be separated from their brothers and sisters.

110 The advantages of living with their father in New Zealand do not outweigh the advantages of remaining all together with their mother. The children will therefore remain in the custody of Suliana, it being understood that there will be generous access to Sonasi and his family.

This order is based on the needs of the children here and now. Circumstances change and it may be that when they are older they may wish to join their father in New Zealand. Mr Etika says that if they do not go now they may not be able to do so later for various reasons. That is possible, but the possibility of education there is not so important as to override all other consideration.

Trial of related charges

120 Recently, when several persons have been charged with different offences arising out of the same incident (for example a gang fight or a series of sexual offences against the same girl) some of those persons have been dealt with in the Magistrates' Court and others have been committed to the Supreme Court for trial.

This practice creates considerable difficulties for the Supreme Court. If the charge in the Magistrates' Court was contested, the same or very similar evidence has to be repeated in the Supreme Court which may come to a different conclusion to that of the magistrate. Even if the accused pleaded guilty in the Magistrates' Court, the Supreme Court is hampered in the sentence which can be given to a co-offender because the sentences must be related to each other. The sentence imposed in the Magistrates' Court sets the standard, and if it is inadequate, the Supreme Court will not be able to pass an adequate sentence on a co-offender.

130 In future, where two or more persons are charged with offences arising out of the same incident, all accused must be tried in the same court, if possible jointly or consecutively. If any one such accused is committed to the Supreme Court, all persons involved must be committed to the Supreme Court for trial or sentence, as the case may be.

140 A similar situation arises when one person is charged with different offences arising out of the same incident (for example rape and indecent assault). In some cases the less serious offence has been dealt with in the Magistrates' Court, and the more serious charge

sent to the Supreme Court for trial. If this is done the more serious charge cannot be heard at all, because a person cannot be tried twice on the same facts.

Where a person faces two or more charges arising out of the same incident, all those charges must be dealt with in the same court. If he is committed to the Supreme Court on one charge, the minor charges must not be dealt with in the Magistrates' Court.