
IN THE FAMILY DIVISION OF THE HIGH COURT

AT LAUTOKA

APPELLATE JURISDICTION

CASE NUMBER: 10/NAN/0015

BETWEEN: MASLA

APPELLANT

AND: ANJANA

RESPONDENT

Appearances: Ms. J. Nair, for the appellant.

Mr. Tarere, for the respondent

Date/Place of Judgment: Friday, 02nd March, 2012 at Lautoka

Coram: The Hon. Justice Anjala Wati.

Cateqorv: All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.

Anonvmised Case Citation: MASLA v ANJANA Fiji Family High Court Appeal Case Number: 10/NAN/0015.

JUDGMENT

CATCHWORDS:

FAMILY LAW: APPEAL: Parentina Orders.

LEGISLATION:

Family Law Act No. 18 of 2003 ("FLA").

CASES:

Roberts v Roberts [1971] V.R 160.

Cooper vCooper [1977] F.L.C. 90-234.

The Cause

1. The father, aggrieved with the decision of the lower Court in not granting the residence of the only child of the marriage to him, brings this appeal. He avers that the lower Court:
 1. failed to adequately consider all the relevant evidence adduced in Court;
 2. was wrong in holding that he did not tender his pay slip when considering financial means of both parties;
 3. failed to consider the social welfare report from Ba;
 4. failed to adequately outline in the judgment the evidence of the parties adduced;
 5. failed to give a fair and balanced judgment;
 6. was wrong in not allowing him an overnight contact of the child.

The Magistrates' Courts Ruling

2. In its ruling of 17th August, 2011 his worship had awarded residence of the child to the mother with reasonable contact to the father.
3. In arriving at the decision, his worship found that
 - (a) The mother was the only child of her family. Her parents were alive and able to look after the child. The mother had family support to look after the subject child.
 - (b) The child was a female aged 3 years and 4 months. At that tender age she needed the love and comfort of the mother. The child was happy with the mother.
 - (c) The shared weekly custody was an interim arrangement and caused practical difficulty and expenses since the mother lived in Korovuto, Nadi and the father

lived in Rarawai, Ba.

(d) The mother was capable and could provide for the needs of the child including emotional and intellectual needs.

(e) The social welfare report stated that the mother was capable of looking after the child and that her house was suitable for the child.

Parties Background

4. The parties were married in , 2006. The child in issue a female, was born in 2007. The parties separated in 2010.

The Submissions

5. In respect of grounds 1, 2 and 3 Ms. Nair submitted that the Court failed to take into account the father's pay slip which was tendered in Court and the Ba social welfare report which was in the Court file. His worship stated that the father never tendered the pay slip but he did, however, the mother having stated that she earned \$200 per week did not tender her pay slip. His worship also did not consider the social welfare report from Ba without giving any reasons. Both the reports were part of the Court's record.

6. Ms. Nair further stated that his worship stated in the judgment that the father agrees that he consumes alcohol but failed to mention that the father stated under cross-examination that he consumes alcohol occasionally and is not a frequent drinker. His worship did not draw his mind to all the evidence before him which thus makes his ruling biased and unfair.

7. In arguing grounds 4 and 5, Ms. Nair stated that his worship mainly considered the evidence of the mother when he should have drawn his mind to both parties evidence. Although the judgment outlines the evidence of the parties, when his worship discusses the law he failed to analyse the evidence of the father. The

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- judgment also does not state why the father is not a better person to look after the child.
8. Ms. Nair said that the days of the perception that mothers are better caregivers are gone. Children are close to their father as well as their mother, even more so with the father. If his worship analysed the father's evidence, that is, the economic and family arrangement, he would have found that the father could also provide for the child.
 9. In arguing ground 6, Ms. Nair stated that the Court did not give reasons for refusing overnight contact to the father. There was no basis for refusing overnight contact. Prior to the ruling on the residence issue, the child was equally with both parents on alternate weeks.
 10. Mr. Tarere conceded that the Magistrate did overlook some important factors but there was no evidence on those factors so the Court decided on the basis of the evidence tendered in Court. The judgment was correct as far as the interest of the child was correct. The Ba social welfare report would only have guided the Magistrate and was not binding on him. The mother's evidence was credible and substantiated. The mother had the support to look after the child as she had a stable home where only few people lived compared to the father's house which was too crowded. The father's family, though, could have provided support to the child.

Further Information

11. Before I delivered the judgment, I was informed by counsel that the maternal grandmother who looked after the child had passed away creating a change in the circumstances.

The Law and Analysis

12. The 1st ground is a rather general ground in stating that his worship did not consider all the relevant evidence and grounds 2 and 3 basically states what relevant evidence

was not considered, being the husbands pay slip and the social welfare report.

13.1 will first take the aspect of pay slip. His worship said in his judgment that the mother was capable to provide for the needs of the child and also noted that although the father stated that he earned \$140 per week, he had not tendered his payslip to confirm his earnings and to show that he has the means to look after the child.

14. There was an error of fact when his worship made that finding. The father's evidence on his earnings was that he earned \$160 per week and had the same employment for 4 years which showed that he had a steady employment. The father also testified that he shared water, electricity and groceries, but after the expenses he could still look after his daughter. His earning was substantiated by his pay slip.

15. Despite that evidence, his worship erred in finding that the husband did not have his pay slip to prove that he has means to support the child.

16. The wife's evidence indicates that she had worked for some 15-16 months. This means that she would not have worked during cohabitation. This indicates that the husband, with his \$140 net income had been supporting the wife and the family. There was therefore no basis to make a finding that the husband has not proved that he did not have the means to look after the child.

17. The wife's evidence on her earnings was that she earned \$200 net per week. She did not substantiate her evidence by her pay slip. If his worship had been flexible with her in this regard, he could not unfairly disregard the husband's evidence and not give and attach the relevant weight it deserved.

18. The next evidence alleged not to be properly adduced was that of the social welfare report of Ba which was dated the 11th day of August, 2010. That report contained the wishes of the child; it reads:

"I have interviewed the child , she stated that she would prefer to be with her

father and "pati", paternal grandmother and then she stated that she will also go to her mother. She further stated that she wants her father to take her to school. Upon home visit she was sitting on her grandmother's laps and kept touching her face and kissing her. She appears to be a healthy child as her father stated that she does not suffer from any illness ..."

19. The report noted the home environment to be as neat and well maintained.
20. The welfare officer's assessment indicated that the father was in a better position to provide care and protection of the child. The reasons for this finding were that the father was in paid employment, the father had his mother and sister in law to provide care and protection to the infant and that the child was attached to those people since she was raised by them since birth.
21. The Nadi social welfare report assessed that the mother was capable of looking after the child and her home environment was suitable for the child.
22. His worship only considered the report from Nadi social welfare and gave no reason why he refused the report from Ba.
23. In fact both reports should have been rejected as each did not make an independent finding after interviewing both the parties. Two different officers made two different reports after interviewing and visiting only one parent and the home environment. Neither party chose to cross-examine the officers of the social welfare department. Both the evidence went in as unchallenged so therefore his worship had to make a finding on the authenticity of the documents and given reasons for accepting one and rejecting the other.
24. Without any exercise of authenticity being established, acceptance of the report in favour of the mother was not proper and highly prejudicial to determining of what is in the best interest of the child.
25. His worship had also noted that the husband confirmed that he drank alcohol. What

turned out on this evidence is not mentioned in the judgment. However what his worship has noted is not the entire evidence of the husband who did say that he consumes alcohol but there is no evidence of him being alcoholic. The father's evidence indicates that he consumes alcohol occasionally.

26.1 have said that I do not know what turned out from this evidence as the judgment is silent but the evidence analysed in this manner definitely goes to affect the father's ability to look after the child and his inability to put the child's interest first.

27. Grounds 4 and 5 states that his worship did not outline in his judgment the evidence of the parties and that his worship did not give a fair and balanced judgment.

28. His worship did state the evidence of the parties but did not analyse the same as required under s. 121(2) of the FLA. S. 121(1) and (2) requires various factors to be examined. The factors though not exhaustive *must* be considered.

"S.121 (1) Subject to subsection (3), in determining what is in the child's best interest, the court must consider the matters set out in subsection (2).

(2) The court must consider -

(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;

(b) the nature of the relationship of the child with each of the child's parents and with other persons;

(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from -

(i) either of his or her parents; or

(ii) any other child, or other person, with whom the child has been living;

(d) the practical difficulty and expense of a child having contact with a

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- parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;**
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;**
 - (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of the child) and any other characteristics of the child that the court thinks are relevant;**
 - (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by**
 - Ci) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or**
 - (ii) being directly or indirectly exposed to abuse, ill treatment, violence or other behaviour that is directed towards, or may affect, another person;**
 - (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;**
 - (i) any family violence involving the child or a member of the child's family;**
 - (j) any family violence order that applies to the child or a member of the child's family;**
 - (k) any other fact or circumstance that the court thinks is relevant."**

29. It is very clear from the judgment that each factor was not considered carefully. The husband's evidence was totally disregarded. His worship should have at least mentioned why he chose to accept the wife's evidence and rejected all the evidence of the husband.

30. Ground 6 relates to refusal of overnight contact. This aspect was never dealt with in the judgment. The husband was given reasonable contact. The parties have indicated to me that overnight contact was refused. Indeed, as Ms. Nair says, the

parties have had shared residence all this time. There is no substantiated allegation of child abuse or neglect. I so see no reason why the child cannot have overnight weekend contact with the father unless an adverse finding is made.

31. On the aspect of contact I cite the case of *Roberts v. Roberts* [1971] V.R 160, the Full Court of the Supreme Court of Victoria said:

"Normally it is for the benefit of the child that it should maintain contact with both parents, the degree of contact between the child and the noncustodian parent varying in accordance with the circumstances of the case. The current view of access is that generally it is highly desirable that a child should have as much contact as possible with both parents, so that there may be created in the child the feelings of security often missing in the case of a child with one parent. Moreover, it is now recognized that boys require contact with their mother and girls with their father, as well as with the parent of their own sex."

32. *Samuels, J.A.* put the same point more methodically in *Cooper v. Cooper* [1977] F.L.C. 90-234 when he said:

"I approach the matter on this basis. First, the paramount consideration is the welfare of the children. Secondly, prima facie the interest of the children would require that both parents have an opportunity to maintain some communications with them, and play some role in their education and general training for adult life. Thirdly, the interests of the parent seeking access are relevant and are not to be ignored. Fourthly, to deny access to any parent is a serious step, which may well have grave consequences for

the child's future development. Hence, fifthly, an order denying access will be made only in exceptions; circumstances and upon solid grounds".

33. There were no proper reasons advanced as to why the contact was not defined and not granted for nights. Day contact is not viable or sufficient for the working father and the child, as neither the child nor the father, would be able to fully enjoy the contact hours with each other. It was therefore prudent that the aspect of overnight contact be considered at least together with day contact.

34. Based on the evidence, I see no adversity in granting overnight contact to the father in the weekends at least. I say weekend for the reasons of convenience but I make no finding on this.

35. In the final analysis, I find that the mandatory factors which would have determined what was in the best interest of the child was not properly analysed. Apart from that, the husband's evidence was apparently rejected without proper reasons advanced for rejecting the same. Errors in finding of fact had also been made.

36.1 I understand that it is cumbersome for parties to go for retrial but it is in the interest of the child that the statutory factors be carefully considered and a determination be made. Further, there is also a change in the circumstances in that the child's maternal grandmother who has been looking after the child has died. I am told that this would have triggered a variation application by the husband which naturally would have meant a fresh hearing because what would have turned out from that evidence had to be carefully analysed.

37. At the end of the day, another hearing is the only outcome of the appeal.

Final Orders

38. The appeal is allowed. The status quo to be maintained. The application for residence and contact must first be listed before a counsellor to see if a parenting plan could be agreed upon failing which the matter could be listed for hearing before another Magistrate.
39. The registrar to list the matter for a conciliation conference before a counsellor and if a parenting plan is not agreed upon, to list a fresh date for hearing of the case before another Magistrate in Nadi.
40. Each party to bear their own costs.
41. 41. Orders accordingly

ANJALA WATI
Judge

To:

1. *Messrs P & N Lawyers, solicitors for the appellant.*
2. *The Legal Aid Commission, solicitors for the respondent.*
3. *File Number: 10/NAN/0015.*