IN THE FAMILY DIVISION OF THE HIGH COURT	
CASE NUMBER:	14/LTK/0005
BETWEEN:	SAIRUSI
AND:	SOVA
Appearances:	Mr. S. Sharma and Ms. S. Nasedra for the Appellant. Mr. N. S. Sahu Khan for the Respondent.
Date/Place of judgment:	Monday 25 April 2016 at Suva
Judgment of:	The Hon. Justice AnjalaWati
Category:	*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 are purely coincidental.*
Anonymized Case Citation:	SAIRUSI V SOVA – Fiji Family High Court Case number: 14/LTK/0005

JUDGMENT OF THE COURT

Catchwords:

FAMILY LAW –CHILD RECOVERY – Locus Standi under s. 108 of the FLA to bring the application – grounds for recovery must be established – proper parties must be before the Court – No reason shown why mater should be heard ex-parte – Forceful recovery against the child's wishes does not support the interest of the child – Alternative available to Court when child wishes not to be handed over to the party in whose favour the application is granted.

Legislation

1. ***The Family Law Act No. 18 of 2003 ("FLA"):ss. 108 and 109.***

Cause

1. The father of the child appeals against the decision of the Court below of 17 January 2014 wherein it refused to set aside the order of 16 December 2013 on which day it ordered that the child, a male born in October 2007 be recovered from the father and handed over to the mother.

2. The application for child recovery was heard and granted on the mother's ex-parte application of 16 December 2013. The actual recovery took place on 19 December 2013.

3. The basis on which the application was granted was based on an affidavit deposed by the mother in support of the application.

4. The mother's allegation in the affidavit was that the parties were in a de-facto relationship for 6 years after which they separated in August 2010. She alleged that the father of the child had taken the child and was supposed to return him on 13 December 2013 but the father called her and said that he would not return the child but take him to Wainibuka.

5. She further stated that she did not want the child to go to Wainibuka because the father had always abused the child and that she had already made a complaint to the Authorized Agency in the Western Division. She stated that the child had already been interviewed by the Authorized Agency.

6. The father then filed an application for setting aside. The basis of his application was that he had been in a de-facto relationship with the mother of the child from 2006 until 2011 when the relationship ended. When the child was three months old, the parties had agreed that the child will be looked after by the paternal grandmother. On that arrangement, the child was sent to the paternal grandmother. The father joined to live with his mother and the child when their relationship ended in 2011.

7. Whenever the mother wanted to take the child for the holidays or in the weekends, she was always given the child. The mother never raised any complaints regarding the child living with them.

8. He then found a new partner and the mother did not want the child to reside with him and the new partner so the parties had an arrangement that the child will reside with the paternal grandmother. There are no parenting orders in respect of the child and the parties had been working with the arrangement entered into by consent.

9. He recently moved back to live with his mother and son and seeing this the mother of the child had decided to take the child back but the child is accustomed to living with the paternal grandmother and him and it is really a disturbance to the child emotionally and psychologically for his mother to force him to stay with her.

10. When the recovery order was made, the child refused to go to the mother and he showed obvious signs of distress. The police officers witnessed the child in distress.

Magistrates' Findings

11. The Court found that the paternal grandmother of the child has been stated to be the primary care-giver of the child but she did not contest the proceeding but the father of the child did. The grandmother should properly be involved in the proceedings and the matter must be decided in reference to the best interest factors set out in s. 121 of the FLA. The best interest of the child could not be worked out on the affidavits and so the application for setting aside of the recovery order was dismissed.

12. The Court ordered that the final application for parenting orders be heard and determined where the paternal grandmother can also participate in the proceedings.

Grounds of Appeal

13. The father raised two grounds of appeal, the first being that the Court erred in law and in fact when he issued the child recovery order in absence of any cogent evidence of child abuse and without considering the best interest factors outlined in s. 121 of the FLA.

Appellant's Submissions

14. Mr. S. Sharma argued that s. 108 of the FLA discusses the rights of person who can bring an application for child recovery and that includes a person who has residence, contact or specific issues order in relation to a child or any other person concerned with the care, welfare or development of the child. The child in this case had been living with his paternal grandmother since he was 3 months old and he lived with her for over 5 years. There was no allegation of child abuse on the child by the paternal grandmother. The mother's affidavit in support says that the father abused the child and that she has reported the matter to the Authorized Agency. There was no application for child abuse filed and neither was there any evidence of the abuse given by the mother or the nature of the abuse. In absence of that there was no basis why the mother should fall under any category to qualify as the right person who could apply for child recovery.

15. Mr. Sharma further argued that s. 109 of the FLA states that in proceedings for a recovery order, the court may make any recover order it thinks fit and in deciding whether to make a recovery order in relation to a child, a court must regard the best interests of the child as the paramount consideration. In determining what is in the child's best interest, the court must consider the matters set out in s. 121(2) but in the ex-parte order granted by the court no such consideration was granted on the basis on which the mother has a right to apply for a recovery orders and on what basis the court considered that it was in the interest of the child to be recovered and handed over to the mother. That is a serious legal and factual error on the part of the Resident Magistrate which cannot be granted any validity and must

be set aside. The mother cannot be given an opportunity to take advantage of a wrongly issued order.

16. When the application for setting aside of the order was being heard, the child was interviewed to assess his wishes and he clearly told the Court that he wanted to stay with his paternal grandmother and his father and that he did not want to go to where his mother stayed. The child stated in his evidence that he enjoyed living with them and that he also has friends where his father and he lived.

17. Having interviewed the child, the Court did not give any consideration to the wishes of the child when one of the factors in assessing the best interest of the child is any wishes expressed by the child although the probative value attached to the wishes depends on the child's maturity and level of understanding.

18. Coupled with the child's wishes, the child also showed distress when he was being recovered pursuant to the order of the Court. He was kicking and crying and struggling showing his refusal to go to his mother. The police officer who went to assist in recovery even gave evidence to this effect but the Court disregarded these facts when it determined the application to set aside the recovery order.

19. The way in which the child was recovered against his wishes is also alarming. When the child refused to go with his mother in the first instance the Court registry wrote a letter to the Station Officer In Charge to effect a second attempt in which they were to make sure that the child returns and they were to use every means possible including pulling and carrying away the child but to be mindful not to harm him. The police was also directed that on the return trip to Ba things should normalize between the mother and the child.

20. Mr. Sharma complained that if the person who wrote this letter did so without the instructions of the Court than she had acted ultra vires as there were no orders to the effect

and if the Court gave instructions to the Registry to issue the letter that shows that it did not care for the interest of the child but bent on executing the orders.

21. In any matter, the child's interest is paramount and giving instructions to the police to pull and carry away the child is most outrageous a direction to be effected on the child.

Respondent's Submissions

22. Mr. Nazeem Khan argued that the mother of the child had stated that the father had been abusing the child and that was not denied by the father so the allegation of the abuse is accepted by him. There need not be cogent evidence of the abuse by the father. If the child is accepted to have been abused then it is in the interest of the child that he does not stay with his father.

23. Mr. Khan also argued that the child was to be returned by the father and he did not honour the arrangement. Coupled with that there was an allegation of abuse which was not contradicted so the basis to make a finding on the best interest of the child was present.

24. The best interest of the child lies with the child residing with the mother. He is going to school there and should not be disturbed.

Law and Analysis

25. The child had been living with the paternal grandmother based on an arrangement between the parties being the mother and the father of the child. The child therefore, since he was three months old, has been with the grandmother. There were no parenting orders in favour of any parent.

26. The Court was made aware of the information that the child was living with the paternal grandmother. In that circumstance the proper party to the application ought to have been the paternal grandmother who had physical custody of the child and was responsible for his daily care and well- being.

27. In the very least the mother should have been made another respondent to the proceedings along with the father of the child.

28. The Court's refusal to hear the grandmother as the proper custodian of the child in the setting aside of the recovery application and refusing the same was incorrect. The matter should have been heard with the proper parties before the Court.

29. This then brings me to the mother's right to bring the proceedings. Under. s. 108 of the FLA, she did not show the basis on which she was making the application or the locus standi she had to do so since the child was always living with the paternal mother. She did not have any kind of parenting order in her favour. Her affidavit only alleged that the father had abused the child and that the matter had been reported to the Authorised Agency.

30. There was no application for child abuse filed as required by the FLA for a proper investigation to be directed by the Court. That can be perhaps overlooked in that the mother may file the said application sometimes in future but of more concern is the particulars of abuse were not stated in the affidavit. The application on the face of it was therefore baseless and could not be given any weight.

31. Even if the allegation of abuse was accepted by the Court, it could not be given any probative value to make a positive finding on the locus standi because there were no allegations against the custodian of the child. If the Court was suspicious that since the father was living with the child, it was in the interest of the child to be recovered, the next best option was to place the child in the exclusive custody of the paternal grandmother and not the mother who had not lived with the child for longer periods and the child was accustomed to his paternal grandmother and her ways of upbringing him.

32. The Court ought to have made an order that the grandmother appear in Court and convince the Court that she could look after the child without the interference with the father as there was allegation of abuse. To have granted an order ex-parte in the

circumstances was neither warranted nor justified by the application. The Court also failed to provide any cogent reason why an order was being granted. The test laid down in s.109 was neither considered nor met for the order to be granted.

33. The Court had not made any finding that it was in the interest of the child not to live with the grandmother. That finding was necessary under s. 109 of the Family Law Act. Allegations of abuse are common in all applications. Most allegations are unfounded for obvious reasons. It was therefore necessary that the Court heard the application and be satisfied that the best interest of the child required that he be placed in the custody of his mother. It is unfortunate that no such pertinent finding was made.

34. I therefore find that the mother neither had the locus standi under s. 108 of the FLA nor had she established a ground under s. 109 for the Court to have granted the recovery orders in the first place. When the application for setting aside was heard, the Court said that it cannot establish the best interest of the child on the affidavits. If that was so then there was basis on which the recovery order could be maintained because no preliminary or substantive finding on the best interest of the child could be made for the order to continue against the paternal grandmother.

35. It must not be overlook that the paternal grandmother was the physical custodian of the child on the parent's wishes and on their wishes the child became accustomed to the environment where he lived. The child also expressed wishes to continue to live there. All this should have been given value when the application for setting aside was heard.

36. On the procedure of hearing the application ex-parte, there was no basis established why the application ought to have been heard ex-parte. The child had always been living with the paternal grandmother. The allegation of abuse lacked sufficient evidence and particulars to find on the best interest of the child. There was no extreme urgency shown why the application should be heard ex-parte and not inter-parte. I find that the Court was

not correct in law and fact to then have heard the matter ex-parte. The application ought to have been heard inter-partes in the first place.

37. I then need to comment in the way the child was recovered. I reiterate that the initial recovery was unsuccessful because the child showed obvious signs of distress and did not want to leave his grandmother and father. The Court Registry then wrote a letter to the Station Officer of the respective Police Station and basically directed the Police to attempt a again to recover the child and to ***make sure*** that the child returns with the mother. The Police Officers were also directed to employ ***every possible means including pulling and carrying away the child but mindful not to harm him.***

38. This letter was most disturbing to me. It has a tone of bias and instructions to ignore the interest of the child. Before I comment on this letter, I will cite the text for the purposes of clarity. It reads:

"The Station Officer
Respetive Police Station

Dear Sir

Re: ***...***

We write with reference to the above.

The Court issued the Applicant a Recovery Order on 16 December, 2013. We provide you with the same for ease of reference. The Applicant relates to our Court Clerks that police assistance to effect the recovery action was unsuccessful. She further relates that when service of the Order was effected upon the Respondent in Wainibuka the child refused to return with the Applicant and cried. According to the Applicant when the child was asked as to why he did not wish to return with her, the child replied that his grandmother told him not to go.

We therefore implore you to instruct your officers at the respective Police Post to effect a second attempt on 19 December, 2013 this time to make sure the child returns with the Applicant. This means that your officers must employ every means possible including pulling and carrying away the child but to be mindful not to harm him. On the return trip things should normalize between mother and child. It is obvious that the child's relatives are interfering with due process hence the vision and foresight if the Court that police assistance be accorded to the Applicant. It is most unfortunate that the Applicant has lost $160.00 worth in taxi fare in trying to effect her first attempt above. In effect she may if she so wishes claim this loss from your above officers".

Underling is Mine

39. I cannot conceive how a Court can authorize a letter of this kind to be issued to have the child pull and carried away against his wishes only to ensure that the orders were complied with.

40. If the Court authorized the letter to be issued, it is most unfortunate and improper that it did so. If the letter was not authorized then the Officer in Charge has acted improperly in the circumstances and has gone outside her powers to issue that letter.

41. It would have been apparent to the Court that the child was refusing to leave his place of residence and once that happened, it was the duty of the Court to ask the custodians of the parents to bring the child to Court and not given to the mother. The matter should then have been heard inter-parte. The child's demeanor, his wishes and the reasons should all have been ascertained before determining whether the recovery order should be executed.

42. In the final analysis I find that the mother had not established that she had locus standi to bring the application for child recovery, that it was in the best interest of the child that he be recovered and handed over to the mother, that she was entitled to an ex-parte order without making the proper custodian of the child a party to the cause and without establishing the need to have the matter heard ex-parte.

43. The Court erred in granting a recovery order and further erred when it refused to set aside the order after hearing the matter inter-partes.

Final Orders

44. The appeal is allowed. The child recovery order made by the Court is set aside.

45. The final application for parenting orders must be heard on an expedited basis in the Magistrates' Courts to determine the issue of the interest of the child.

46. I direct the Registrar of the Court to furnish a copy of this judgment to the appropriate RM and the Officer in Charge Ba Court so that comments in the judgment are noted and implemented.

Anjala Wati

Judge

25. 04.2016

<u>To:</u>

1. ***Legal Aid Commissionfor the Appellant.***
2. ***Nazeem Lawyers for the Respondent.***
3. ***RM Ba.***
4. ***Family Division of the Magistrates' Court Registry Ba.***
5. ***File: 14/Suv/0005.***