

IN THE FAMILY DIVISION OF THE HIGH COURT OF FIJI AT LAUTOKA

ORIGINAL JURISDICTION

ACTION NUMBER:

FAMILY APPEAL NO. 5 OF 2022

MAGISTRATE'S COURT FILE NO. 18/NAN/0185

BETWEEN:

SAABIR

APPELLANT

AND:

NAAZ

RESPONDENT

APPEARANCES:

Mr Victor Sharma (Pillai, Naidu & Associates) for Appellant

Mr Anil J. Singh, Ms Prasad & Ms S. Khan (Anil J Singh Lawyers) for Respondent.

DATE OF HEARING:

Wednesday 26 July 2023

DATE OF JUDGMENT:

Wednesday 30 August 2023

CORAM:

Hon. Mr. Justice Chaitanya Lakshman

CATEGORY:

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

JUDGMENT

A. Introduction

1. The Appellant filed a **Form 26 - Notice of Appeal** appealing the Learned Magistrate's Orders of 30th March 2022. The parties were married in October 2014. They separated in July 2016. A child of the parties was born in October 2016. A Form 8 (Application for Consent Orders) was filed on 18th April 2018. Consent orders were granted on 2nd May 2018. The child was to reside with the Appellant (Man) and the Respondent (Lady) was to have contact every Sunday for 3 to 4 hours and on other days by mutual understanding of the parties. The Appellant was to provide for the maintenance of the child until the child turned 18 years old and the Respondent was barred from making any application to family court for the residence of the child and or sole residence of the child unless it was made by consent of both parties in which case the Respondent would be responsible for the maintenance of the child and the Appellant would have contact.
2. On 17th May 2018 the Respondent filed Forms 9, 12 and 23 seeking that the orders of 2nd May 2018 be discharged. A Response (Form 10) and Form 23 was filed by the Appellant. On 6th June 2018 the consent orders were varied to allow the Respondent (Lady) to have contact with the child at McDonalds for the purposes of breastfeeding. On 17th October 2018 by consent, contact of the child with the Respondent (Lady) was varied to allow overnight contact from Friday 5pm to 5pm Sunday effective on 19th October 2018.
3. On 29th November 2019, a Form 9, 12 and 23 was filed by the Respondent seeking to set aside or vary the consent orders that were entered on 2nd May 2018. A Ruling was delivered by the Learned Magistrate on 30th March 2022. That Ruling is the subject of this appeal. The Ruling set aside the consent orders and residence of the child was granted to the Respondent with contact of the child with the Appellant every other weekend from 7pm on Friday to 10am on Sunday starting from second weekend of April. The Appellant was also ordered to pay child and spousal maintenance in the sum of \$100 each/week starting from 1st April 2022.

B. The Grounds of Appeal

4. There are **10 grounds of appeal**. We will go over each ground of appeal in turn. The **first ground** is that "*The Learned Magistrate erred in law and in fact when the Consent Order dated 2nd May, 2018 was set aside*

based on her incorrect assumption that the Respondent/Lady (Original Applicant) did not have independent legal representation in Court on 2nd May, 2018.” This ground of appeal relates to the issue of the independent legal advice and representation of the Respondent. The Appellant’s Lawyer argued that the Form 8 was filed by a lawyer acting for both the parties and that the Respondent executed the Form 8 before a lawyer. They also suggest that the Respondent confirmed that she received independent legal advice by signing on page 14 of the Form 8. They further argued that the Respondent is educated, has a diploma, with good understanding and knowledge of English. They also state that the Form 8 orders were read over to her in Court by the Learned Magistrate whereby she agreed with those orders. The Appellant’s deny that the Respondent was deceived by the Appellant.

5. The Respondent’s Lawyer argued that the Respondent was not represented at any time leading up to the consent order dated 2nd May 2018. They state that the Appellant’s lawyer represented the Respondent. They also cite that the Learned Magistrate in her Ruling of 30th March 2022 took judicial notice that the Appellant’s lawyer also represented the Respondent. According to the Respondent’s Lawyer, *“independent legal advice is the advice that each person involved in a legal issue gets from their own lawyer. Lawyers can only give advice to one of the people involved in the agreement. The maligned Court Order dated 2nd May 2018 that has been found to be made by deception was prepared in one law office alone and even for the signing, the Lawyers were in that office.”*
6. The Learned Magistrate found that while the Respondent was educated, she had explained to the Court how she simply believed her husband’s words and believed that the Consent Orders were for the Appellant to have ‘undisturbed’ contact with the child. The Learned Magistrate believed the Respondent that “she had no independent legal representation in court when the Consent Orders were made.” The Learned Magistrate confirmed the records of the Magistrate of 2nd May 2018 and listened to the recordings of the case of that day. She found that the Respondent did not have independent legal advice.
7. The Form 8 shows that the Appellant is the Applicant. The Respondent in appeal is the Respondent in the Form 8. She is not a joint Applicant. The Lawyer representing the Applicant also purports to represent the Respondent. The Lawyer, representing the Applicant should not have represented both the Applicant and the Respondent.

8. A review of the Form 8 shows that the witness to the affidavit of the Applicant is Kishan Siwan and independent legal advice was given by Aminiasi Turuva. Witness to the affidavit for the Respondent is Aminiasi Turuva and the person giving independent legal advice is Kishan Siwan. This shows that the lawyers switched their roles with the parties in witnessing the affidavits and giving independent legal advice. For the Form 8 a Lawyer giving independent legal advice to a party should normally be their chosen lawyer. According to the Respondent she did not have her own lawyer. The Form 8 was prepared by Klaw Chambers and Partners. The lawyer being Eparama Sailo.

9. Paragraph 6.5 of the Learned Magistrate's Ruling shows that the Appellant "*admitted that K Law is his lawyers and that he and the applicant [Lady] ha[d] gone together to sign some papers.*" The evidence of the Respondent in the Magistrate Court was not discredited. Para 2.12 of the Ruling of the Magistrate on the evidence of the Respondent is that "*she has seen 3 lawyers in the office, and they have instructed her to sign some documents which she has never seen before. She had no lawyer for herself, and she has not known the contents in the documents that she had to sign...*" The date in the Form 8 by all those witnessing is 16th April 2018. A memorandum of understanding which is referred to in the Form 8 is dated 12th April 2018 is also signed by the parties. This is not witnessed by anyone. It is a requirement that the Lawyers giving independent advice sign each page of the draft consent orders sought (see Part J and L of the Form 8). The draft consent orders sought or the memorandum of understanding is not signed by the lawyers.

10. The Form 8, the Court records and the evidence of the Parties before the Magistrate show that the Respondent did not receive independent legal advice prior to her execution of the Form 8. Each party was required to receive independent legal advice. The lawyers involved in the execution of the Form 8 did not act fairly. A lawyer giving the Respondent, independent legal advice in relation to the Form 8 would have drawn to her attention that she was giving residence of her child to the Appellant and she would only have contact with the child every Sunday for 3 to 4 hours. A lawyer's obligation is not simply to explain the legal effect of documents but to advise his or her client of the obvious practical implications of the client's entry into a transaction. One of the orders sought was "*that upon grant of the above consent orders the lady will be barred from making any application to the family court for the residence of the child unless it is made by consent of both parties...*" A lawyer would rarely advise his or her client to oust the jurisdiction of the Court.

This was not a fair term to advise the Respondent off. It was also not in the best interests of the child.

11. It is trite law that a party in family law proceedings cannot contract out of his or her statutory obligations. The basic objective of the Family Law Act 2003 (hereafter “FLA 2003”) is to ensure that children receive adequate and proper parenting to help them achieve their full potential and to ensure that parents fulfil their duties and meet their responsibilities, concerning the care, welfare and development of their children. (See generally Section 41 of the FLA 2003). An order by consent which takes away a child who has lived with his mother since birth is not in the best interest of the child. To bar the Respondent (Mother) from future residence applications of the child is also not in the best interest of the child. The circumstances of the child may change as the child grows requiring changes in residence and contact orders.
12. A Court always needs to recognise the fact that parenting is ongoing and that simply making an order will not necessarily resolve parenting difficulties. By putting clauses to oust the Respondent from Court the lawyers were ill advising her. The Court should have struck out such a request and not made it an order of the Court. The lack of or the absence of independent legal advice for the Respondent invalidates the Form 8. On the issue of independent legal advice this Court believes the Respondent. She was neither independently represented nor given proper legal advice. The Learned Magistrate was correct in setting aside the consent orders.
13. The **second ground** of appeal is that “*the Learned Magistrate erred in law when she set aside the consent orders dated 2nd May 2018 pursuant to Form 8, when she failed to consider and apply the Family Law Rules 2005, Rule 10.1.3 and Family Law Act Section 62 and the totality of evidence which includes evidence that the Respondent/Lady (Original Applicant) had read and understood the contents of Form 8.*” In this ground of appeal, reference is made of Rule 10.1.3. There is no such Rule in the Family Law Rules. Order 10 of the Family Law Rules 2005 deals with Consent orders, agreements and parenting plans. There are 4 divisions of the Order 10. Division 10.1 deals with consent orders. Subdivision 10.1.3 deals with effect of consent orders. The Rule under this section is Rule 10.08 which deals with the effect of consent orders.
14. It is important to note that consent orders may be made in the context of existing proceedings if the parties reach agreement after proceedings have been issued but prior to final resolution. Alternatively, parties may reach

agreement without commencing court proceedings (as was in this matter), and may apply to the Family Court to have orders made in accordance with their agreement. Consent orders are subject to judicial scrutiny. In considering issues between spouses, the Court must be satisfied that the requested orders are just and equitable. A Court has wide powers while making parenting orders. It also has the power to discharge, vary, suspend or revive part or all of an earlier parenting order. In deciding whether to make a parenting order in relation to a child, a Court must have regard to the best interests of the child as the paramount consideration (See generally Section 66 FLA 2003).

15. This Court has already dealt with the issues of the Form 8. On the issue of reading and understanding the Form 8. The Respondent was very clear and her evidence was accepted by the Learned Magistrate that she did not have enough time to read it and neither the lawyers read out and explain to her the contents of the documents. She was told to be in Court and the Appellants lawyer was in court. She was asked to say “yes” and agree with what the Magistrate would ask her. The Respondent should not be blamed for the Professionals’ failure to perform their designated duties. This Court finds that the Learned Magistrate properly analysed the evidence before her on this issue.
16. The **third ground** of appeal is that “*the Learned Magistrate erred in law when she failed to consider that the evidence led in trial did not satisfy any element of Section 62 of the Family Law Act in that there was any undue influence, fraud or duress*”. The Form 8 orders sought were parenting orders not a parenting plan. The Magistrate was not required to deal with the Form 8 in relation to Section 62 of the FLA 2003. The issues relating to the Form 8 has been dealt with the in the earlier grounds of appeal.
17. The **fourth ground** of appeal is that “*the Learned Magistrate erred in law when she gave sole custody/residence orders to the Respondent/Lady (Original Applicant) without first allowing a Social Welfare Report under the Family Law Act.*” The submission for the Appellant on this ground of appeal is that a report from the Social Welfare would have assisted the Court on the child’s interests and other areas.
18. The Appellants raise a pertinent point. Section 54 of the FLA 2003 provides for reports by family and child counsellors and welfare officers. A Court has a discretion to direct a welfare officer or counsellor to

provide a report on any matter relating to care, welfare or development of the child. Such reports can provide the Court with valuable, independent assessment of the family situation and the information necessary to decide on what would be in the best interests of the child. It should however be noted that the report is not binding, and the judicial officer must still make his or her own determination of what is in the child's best interest.

19. The **fifth ground** is that *“the Learned Magistrate erred in law and in fact when she gave sole custody/residence in favour of the Respondent/Lady (Original Applicant) with the Applicant/Man (Original Respondent) only having access to approximately two days in two weeks intervals. Orders which were grossly unfair to the Applicant/Man (Original Respondent) considering the Applicant/Man has been solely caring for the child for the past 3 years 10 months 29 days without any support from the Respondent and considering the totality of the evidence in Trial.”* On this ground of appeal the Appellant for his part must realise that from birth until the child was about 1 year 7 months old the child lived with his mother and was cared for by her. The evidence before the Learned Magistrate was that there was no contribution by the father for those years. The Respondent promptly initiated court action challenging the consent orders. The Learned Magistrate in her Ruling noted *“it is well proved through evidence and also accepted by the Respondent that the Applicant has immediately taken steps to move for court orders to vacate the Consent Orders. She was already in court on the 17th May 2018, just 3 days after the respondent had taken the child away, with medical reports to prove how affected she was mentally and physically due to the separation from her child”*. To argue the time frame and that the Respondent did not contribute towards the child for a certain period of time before this Court is mischievous. Especially when we consider the actions of the Appellant and the manner in which he got the Residence of the child through his lawyers, the Form 8 and the grant of consent orders.
20. The Learned Magistrate in her decision found that the mother was the most suitable person to take care of the child. She did not find other cogent reasons to order otherwise. One issue which is of concern is the length of time the parties have taken to resolve the residence and contact issues. The actions of the Appellant were condemned by the Learned Magistrate, in Para 8.10, she states *“...the Respondent instead of taking efforts to create a home environment for the child that has the love and care of both the parents, has adamantly refused even to enhance the time of access despite the many requests made by the Applicant. He has acted*

as if he only has rights over the child...". Apart from this the Learned Magistrate clearly understood the bonding of the child and the father during the pandemic and acknowledged that the father was fulfilling his financial obligations towards the child.

21. The Learned Magistrate in Para 8.12 of her Ruling states that "*...it is highly essential that he [child] be given an opportunity to spend more time with the mother and the maternal relatives in order to catch up the lost time with them as well as to learn values that he missed learning during the time away from his mother.*" It is correct that the child lost out on quality time with his mother and the maternal family members. This is a sad reality. The Learned Magistrate after setting aside the consent orders needed to consider the best interests of the child. The Learned Magistrate rather than focusing on the best interests of the child carried out a balancing exercise. In that exercise she forgot about the development of the child and the child's bonding over time with the father. The issue always is what is in the child's best interest. Things that happened between the parties' overtime cannot be reversed. However, from this moment onwards a sense of stability for the child and the parties must prevail. Both the parents have over certain duration have had residence of the child while the other has had contact.
22. The question that we need to pose is whether it is in the child's best interest after having bonded with his father and his paternal family members to be separated from them or have minimal contact (every other weekend from 7pm on Friday to 10am on Sunday). This Court is not in favour of any child having one sided contact with his parents and extended family members. Where there are no risks for a child in an environment to prosper. The child must be allowed to have meaningful interaction with all his family members. The parents must ensure that the child knows and interacts with all family members. It is not about the parents. It's not what the parents are happy with. It is about the child. Its about the child's happiness.
23. The **sixth ground** of appeal is that "*the Learned Magistrate erred in law and in fact when she failed to apply the relevant provisions of the Family Law Act including Sections 66 and Section 121 and the best interest of the child who has been living, being cared by Applicant/Man (Original Respondent) and the totality of evidence when she interfered with consent orders dated 2nd May 2018.*" On this ground the Court in the 5th ground of appeal addressed the relevant issues.

24. The **seventh ground** of appeal is that “*the learned Magistrate failed in law and in fact in putting the interest of the child as the paramount consideration*”. This ground of appeal is ambiguous. Like many other jurisdictions, we have embraced what has become known as ‘the paramountcy principle’. Broadly speaking, this means that when making a decision concerning a child, the child’s best interests will be the paramount considerations. Section 66 (4) of the Family Law Act 2003 provides that the court must regard the best interests of the child as the paramount consideration in making a parenting order, and this paramountcy principle applies in a number of specified contexts under the law. The term ‘interests’ is defined in this context in Section 42 (1) of the FLA 2003 as including matters related to the care, welfare or development of the child. Hence, it is clearly intended to be a concept of broad application, encompassing all matters relevant to a child’s upbringing.
25. The **eighth ground** of appeal is that “*the Learned Magistrate erred in law and in fact when she disallowed key evidence including video of the Respondent’s Mother and phone messages which were crucial in showing that the respondent/Lady (Original Applicant) having custody/residence would be in the best interest of the child.*” The records show that the Learned Magistrate noted that the messages between the parties were “*part of reconciliation process and it happened under ‘without prejudice’*” and also there was no notification to the Respondent that the messages would be used against her. Having perused the records and the evidence before the Learned Magistrate this Court finds that the Magistrate based her decision on the relevant evidence.
26. The **ninth ground** is that “*the Learned Magistrate erred in law and in fact when she awarded maintenance to the Respondent/Lady (original Applicant) when the totality of evidence showed that the Respondent/Lady (Original Applicant) not to be provided Spousal Maintenance under section 155 of the Family Law Act.*” This ground of appeal raises the issue of spousal maintenance. The Learned Magistrate in her Ruling had information that the Respondent was working. Spousal maintenance is not as of right. A party claiming spousal maintenance must establish right in accordance with Section 155 of the FLA 2003. According to Section 155 of the FLA 2003 the Respondent is not entitled to spousal maintenance. The factors stated in Section 155 of the FLA 2003 were not considered by the Learned Magistrate. Had she considered those factors she would have found that the Respondent was not entitled to Spousal maintenance. The Respondent has the ability to support herself.

27. The **tenth ground** being that “*the Learned Magistrate erred in law and in fact when she granted Maintenance without having regard to evidence and provisions of the Family Law Act.*” The child maintenance that was ordered for the child needed to be properly analysed according to the needs of the child and the capabilities of the parties. The parents of the child have a primary duty to maintain the child (Section 86 FLA 2003). The parents are working. They have the means and the ability to support their child. Both the parents are responsible for the child and should equally contribute towards the welfare and upbringing of the child. In calculating the maintenance payable for a child, a court should consider the factors listed in Section 90 of the FLA 2003. In determining the financial contribution of each party, a Court is required to consider the factors listed in Section 91 of the FLA 2003.

C. **Conclusions**

28. This Court has analysed the grounds of appeal. This Court finds that the Learned Magistrate was correct in setting aside the consent orders. The consent orders were not properly made. Having set aside the consent orders the Learned Magistrate needed to analyse the best interests of the child. For that the Court needed to look at Section 121 (2) of the FLA 2003. The Learned Magistrate should have set out the Section 121 (2) factors and gone over each factor in turn. This would have assisted the Magistrate in analysing the best interests of the child. If the Magistrate did that it would have helped everyone understand how the Magistrate came to the decision about the residence and other issues relating to the child. The child at the time the Magistrate made her decision was about 4 years 7 months old. The child had lived with his mother from birth to until he was about 1 year 7 months old. After that child lived with his father for over 3 years.
29. The child now is about 7 years old. To get his views and wishes at this tender age would not be reasonable. The child has already spent considerable time with both parents. After his birth he spent time with his mother and her family. Later he spent time with his father and his family. It can be emotionally distressing for the child to feel that he has to “choose” between his parents. It is important that the Court protects the child from being manipulated or unduly drawn into the dispute between his parents. It is also important to note that a Court may take wishes of the child into account if the child expresses it, however the final decision rests with the court and not the child.

30. The child is familiar with both his parents. He has lived with his mother and father. Both seem to be well aware of their responsibilities. Both are employed and have the ability to provide for their child's emotional and intellectual needs. The child should spend quality time with both his parents. The parents for their part must understand that they must see that their child does not suffer due to their differences. You should be reasonable enough to understand what is best for your child. A parent who ends up seeking revenge from the other, does not realise that his/her actions indirectly affect their child. You should exercise caution and focus on the upbringing of your son. That is what you must focus your attention on. Focus on your child's future. A future which you both are jointly responsible for. You both must ensure that you restraint yourselves and do not allow your personal issues and other emotions to affect you in your child's upbringing. Each one of you are responsible to explain to your side of the family of your roles and the role that you each play in the life of the child. Sometimes family members forget your roles and the role they can play in the life of the child. Everything is up to you two. Start of by being fair and respectful to each other. Everything else will fall into place.
31. You as parents are capable and have the ability to maintain and enhance the lifestyle of your child. This includes inculcating appropriate religious, cultural and human values. Both of you have the ability to protect your child from any physical or psychological harm, abuse or ill-treatment. Over time you both have demonstrated the responsibilities of parenthood.
32. I would like to caution you that parenting orders are never final in the sense that your child's and your personal circumstances may change. You might need to make suitable arrangements to alter the parenting orders as a consequence of those changes. The role of a Court is to make parenting orders that minimise the prospect of future disputation. Litigation is expensive in emotional and financial terms. It also has the effect of standing in the way in you moving on with your life. It also undermines your capacity to parent to the full extent of your ability. Years after separation, you cannot remain hostile. Continued litigation will keep that hostility at the forefront and undermine your potential. You have to let go the unhappy past. With this in mind I am of the view that this court should make orders that will be least likely to involve you both and the child in future litigation.
33. Having considered everything this Court finds that it is in the child's best interest that both the parents have joint residence of the child. In other words, the child will live with both the parents. Both the parents are on

equal footing. Both have looked after the child. Both are capable and responsible. Both have the means. For your child, you the parents must make appropriate decisions. It may be about schooling, holidays, travel or some other choices. You the parents are the best persons to decide. You must act reasonably and not be irrational. Everything cannot be covered or provided for by a court. However, if you are not able to reach a compromise you may seek relevant assistance. Day to day decision making, will lie with the parent who has physical care of the child at that given time. The parents in this arrangement will have shared parental responsibility. The parents are also required to communicate with each other about the health, well-being and other issues about the child. Clear and respectful communication is expected. If that happens it will ultimately reflect in your child and his upbringing.

34. One final point I wish to make is with regards to the choice of words being used in this matter. This has also been noted in other matters. Reference was made to “custody” and “access” in the Magistrate’s Ruling and the grounds of appeal. In the Family Law context, the use of these words is inappropriate. The Family Law Act 2003 refers to residence and contact. These words should be used. In this matter both parents are granted ‘live with’ orders, specifying the time ratio to be allocated between them. This approach is consistent with the strong emphasis on parental responsibilities and helps avoid the win or lose mentality associated with having one type of order being considered superior to the other.
35. For the reasons given I am satisfied that these orders are in the child’s best interests:
- (a) *The orders of the Learned Magistrate of 30th March 2022 are discharged.*
 - (b) *The Mother will be responsible for the day-to-day care, welfare and development of the child when he is in her care.*
 - (c) *The Father will be responsible for the day-to-day care, welfare and development of the child when he is in his care.*
 - (d) *The Father and Mother will be jointly responsible for the long-term care, welfare and development of the child.*

- (e) *The Child will live with his Father:*
- (i) *For a week from 5pm Friday 1st September 2023 up to 5pm on 8th September 2023 and then on each alternate week on the same days and times thereafter.*
 - (ii) *For the first half of the first and second term school holidays.*
 - (iii) *For one half of the third term, being each Christmas school holiday period, the first half in 2023/2024 and the second half in 2024/2025 alternating each year thereafter.*
 - (iv) *One half of every religious festival.*
 - (v) *At other times as mutually agreed to between the parties.*
- (f) *The Father will pick up or cause a family member to pick up the child from the Mother's home or residence or any other mutually agreed location at the commencement of his residence period.*
- (g) *For the purpose of changeover, the Mother shall pick up or cause a family member to pick up the child from the Father's home or residence or any other agreed location at the commencement of her residence periods.*
- (h) *Each of the parties is entitled to obtain directly from the school attended by the child or from any health or welfare professional or other professional attended by the child, copies of any reports, notices or other relevant verbal or written advice affecting the education, health and welfare of the child and for this purpose each of the parties shall immediately notify the other of the names and contact details of any relevant education, health or welfare professional and keep the other party so informed.*

- (i) Each party is to communicate with the other regarding the health, education, welfare and other relevant issues of the child.*
- (j) Both the parents are equally responsible for any major expenses relating to the welfare, health, and education of the child.*

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Chaitanya Lakshman
Acting Puisne Judge