

**IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA**

**APPELLATE JURISDICTION**

<b><u>ACTION NUMBER:</u></b>	<b>APPEAL CASE NUMBER 2023/SUV/05</b>
<b><u>BETWEEN:</u></b>	<b>VENKAT</b>  <b>APPELLANT</b>
<b><u>AND:</u></b>	<b>LALINI</b>  <b>RESPONDENT</b>
<b><u>Appearances:</u></b>	<i>Mr. Ali for Appellant</i> <i>Ms. Kirti and Mr. Kumar for the Respondent.</i>
<b><u>Date/Place of Judgment:</u></b>	<i>Friday 15 March, 2024 at Suva.</i>
<b><u>Coram:</u></b>	<i>Acting Hon. Madam Justice SLTTW Levaci.</i>
<b><u>Category:</u></b>	<i>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.</i>

**JUDGMENT**

**(AN APPEAL FROM THE FAMILY DIVISION OF THE MAGISTRATES COURT)**

**Cause and Background**

1. The Appellant has made an application to Appeal against the decision of the Learned Magistrate.
2. The parties were married on 14 April 2008 and separated on 1 September 2016 which was dissolved on 10 April 2020.

3. There are two children of the marriage and the Respondent resided with the two children with contact given to the Appellant.
4. His application for an Appeal stems from the decision of the Learned Magistrate on 30<sup>th</sup> of March 2023 for the following Orders:

(a) The Respondent mother to have residence of the children namely: Aiden, a male born on 18<sup>th</sup> April 2011 and Ayush, male born on 13<sup>th</sup> August, 2016.

(b) That the Court Orders of 16<sup>th</sup> August 2017 be affirmed. The only variation the Court makes is with respect to contact of the children with their father. The contact of the children with their father is varied as follows – Father to have contact with both the children from Friday 5pm to Sunday 5pm, on a weekly basis. This will start from 31<sup>st</sup> March 2023.

### **Grounds of Appeal**

5. The Appellant relied upon only one ground of appeal as follows –

- a. *That the Learned Magistrate erred in law and in fact by failing to properly consider and give proper weight to the wishes expressed by the children regarding their living arrangements in the Social Welfare Report and Empower Pacific Report;*
- b. *The learned Magistrate erred in law and in fact by failing to take into account and give proper weight to the evidence of, attachment and close relationship, of the children with their father, as highlighted in the Social Welfare Report and Empower Pacific Report.*
- c. *The learned Magistrate erred in law and in fact by failing to properly consider and give proper weight to the financial capacity of the mother as an unemployed person, who is fully dependent on the monies sent by her grandmother from Australia, to cater her 50% financial responsibility towards the children, whereas, the father is employed and has the means to fully sustain the children by himself.*
- d. *The learned Magistrate erred in law and in fact by failing to properly consider the evidence of child abuse in the report prepared by Social Welfare Department.*
- e. *The learned magistrate erred in law and in fact by misinterpreting the term “abuse” in relation to the children, and finding that the physical means of disciplining the children by the mother did not amount to child abuse.*
- f. *The learned Magistrate.*

## Law on Appeal

6. Section 19 of the Family Law Act 2003 empowers the Family Division of the High Court to hear and determine Appeals from the Family Division of the Magistrates Court. It states

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### *‘Appeals from the Family Division*

**19.-(1)** An appeal from the Family Division of the Magistrates' Court lies as of right to the Family Division of the High Court’.

7. Although there is a right of every applicant to appeal a decision of the Family Division of the Magistrates Court, the Appellate Court will not overturn a decision of the Magistrates Court unless and until the Learned Magistrates Decision is of error in fact or law. As was held in Roberts -v- Chute [2009] FJCA 4; ABU0040.2007 (17 March 2009) Scutt JA, Lloyd JA and Bruce JA stated –

‘**85]** Appeal courts should always take care in overturning or interfering with the decision of a court below, where the trial court has had the opportunity of hearing witnesses and gauging their credibility, and especially where the trial court has a broad discretion in respect of its decision-making. This latter is particularly so in matrimonial causes or family law: MAK and KN (Fam Mag Ct Appeal No. 06/SUV/0021, 25 July 2008) As the High Court of Australia emphasized in CDJ and VAJ (1998) 197 CLR 172, [1998] HCA 76, appellate courts need to exercise ‘much caution in a case where an error of principle cannot be clearly identified’:

Such reasons for appellate restraint ... have particular relevance to appeals within, and from, the Family Court of Australia. This is because of the functions and purposes of that Court and the difficult and evaluative decisions which it often has to make. The peculiar nature of decisions relating to the intensely personal questions of the division of the property of parties to a failed marriage and the welfare of their children makes it essential that those who decide appeals respect the onerous responsibilities of those whose decisions they review. They need to recognize that it is of the very nature of such decisions, including those relating to the residence of children, that any two decision-makers may, with complete integrity and upon the same material, often come to differing conclusions.’

## **Analysis and Determination of the Grounds of Appeal**

8. When considering these factors, the Court turned to the application and the grounds of Appeal relied upon by the Appellant. Grounds (a), (b) (c) and (d) deal with similar grounds and will be dealt with together.

### **Grounds (a), (b), (c) and (d)**

- (a) *That the Learned Magistrate erred in law and in fact by failing to properly consider and give proper weight to the wishes expressed by the children regarding their living arrangements in the Social Welfare Report and Empower Pacific Report;*
- (b) *The learned Magistrate erred in law and in fact by failing to take into account and give proper weight to the evidence of, attachment and close relationship, of the children with their father, as highlighted in the Social Welfare Report and Empower Pacific Report.*
- (c) *The learned Magistrate erred in law and in fact by failing to properly consider the evidence of child abuse in the report prepared by Social Welfare Department.*
- (d) *The learned magistrate erred in law and in fact by misinterpreting the term “abuse” in relation to the children, and finding that the physical means of disciplining the children by the mother did not amount to child abuse.*

9. The deliberation of the Learned Magistrate are as follows:

*“The allegations against Lalini in the Form 15 are as follows:*

- 1. The children were physically abused by the Respondent who beat them up for informing me about an accident which she told them not to tell me.*
- 2. The children are also physically abused by the Respondent who beat them up when the children get mischievous.*

*Allegations were denied by Lalini. Her position is that Venkat is trying to make up the allegations to avoid maintenance. From the evidence tendered in Court the Court finds that the children have been disciplined by the mother when the children have been mischievous. She alone is responsible for the children. She is doing all she can for her children. Situations sometimes arise when she also needs support. She lives with her other family members they provide her emotional and financial*

*support. This Court further finds that the children are not being abused by their mother. Lalini is to note that she must find other means of disciplining her children. Any physical means of disciplining is illegal and may lead to criminal action or domestic violence restraining orders being issued.*

*...This Court has noted Section 121 of the Family Law Act 2003 and considered all the factors including the wishes of the children. One factor does not take precedent over the other. All the factors must be considered in totality.”*

10. According to the Supplementary Records, the Investigation on Child Abuse Report (referred to hereinafter as “ICAR”) dated 5<sup>th</sup> September 2022 provided that both children opted to reside with the father as they did not like being scolded or hit by the mother for playing all the time.
11. In the case of Salini -v- Annand [2023] FJHCFD 4; Family Case 005 of 2020 (6 July 2023) Wati J on discussing expert witnesses and their reports cited cases from Australia stating:

*“[65] Giles JA (with whom Mason P and Beazley JA agreed) approved the Full Federal Court’s analysis of Makita in Adler v Australian Securities and Investments Commission [2003] NSWCA 131 saying (at [63]):*

*[63] Whether an opinion has been shown to be based on the specialized knowledge is a question of fact,....What is required by way of which Heydon JA spoke in Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305 at [85] will depend on the circumstances. The disconformity in HG v R (1999) 197 CLR 414; 160 ALR 554; [1999] HCA 2 to which his Honour referred was gross, in that the psychologist’s evidence went to when the complainant was abused and who abused her, outside the psychologist’s expertise and based on matters other than a psychologist’s expertise. Other circumstances will be quite different. And, as was said in Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd [2002] FCAFC 157, absolute certainty that the opinion is based on the specialized knowledge is not required (at [14]) and many of the stated qualities of the opinion evidence by Heydon JA ‘involve questions of degree, requiring the exercise of judgment (at [87]). [Emphasis added.]*

*[66] It is inherent in the process of preparing many expert reports that the factual basis for the opinion expressed is third party information. Courts emphasize the necessity that the factual bases of opinions be clearly laid out so that the opinion can be tested. An expert is rarely the source of all the factual information in his or her report. It may be garnered from a party (the typical illustration from a medical report), from empirical investigations (engineering reports for example), or in the case of valuations, from data relating to the properties about whose value and opinion is to be expressed.*

*[67] Consistent with that reality, it is accepted that an expert need not amass all the factual data on which an opinion is to be expressed. The task can be delegated to another. As Austin J said in Australian Securities & Investments Commission (ASIC) v Rich (2005) 190 FLR 242; 53 ACSR 110; [2005] NSWSC 149 at [329]:”*

12. In weighing out the allegations of abuse and the ICAR, the learned Magistrate determined that the actions of the Respondent was of disciplining her children and found that they were not acts of abuse. Despite the evidences by the father alleging abuse as well as statements made on the Report by the children, there was no secondary evidence to verify the allegations of injuries sustained from the alleged abuse tendered into Court. There was also no expert evidence called upon apart from the ICAR to verify the abuse sustained.
13. It was therefore correct for the learned magistrate to weigh the ICAR as well the factors in section 121 of the Family Law Act in order to arrive at the conclusion that it did. The Court finds that the learned Magistrate did not err in fact or in law.
14. The appellant has also alleged that the learned Magistrate failed to give proper weight to the relationship between the Appellant and the children as recorded in the Reports.
15. The learned Magistrates deliberations were:

“(b) **Residence**

*Lalini has had residence of the children for over 6 years. She has provided decent home for the children. It is a good place for the children to be reared. The children are in a settled environment. They should not be disturbed. The children regularly meet their father. Concern is for the children’s education. This is a genuine concern. Both parents must support the children so the children are educated. The father must ensure that*

*maintenance is paid on time. The mother is the primary care giver must supervise her children's education and provide them the necessary support."*

16. From the deliberations, the learned Magistrate had considered the concerns of the Appellant regarding the education of their children and the need for more support by both parties. He also considered that the Appellant exercised contact with the children. The Court finds that learned Magistrate had considered all of the relationship of the parties towards their children prior to arriving at the decision that he did.
17. The Court therefore finds that the learned Magistrate did not err in law and in fact when analyzing section 121 in order to arrive at the decision that Residence should remain with the Respondent.

### **Ground (e)**

*The learned Magistrate erred in law and in fact by failing to properly consider and give proper weight to the financial capacity of the mother as an unemployed person, who is fully dependent on the monies sent by her grandmother from Australia, to cater her 50% financial responsibility towards the children, whereas, the father is employed and has the means to fully sustain the children by himself.*

18. In Ground (e) the Appellant argues that he is capable of providing for the children if they reside with him as he is financially capable of providing for them. However in considering the best interests of the child, financial capacity is only one of the factors. The social and emotional well-being of the children are also taken into consideration. Hence despite the Respondent relying on her grandmothers monies financially, she provided for their social and emotional wellbeing as provided in her evidence in chief in the court records. This was not contradicted by the Appellant in cross-examination. As a stay at home mother, she supervised their studies, looked after them prior to attending school and after school. She created a settling environment for the children to grow. This was the basis of the learned Magistrates decision to make final the interim orders awarding Residence to the Respondent.
19. The Court therefore finds that the learned Magistrate did not err in law or in fact when he took into consideration all the factors including her the fact that she was unemployed in determining Residence.

### **Orders**

20. The Court Orders as follows:

- (i) The Grounds of Appeal are hereby dismissed;**
- (ii) The decision of the Learned Magistrate is upheld;**
- (iii) Costs for the Respondent at \$800.00.**

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**SLTTW Levaci**  
**Acting Puisne Judge**