

## ELENOA RAVULA

v

## RICHARD CLIFFORD EVANSON

[HIGH COURT, 1993 (Scott J), 24 March]

## Appellate Jurisdiction

*Family Law- illegitimate child- limited rights of putative fathers- Maintenance and Affiliation Act (Cap. 52)- Magistrates Courts (Civil Jurisdiction) Decree 35/88.*

On appeal against orders for maintenance and access made in respect of an illegitimate child the High Court analysed the powers of the Courts in respect of such children and quashed the orders.

## Cases cited:

*R v. Armitage* (1872) LR QB 773  
*Re C.T. (an infant)* [1957] 1 Ch. 48  
*Re M (an infant)* [1955] 2 QB 479  
*Sinclair v. Rankin* [1921] SC 933

Appeal against ancillary relief orders by the Magistrates Court.

*T. Fa* for the Appellant  
*P. Knight* for the Respondent

## Scott J:

On 27 September 1988 the Appellant who is not and never has been married to the Respondent gave birth to a child. On 17 October 1989 the Appellant filed a complaint in the Suva Magistrates' Court pursuant to the provisions of section 16 (c) of the Maintenance and Affiliation Act (Cap. 52) (the Act) alleging that the Respondent was the father of the child.

On 16 June 1990 following discussion between the Parties and their legal representatives an Agreement was reached. According to the record of the proceedings in the Magistrates' Court the Agreement was as follows:-

“ AGREEMENT

1. The Parties have reached settlement. Paternity is admitted. Complainant to have custody. Defendant will pay \$250 per month maintenance for the child and access 1 week every month.

The access will be on first week of each month on

Saturday and seven days thereafter. Defendant representative will pick the child in Suva to Turtle Island and return the child to Suva.

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The child is not to be taken out of the jurisdiction of the Court of Fiji without the consent of the other Party.

If both Parties are outside Fiji the child is to be taken care of by the complainant's parent."

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The Court (A. Katonivualiku Esq.) then made the following order:-

"Ordered that Agreement be accepted".

On 8 October 1992 the Appellant was given leave by the Magistrates' Court to file an appeal out of time against the Magistrate's Order. The grounds of appeal are as follows:-

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" a. That the learned trial Magistrate erred in law when he ordered that the Defendant could have access to the child during the period specified.

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b. That the learned trial Magistrate erred in law when he ordered that the child should not be taken out of the jurisdiction without the consent of both the Complainant and the Defendant.

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c. That the learned trial Magistrate erred in law when he ordered that the child shall live with the other Party in Fiji should one of the Parties live Fiji."

The appeal raises the very interesting and important question of the extent of a Magistrate's powers under the Act. Counsel both told me that there was considerable doubt in the Magistrates' Courts as to what powers the Magistrates had and I was further told that the question had not been raised in the High Court before.

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Before considering Counsels submissions it should be noted that the Magistrate's procedure whereby he simply embodied the Agreement reached between the parties into an Order of the Court was misguided. Before making an Order a Magistrate must satisfy himself that he has the power to make the order the parties seek. Under the Act the evidence of a complainant must be heard (section 18(1)) and the Magistrate must make a finding that the putative father is in fact the father of the child as alleged whether or not there is a consent or admission by the putative father (see *R. v. Armitage* (1872) LR 7 QB 773; *Sinclair v. Rankin* [1921] SC 933). In the present case the Magistrate did not hear any evidence. He was therefore in breach of the procedure laid down by the Act and should not have made the Affiliation Order that he did.

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In support of the appeal Mr. Fa pointed to Part III of the Act. Under section 16 the mother of an illegitimate child has a right to issue proceedings against the putative father but the father has no parallel right to seek an order that he is in fact the father of the child. Under section 18 the Court can order a putative father to make payments for the maintenance of the child once the Court has adjudged that the putative father is fact the father of the child but there is no parallel power to make an order for payments against the mother. Under section 22 which is headed "appointment of custodian and provisions relating to custody" the word "custody" appears for the first time in the Act. Under section 22(1) the Magistrate may make an order for custody on some person other than the mother only if either (a) the mother of the child is not a fit and proper person to have custody of the child or (b) the mother has died or become of unsound mind or is in prison. It is important to note that the Magistrate can only make such an award of custody either at the time of making an affiliation order or thereafter. In other words the Magistrate cannot, under the Act, make an order for custody in favour of a person other than the mother before making an affiliation order.

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Mr. Fa went on to point out that the Act made no mention of access, residence of the child or removal from the jurisdiction. This lack of reference to these ancillary reliefs was, he submitted, because the Act was not intended to cover these matters reflecting as it did the fact that in common law the putative father of an illegitimate child had almost no rights over the child, merely duties towards him.

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Mr. Knight conceded that if by the Act it had been intended to confer on a putative father the right to seek ancillary relief in respect of his illegitimate child then that intention was, at best most unclearly expressed. He however pointed to a number of sections in the Act which appeared to imply that the putative father had somewhat parallel rights to those enjoyed by the mother in relation to ancillary relief. He pointed to section 22 (2) which allow a putative father to apply for the appointment of a custodian (not, it should be noted, himself - see section 2 of the Act) furthermore under section 24 the offence of misapplying money or ill-treating the child is created and specifically applied to a putative father "who has custody".

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Since the Act envisages that in some cases the putative father could have custody Mr. Knight argued that it must follow that there was a procedure for allowing the putative father to apply for that custody.

In further support of the Order made by the Magistrate Mr. Knight argued that the Order was made by consent and that therefore both Parties had willingly agreed to the Order being made; therefore it should not be impugned. He also referred to the Juveniles Act (Cap. 56) and in particular to section 19 thereof which gives the Court power to order that specific arrangements be made for a child's welfare. He also referred to the Magistrates' Courts (Civil Jurisdiction)

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A Decree 35/88 which under section 2 (1) (e) gives power to magistrates to appoint guardians of infants and to make orders for their custody. From these powers, it was submitted, must flow automatically and logically the power to make other orders for ancillary relief such as access, residence and leave to remove from the jurisdiction.

B Both Counsel advanced their submissions with skill and clarity and I am grateful to them for their assistance. As already mentioned the question of law raised is an interesting one and also as will have been seen highly relevant to the daily business of the Magistrates' Courts. If Mr. Fa is right then the putative father of an illegitimate child has only the most rudimentary rights in respect of the child: his primary duty is to maintain it. If Mr. Knight is right then the father's rights are more or less parallel to those of the mother.

C As is often the case research establishes that the problem now before this Court is not a new one but on the contrary is a problem which has been the subject of much judicial and legislative attention in the past. In my opinion the resolution of the problem must begin with a consideration of the history of the legislation now under review.

D The Maintenance and Affiliation Act (Cap. 52) (the Act) is the successor to the Maintenance and Affiliation Act 16/71 which itself repealed and replaced the Separation and Maintenance ordinance (Cap. 43 - 1967 Edition) and the Bastardy Ordinance (Cap. 46 - 1967 Edition). The 1971 Act incorporated revised versions of both the repealed Ordinances and the provisions of the Bastardy ordinance as amended became Part III of the new Act under the title "Affiliation". This scheme was continued in the Act. The effect of this is that  
E Part III of the Act is the successor to the Bastardy Ordinance.

F The Bastardy Ordinance was itself an amended and expanded version of the English Bastardy Laws Amendment Act 1872 (35 & 36 Vict c 65) and the Poor Law Amendment Act 1844 (7 & 8 Vict c 100). Briefly, the 1872 Act provided that the mother of an illegitimate child could apply to the Court for a determination that the putative father was the actual father of the child (oddly he always remained described as the putative father even when his status had been finally determined by the Court) and for an order that he maintain the child (see now section 16 and 18 of the Act). Under the 1844 Act the Court was empowered to grant the custody of the child to some person other than its mother when the mother had died, was of unsound or was detained in prison (see now section 22 of the Act). What then were the rights of a father under  
G 1872 and 1844 Acts? The answer is virtually none.

As late as 1955 Lord Justice Denning described the putative father as having almost no rights at all (see *In Re M* (an infant) [1955] 2 QB 479). He said:-

"The Law of England has from time immemorial looked on a bastard as the child of nobody that is to say of no known body

except its mother. The father is too uncertain a figure for the law to take any cognizance of him except that it will make him pay for the child's maintenance if it can find out who he is. The law recognises no rights in him in regard to the child; whereas the mother has several rights".

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Later he said:-

"(The father) has no rights at all though no doubt he can apply for the child to be made a Ward of Court just as any one else can".

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In 1886 there was a very important development in the Law relating to children with the enactment of the Guardianship of Infants Act (40 & 50 Vict c 27). This Act for the first time gave a mother (but not, it must be noted a father) the right to apply for an order "regarding the custody of (the infant) and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents and to the wishes as well as of the mother as of the father ...". Did this alter the position of a putative father? It did not.

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In the case of *In Re C.T. (An infant)* [1957] 1 Ch. 48 Roxborough J held that neither the 1886 Act nor its successor the Guardianship of Infants Act 1925 (15 & 16 Geo 5 c 45) - which for the first time enacted that in approaching matters regarding the custody or upbringing of a child the first and paramount consideration was the welfare of the child (see section 85 (1)(a) of the Matrimonial Causes Act, Cap. 51) - afforded a putative father any right to apply for custody or other ancillary relief in respect of the illegitimate child. In other words the common law position described by Denning L.J. still obtained.

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But in 1928 things had begun to change. By the Administration of Justice Act (18 & 19 Geo 5 c 26), section 16, the father of a child was given the same rights already enjoyed by the mother under the 1886 Act. Then in 1959, following the decision in *re C.T. (an infant)*, already referred to, section 3 the Legitimacy Act (7 & 8 Eliz 2 c 73), extended the right to apply under the 1886 Act to a putative father. The position in England now is that the father of an illegitimate child has the same right to apply for its custody or for access to it or for other ancillary relief as has its natural mother.

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In my view, however, the position in Fiji is not at all the same as it is in England. In my opinion Part III of the Act merely reproduces the right, first conferred by the Bastardy Laws Amendment Act 1872, of a mother to claim maintenance from an adjudged putative father. The 1872 Act was never considered to confer any right on the father at all and it was only following the Guardianship of Minors Acts and their subsequent extension to the putative father by the Legitimacy Act that such a father came to have a right to apply for ancillary relief in respect of his illegitimate child. In Fiji there never has been a Guardianship of Infants Act and none of the rights embodied in those

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acts have ever been extended to putative fathers. Therefore, in my judgment, putative fathers do not have those rights under the Act. What rights do putative fathers in Fiji then have?

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First, under the Act the putative father may apply for the custody of the child if the conditions laid down by section 22 (1)(a) and (b) are satisfied.

Secondly, he may apply for the appointment of a custodian pursuant to the provisions of section 22 (2).

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Thirdly, he may invoke the provisions of the Juveniles Act (Cap. 56) (and here section 39 (2) of Cap. 56 may be noted in passing) and apply for a Care Order (see sections 40(b) and 41(1)) which will not however result in an order that custody be granted to him (see section 41 (4)). Finally, he may apply to the High Court for an order that the child may be made a Ward of Court (see RHC O.90).

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In my opinion the references within the Act, within the Juveniles Act and within the 1988 Decree referred to by Mr. Knight merely reflect the fact that in certain very limited circumstances a putative father may obtain custody of the illegitimate child. They do not, as I find, enlarge Part III of the Act to confer any parallel rights on the putative father. As has been seen from this brief review of the history of the legislation in England it has never been held that an order for custody automatically confers rights or duties relating to access or other ancillary relief. I find that a putative father has no right to apply for such orders under the Act.

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I find no grounds for according to Magistrates' Courts any inherent jurisdiction to make orders relating to children; Magistrates' Courts have always been held to have merely those powers which are specifically afforded to them by statute. As already stated I do not think that the Parties could by consent confer powers on a Magistrate which by law he did not have.

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In all these circumstances the Appeal succeeds and the whole order made by the Suva Magistrates' Court on 16th January 1990 is set aside.

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I wish to add a footnote. If my analysis of the law relating to illegitimate children and putative fathers in Fiji is correct then there is a major lacuna in the law relating to such children and fathers. Whether or not we approve of it, the fact is that an increasing number of children are born out of wedlock. Even though many of such children will be brought up within the extended family system some will not and given that illegitimate children need at least as much care as children of a marriage it would obviously be sensible for putative fathers to have some say in the way in which they are brought up and in suitable cases for them to enjoy access to them. In my view the Act needs to be amended to allow putative fathers approximately parallel rights to those already granted to mothers. It also needs to be expanded to include provisions similar

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to those contained in the Guardianship of Infants Acts so that ancillary relief can be applied for and granted. Magistrates' Courts already have extensive powers over legitimate children but where they are illegitimate not even the paramount interest of their welfare has been recognised by law. Why should the paramount interest of an illegitimate child be any different from that of a legitimate child? Wardship applications to the High Court are no effective substitute for a modernized law applicable to illegitimate children which should routinely be administered by the Magistrates' Courts.

*(Appeal allowed)*

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*(Appeal allowed)*

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