

IN THE FAMILY DIVISION OF THE MAGISTRATES' COURT AT SUVA

FILE NO. : 13/SUV/236

BETWEEN:

**PKL and MLL
Applicants**

A N D

**A J L and A M
Respondents**

APPEARANCES/REPRESENTATIONS

Ms. Narayan P. for the Applicants

The Respondent- Absent and unrepresented

JUDGMENT

Introduction

1. The Applicants who are the paternal grandparents of the child; SML born on 01st May 2011 [hereinafter “**the child**”] filed a Form 9 application on 14/05/2014 seeking orders, which I quote in verbatim as follows:-
 - I. That the Applicants as grandparents be joined as Applicants in this proceedings;
 - II. That custody of SML be granted to both the Applicants being the child’s paternal grandparents; and
 - III. That the Respondents have contact of the child namely SML born on 01st May 2011 as follows:

- (a) The first Friday of the month between the hours 10am to 5pm, the 2 children A and AN spend time with SML at the Applicant's residence. The children A and AN will be collected and dropped by the Applicants from the mother's residence;
 - (b) The third Friday of the month between the hours 10am to 5pm, SML accompanied by her nanny will spend time with her mother AM and her sisters A and AN. The Applicants will drop and collect SML from the mother AM's residence;
 - (c) SML be able to talk to her sisters on the phone at any reasonable time; and
 - (d) That the mother AM during the time of contact with SML maintains decent language.
2. The court record shows that the respondents were duly served and I note that on the 11th June 2013 both parties appeared before the Registrar/ Conciliator for Procedural hearing. I also note that the Registrar/ Conciliator granted time to the Respondents to file their Form 10 and also granted an interim order by consent which stated inter alia that the child shall continue to reside with the applicants with the contact to the respondents and the respondents given contact to the child.
3. I also note that the Respondents failed to file Form 10 response and failed to appear before the court as well.

The Evidence

The Applicants

4. The Applicant relied on his Form 9 Application for Final Orders.
5. Both the applicants PHKL and MLL of 00 Knolly Street, Suva testified in court and the second applicant also filed an affidavit dated 6-05-14. I will consider both of the applicant's evidence together. They stated in their evidence that;
6. Both of them were married in 1997 and have been living in Fiji and they have two children namely NL born on 23 January 1985 and AJ born on 25 September 1986. Both the children are adults and have children of their own. AU has 4 children including the second Respondent. They are A aged 5 years, SML aged 3 years, AN 1 year and 7 months and C 7 months.
7. AU and AM were living with AM's father at Flagstaff with A when AM was carrying SML. Medical expenses were paid by the applicants on the birth of SML as the first respondent was struggling financially since 2010. It became difficult for him to meet with his family expenses.
8. AU (first Respondent) began calling the applicants for monies to pay for the children's milk and diapers almost every week. The demands for financial assistance increased to SML's birth.
9. On 14th August 2011, the Respondent said they wanted Applicants to look after SML as they were unable to do so.

10. Both applicants agreed to look after SML on the condition that AU and AM visited SML on a weekly basis at their home in Suva and they bring the older child home so that the siblings could bond.
11. However once we had SML in their possession, they continued to ask for financial assistance for A. AM and AU did not visit SML as promised.
12. Both applicants looked after SML on their own as their own child feeding her, changing the diapers, taking her walks and spending and developing the child.
13. Over a period of time, it became apparent to them that AU and AM's personal issues began to affect SML. Every time they had differences or difficulties, one of them usually AM would ask to see SML. The applicant's noticed the patterned and did not want SML to be embroiled in their personal difference.
14. On 30 April 2013, AU served applicants with the interim parenting agreement to say that SML is to be dropped off at AM's place on Saturday at 9am and picked up at 5pm.
15. After that nothing materialized to put any constructive semblance of AM and AU role in SML's life.
16. Further, the applicants stated that they have a 3 bedroom home. SML has her own room. As she grows she will need her own space and that has been planned for.
17. The first applicant works with the Fijian Teacher's Association and earns annual salary of \$40,000.00. He earns \$700.00 per week. Both the applicants have been taking care of SML's expenses and needs since she has been in their care.
18. Furthermore the applicants stated that they seek custody of the child SML with contact to be defined on the respondents and also seek leave of the Court to take SML out of Fiji when they travel out of Fiji for holidays.
19. They have had custody of the child since August 2011 and the child has lived with the applicants since then.
20. Both applicants stated that the Respondents have not made any contribution to the needs of the child.

The Respondent

21. The Respondent failed to appear for the Hearing.

The Law and the Determination

22. Part VI of the **Family Law Act 2003** [hereinafter "**the Act**"] deals with Children wherein the object of the Part is stated at section 41 and provides as follows:

(1) The objects of this Part are:-

(a) to ensure that children receive adequate and proper parenting to help them achieve their full potential: and

(b) to ensure that parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests-

(a) Children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together;

(b) Children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development;

(c) Parents share duties and responsibilities concerning the care, welfare and development of their children; and

(d) Parents should agree about the future parenting of their children.

23. At Section 120 and 121 of Division 10, part VI of the Act, provision is made for how the court is to determine the best interest of a child as follows:-

120.-(1) This subdivision applies to any proceedings under this Part in which the best interests of a child are the paramount consideration.

(2) This Subdivision also applies to proceedings, in relation to a child; to which section 60(6) applies.

How a court determines what is in a child's best interests.

121- (1) Subject to subsection (3), in determining what is in the child's best interests, the court may 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 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:-*
 - (i) 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;*
 - (iii) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;*
 - (iv) any family violence involving the child or a member of the child's family;*
 - (v) any family violence order that applies to a child or a member of the child's family;*
 - (vi) any other fact or circumstances that the court thinks is relevant.*

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2). [Emphasis added]

Brief Analysis

- 24. The Applicants seek residence of the child with the Respondents are to have contact with the child.
- 25. The Applicants informed the court that the child received to their custody since 14 August 2011, when the child was almost 3 months and 2 weeks of age.
- 26. The applicants also stated that since the child has been in their custody, the Respondents have rarely called to speak to the child via telephone or visit her, despite of the interim Residence and Contact order granted by the Court.
- 27. The Respondents had not made any contact during special occasions such as the child's birthdays and Easter or Christmas holidays as submitted by the applicants.

28. They stated that the Respondent has not willing made any contribution whatsoever to the welfare and wellbeing of the child.
29. As discussed above Section 121 deals with the various considerations that the court must consider the “best interest of the child”. The evidence of the Applicants which tendered into evidence demonstrates the Applicants’ intentions of being grandparents who is concerned about the wholesome development of the child.
30. Due to the absence of the Respondents during the Hearing, the evidence of the Applicant has not been contested and not challenged.
31. Section 121(2)(c) allows the court to consider the effect of any changes in the Child’s circumstances including any separation from either of the parents.
32. The child in the present case has been living with the Applicants and not with her biological parents since August 2011. It is noted that for the past 2 ½ years, the child has only been surrounded by her paternal grandparents and paternal relatives. Considering the evidence adduced in court it is suggest that the Respondents have failed to keep in contact with the child despite the development of technology.
33. Section 121(1)(b) of the Act also allows the court to consider the nature of the Child’s relationship with each of the parties to the current proceedings.
34. Section 121(1)(g) of the Act allows the court to take into consideration the attitude to the child and the responsibilities of parenthood demonstrated by each of the child’s parents. In this matter it is extended to the grandparents as well. To this end, the Applicants have taken responsibility of the child.
35. The Applicants in their evidence in chief stated that the Respondents very rarely utilised the contact granted to them by the court by virtue of the Interim Order. Furthermore, the Applicant stated on oath that the Respondents have never willingly contributed to the welfare and wellbeing of the child which suggest the attitude that the Respondents have towards their duties as a parents to the child. Accordingly, it appears for the reasons articulated above that the Applicants who have been the constant, consistent and primary care giver of the child.
36. During the hearing, I have observed the child and noted she shares a close bond with the grandparents as I did not interview the child as she is given her age and she is still not old enough to express her preference on the subject.
37. I have considered the report submitted by the Social Welfare Officer dated 25/2/14. The contents of the report inter alia outlines that the Social Welfare Officer was unable to obtain information from the Respondents on their given address as efforts to locate the Respondents were futile. The Social Welfare Officer also observed a close bond the child shows with the Applicants.
38. When considering this application I bear in mind relevant provisions of section 41, 120, 121 and 122 of the Act, it is concluded that it is in the best Interest of the child that residence of the child. In addition to that in reaching the decision relating to the residence of the child, , the court also considered, amongst others that;

- a) Social Welfare Officer's report
- b) Interim orders which was delivered on the 11/6/13.
- c) Her physical, emotional and educational needs;
- d) The likely effect on hereof any change in her circumstances;
- e) Her age, sex, background and other characteristics of which the court considered relevant;
- f) How capable each of her parents, in particular he farther and any other person in relation to whom the court considered the question to be relevant, is of meeting he needs;

39. In light of the above discussed and considering the entire evidence, the relevant law and the and most importantly the best interest of the child I find the Applicants are capable and can provide for the needs of the child, including emotional and intellectual needs and therefore is the best person to have Residence and take care of the child.

41. The Court also, wishes to highlight that as the Applicants also wishes, that the child should be bonded with her biological parents and her siblings.

ORDERS

40. Accordingly, the Applicants shall have Residence of the child namely; SML born on 01st May 2011.

41. The Respondents shall have reasonable contact and both parties to mutually arrange the place and time of contact. The respondents are also allowed to have open contact via telephone or Skype or any other mode of communication or upon mutually agreed by both parties.

42. The applicants may be taken the said child, namely SML out of the jurisdiction of this Court for vacations and other travelling purposes. But should the child removed from the jurisdiction of this court for migration purposes it would be by consent of both the Applicants and the Respondents, or by a way of a Court order.

43. Biological parents of the child are at liberty to fill for variation of Residence and Contact of the child.

44. The order to be served on the Respondents by the Applicants within 21 days and the Affidavit of Service to be filed in the Registry.

45. Right of Appeal – 30 days.

LAKSHIKA FERNANDO (MS)

RESIDENT MAGISTRATE

DATED AT SUVA on this 29th day of May 2014.