

**IN THE FAMILY DIVISION OF THE MAGISTRATE'S COURT AT SUVA**

**FILE NO.: Maintenance 162/SUV/0427**

**BETWEEN**

SW  
**Applicant**

**A N D**

ABS  
**Respondent**

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**APPEARANCES/REPRESENTATIONS**

Ms. Nabainivalu A. (LAC) for the Applicant

The Respondents – Present in Person

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## **JUDGEMENT**

1. The Applicant is the mother filed a Form 9 Application on the 11<sup>th</sup> August 2016, seeking orders, which I quote in verbatim as follows:-
  - a. “That I seek full residence of our child, KVD, a male child born on 24<sup>th</sup> of June 2009.
  - b. That I be granted contact orders to our eldest child, namely ILD, a male child born 09<sup>th</sup> of September 2016.
  - c. Any other orders the court deems fit.”
2. In response the Respondent who is the father of the children filed Form10 on 12<sup>th</sup> September 2016, seeking full residence of both the children and Applicant be given a reasonable access.
3. On the 24<sup>th</sup> of August 2016, an Interim Order was made and I considered the same.
4. The Social Welfare Report has been provided to the Court. The Director Counsellor also furnished a report upon interviewing the children.
5. The Court also interviewed the children.

## **ISSUE**

6. Residence and Contact of the children.

## **THE EVIDENCE**

7. I will not reiterate the entire evidence on the court but reference would only be made to the relevance of evidence to the present application and for analysis purpose. Also I wish to emphasis some portion of evidence with intention of analyzing the same potions later without reproducing the same.
8. I also perused the Social Home Environment report and considered the contents carefully.

## **THE LAW AND THE DETERMINATION**

9. 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.
10. 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** is 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]

## **EVIDENCE AND ANALYSIS**

11. According to the above paragraph that the Section 121 deals with the various considerations that the court must consider when determining the "best interest of the child". Section 121(2) (a) allows the court to consider 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; In this matter the children are matured enough to express their wishes and the Court considered their expressed wishes. But their wishes are not the determinative factor.
12. The object of 'Resident and Contact' is to enable the parent and child to keep in touch with each other by allowing periodically visits at specified times to avoid potential conflicts.

13. Section 121(2) allows the court to consider the effect of any changes in the Child's circumstances including any separation from either of the parents and The nature of the relationship of the child with each of the child's parents and with other persons:
14. Applicant and Respondent got married in October 2008 and separated 2-3 years ago. According to the Applicant they had lot of issues in their marriage including domestic violence. Until August 2016, the younger child was with the mother and since then both the children have been residing with the father.
15. The father has residence of the children with weekend contact to the mother by the Interim Order dated 24 August 2016.
16. The children are currently living with their father and step mother in Raiwaqa also with his siblings and mother. The Children attend John Wesley Primary School. Their father drop and picks them from school.
17. The children have close relationship with their step mother as well.
18. The children stay with their father since **separation** surrounded by paternal relatives excluding mother's weekend contact. Applicant confirmed in her evidence that she is separated for 2- 3 **years**.
19. I quote the Applicant's evidence *"He took the younger child in Aug.2016.At that time child was not schooling. I was in Colabu with another man. Child was with my parents. When I got my salary I visited the child at my parents ...."*
20. The Applicant stance has been that she seeks the residence of KVD and seeks contact of ILD.
21. A further important point to be noted about the sec 41(2) (b) of Family Law Act inter alia that) "children have a right of contact, on a regular basis, with both their parents". And their education and the daily routings should not interrupt. Also this Court also of the view that both the children already been bonded with each other and it is not for the best interest of the children to separate from each other. This Court needs to consider practical solution considering all the circumstances of the case not forgetting that the children are schooling.
22. Sec 41.- (1) of FLA reads 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.

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

(4)

(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. It is immediately apparent that, in the light of child's right, no longer to speak of only parents' rights. **Neither the father nor the mother has an absolute right to have the residence of the children.** Because, whatever his or her wishes may be, children have the right to know and be cared for by both their parents.
24. It will be seen that this provision is very much wider than the above mentioned Sections about parents' rights to be bonded with their children, because it applies not merely to parents, but also to "the children".
25. According to the Interim order mother spends weekend with the children from the date of the said Order.
26. The Court cannot justify change the orders dramatically granting the residence of the children to the mother. The children also expressed their desire to reside with their father to the Social Welfare Officer and it is reflected in the report. This Court also obtained the wishes of the children.
27. The capacity of each parent, or of any other person, to provide for the needs of the children, including emotional and intellectual needs;
28. The Respondent caters for financial needs for the children. The mother is currently unemployed.
29. There is a necessity to consider the likely effect of any changes in the children's circumstances, including the likely effect on the child of any separation from –either of his or her parents: or any other child, or other person, with whom the children has been living:
30. The Applicant states that the Respondent does not comply with the Interim Order at times.
31. The Court considers all the factors in s.121 as a whole.
32. The Court also considered the practical difficulty and expense of a children 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;

the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs; 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; the need to protect the child from physical or psychological harm caused, or that may be caused by:- being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect another person; the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

33. The aforementioned Social Welfare Report recommends that the children to remain with the respondent and children to spend the school holidays with the applicant. The child was interviewed and the home in which she lives was inspected. This report was not challenged. In the report, the Welfare Report favours current status quo which is that children continue to reside with the father with access to the mother.
34. Apparently, due to children's tender age, any drastic change in the status quo may be detrimental therefore any change must be gradual to allow them to adapt at their ages.
35. As noted children are residing with the father. Their intellectual, Development and welfare is being looked after unchallenged.
36. There is no any alleged abuse against the Respondent. But there are allegations of abuse against the mother yet to determine by Form 15.
37. It was evident during the hearing of this application that adults dwelled on past differences and personal attacks thereby were distracted from what is best for children's development and wellbeing. The applicant alleges previous domestic violence and he is alcoholic. The father also alleges mother is alcoholic and abused the children.
38. The Court conclude that the children are bonded with the father and his relatives and it is for the best interest of the children should the court allow the children to continue their residence with them with reasonable contact to the biological mother.
39. The Court does not wish to separate 2 children.
40. I agree with the recommendation of the Social Welfare Department as it is also the view of the Court. It is no doubt that the mother must be allowed the opportunity to bond with her children with better access that will not hinder her from performing her role imposed by law must be put in place. This will also be in children's best interest. Therefore, I confirm the interim Order as a final Order with some amendments.
41. I invite both parents to put their children's best interest first and focus on their future wellbeing rather than lingering in the past conflicts and continue their lives without disputes.

## **ORDERS**

- a. The Respondent/Man shall have residence of the children namely, ILD, a male child born 09 August 2007 and KVD, a male child born on 24 June 2009.
- b. The Applicant/Lady shall have contact to the children from 4 pm on Friday till 5 pm on Sunday.
- c. Place of exchange is father's current residence. Mother shall pick and drop children on her expense.
- d. The parties' whilst the children are with either party, the other parent is may telephone contact between 7 am and 8pm except that there is an emergency.
- e. Both parents shall supervise the children while the children are with them.
- f. The current residence of the children, school shall be not changed without consent of the mother/ Court Order.
- g. That for school holidays, the children will spend alternative weeks with each parent starting from the first week with the Applicant/Lady.
- h. The Respondent/lady will take the children to her residence for the weekend contact.
- i. The medical issues, each party shall advice the other at the first available opportunity in the event that the child requires medical attention or hospitalization while the child is in that parties care and if the children are sick both parties are to communicate with each other and attend to the children's needs mutually.
- j. Each party shall keep the co-parent, advised of a current home address, telephone numbers (including cellular phone numbers), email addresses, and other addresses at which electronic contact may be made, and advice the other party within 7 days whenever a change is made or may occur.

## **CONCLUDING REMARKS;**

42. Making decisions about where children will live is one of the most difficult tasks of separation/ divorce. The prospect of no longer being with the children *all* the time is bad enough. The fears – and the conflicts that can stem from them – often are compounded by traditional legal language: One parent wins Residence, while the loser gets only "visitation" with his own child. In order to avoid this, whenever possible, this court would like to take the approach of joint Residence.



43. Good parenting is not a contest. Parents can take a different, more child-friendly approach to comply with the court orders. I prefer to think about this challenging task as devising a (*parenting plan*) *order that* spells out a clear, specific schedule for child as well as guidelines for each parent's co-parenting responsibilities and role in decision making. The court and the parties need to recognize several key issues.
44. There is *no* single ideal schedule for joint physical residence all of these arrangements can work, or none of them can. Making the orders work depends upon you, the other party, and **your co-parenting relationship.**
45. Neither Magistrate nor the Registrar possesses mysterious tests. That was the reason, the Registrar encouraged you to consider the best approach by a way of a settlement/ consent orders, the parents, are in the best position, by far, to make these decisions. And you did not agree, you tried again but in futile.
46. I advise both the parties to be flexible when necessary by consent, make some compromises, and comply with the orders. Remember: This is about your *responsibilities* as a parent, not your "rights."
47. View time with your child in terms months and years not just hours, days and weeks. Your parenting responsibilities can be a "living agreement," one that you are likely to alter as your children grows older and your family circumstances change. After all, what you decide for a 7 year old may not be best for the child when the child is 13 or 15. And you probably want to experiment with your ideas about a schedule a bit now. Why? So you can see how your child reacts to a schedule instead of guessing what will or won't work. If you are willing to experiment a bit, you can make changes as needed to create an even better schedule for your child with an application for variation of the order.
48. Different schedules work better for children of different ages. In general, younger children benefit from having more of a "home base." School aged children can manage more complicated schedules – as long as the parents can help them negotiate the complications. And you need to consider a third schedule for teenagers considering their wishes too.
49. Parties to bear their own costs.

30 days to appeal.

**LAKSHIKA FERNANDO**

**RESIDENT MAGISTRATE**

**On this 28th day of July 2017**