

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Matrimonial Case No. 04 of 2013

BETWEEN: YUKA DALLEY
Petitioner

AND: PAUL DALLEY
Respondent

Coram: Justice Aru

Counsel: Mr. C. Leo for the Petitioner
Mr. Paul Dalley Respondent in person

REASONS FOR DECISION

Introduction

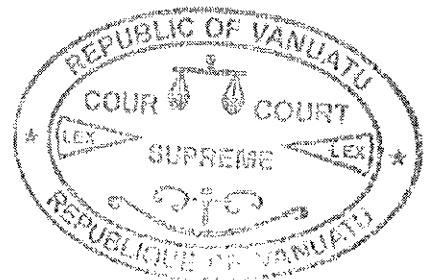
1. These are my reasons for making the orders dated 25 May 2016 for the custody of the two children of the marriage namely Acqua and Air Dalley. The orders were as follows:-

"ORDERS

Upon Hearing the parties in relation to the Application for custody of the children of the marriage namely Aqua and Air Dalley;

AND UPON considering the papers filed;

IT IS ORDERED as follows:-



"1. Custody, care and control of the child Aqua Dalley

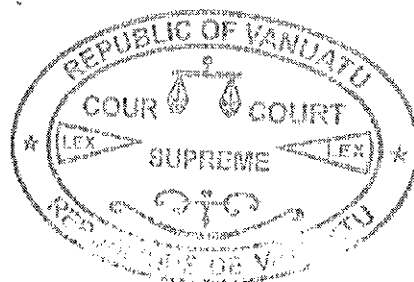
- (a) That the custody of the child Aqua Dalley is granted to her mother, the Petitioner.
- (b) That the child Aqua Dalley shall be under the care and control of her mother.
- (c) The Respondent, father will have access to his daughter to be mutually agreed and arranged by the parties under supervision of an independent party who has the skills to assess parent-child problems .

2. Custody, care and control of the child Air Dalley

- (a) That the custody of the child Air Dalley is granted to his father, the Respondent.
- (b) That the child Air Dalley shall be under the care and control of his father.
- (c) That the Petitioner, mother will have access to her son to be mutually agreed and arranged by the parties.

3. Reasons to be given."

2. Prior to the issuing of the above orders, interim custody was granted to the petitioner with access to the respondent. The issue of custody arises out of the separation of the petitioner and the respondent. Following the grant of divorce orders, Mrs. Patterson then acting for the petitioner filed a Final Application Under Petition (Final Application) where she seeks a number of orders one of which is for the custody of the two children of the marriage. The order sought is:-



"2. The sole custody of the children of the marriage namely Air Calm Dalley and Acqua Serene Dalley with reasonable access to the respondent under supervision of an independent party who has skills to assess parents – children problems."

3. As there is so much animosity between the parties I have only dealt with the issue of custody under the Final Application. Other orders sought are yet to be determined. The grounds to support the grant of custody orders are:-

"...

3. The court has already given interim custody orders of the child Aqua Serene Dalley on 18.12.13 and of the child Air Calm Dalley on 8.10.14 to the petitioner until further orders of the court.

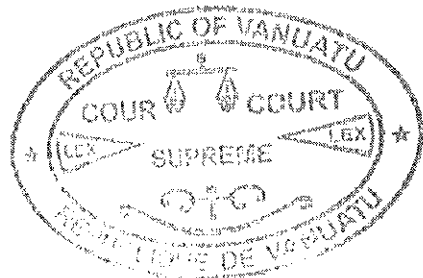
4. The two children of the marriage are very young in age and are more secure and taken care of by the Petitioner. Further grounds would be outlined in the statement of the petitioner in support of this Application.

...."

4. The respondent on the other hand does not object to the petitioner being given custody of the girl, Aqua Dalley as long as he has custody of his son, Air Dalley. That is where the parties cannot agree as the petitioner wants custody of both children.

Background

5. In preparing for the custody hearing, the parties were given time to file their sworn statements. At this time Ms. Kayleen Tavoia was acting for the respondent. When the matter was ready to be heard, at a conference on 28 July 2015 Mrs. Patterson objected to all the sworn statements filed by the respondent on the grounds of hearsay and opinion evidence. Ms. Tavoia conceded to the objections

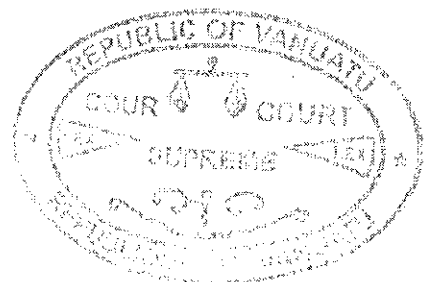


and sought more time to prepare further sworn statements. The hearing was then adjourned to 1 to 2 October.

6. Before the hearing begun, Ms. Tavoia informed the Court that she will be relying on the sworn statements of Tony Deamer, Leah Kelven, and Bob Wylie filed two days before the hearing date. Mrs. Patterson again objected to the use of these sworn statements due to their late filing and also on the grounds that they are similar sworn statements previously objected to on the grounds of hearsay and opinion evidence. Ms. Tavoia again conceded to the objection. The hearing then proceeded with the petitioner calling her witnesses for cross examination by the respondent. The evidence in support of the petitioner's case were tendered and marked as Exhibits "P1" – "P19". At the closing of the evidence the parties were then heard on their submissions. The petitioner filed her submissions on 30 September 2015. Submissions in response were filed by the respondent on 2 October 2015.

7. Before a decision was made the respondent appearing in person applied to re-open the proceedings. I granted the application on 11 November 2015 after hearing the parties and ordered the respondent to file and serve his further evidence. The rehearing was on 17 May 2016. At that stage Mrs. Patterson had filed a notice of ceasing to act and Mr. Colin Leo begun acting for the petitioner.

8. After that hearing I issued the orders for custody on 25 May 2016 with reasons to be given. Soon thereafter, the petitioner made an urgent application to stay those orders on the grounds that the respondent was taking Air Dalley to Papua New Guinea. Having heard the parties on the application I dismissed it on 13 June 2016 with reasons given.



Applicable law

9. The starting point when considering issues of custody is section 15 of the Matrimonial Causes Act [CAP 192]. It states:-

"15. Custody and maintenance of children

(1) *In any proceedings for divorce or nullity of marriage the Court may, from time to time, either before or after the final decree, make such provision **as appears just** with respect to the custody, maintenance and education of the children of the marriage.*

(2) *For the purpose of this Act the expression "children of the marriage" shall include any child of one party of the marriage (including any illegitimate or adopted child) who has been accepted as one of the family by the other party."*

(emphasis added)

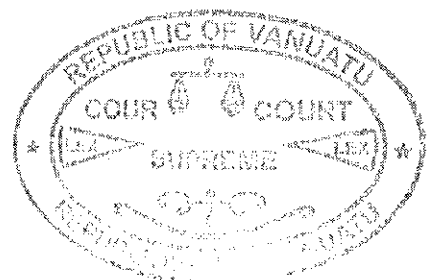
10. The Act gives the Court discretion after the final decree is issued to make such provision as appears just with respect to custody of the children of the marriage. The paramount consideration in that exercise is also the application of Article 3 (1) of the Convention on rights of the child which has been ratified by Vanuatu and states:-

"Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

....."

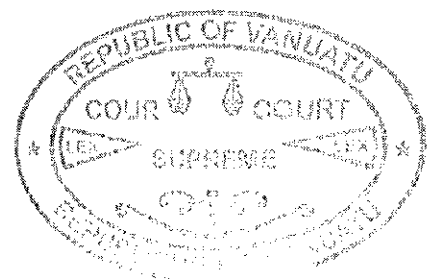
11. In **Molu v Molu No2** [1998] VUSC 15 the Court said:-



"This Article 3(1) is enforceable by the Courts and no specific legislation is required to implement it as opposed to other Articles of the said Convention.

In any proceedings before the courts for the legal custody or upbringing of a child, or the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, the Court must regard the welfare of the child as the first and paramount consideration and not the punishment of the guilty spouse/parent. This means that, in such proceedings, the Court shall not take into consideration whether from any other point of view the claim of the father, in respect of such legal custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father. Importantly, thus, in dealing with such matters, the Court, before reaching a decision which is necessary for the well-being of the child, must take into account the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for or recognised by local custom of a village or island of the country, which is not inconsistent with the Vanuatu Constitution of 1980. That balancing exercise ought to be done in a manner consistent with the evolving capacities of the child so that the best interest of the child shall always prevail in a particular given case.

The terms "custody", "care and control" of the child are not defined by the Matrimonial Causes Act CAP 192. In order to understand the meaning and the intent of the Order of this Court, it is important to note that "custody", in the legal sense, means the parental rights and duties as related to the person of the child (including the place and manner in which the child's time spent). This covers such rights and duties as the rights to the child's physical possession, protect and educate the child. The terms "care and control" is used in the case where a person is given the right to the child's physical possession."



12. The same principles were again echoed in **Michel v Michel & Toagase** [2001] VUSC 71 where the Court stated that:-

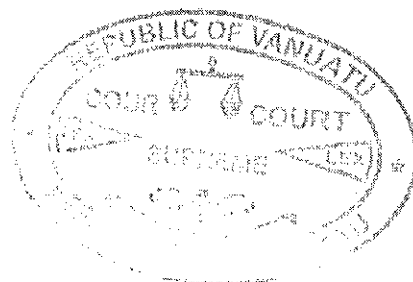
"It has been a well-established principle of law in cases where custody is in dispute; the welfare of the children is a paramount consideration when Court decide who should have custody of the children (referred to as "Welfare Principle"). In doing so, the always have regard to the fact that children need access to both parents as both have equal right to custody of the children.

This Court has adopted this principle and must determine custody of the two children base on the principle. It is fundamental that Court, although do not ignore what the parents wants, where practicable it must not ignore what is good for the children. There are general questions of consideration, which the Court must consider when determining custody of the children base on the welfare principle. They are as follows:

- (i) *Which parent will best look after the child or children?*
- (ii) *Which parent will best be able to make the child happy in a difficult situation?*
- (iii) *Which parent will cope best with running a single parent family?*
- (iv) *Which parent will provide access without conflict?*

In addition, the Court will also consider:

- (i) *the age and sex of the children,*
- (ii) *the children's feelings and wishes,*
- (iii) *the financial means of the parties,*
- (iv) *the conduct and behaviour of the parties, and*
- (v) *the hostility of the parties."*



13. The principles applied in the above cases equally apply to this case and I adopt them. The parties have referred to numerous cases from other jurisdictions which are persuasive, I apply and adopt what this Court has said in so far as custody is concerned.

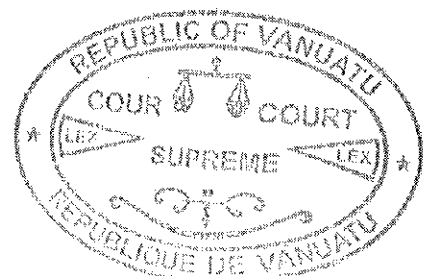
Evidence for the petitioner

14. Patricia Gavotto's evidence in chief was tendered and marked as **exhibits "P1"** to **"P4"** her evidence in brief is that she is a psychologist and has observed the girl Aqua Dalley and concludes that she may have been exposed to sexual abuse whilst with the respondent therefore she strongly recommended that Aqua remains with her mother. With Air Dalley, the area of concern was the irregular visits by the respondent has led to changes in his mood and she recommended also that he remain with the petitioner. She was cross examined on her evidence.

15. Viska Muluane's evidence in chief was tendered and marked as **exhibit "P5"**. Her evidence in brief is that she was in charge of arranging visits with the petitioner for Air Dalley to visit the respondent and he would harass her during these times. She was cross examined on her evidence.

16. Annette Nagof's evidence in chief was tendered and marked as **exhibit "P6"**. Her evidence is that (during the time when exchanges of the two children were done in the presence of a Police officer) the respondent told her that he had masturbated on one occasion and the girl child Aqua Dalley saw him. Under cross examination, she said she knew the respondent because she investigated him for assaulting his wife and seeking custody of the children.

17. Willie Pakoa's evidence in chief was tendered and marked as **exhibit "P7"**. His evidence is that he is an investigator and was hired to investigate and see whether the respondent could take care of his son. His finding was that Air Dalley was not safe with the respondent as the child is always taken care of by a house



girl. Under cross examination he said that his investigation was to see who was the right parent to look after the children by interviewing other people and using undercover agents to provide information but not the respondent directly.

18. The petitioner's evidence in chief was tendered and marked as **exhibits "P8" to "P18"**. Her evidence in brief is that as the mother of the two children, she can look after them better than the respondent who has had extra marital affairs, is addicted to pornography and is an aggressive and violent man who has not only assaulted her but threatened her as well. Under cross examination she denied that the respondent was capable of looking after Air Dalley.

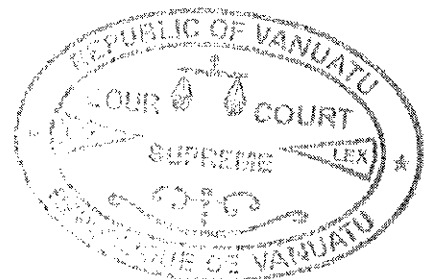
19. Yasuda Thoside's evidence in chief was tendered and marked as **exhibit "P19"**. His evidence in brief is that he provides financial support to the petitioner and the children who have moved into his house and are living with him as the respondent has refused to maintain them. He was also cross examined on his evidence.

Evidence for the respondent

20. The respondent appeared for himself in applying for the matter to be re opened and continues to be self-represented. His witnesses were not required for cross examination by Mr. Leo who by now had begun acting for the Petitioner after Mrs. Patterson had filed a notice of ceasing to act.

21. The respondent filed his submissions on 10 May 2016 with his sworn statement. He relies on his sworn statement filed on 9 December 2015 which was amended and filed on 10 May 2016 in support of his application to be granted custody of Air Dalley.

22. The respondent's evidence is that he is now a baptized Seventh Day Adventist with a stable employment as a missionary pilot with good benefits and will be



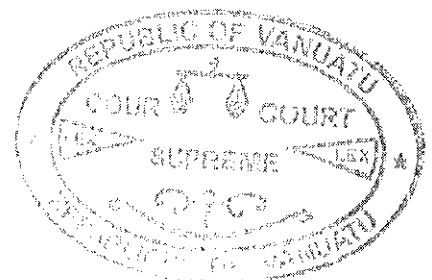
marrying Leah Kelven who has been a long term care giver for the children. That he has provided a written offer of custodial settlement to Mr. Leo on behalf of the petitioner with no response. He relies on the observations made by Dr Obed Jimmy of the Vila Central Hospital.

23. Leah Kelven's evidence in chief was also filed on 10 May 2016. Her evidence in brief is that she is also a baptized Seventh Day Adventist and has agreed to marry the Respondent. She says that since January 2010 she has helped care for Aqua Dalley and Air Dalley since July 2013. She has agreed to follow the Respondent to take up his new employment in Papua New-Guinea and is willing to take Air Dalley to see his mother the petitioner during holidays. She says that she has been the care giver of the children over the years and she gets on well with the Petitioner.

24. Dr. Jimmy Obed's evidence in chief was also filed on 10 May 2016. His evidence in brief is that he is a qualified psychiatrist with over 6 years experience and is practicing at the Vila Central Hospital. He says he has observed Air Dalley and his father and found no adverse behavior between them.

Discussion

25. The gist of Mrs. Patterson's submissions for the petitioner is that the best interest of both children is for her to continue to have custody of both children given that they are young and she is the primary care giver. She submits that there can be supervised visits by the respondent and the matter can be brought back to Court on application of either party. Similarly, Mr. Leo when the matter was re-opened made oral submission's that the children are with the petitioner and there is no evidence to show that they are being ill treated. He submits that the totality of the evidence does not show that the respondent should have custody of Air Dalley. In response to the respondent's reference to authorities from other jurisdictions, Mr. Leo submits that the starting point must be the laws of Vanuatu.



26. I was referred to section 15 of the Matrimonial Causes Act as set out above, Article 3(1) of the Conventions on rights of the child and what the Court said in Molu v Molu.

27. The respondent on the other hand submits that he is a baptized Seventh Day Adventist and Leah Kelven who is also of the same faith and has been a long time carer of the children has agreed to marry him. That he has a new contract of employment signed with Adventist Aviation Services (see Annexure H to his amended sworn statement) with very good benefits being:-

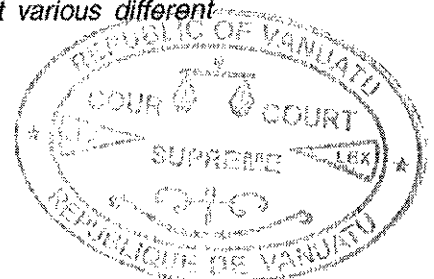
- Financial means – US\$3000 per month salary increasing to US\$4000 with overtime
- Housing supplied
- Medical and insurance care provided
- Travel allowances
- Insurance

28. He submits that with his new employment he will be able to take good care of Air Dalley. Furthermore he submits that his son loves being with him and relies on what Dr. Jimmy Obed, the Senior Psychiatry Registrar at the Vila Central Hospital said after observing them together. In his brief report dated 9 May 2016 Dr. Obed stated as follows:-

"09 May 2016

Mr. Air Cam Dalley, DOB: 3/06/2012, UN#130600

Air Cam Dalley is a 3 year old boy going on 4 who is the youngest of two sibling is allowed to as. Given the restricted time he is allowed to be around his father, Paul Warwick Dalley and carer Leah Kelven, I had the opportunity to observe him with his father and carer at various different



situations, including social gatherings with children of his age, supermarket and airport.

He is a young boy who is very affectionate towards his father. He is found to be smart, active and intellectual for his age. During my observations of him, he is developmentally appropriate for his age and well mannered. He engages well socially and in activities with other children of his age. There was no distress seen in his interactions with his peers or with his father and carer. This is as a result of the love, affection and attention given to him by his father and carer.

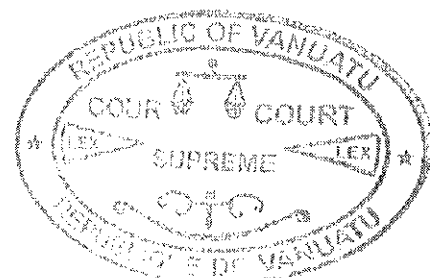
Based on my observations thus far, there is no adverse behavior found between Mr. Air Cam Dalley and his father.

(sign)

Dr OBED Jimmy (MBBS, Post graduate Dip. Mental Health – FNU
Senior Psychiatry Registrar
Vila Central Hospital "

29. The respondent finally submits that because of the animosity between him and the petitioner by giving custody of one child to each parent would ensure that both children remain accessible to both parents all the time and fears that if full custody of both children are given to the petitioner he may never get to see them again once they are taken to Japan as the petitioner is now living with Mr. Yasuda who is also from Japan.

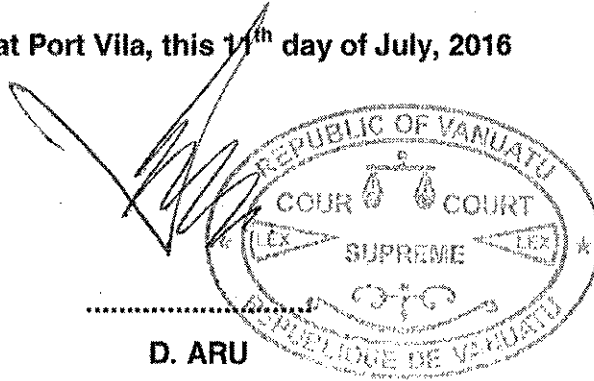
30. I am satisfied that the respondent has all the best intentions for his son Air Dalley. He has demonstrated that he has a new job with good benefits to be able to take good care of Air Dalley and by marrying Leah Kelven who has been a long time care giver to the children the respondent will be able to provide a stable, safe home for his son.



31. As for the girl child Aqua Dalley the respondent does not oppose custody being granted to the petitioner. Taking into consideration the evidence of Patricia Gavoto in respect of Aqua Dalley, any rights of access by the respondent will be with conditions.

32. Having considered the law and the evidence, these are my reasons for making the custody orders of 25 May 2016.

DATED at Port Vila, this 11th day of July, 2016



D. ARU
Judge