IN THE FAMILY DIVISION OF THE HIGH COURT

AT SUVA

CASE NUMBER:	07/SAV/0037
BETWEEN:	SAVERANI
	APPELLANT
AND:	BETI
	RESPONDENT
Appearances:	Mr. G. O' Driscoll for the Appellant. Ms. M. Rakai for the Respondent.
Date/Place of judgment:	Wednesday, 29th December, 2010 at Suva.
Judgment of:	The Hon. Justice Anjala Wati.
Category:	*All identifying information in this judgment has been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.*

JUDGMENT OF THE COURT

Catchwords

APPEAL - PARENTING ORDERS- APPLICATION FOR VARIATION-Trial Magistrate ordered that the father must have residence of the two children of the marriage-initial orders gave joint residence to the parents-aggrieved at the decision the mother appealed on the ground that the children's wishes were not taken into account, the social welfare reports not made available before the verdict of the court and that the children' s best interest factors were not considered by the court-what constitutes best interest factors discussed- also discussed was the means of ascertaining children's wishes-the legislative provisions on social welfare report discussed- the need for a social welfare report in the matter based on the facts of the case also discussed-appeal allowed-matter sent back for re-trial before another Magistrate-no order for costs.

Legislation

Family Law Act No.18 of 2003.

Cases/Texts

In the Marriage of Rice and Asplund [1979) F.L.C. 90-725.

Dickey, A, "Family Law" 4th Edition (2002) Lawbook Co; Sydney.

The Appeal

1. The mother filed an appeal against an order of the trial Magistrate where his worship had on the 15th day of February, 2010, after a defended hearing, varied the order where both parents had joint residence of the children and made residence orders in respect of two children of the marriage in favour of the father. Further order was made that the mother was to have contact of the children during the entire summer holidays and that the father was to pay the airfare of the children.

The Grounds of Appeal

2. There are 5 grounds of Appeal and they are:-

   a. That the learned Magistrate erred in law and in fact in failing to adhere to his orders of 17th day of November, 2009.

   b. That the learned Magistrate erred in law and in fact in failing to call for a welfare officer's report for the children before making a decision as to their residency.

   c. That the learned Magistrate erred in law and in fact in failing to allow the Social Welfare Officer time to compile the report.

   d. That the learned Magistrate erred in law and in fact in failing to interview the children in order to establish their wishes rather than basing his decision on the evidence of the respondent father.

   e. That the learned Magistrate failed to take into consideration all relevant factors in determining the best interests of the children.

Orders Sought by Appellant

3. The appellant seeks an order that the new parenting orders be set aside. In his submission Mr. Gavin O'Driscoll also asked for an order for re-trial.

The Parties/ Case Background

4. The parties were married in 2000. They separated in June, 2006. In 2007 the parties had their marriage dissolved. A conditional order was granted to become final after one month from the date of the order. On this date a further order was made that both parents were to have joint residence of the children. The order was made on an application for dissolution of marriage.

5. The parties have two children of the marriage first child, a male, born in 2002 and second child, also a male, born in 2004.

6. The mother lives in Town D and the father lives overseas.

7. The children were living with the mother and schooling in Town D when the trial Magistrate had ordered that their residence be awarded to the father.

8. The application for variation of the residence order was filed by the father. The mother is the ·appellant and the father is the respondent. For convenience sake I shall refer the parties as "mother" and "father".

Appellants Submission

9. The appellant has dealt with grounds 1 to 3 together. The counsel for the appellant submitted that on the 17th day of November, 2009 the court had ordered a social welfare report and made a further order that the full hearing of the custody application be done after receipt of the social welfare report. There is a memorandum of 24th December, 2009 sent by the Labasa Court Registry to the Social Welfare Department in Labasa which directs a report to be made. On the 2nd day of February, 2010 a reminder was sent to the Social Welfare Department in Savusavu whereby the Department was informed that a report was needed before the 15th day of February, 2010 when the matter was going to be called in court next. On the 15th day of February, 2010, the Department of Social Welfare requested for an adjournment to compile the report because the Department was still waiting for the required supporting documents and further interviews from respective parties. The report was not made available and his worship determined the case. He should have instead adjourned the proceedings and waited for the social welfare report. There is no indication in the judgment why he failed to do this. The order of 1 7th November, 2009, the memorandum of 24th December, 2009 and 2nd February, 2010, all indicate that the proceedings of 13th November, 2009 were not complete without the social welfare report despite which a verdict was delivered.

10. In respect of grounds 4 and 5, the counsel for the appellant submitted that in order to make the orders the learned Magistrate had to take into account the best interest of the children and the factors to be considered are outlined in section 121 of the Family Law Act No. 18 of 2003. The learned Magistrate failed to take into consideration important factors like the wishes of the children. A social welfare report or interview by the Magistrate should have ascertained the wishes of the children. The counsel further submitted that another factor that was not considered was the relationship of the children with the fathers' new partner.

11. Mr. O' Driscoll further submitted that the judgment falls short of explaining and giving reasons why a later application for variation was entertained; there was nothing to show that the earlier orders were not workable. It was contended that in applications for variation of parenting orders, one has to show some change in circumstances and this was not done by the respondent or the Magistrate.

The Respondents Submission

12. The order for social welfare report was made after the hearing of the residence orders. They were made in relation to ex-parte orders sought by the applicant for a surety for the safe return of children of the marriage. It had nothing to do with the hearing of the application for variation of parenting order. The appellant could

have called for a social welfare report if she so wished to rely on the same. It was the appellants' duty to present all the evidence that she wanted the court to consider.

13. Wishes of children are important but it is not the determining factor. The Magistrate exercised his discretion in not ascertaining the wishes of the children as they are only aged 6 and 8 years and there was ample evidence on wishes of the children.

14. On ground 5, the respondent submitted that it does not constitute a ground at all since it is simply a way of saying that the Magistrate's decision was wrong.

The Determination

15. I will first deal with grounds 1 to 3 which relates to ordering of social welfare report after hearing of the matter and the delivery of the judgment without waiting for the report.

16. On the 2nd day of March, 2009, the respondent father filed an application for variation of the parenting order in respect of the two children of the marriage. The matter was first listed and called in court on the 13th day of March, 2009. On this day the learned Magistrate ordered that the matter be heard on the 13th day of November, 2009. On the 13th day of November, 2009 the matter was heard and adjourned for ruling on the 24th day of December, 2009.

17. On the 17th day of November, 2009 the mother made an application to the court seeking an order that the father be allowed to take the children out of the jurisdiction to the overseas country and return them to the mother on or before 26th January, 2010. She sought a further order that a surety be provided by the respondent for compliance with the orders prior to the removal of the children. **Crucial to this application was the application by the mother whereby she sought an order that a full hearing of the custody application be conducted after the receipt of the social welfare report.** She supported her this application with reasons in the affidavit and her reasons were:-

"1. That on Friday the 13th day of November, 2009 I attended Family Court sitting at Savusavu.

2. That I was not represented. However my ex-husband was represented by a lawyer. I did not think that I required a lawyer as in the past my ex-husband and I were able to work things out amongst ourselves without legal representations.

3. I am informed and verily believe that the hearing was about custody of the children.

4. I am informed and verily believe that a welfare officer's report was not made available to the court..."

18. The application was heard in absence of the father on the 17th day of November, 2009 and amongst other orders was granted an order that:-

"That the **full hearing of the custody application** be conducted after receipt of Welfare Officer's Report".

(Underlining is Mine)

19. The orders were made by the same Magistrate who heard the case.

20. The matter was not called in court as scheduled for judgment on the 24th day of December, 2009. However the matter was next called in court on the 21st day of January, 2010. I do not see any notes to the effect on the court record as to why the matter was called in court on this date and whether any party was informed of the new date. Neither party appeared in court, and his worship after ordering that "**residence report be provided by Divisional Social Welfare Officer**", adjourned the matter to the very next day of 22nd January, 2010. Again on 22nd January, 2010 neither party appeared in court. His worship adjourned the matter to the 15th day of February, 2010 and ordered that Notice of Adjourned Hearing be served on the parties. There was no indication that the day of 15th February, 2010 would be the judgment date. On the 15th day of February, 2010 judgment was delivered. Before the judgment was delivered the court registry sent two reminders to the Social Welfare Department. One to the Labasa Office on the 24th day of December, 2009 and the other on the 2nd day of February, 2010. Both the reminders asked for welfare officers' report. On the 15th day of February, 2010 the request from the Department of Social Welfare Savusavu was made for an adjournment to obtain documents and interview parties before compilation of the report.

21. The order of 17th November, 2009 by his worship does indicate that a report was ordered and full hearing was to take place after receipt of the report. This order was made in absence of the father. It was an error on his worships part to have made this order in absence of the applicant father when the trial in respect of the residence issue had closed and the matter was adjourned for judgment on 24th December, 2009.

22. However, his worship did order a full hearing of the application for variation of parenting order after receipt of the social welfare report. Whether an order is made rightly or wrongly, it must be obeyed and followed until such time it is set aside or varied. I believe that the reason why the judgment was not delivered on the 24th day of December, 2009 was because of the fresh order for social welfare report and full hearing of the application for variation of parenting order. That is the reason why a reminder was sent to the social welfare office, Labasa, to present the report. On the 21st day of January·, 2010 his worship again ordered that the residence report be provided. A further reminder was sent to the Social Welfare Department on the 2nd day of February, 2010 for submission of the report.

23. The orders of his worship are clear indication that he was going to further hear the matter or at least consider the social welfare officers report before giving a verdict. The report was definitely for the purpose of the parenting order application. I reject the submission of the counsel for the respondent that it was not in relation to the same. The orders and the record of the court are very clear to this effect.

24. When the Welfare Officers report did not reach the court, his worship proceeded to give the judgment without waiting for the same.

25. The issue is whether his worship should have waited for the social welfare report and granted an adjournment?

26. The Magistrate had ordered a full custody hearing after receipt of the welfare report. The post-trial order of the 17th day of November, 2009 indicates that more evidence was to be adduced in the case. In essence, the hearing was to continue. If the report was waited only for the purpose of the judgment than again the hearing was incomplete as the parties are entitled to clarify matters contained in the social welfare report and give evidence to substantiate or contradict the same. The magistrate cannot consider the report in isolation especially if he is going to use the same as evidence in the proceedings. Any piece of evidence in courts needs to be tested and proved and the court must not receive evidence behind the back of the parties.

27. Having made an order to further hear the matter after receipt of the social welfare report, it was improper and erroneous on his worships part to deliver a verdict without receiving the report and completing the hearing.

28. I have not lost sight of s.54(3) of the Family Law Act No. 18 of 2003 which states that if a report is ordered in proceedings for the care, welfare and development of the child then the court may "if it thinks is necessary adjourn the proceedings until the report has been given to the court". The use of the words "may" and "if it thinks is necessary" indicate that it is the discretion of the court to either wait for the report or proceed without the same. However in any judicial proceedings the exercise of the discretion must be a judicial act. In the matter at hand his worship had not only ordered a social welfare report but had also ordered the full hearing to take place after the receipt of the report. Having made that order he proceeded to give a judgment without setting aside the earlier orders for full custody hearing. He did not give any reasons why the order he made earlier was ignored and why he would not wait for the social welfare report. He should have at least given reasons for not giving any recognition to his earlier orders.

29. The social welfare office had also requested for an adjournment. There is no reason recorded in the judgment and the court records as to why the request of the social welfare office for an adjournment was not considered and an adjournment not granted.

30. I understand that presiding officers do not wish to delay their judgments because of incomplete work of other personnel involved in the matter. Family proceedings are such that not only court is involved in the proceedings but welfare officers, child representatives, court and family counsellors and human rights officers often get involved. The resources are scarce in every department and sometimes it takes some officers' time to complete certain investigations and file reports. This means that everyone in the proceeding has to be vigilant, diligent and patient especially when it comes to matters affecting children as work done in haste without completion of all formalities will at the end of the day affect the children. The obligation of the court is to have regard to the best interest of the children and this best interest of the children is not only considering the section 121 factors of the Family Law Act but also observing and implementing some practical efficient means of considering those factors.

31. Section 67 of the Act mandates that before a parenting order is made, the parties to the proceedings must attend a conference with a family and child counsellor or a welfare officer to discuss the matter to which the proceedings relate unless it is not practicable to require the parties to do so, or there is an urgent need for a parenting order, or there are some other special circumstances such as existence of family violence order which makes it appropriate to make the order even if the parties have not attended the conference.

32. His worship has not provided any reasons why he has proceeded to make a parenting order without complying with the general requirement for counselling. His worship erred when he proceeded to make the said orders.

33. In his judgment his worship states that he did not call for a welfare report because the father resides overseas and that even if he had ordered the same the discretion to award residence is his sole prerogative.

34. His worship is not correct in saying that he did not order a report. The court record is clear that he did albeit not before or during the hearing but after the hearing and before the judgment.

35. I am also surprised at the comments of his worship that "However, as far as I am concerned, although I may receive the Residence Report in the evidence, if requested, no matter how persuasive the report is, the discretion to award residence remains my sole prerogative". A residence report will not make any finding of who shall have the residence of the children. It may contain recommendations if the court asks for the same. It is made after investigation on matters that are relevant. It is received in evidence and like any evidence; the court may accept or reject it. The court is the ultimate judge of the cause. However this does not mean that because it is the prerogative of the court to judge the cause, evidence should not be received or must not be received.

36. I turn to the respondents' submission that the appellant should have asked for welfare report at the time of the hearing. She did not do so and she cannot now

complain that the welfare officers' report was not awaited and taken into consideration. I reject this submission. When the appellant realised that there was no report by the social welfare officer, she immediately, within 4 days, made an application to the court for a report to be ordered and full hearing to take place. After considering the application, the orders were granted. The issue then is, why were the orders not respected and judgment delivered in defiance of the existing orders? This is where his worship fell in error. I uphold grounds 1 and 3 of the appeal and allow the same. Ground 2 states that the Magistrate failed in calling for a social welfare report. This ground is inconsistent with ground 1 and 3. In any event, the court record is clear that his worship did call for social welfare report.

37. I will now deal with grounds 4 and 5 combined. Grounds 4 and 5 basically state that his worship did not consider the best interest of children factors outlined in section 121 of the Family Law Act, 2003.

38. When making parenting orders the court must regard the best interest of the child as paramount consideration: **s. 66 (4) of the Family Law Act**.

39. A residence and contact order is a parenting order: **s. 63(2), (3) and (4) of the Family Law Act.**

40. The court has powers to make orders varying earlier parenting orders: s. 66 (2) of the Family Law Act.

41. A variation of a parenting order is in essence a parenting order: s. 63(1) (b) of the Family Law Act 2003.

42. Section 121(2) of the Family Law Act outlines the best interest factors. I will take each factor and examine whether the same was taken into consideration by his worship.

43. "A court must consider any wishes expressed by the child and any factors (such as the child's maturity and level of understanding) that the court thinks that are relevant to the weight it should give to the child's wishes".

44. One of the reasons why his worship gave the residence of the children to the father was that the children had expressed the view to be with the father. This view was given to the Magistrate by the father through evidence in court. His worship said "my decision firstly stems from the children's view to be with the Applicant. Despite the children's absence to give evidence on which of the parties they wish to reside with I am convinced and chose to accept the Applicant's evidence over the Respondent".

45. The question that arises is whether ascertaining the wishes of the children through evidence by the father is proper and should have been allowed. S. 122 (1) of the Family Law Act provides that the court may inform itself of wishes expressed by a child by having regard to anything contained in a report given to the court under section 54(2). It also provides that, subject to the Rules of the

Court, the court may inform itself of the wishes of the child by such other means as it thinks appropriate. The Act does not specify the other means by which a court may ascertain wishes of a child. The various case authorities however are of assistance and upon perusal it is apparent that the other means are:-

- **Permitting a child to give formal evidence, either orally as witness or by affidavit. One must however note thats.186 of the Family Law Act prohibits:-**
  a. Any child in a court room except a child who is a party to the proceedings or who is called to give evidence and then only while the child is giving evidence;
  b. Any calling of child witness without the leave of the court; and
  c. Filing of an affidavit or admitting into evidence affidavit of a child without the leave of the court.

  In deciding whether to give leave to call a child to give evidence or to file an affidavit of a child, a court must regard the best interests of the child as the paramount consideration.

- **By a private interview by the magistrate in chambers.** The Magistrate may indicate in court what the wishes of the child are.
- **By an interview by the magistrate in the courtroom, in the presence of the parties and their lawyers.** This procedure is justified as everyone has the benefit of hearing the wishes of the child and their demeanour when expressing such wishes. The parties can then submit on the weight to be given to the wishes of the child considering the child's behaviour as well and whether at the time of the expression of the wishes there was an indication that the child was not having a sufficient level of maturity or understanding to express the wish or whether the child was brainwashed by a parent and so forth.
- **By hearsay evidence presented by a party or a witness (and especially a child psychiatrist or similar expert witness).** S. 186(3) states that "evidence of a representation made by a child about a matter that is relevant to the welfare of the child or of another child, which would not otherwise be admissible as evidence of the law against hearsay, is not inadmissible solely because of the law against hearsay.
- **Through the agency of a child's separate legal representative, especially one appointed under section 125 of the Family Law Act.**

46. It is not improper to adduce the wishes of the children through the evidence of the father. Therefore it is in correct to say that the Learned Magistrate did not consider the wishes of the children. The issue is more of whether the father was unambiguous in expressing the wishes of the children in his evidence and whether in the circumstances it was proper to ascertain the wishes of the children in the manner his Worship did.

47. In the examination in chief of the father, the notes of which appear at page 97 of the court records, the father gave evidence that the **"children liked to go back to the overseas country. They never complained about being overseas. They have**

been complaining about coming back to Fiji". In the cross examination notes of the father, there is a piece of evidence recorded at page 99 of the record which states that "**children don't know what they want. They want to please both parents**". It is not clear as to who gave this evidence. It appears to be a statement of the father as it is recorded under his cross - examination notes. However it could also be the evidence of the mother as there are certain statements recorded under the fathers cross examination notes which indicate that the statement is the mothers and not the fathers. If it is the fathers' evidence, then there is in consistency in the evidence and it was improper to accept the fathers' version on the children's wishes. Further, the mother contradicted the fathers evidence and said that the "children were not upset with their life in Fiji". I appreciate that it is the prerogative of the trial Magistrate to accept or reject a piece of evidence looking at the demeanour and the deportment of the witness and the entire evidence in the case. His worship preferred the fathers' evidence on this aspect of children's wishes without indicating why he rejected the mothers' evidence. Given the contradiction in the evidence his worship should have employed another method of ascertaining the children wishes. There could have been a social welfare report to the effect or a direct interview or examination of the children.

48. His worship has placed sufficient weight on the factor of wishes of children and if he was to do that, he must have clear, consistent and uncontradicted evidence on the children's wishes.

49. Ground 4 succeeds in that the wishes of the children were not ascertained duly and properly based on the facts of the matter.

50. The second best interest factor that the court must take into account is the nature of the relationship of the children with each of the parents and with other persons. The record does not say anything on the children's relationship with each parent. How attached they are to each parent, the bonding they have with each parent, the level of discipline with each parent and so forth. There is one statement under the fathers cross examination notes to the effect that the father is a wonderful father. Apart from this there is nothing on this crucial factor that has been recorded. There also should have been evidence of the children's relationship with the father's partner because she would be an important person in the children's life as evidence is that she would be looking after them. The court has to look at this relationship to ensure whether it would be in the interest of the children to be with the father because of the presence of the partner. There is a fatal shortfall in the evidence.

51. The third factor is the likely changes in the child'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 child has been living. There is evidence on the effect on children if they stay in Fiji longer and not go to the overseas country. The main issue was that the children's education will be

affected. Much emphasis has been given on children's education. However there is an overlook on the part of the counsel, the parties and the court to ascertain evidence on the effect of the children separating from each parent and with the mother with whom the children had been living with when the trial took place.

52. Another best interest factor is 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 regular basis". There is enough evidence on this aspect that both parents have the means and the willingness to facilitate contact. Evidence was properly adduced in this instance.

53. There should also be consideration of "the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs". There is evidence on the parties' ability to provide for the needs of the children in terms of finance but there is no evidence on the capacity of each parent to provide emotional and intellectual support. However his worship goes on to record in his judgment that "**it is apparent that the parties love and adore the children and wants to contribute in one way or another, if not solely, towards the welfare of the children. Both are seeking residence of the children. At the same time, both are not denying contact or access by the other parent to the children. It is also apparent that the parties are in equally good position to provide good life, good household, good health and good family to the children. I am also convinced that the parties wishes to see their children obtaining the best education whether in Fiji or in the overseas country"**. It appears that there was some evidence given and not recorded for his worship to have come to an assessment of such a nature.

54. Another factor the court has to consider is the "Child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of the child)". The court did consider the children's age and sex and their background and the need for them to be in the overseas country to learn their language and maintain a steady education. Evidence is also apt on this factor.

55. The other factor that the court needs to consider is the need to protect the children form physical or psychological harm that may be caused by being subjected or exposed to abuse, ill-treatment, violence or other behaviour or being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person. In the evidence recorded under father's cross - examination notes at page 99, it is recorded "Concern-children not to be hurt". I do not know whose evidence that was, whether it was the fathers or the mothers. Whoever had said that was concerned about the children being protected from being hurt. His worship failed to give any consideration to that evidence and the factor that specifically requires that evidence to be taken into consideration for the best interest of the children.

56. The court must also consider the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents. The court has considered this factor and as I have said it is recorded in his worships judgment and the excerpt appears in paragraph 53 of my judgment.

57. The other factor the court must consider is if there is any family violence order that involves or applies to a child or a member of the child's family. The record shows that there was no such order and therefore there was no need for emphasis on this factor.

58. Succinctly, all the best interest factors have not been taken into consideration. It is for the parties and the counsels to present their case in accordance with all the factors and for the court to consider them. If the parties do not present evidence then the court must direct them to present evidence on each factor so that it is properly able to assess the interest of the children. Generally, it is not the duty of the court to hunt for evidence and assess the matter before it. The onus is normally on the parties. However section 121 of the Act mandates the court to consider all the factors, thus, the court must call upon the parties to give evidence and submit on all such factors to assist the court in arriving at a proper verdict.

59. Grounds 4 and 5 succeed for the above reasons.

60. I must also briefly deal with Mr. Driscoll's submission that the application was for variation of parenting order and both the father and the court must indicate why the applicant was entertained. Was the initial order not workable? Mr. Driscoll submitted that neither the father nor the court showed any change in circumstances of the parent s or the children to entertain such an application.

61. There are no statutory grounds upon which a court may vary a parenting order. The Full Court of the Family Court in the case of In the Marriage of Rice and Asplund (1979) F.L.C. 90-725 at 78,905 m ad e it clear that the court should not entertain proceedings to vary such an order lightly. What normally needs to be established before a court will consider varying an existing parenting order is either a subsequent change in the circumstances of one of the parties or of the child which makes it in the interests of the child to review the original order, or an awareness of a factor relating to the welfare of the child which was not disclosed to the court at the original hearing.

62. There are so many problems with the initial order. First it was made in divorce proceedings when it should not have been made. In divorce proceedings ancillary issues must be dealt with separately. Secondly the order was made by consent and no regard to the best interest factors was made. By virtue of s. 121 (3) of the Family Law Act, "if a 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" (the best interest factors). It is in the discretion of the court whether or not to take into account the best interest factors when it is proposing to make consent orders. In

this case the court did not take into account the best interest factors but it just made the consent orders. So, in the circumstances, a subsequent application to vary the order cannot show a change in the circumstances as no one knows or has the benefit of the circumstances based on which the initial orders were made. What the court had correctly done was to consider afresh all the factors that determine the best interest of the children as it is also a specific requirement of section 66 (4) that the best interest of the child be a paramount consideration when any parenting order is made and that includes a variation of a parenting order.

63. Be that as it may, the judgment is clear that a variation application was filed because education in the overseas country is obtained in German language. The delay in the education would have slowed down the learning progress of the children. It is also obvious that when the initial order was made the children were only 3 and 5 years respectively. They did not attain age for schooling. At the time of the hearing of the application for variation, the children had both started school. There definitely was a change in the circumstances of the children for the variation application to be filed and entertained in court.

64. His worship had given 3 specific reasons why he changed the orders to awarding residence of the children to the father. The first was based on the wishes of the children. I have dealt with this factor in detail in my judgment. The second was that due to the uncertainty of their status in Fiji, the children will not be able to concentrate on their academic development and this will cause a lot of unwanted disruptions to their academic growth. I do not see how his worship came to this conclusion safely. There was no evidence of the children's performance at school by the school or the welfare office. There was also no evidence whether they were mentally instable and what was their position at the time of the trial. Whether they would face disruption and whether they had any feelings of insecurity regarding their status. There was evidence by the mother that the elder child was a class prefect and came second in class. This definitely does not indicate any disturbance that the children are facing at the moment. It was improper inference of the state of mind of the children based on their status in Fiji. There was also insufficient evidence for such an inference to be drawn. The fact could be that the children may not at all be worried about their status. Was their security linked to the parent or their legal status in Fiji? All this needed discovery.

65. His worship also gave a reason that the environment offered by the father was more conducive for the proper upbringing and development of the children. The only evidence the father gave in regards to the environment was that the children will have their own room in the apartment in the overseas country and that the father would offer good household, good education, good health care and good family. The mother gave evidence that children have a secure life in Fiji. The children have great friends. The children go to school and play sports like sailing,

biking, running, snorkelling. I do not see what conducive environmental factor his worship relied on to reach the conclusion he did.

66. This case falls far short of the evidential requirement necessary to make any orders varying the initial parenting plan. Too much emphasis has been placed on the children's education which has not been balanced with other factors. The judgment and order cannot stand in light of the above observation.

67. The appeal is allowed. A proper hearing is required based on the same application for variation. An order for re-trial on the same application before another magistrate will justify the circumstances.

68. On the issue of costs, each party is to bear its own costs. Both parents are determined to provide the best to the children of the marriage and thus the application and the appeal. There is no misconduct by the parties in initiating, prosecuting and defending the matter. Any orders against any party for costs will not be justified.

The Final Orders

69. The appeal is allowed. The orders of the trial Magistrate is set aside.

70. A fresh hearing must be conducted by another Magistrate in Savusavu on the same application.

71. Each party to bear their own costs.

ANJALA WATI

Judge

29.12.2010

To:

Mr. Gavin O' Driscoll for the Appellant.

Ms. Rakai for the Respondent.

File Number 07/SAV/0037.