IN THE FAMILY DIVISION OF THE HIGH COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	13/Suv/0012
BETWEEN:	IVAMERE APPELLANT
AND:	KAVENI RESPONDENT
Appearances:	Applicant in Person. Respondent in Person.
Date/Place of Judgment:	Tuesday, 25 February 2074 3tSnva.
Judgment of:	The Hon. Justice Anjala Wati
Category:	All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental
Anonymised Case Citation:	IVAMERE v. KAVENI- Fiji Family High Court Appeal Case Number: 13/Suv/0012.

JUDGMENT

Catchwords:

Family Law - Child Maintenance- Parties not married- Paternity disputed-Application by mother for an order for DNA testing- consent of respondent withheld by him- Court refused to order DNA testing on the grounds that there was no consent mother appeals- powers of Court to order parentage testing- discretion of the Court- should discretion be exercised in favour of refusing the application for parentage testing when one party refuses to undergo medical test- Can a Court compel a party to undergo parentage testing- Courts' powers when a party refuses to undergo parentage testing or to comply with an order to submit for parentage testing.

Legislation:

Family Law Act No. 18 of2003 ("FLA"): ss. 137,138,139,140.

Cases Referred To:

Re C (No 2) (1992) FLC 92-284.

J and P (No. 2) (1986) FLC 91-707.

Case Background

1. In the Magistrates' Court the appellant made an application for child maintenance on the grounds that the respondent is the putative father of the child. At the trial she sought an order that a parentage testing procedure by way of DNA test be carried out to ascertain the paternity.

2. The child for whom maintenance is sought was born in 2004.

3. The respondent denied having any form of relationship with the appellant. He thus denied paternity and objected' to undergo DNA test.

4. On 27 May 2013, by an oral ruling, the RM Mr. Sharma stated that since the respondent was refusing to undergo DNA test, the Court could not force the respondent but will later deliberate on the refusal to undergo a DNA testing. The parties were directed to undergo a blood test at CWM Hospital. The trial proceeded on other evidence.

5. The appellant appeals against the order of 27 May 2013. The lower Court, I was informed at the appeal hearing, is waiting for my verdict.

The Appeal

6. The appellant says that the Court erred in declining to hear the appellant's application for DNA testing and to order that the parties undergo DNA testing.

7. The appellant seeks an order that the parties submit themselves for DNA testing.

The Submissions

8. The appellant argued that in this case, DNA is the only conclusive evidence to solve the

problem. By refusing to undergo DNA, the problem will not be resolved. The Court thus, must have ordered that the parties undergo DNA testing.

9. The respondent argues that the assertion that the trial Court had declined to hear the application for DNA testing is mischievous as the Court heard both parties orally and then delivered its ruling.

10. Kaveni argued that the Court cannot order him to undergo a needle unless he consents to the same. He argues that a blood test which involves the insertion of a needle is an assault unless consented to. Courts have no inherent power to require on adult to undergo a blood test against his or her will.

11. -Kaveni further argued that under s.140 of the FLA "*if a person who is aged 18 or over fails to comply with a parentage testing order or an order under section 139, the person is not liable to any penalty in relation to the contravention, but the court may draw such inferences from the failure as appear just in the circumstances*". Kaveni argued that if no explanation for refusal to undergo DNA testing is provided' than an adverse inference may be drawn. Ordinary a court will draw two inferences concerning a refusal to comply with a blood test order. One concerns the state of mind of the person who has refused to comply with the order and the other concerns the basic question of whether he or she is the parent of the child concerned. The Court has a discretionary power to order parentage testing. The Court has an unfettered discretion and the unfettered discretion must be dealt with by the ordinary rules of justice and fairness between the parties.

12. Kaveni argued that there are a number of factors for determination prior to ordering a paternity test. These are

a. There must be substantive proceeding before the Court. The Court will not order parenting testing simply to satisfy the interest, knowledge or curiosity of a person.

b. Paternity must be an issue in the proceedings, that is, there must be established on the evidence, the onus of which is on the applicant, that there is doubt in the applicant's mind as to paternity, and the doubt must be honest, bonafide and reasonable. Importantly, the applicant need not show that any person is the father of the child. The applicant need only show that there is an honest, bonafide and reasonable doubt as to paternity. Often evidence of such belief is difficult to corroborate and, consequently the

Court will accept that evidence unless the Court concludes the applicant's alleged doubt is affected by malice or other extraneous considerations.

13. Kaveni contended that the application for DNA testing could not be allowed before the substantive evidence on parentage was heard. Now that the hearing in the lower Court had concluded, the Court must be allowed to give a decision.

The Law and Analysis

14. The first ground of appeal relates to the refusal of the Court to hear tire appellant's application for DNA testing. On the appellant's application, there was an oral hearing as there should have been. Since the matter was listed for trial the Court gave an extempore ruling refusing to order that the parties undergo parentage testing on the ground that the respondent's consent was needed for the Court to make any orders to that effect. The first ground thus is misconceived because the parties have had the opportunity to argue the case and they also had the benefit of a short reasoned ruling.

15. The second ground relates to the refusal by the Court in ordering DNA test. The powers of the Court to require a parentage testing procedure to be carried out on a person is found in ss. 137 - 139 of the Family Law Act. It reads:-

"*Evidence of Parentage*

137. If the parentage of a child is a question in issue in proceedings under this Act, the court may make an order requiring any person to give such evidence as is material to the question.

Orders for carrying out of parentage testing procedures

138. (1) If the parentage of a child is a question in issue in proceedings under this Act, the court may make an order (a parentage testing order) requiring a parentage testing procedure to be carried out on a person mentioned in subsection (3) for the purpose of obtaining information to assist in determining the parentage of the child.

(2) A court may make a parentage testing order

a) on its own initiative; or
b) on the application of:

(i)
(H)

(3) A parentage testing order may be made in relation to-

(a) the child;
(b) a person known to be the mother of the child: or
(c) any other person, if the court is of the opinion that, if the parentage testing procedure were to be carried out in relation to the person, the information that could be obtained might assist in determining the parentage of the child.

(4) A parentage testing order may be made subject to terms and conditions

(5) This section does not limit section 137.

Orders associated with parentage testing orders

139. (1) If a court makes a parentage testing order, it may also make orders under subsection (2) or (4).

(a) to enable the parentage testing procedure to be carried out; or

(b) to make the parentage testing procedure more effective or reliable.

3) The orders the court may make under subsection (2) include, but are not limited to-

(a) an order requiring a person to submit to a medical procedure;

(b) an order requiring a person to provide a bodily sample;

(c) an order requiring a person to provide information relevant to the person's medical or family history'.

(4) The court may make such orders as it considers just in relation to costs incurred in relation to-

(a) the carrying out of the parentage testing procedure or other orders made by the court in relation to the parentage testing procedure; or

(b) the preparation of reports relating to the information obtained as a result of carrying out the parentage testing procedure".

16. The various sections above make it clear that the Court has a discretion to exercise in determining whether or not to make a parentage testing order. It is not compulsory for the Court to make a parentage testing order in every case or application before it. Was it proper for the Court to refuse to order DNA testing when the respondent refused to undergo the test?

17. I will find my answer from s.140 of the FLA. It reads.

"*Orders directed to persons aged 18 or over*

140. If a person who is aged 18 or over fails to comply with a parentage testing order or an order under section 139, the person is not liable to any penalty in relation to the contravention, but the court may draw such inferences from the failure as appear just in the circumstances".18. If the Court has no powers to punish a person for not complying with an order for parentage testing, there is in essence, no merit in ordering a test without the consent of a party. The Court has a right to draw appropriate inferences from the failure to consent to DNA testing but it cannot compel a party to undergo a parentage testing procedure if a party refuses to submit to such procedures.

That is implicit in s. 140 of the FLA.

19. The cases of *Re C (No 2) (1992) FLC 92-284* and *J and P (No.2) (1986) FLC 91-707* both indicate that where a party refuses to undergo parentage testing procedure, the best the Court can do is to draw appropriate inferences from the refusal. The Court cannot compel a party for parentage testing.

20. In *Re C (No.2) (1992) FLC 92-284* the applicant alleged that the respondent was the father of her son and sought maintenance for the son. The respondent denied paternity although he went close to conceding that he had had sexual intercourse with the applicant in May 1972. The son was born in February 1973.

Parentage tests were ordered by consent. Blood samples were taken in Darwin, tests were carried out in Adelaide and two reports prepared. The first report was based on analysis of red cell antigen blood grouping, red cell enzyme blood grouping and serum markers. The second report was based on DNA typing tests. In Re C (No 1) (1992) FLC 92-283 the Family Court held that the second report was inadmissible and ordered that a further parentage testing procedure be carried out. The respondent declined to take part in that further procedure.

The primary issue was whether the applicant had established to the appropriate standard that the respondent was the father of the child. She relied upon the following matters among others:

(i) evidence that she and the respondent had had intercourse at the probable time of conception;
(ii) conclusions to be drawn from the first of the parentage tests;
(iii) the respondent's refusal to undergo the second parentage test.

The Court held that the respondent's refusal, without explanation, to participate in the second parentage test was a striking and significant circumstance. Parentage is a medical rather than a legal issue. The determination of such an issue has an importance to the child involved which would normally transcend the tactical interests of the parents in the particular litigation. The Court held that this was a clear case to draw an inference adverse to the respondent. The inference which the trial Court drew from the respondent's refusal was the knowledge by the respondent of the fact that he and the applicant had intercourse at the

relevant time and the belief by the respondent that he was the father or at least that there was such a high risk of that conclusion being reached from the tests that he preferred to stifle that evidence.

The Court further held that the standard of proof in this case was the balance of probabilities. The combination of the evidence as to intercourse at or about the relevant time, the results of the first test and the respondent's refusal to take the second one, caused the trial Court to conclude that the respondent was the father of the son.

21. In *J and P (No.2) (1986) FLC 91-707* the husband and wife were married in April 1982. The wife was the mother of two children, M born in May 1982 and S born in August 1984.

The husband sought access to M and S who he alleged were children of his marriage to the wife. The wife opposed the application on the ground that M and S were not children of the husband and wife but were children of the wife and B. The wife filed an application for dissolution of marriage which declared that there was no child who was a child of the marriage. Both the wife and B refused to participate in paternity tests.

The trial Judge held that it was open to him to draw inferences against persons refusing to participate in paternity tests. However, he held that he would draw no inference if, upon consideration of the other evidence, the question of paternity was not in doubt or if he was satisfied that one relevant male person had not had sexual intercourse with the wife during the period of time when conception could have taken place. The trial Court accepted medical evidence as to the possible periods of conception and was satisfied from the evidence of reliable lay witnesses that the husband had not engaged in sexual intercourse with the wife during these periods. He held that M and S were not children of the marriage and dismissed the husband's application for access to them. He held, however, that the wife's and B's refusal to undergo paternity tests was unreasonable and that the wife should bear the husband's costs for the period from the delivery of brief for trial.

The husband appealed against the dismissal of his application for access. He argued that the evidence relied on by the trial Judge ought not to have outweighed the effect of the presumption of paternity and the inference to be drawn from the wife's refusal to undergo a

paternity test.

On appeal it was held that the Court is not bound to draw an adverse inference against the unreasonable refusal to undergo a paternity test. The Court may do so and in determining whether or not to do so will have regard to all the circumstances of the case, including the nature of the test, the issue involved and the reasons (if any) proffered for the refusal.

Asche A.C.J. found that a refusal to undergo blood testing is not to be taken as conclusively establishing the opposite case against the person who so refuses. In the present case, it is not sufficient that, because the wife refused blood testing, her allegation that the children were not the husband's children should necessarily be disbelieved. However, it was a matter of considerable weight against the wife. His Lordship said that the refusal to undergo blood testing where paternity is in dispute would normally indicate, at the very least, that the person so refusing has a very real doubt about paternity which he or she does not wish to be resolved. However, there are "cases where the refusal might be less prejudicial, for example, if a party has a sincere religious belief against such a procedure.

It was further held on appeal that it was open to the trial Judge to accept the medical evidence as to the relevant periods of possible conception and the evidence concerning the opportunity for the husband and wife to engage in acts of sexual intercourse during- those periods, and to find on this evidence that the husband was not the father of either M or S.

22. In terms of sections 137 - 140 I do not find that the Court erred in refusing to order DNA test in light of the refusal by the respondent to submit to any medical test. It is for the Court to now determine the matter based on the other evidence and make appropriate inferences from the respondent's refusal to undergo the medical tests.

The Final Orders.

23. I dismiss the appeal wholly and I order that the Resident Magistrate proceeds to make a determination of the application on the evidence available before him.

24. Each party shall bear their own costs of the appeal proceedings.

ANJALA WATI

Judge

25.02.2014

To:

1. *The Applicant*.
2. *The Respondent*.
3. *File Number: 13/Suv/* 012.