

RANDY v. ANA - FIJI FAMILY HIGH COURT APPEAL CASE NUMBER, 14/Suv/0011  
 IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA  
 APPELLATE JURISDICTION

<b>ACTION NUMBER:</b>	<b>14/Suv/ 0011</b> <b>(From 13/Nau/0276)</b>
<b>BETWEEN:</b>	<b>RANDY</b>  <b>APPELLANT</b>
<b>AND:</b>	<b>ANA</b>  <b>RESPONDENT</b>
<i>Appearances:</i>	<i>Appellant in Person.</i> <i>No Appearance of the Respondent.</i>
<i>Date/Place of Written Judgment:</i>	<i>Friday 10 July 2015 at Suva.</i>
<i>Coram:</i>	<i>Hon. Madam Justice Anjala Wati.</i>
<i>Category:</i>	<i>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.</i>
<i>Anonymised Case Citation:</i>	<i>Randy v. Ana - Fiji Family High Court Appeal Case Number: 14/Suv/0011.</i>

JUDGMENT

Catchwords:

FAMILY LAW - APPEAL - Parenting orders - best interest of child - duties of parents not transferrable unless necessary in the best interest of the child - child's rights to be cared for by the parents must prevail unless it is contrary to the child's interest that he be cared for by his biological parents.

Legislation:

1. Family Law Act No. 18 of 2003 ("FLA"): ss. 41 and 42

1. The appellant is the grandfather of the child in respect of whom he sought a residence order in the lower Court where his application was refused and the following orders were made:

a. the child was to reside with the mother.

b. the child to have contact with the paternal grandparents during the school holidays. The parties were to agree on the contact period and exchange point.

2. The respondent is the daughter in law and the biological mother of the child.

3. The appellant's son is the husband of the respondent, the parties being married in 2008 and divorced in 2013.

4. The subject child was born in 2008.

5. Initial parenting orders were made on 23 August 2010. The terms of the order were that the child was to reside with the father and the mother to have reasonable contacts on weekends from Fridays 4pm to Sundays with effect from 27 August 2010.

6. Despite the orders of 23 August 2010, the child did not live with his father but lived with the paternal grandparents and his mother at intervals until 2013 when the child started living with the respondent mother solely but visited the paternal grandparents during school holidays.

7. The basis upon which the orders appealed against were made was that it was in the best interest of the child that he lives with his mother.

8. The factors that primarily influenced the decision were:

a. that the child had expressed his wishes twice: once to the Family Court Counsellor and the secondly to the Social Welfare Officer to stay with his mother and the discussion of parting made the child emotional:

However the Court did note that the child had just turned X years old in 2014, and so his views were to be approached with caution.

b. the child had started education in Namosi and changing the place of residence was going to affect his education;

c. the report and recommendations of the social welfare officer that the residence be given to the mother as she was capable of looking after the child and the child was emotionally connected to the mother.

9. The grandfather says in his appeal that the best interest of the child was not properly considered in that:

(i). the social welfare report that was relied on lacked relevance to the subject matter;

(ii). the child had not expressed his wishes freely;

(iii). change in the place of residence will have a minimal effect on the child's education as opposed to the finding that it was going to affect the child substantially;

(iv). there was no evidence that was tendered on behalf of the mother and so the welfare report should not be relied on.

(v). the court remarked that the mother would freely give the child for contact previously but that is not the correct position.

10. In his submissions, the appellant raised new evidence which could have been tendered at the lower Court. It is not proper to raise that evidence at the appellate level and as such I have not considered the same whilst determining the appeal.

11. I must state that the social welfare report was unchallenged by the appellant at the lower Court. He did inform the Court that the report was not balanced but he did not subpoena the officer who prepared the report to challenge the contents of the same.

12. The appellant is concerned why the social welfare report was accepted in evidence when the respondent did not come to court to give evidence .

13. The report ordered by the social welfare is an independent report and it is to be admitted in evidence for the benefit of the child. If the report is challenged than it is for the Court to decide the probative value it wishes to attach to the report.

14. In this case the report was not challenged properly and therefore the Court did not reject to give weight to it, which, in my finding, is correct in law and fact.

15. There was no reliable evidence that it was not in the interest of the child to live with his mother. The appellant made allegations that the mother was more interested in her social life and would drink grog and neglect the child but the independent report from the social welfare office was that the child was comfortable with his mother whom he adored.

16. The social welfare report also stated that the mother is able to look after the child financially from her subsistence farming and from the support she receives from her family.

17. Since there was no adverse finding that the mother is not the proper parent to look after the child, the Court was correct in not disturbing the status quo of the child who was schooling in the village he lives. The Court did not prefer to disturb the child's school, his living condition and his stability. That finding cannot be flawed given the evidence before the Court.

18. The social welfare officer found that the appellant's had concealed certain information from the investigator. The report also highlighted the motive of the application. The pertinent parts of the report states that the application was pursued to allow the appellant's son the freedom to indulge in his own personal desires and wishes with no respect in particular for the child's well- being. The appellant and the wife did not wish to have any more ties with the mother of the child and that is the reason they pursued the application. The paternal grandparents were supporting their son's new relationship and they wished to exclude the natural mother from being with her own child.

19. The report also noted that the appellant and his wife concealed the information

that their son had been living separately in Nakasi in a new relationship and that they had asked the mother of the child to vacate the home in Nausori. It also remarked that there were a lot of contradictory factors in the appellant's version and that of his son and the cousin.

20. It is the object of the FLA that children receive adequate and proper parenting to help them achieve their full potential and to ensure that the parents fulfill their duties and meet their responsibilities concerning the care, welfare and development of their children: s. 41.

21. S. 42 of the FLA outlines that the principles underlying these objects are that:

(a). except when it is or would be contrary to a child's best interests, they have the right to know and to be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together: s. 41(2) (a).

(b). children have a right to contact, on a regular basis, with both parents and with other people significant to their care, welfare and developments. 41(2) (b).

(c). parents share duties and responsibilities concerning the care, welfare and development of their children; s. 41(2) (c).

(d). ...

22. The mother in this case is willing to undertake her responsibility for the welfare of the child . That responsibility will not be transferred or imposed on someone else unless it is required in the best interest of the child that such a step be taken by the Court.

23. It is not disputed that the father of the child has not taken care of the child and that he is in another relationship. He simply left the child to be cared for by his parents with no financial support for the child's welfare.

24. The father of the child has not been able to provide for the child for his well-being and upbringing. It is therefore not in the child's interest to be sent to a parent who will

neglect the child's affairs over his.

25. Under the FLA, another person who has the legal duty and responsibility for the daily welfare and upbringing of the child is his mother. The mother is willing and in fact has cared for the child with whatever she has available and there is no evidence of the child being left uncared for emotionally and physically. Since this is not been established there is no reason in law and on the facts of the case to transfer the parental responsibilities to the maternal grandparents. If it was established that the mother was not able to provide for the child and that it is not in the best interest of the child to be with her, the obligations could be transferred with orders for monetary assistance and provision for the child.

26. I accept that since the paternal grandparents had been looking after the child, it is in the interest of the child to have contact with them and the Court did not fail when it made the contact orders in favour of the child with the paternal grandparents.

27. Given the evidence before the Court, I find that the Court did not err in not disturbing the status quo of the child who was living with his mother and when it was not established on evidence that she was not the proper custodian for the child's welfare.

28. I dismiss the appeal and affirm the orders of the lower Court.

29. Each party must bear their own costs.

Anjala Wati

Judge

10.07.2015

To:

1. Appellant.

2. Respondent.

3. File: 14/Suv/0011.