

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA
APPELLATE JURISDICTION

CASE NUMBER: **63/2013**
13/Rak/0063

BETWEEN: **Jamesa**
APPELLANT

AND: **Laila**
RESPONDENT

Appearances: *Appellant in Person.*
Respondent in Person.

Date/Place of Written Judgment: *Thursday 21 April 2016 at Lautoka.*

Coram: *Hon. Madam 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: *2016.04.21 Jamesa v Laila Fiji Family Appeal case number: 63 of 2013*

JUDGMENT

Catchwords·

FAMILY LAW – PARENTING ORDER APPLICATION - What orders should be made in the interest of the child - contact to a parent to be defined in the interest of the child.

Legislation:

1. The Family Law Act No. 18 of 2003 ("FLA"): ss. 54(2); 66 (4); and 121.

Cause

1. In the Magistrates' Court, the father of the child applied for parenting orders and sought in particular that he be given residence of the child, a female, born on 2011.
2. The application was refused by the Court wherein it ordered that the mother has the residence of the children and the father to have reasonable contact. What would be reasonable contact in case of this child was not spelt out. I will deal with this aspect later in detail in my judgment.
3. Aggrieved at the decision of the Court, the father appealed. He asserts that the Court erred in law and in fact:
 - (i). When it ignored the recommendations of the two social welfare officers to determine the best interest of the child and making a decision to grant residence to the mother.
 - (ii). When it ignored the financial and other forms of assistance that his family provided to the child.
 - (iii). When it ignored the financial status of the mother as an unemployed person who had an additional burden of looking after another child and thus compromised the interest of the subject child.
4. The appeal was defended by the mother.

Parties Position in Court and the Findings

5. The father's position was that he had a better home and financial ability to look after the child. He also asserted that his parents supported him financially and morally in looking after the child.
6. The father is a school teacher and his parents are farmers. He has a better home environment than that which had been provided by the mother to the child.
7. The father had asserted that the mother did not earn any money and that the living conditions were not proper and hygienic for the child. He also said that the child was not well looked after by the mother and was getting sick and weak.

8. The mother's position was that she had always maintained the child with her father's income and that the family earned enough to survive on. She had emotional ties with the child and that she had moved to live in the father's village which had a proper building and sanitary conditions for the child.

9. In arriving at the parenting order of the nature described above, the Court found that it was in the best interest of the child that such orders be granted.

10. The factual matters which were taken into account to arrive at the best interest of the child were that the parents of the child had separated when she was 1 year 10 months old and at the time of the decision the child was 3 years 4 months old. For the period of 1½ years, the child always lived with the mother. The mother had been responsible for the child's daily welfare although the father had spent time with the child for brief periods.

11. The Court found that there was a stronger tie between the mother and the child. The mother always provided the child with the physical, emotional and intellectual needs necessary for the child's development.

12. It was also found by the Court that the mother was unemployed and was always available to be with the child and look after her when the same could not be said for the father as he was a school teacher and most of the time in the day would be at work. He depended on his elderly parents and sister to look after the child. The Court found that the parental duties for the child should be fulfilled by the parents and not passed unto someone else at one's convenience and whim.

13. The Court then assessed the two welfare reports which recommended that the residence of the child be given to the father. It found that it was undisputed that the father was financially in a better position to look after the child but since the preparation of the report, a lot had changed for the mother in that she got more financial support from her father. They did farming and earned about \$200 - \$300 per week from farm produce. She resided in her father's village which had proper sanitation and water facilities. The village is close to the hospital and road.

14. In rejecting the recommendation of the two social welfare officers, the Court found that having the financial ability to maintain the child does not, on its own, qualify a parent as suitable for the best interest of the child.

Submissions

15. The father submitted that there were two social welfare reports before the court and the medical report based on which the court ought to have made a finding that the residence of the

child be with the father. It was also not disputed that he had the financial capacity to look after the child and a safe home environment. The mother does not have any income nor does she have a safe home to look after the child.

16. The father further contended that since the parenting orders were made, he has not had contact with the child. Due to that he had to consult his lawyer where an arrangement was entered into between the parties that the child will have contact with him once a week every month. He was to pay the cost of the transport and also to give \$50.00 to the mother. The agreement was never put to effect until now.

17. The father applied orally that the residence between the parties be split. The Court then questioned him on the practicality of this as the mother lived with the child in Ba and the father lived in RakiRaki. The father stated that it was not improper for the child to study in two different schools.

18. The mother was very distressed during the hearing. She was emotional and submitted that the Court should grant her the residence as ordered.

Law and Analysis

19. The Court was correct in stating the law in regards the parenting order application. Indeed, in deciding whether and what order should be made in respect of a child, it must regard the best interests of the child as paramount consideration: s. 66 (4) of the FLA.

20. In determining what is in the best interest of a child, the court must consider the matters set out in s.121(2) of the FLA: s. 121(1) of the FLA.

21. The first reason why the father says that the Court is factually incorrect in making a finding on the best interest of the child is that the two social welfare reports had recommended that the father should have the residence of the child.

22. It is prudent that I analyse the two social welfare reports but before I do that I must say that these reports were ordered under s. 54(2) of the FLA. This report, once prepared, may be received in evidence in any proceedings under the Act but is not binding on the Court. The Court is not bound to accept the report on its face value.

23. The recommendations in the report are not decisions and were not required to be made by the Court. The Social welfare Officers do not have the benefit of the entire tested evidence

before it to decide on what is in the interest of the children. The recommendation is therefore an opinion which is not evidence that the Court is obliged to consider.

24. The father's submission that the Court should have accepted the recommendations of the social welfare officer is therefore not sustainable. What the Court however has to do is to consider the report and place the appropriate weight to the same. Did the lower Court do this? To answer that, I have to now analyse the two reports.

25. The first report is dated 24 October 2013. This report was prepared exactly a year before the matter was heard. The matter was heard on 24 October 2014.

26. The first report stated that the father had a nice home environment and the finance to look after the child. He also had support from his family in looking after the child.

27. This report also mentioned that the mother did not have any income and that the house that they lived in was not proper and hygienic for the child.

28. The second report was prepared on 6 February 2014. This was done some 8 months before the hearing. This report also stated that because the child does not have a proper home and the mother does not work, the father should have residence of the child.

29. The Court was correct in rejecting the investigation report in that the mother had, since the preparation of the report, started living in her father's village which had a better home and sanitation. The allegation therefore that the environment was not safe for the child was addressed by the mother. The Court was thus correct to give weight to the change of circumstances since the preparation of the report. There was no evidence to suggest that the current place of residence was not proper for the child.

30. The Court was correct in finding that the ability to support the child financially on its own did not qualify a parent to be one who would support the interest of the child.

31. It was not disputed that the mother also depended on the farm produce which gave them food and income and that that money was sufficient to maintain the child. I find that even if the income is not sufficient, the father is under a legal duty to maintain the child financially. He does not say why he should not and that he cannot maintain the child financially. His evidence has been that he is in a better position to support the child. If that is his financial capability, the child must be provided for and any qualms about the discrepancy in the income earning ability with then and should not affect the child.

32. The father also stated that he relied on the medical report which suggests that the mother neglects the child. The medical report which was attached to the social welfare report does not in any way indicate that the child had been neglected by the mother. It basically notes the child's age and weight and the type of feed the child is on and the advice of the nurses. No one explained the report in any detail either. The report thus does not assist in making any conclusive finding of fact.

33. The father's second ground was that the Court did not take into account the support that the father received financially and otherwise from his family to look after the child. The Court did take into account the fact that the father's family would look after the child when he would be away but it is in the child's interest that she be looked after by a parent especially when that care was available. The mother could provide that day to day care.

34. I do not find that the Court was incorrect in assessing that the mother had been providing the care to child on a daily basis and that there were insufficient reasons why that care should be withdrawn from her and placed on the paternal aunts and grandparents.

35. The Court found that the child had spent longer periods with the mother and the physical, emotional, and intellectual support was greater from the mother. I have not been shown any evidence based on which I can make a finding contrary to that of the lower Court. The child has bonded with the mother and her parents. Even the second social welfare report which the father relies on states:

"The respondent's (reference is made to the mother) family is supportive and they assist in taking care of the child ... she is attached to the child and the child has bonded with her family. The respondent has moral support from her siblings".

36. There is no evidence to suggest that the support provided by the father's family is greater than the support by the mother's family. Her family too has used up its income to look after the child. The maternal grandmother gives a hand in looking after the child as well. Her father provides them with food, shelter and money for the day to day living.

37. I do not find that the ground of appeal based on family support has any merits or the final ground on the mother's inability to look after the child financially. She had been maintaining the child thus far. Moreover, she is entitled to ask for financial contribution from the father to maintain the child. She also has another child but that does mean, as raised in the ground of appeal, that the subject child's interest has been compromised. There was no evidence to this effect except the mere assertions of the father.

38. The Court was correct in making a finding to the following effect:

"I also note that the respondent has another child that was currently born out of wedlock. I don't see as to how this situation can be taken to mean that the respondent is not fit and proper mother to look after the welfare of the subject child. Obviously there are many mothers in society who have been able to manage the welfare and interest of their child or children who are born out of wedlock. In this case I'm not satisfied that sufficient evidence has been established to show that the respondent is not a fit and proper person to look after her child 11"

39. In absence of any cogent evidence before the Court, it was open to the Court to make a finding that the mother, having another child from another partner, does not compromise the interest and safety of the subject child.

40. I have dealt with the grounds of appeal which I find have no merits to change the parenting orders made by the Court. It is however important that the contact orders be defined. In this case the Court has ordered that the father has reasonable contact with the child.

41. The term reasonable contact brings along with it its own difficulties. What is reasonable contact will differ in each case depending on the circumstances of the child and the parents. A lot of factors have to be considered and the question arises as to who will consider these factors at the end of the day if it were to be left open for the parties to work out? Experience would indicate that this term only creates further confusion and animosity between the parties because there is no cogency about the order and no specific obligation on any party to comply. It is therefore proper that meaningful contact orders be made by the Court and the definitive nature of the order would depend on the circumstances of the parties and the children.

42. In considering what would constitute a meaningful contact order in this case, I have considered the child's age and ability to travel, the need for the child to have enough rest in between travels, the need for the child to bond with the father, the different districts the parents live in, the need for the child to attend pre-school and prepare for pre-school, the hours of pre-school; and the need for the child to be supervised by the custodian parent in regards the schoolwork.

Final Orders

43. In the final analysis I find that the appeal does not have any basis and I dismiss the same.

44. I affirm the order of the Court below that the mother has residence of the child.

45. The father to have contact as follows:

(i) Every Friday 5pm to Sunday 12pm with effect from 22 April 2016.

(ii) First half of every School holiday from appropriate Friday 5pm to appropriate Sunday 12pm.

(iii) Father must pick and drop the child from the mother's residence.

46. Amongst the statutory right to apply for variation of parenting orders, the parties are also at liberty to apply for variation of contact orders if necessary to enable the child attend primary school without any impact on the child's physical, emotional and psychological well-being.

47. Each party must bear their own cost of the appeal proceedings.

Anjala Wati

Judge

21.04.2016

To:

1. Appellant.
2. Respondent.
3. File: 13/Rak/0063.