

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER: 17/Suv/ 0015

BETWEEN: **SUDESHNA**

APPELLANT

AND: **MANIKAM**

RESPONDENT

Appearances: Mr. A. Chand for the Applicant.

No Appearance for the Respondent.

Date/Place of Judgment: Tuesday 1 October 2019 at Suva.

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 are purely coincidental.

JUDGMENT

Catchwords:

FAMILY LAW – Consent Orders – discharging of consent orders-- whether discharging of the consent order catering for the maintenance of the child made in the best interest of the child.

Cause and Background

1. The mother has appealed the decision of the Family Division of the Magistrates Court made in 2017. The only portion of the order that is appealed is the setting aside of the consent order which granted the father “***full responsibility to pay the elder child’s education, living and other expenses***”.

2. For reasons of clarity, I will briefly recite the salient history of the proceedings. In 2016, the parties had entered into an agreement regarding the parenting and maintenance of their two children. The court having being satisfied that it was in the interest of the children, granted consent orders in 2016.
3. The gist of the consent orders were as follows:
 1. *The father to have residence of the elder child from Monday to Friday. The father was to drop the child at the mother's residence on or about 6pm every Friday and pick him every Sunday on or about 6pm.*
 2. *The younger child was to reside with the mother until he attained the age of 6 years and upon reaching 6 years, the father was to have residence of the child from Monday to Friday and the arrangements in (1) above would take effect. If the child was to reside with the father then the mother was at liberty to visit the child in the weekends with prior arrangements between the parties.*
 3. *The father was to take full responsibility for the education, living and other expenses of the elder child.*
 4. *The father was permitted to take either child out of the country to visit his families abroad.*
 5. *The father was to pay child maintenance for the younger child in the sum of \$150.00 per week until the child attained the age of 6 years.*
4. The consent orders were being complied with by the parties until the mother complained to the police that the father had assaulted the elder child. The father was charged and brought to court. In the domestic violence restraining order case, the mother obtained interim residence of the elder child and also interim non-contact orders against the father in favour of the same child.

5. Subsequently, she filed an application in the Family Division of the Magistrates' Court to set aside order numbers 1, 2 and 4 and part of order 5 above. She asked for residence of both children and reasonable contact to the respondent.
6. In setting aside the orders that the mother had sought, the court also set aside the order vesting on the father the full responsibility of the elder child's educational, living and other expenses. Being aggrieved, the mother brought an appeal against the order.
7. The mother asserts that since she was bestowed with the additional responsibility to look after the elder child, the order for the father to cater for the child's living, educational, and other expenses should not have been cancelled. She asserts that it was in the interest of the elder child that he be provided for and that that interest was not given regard to by the court.
8. I was informed during the hearing of the appeal that the father is now paying \$250 per week in maintenance for the two children under an interim order and that the issue on appeal is a moot point which the Legal Aid Commission wants determined for other matters as well. I have not been told as to which other cases can get affected by the facts of this case. However, since the appeal is intact, the court is duty bound to determine the same unless it is withdrawn.
9. I have perused the records and it does not show when the interim orders of \$250 was made for payment of maintenance for both the children. I believe the orders would have been granted after the appeal was filed and the records compiled.
10. Mr. Chand, appearing for the mother has asked the court for an order for payment of a sum of money in favour of the elder child for the period he was not supported by the father, that is, from the date of the discharge of the consent orders until the date for an order for interim maintenance in his favour.
11. Mr. Chand has tendered evidence from the bar table that a sum of \$125 per week for this period is sufficient. I find it surprising that such a statement can be made without the father being given an opportunity to respond to the alleged expenses as proper. This is an issue that the lower court has not dealt with till date and I cannot exercise my original jurisdiction in

the appellate proceedings as the father has not been heard on this issue and not put on notice either vide the appeal proceedings.

Law and Analysis

12. I will first deal with the aspect of cancellation of the order for the father to take full responsibility for the elder child's living, educational and other expenses. The court gave a reason for cancelling the order.
13. The judgment of the court indicates that Mr. Chand appearing for the mother had conceded that the order was vague. The court accepted that the order was vague. The court further found that at the time the consent order was made, the mother was unemployed but at the time of the hearing of the application to set aside the consent orders, she was employed.
14. On a cursory read of the judgment, the remark regarding the mother being employed appears to have been made to justify why the court discharged the order being the subject of the appeal in favour of the elder child. However, if the entire judgment is read, it becomes apparent that contextually the remark was made to justify the order of the court which converted the final order for younger child's maintenance to an interim order due to which the court then needed to fix a hearing date for final orders for maintenance for the younger child. Be that as it may, the factor is relevant in considering the amount of maintenance which ought to be paid by the father for the elder child as well.
15. If the court was of the view that the order was vague and it needed setting aside, then it ought to have taken two steps immediately. The first was for the court to have worked out an interim order for maintenance for the elder child until such time the final orders for maintenance was heard for both the children. The second important step was to fix a hearing date for the final maintenance orders for the elder child.
16. The matter was fixed for 8 December 2017 for hearing of the final maintenance orders for the younger child but the court made no mention or gave indication that the elder child's final

maintenance application needed to be heard too. In that regard the court failed to tie the loose ends in the case.

17. It becomes clear from the records that the elder child was bereft of an order for interim maintenance and a hearing date for the final application for the maintenance. Such an order does not serve the interest of the child.
18. At some point in time, the court did make interim orders for maintenance for both the children but there was a period in between when the elder child's interest was not catered for. This is the period that Mr. A. Chand is asking me to grant maintenance for, which this court cannot consider as I do not have proper evidence of what the proper expenses of the child was in this period.
19. Mr. A. Chand should have asked the Court ascertaining the interim maintenance for the elder child for reimbursement of the expenses incurred by the mother for this period.
20. The other reason why I do not endorse the orders of the court below is that part of the orders that was set aside could have been saved and does not qualify as vague orders incapable of being enforced.
21. This child was in a private school and due to the cancellation of the order, I am told, the father withdrew his support and the child had to be removed from the private school. What the court could have done was to maintain the order for the father to pay the child's educational expenses which would have included the school fees for the child's private school.
22. Educational expenses do not normally vary in weeks. There are some standard costs such as school fees, travelling costs and pocket expenses. If the child needed additional stationary, for example, writing materials, that could have been easily catered for by the mother herself as she had started working. What she was concerned about was the significant expenses that she could not cater for, for example, the school fees for the child.

23. I accept that it may be difficult for the father to say with certainty what the child's living expenses would be with the mother. In that regard the order was inchoate. It is much easier for a parent to take full responsibility of a child's living expenses when the child is living with the parent ordered to pay but if the child is living with the other parent, the paying parent does not have any certainty as to what the correct expenses are for his living. This may change from one week to the other. In that regard a monetary sum and the period for payment needs to be fixed for the order to have precision for compliance.
24. The court in cancelling the orders wholly without any substituting orders failed to have regard to the best interest of the elder child and that was an error in law and in fact. The proper order in the circumstances would have been to cancel the orders partially. The order for payment of living and other expenses could have been quantified and the order for payment of the school expenses could have been maintained.

Final Orders

25. In the final analysis, I find that the court erred in wholly setting aside the orders for the father to be fully responsible for the elder child's living, educational and other expenses. The court ought to have set aside the orders in part which bestowed on the father the responsibility to pay for the living and educational expenses and substituted with an order for payment of a monetary sum. The order for payment of the child's educational expenses ought not to have been cancelled.
26. I therefore allow the appeal but will not disturb the orders which has set aside the father's obligation to cater for the child's living, educational and other expenses in light of the interim orders for payment of maintenance for the two children which effectively, in the interim, takes care of the rights of the elder child too.
27. I order that the final application for maintenance for the elder and the younger child be heard as soon as possible by the Magistrates' Court if it is not already heard. The mother is at liberty to claim reimbursement of expenses that she incurred in respect of the elder child from the date of the setting aside until the date of the interim order for maintenance of the elder child. This court is not in a position to make those orders without hearing the evidence.

Anjala Wati

Judge

01.10.2019

1. *LAC for the Appellant.*

2. *The Respondent.*

3. *File: 17/Suv/0015.*