

**IN THE FAMILY DIVISION OF THE HIGH COURT
APPELLATE JURISDICTION
LABASA**

CASE NUMBER: 19/Lab/0007

BETWEEN: KUNAL

AND: SHALESHNI

Appearances: Mr. Sushil Sharma for the Appellant.
Ms. J. Korotini for the Respondent.

Date/Place of judgment: Wednesday 4 March 2020 at 9.30am at Labasa.

Coram: Hon. Mr Justice Vishwa Datt Sharma

Category: All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.

Anonymised Case Citation: Kunal v. Shaleshni - Family High Court Appeal Number 0007 Lab of 2019

JUDGMENT OF THE COURT

Family Law: Parenting Order Application - What Orders should be made in the interests of the child(ren) - contact to a parent to be defined in the interests of the child(ren)

Legislation: The Family Law Act 18 of 2003 ("FLA"); ss54(2); 66(1) and 4; and 121

INTRODUCTION

- [1] In the Family Magistrates' Court, the mother of the TWO (2) children filed a Form 9 Application for Final Orders and applied for Parenting Orders.
- [2] The essence of the mother's application sought in particular that she be given residence of the TWO (2) children; a male child 12 years of age and a female child 14 years of age.
- [3] The Applicant was opposed by the father.
- [4] The Social Welfare Officer's Report was furnished to court in terms of Section 54(2) of the FLA.
- [5] After a full hearing, the mother succeeded with her Form 9 Application and the following Orders were accordingly made in her favour on 4th July 2019: -

"TWO (2) children; the male child and the female Child to reside with the mother with reasonable access to the father respectively."

GROUNDS OF APPEAL

- [6] The father was aggrieved by the court's decision and accordingly filed the Appeal currently before this court on SIX (6) grounds.
- [7] Subsequently, the SIX (6) grounds of appeal were amended and reduced to THREE (3) grounds only.
- [8] The counsel representing the father informed court that he will proceed with the following THREE (3) grounds only:
 - (i) The Learned Trial Magistrate erred in law and in fact in relying heavily on the Social Welfare Report in arriving at a finding regarding the residence of the children on the Social Welfare Report which was not disclosed to the father.
 - (ii) The Learned Trial Magistrate erred in law and in fact in not taking into account the provisions of Section 121(2)(b)&(c) of the Family Law Act as the male child had an attached and close relationship with the father and has been in continuous residence of the father from 11th October 2017 after the mother deserted the matrimonial home.
 - (iii) The Learned Trial Magistrate erred in law and in fact in not considering the likely effect and the change of circumstances of the male child by granting the residence of the male child to the mother.
- [9] The counsel representing the father did not file any written submissions, rather argued the appeal orally.
- [10] The mother was represented by Legal Aid Commission Lawyer who defended the THREE (3) amended grounds of appeal hereinabove and furnished court with written submissions.

FATHER'S CASE

- [11] The counsel representing the father informed court that he will only proceed with the amended grounds of appeal as mentioned at preceding paragraph 8(i)(ii)&(iii) mentioned hereinabove and not proceed with other grounds mentioned at paragraphs 4, 5 and 6 of his amended grounds of appeal.
- [12] He submitted that the Social Officer's Welfare Report was an important document and parties must have a cite of the report. Contents were not disclosed.
- [13] The interim Residence of the male child was with the father 8 months prior to the court decision.
- [14] The court must see the change of circumstances. There is no evidence before court as to when the male child was in interim residence of the father. No counter reports before court.
- [15] There is nothing in the Resident Magistrates' judgment about any counter reports in the Social Welfare Officer's Report.
- [16] The Resident Magistrate should have defined the contact Orders - not done.
- [17] The children's change of circumstances was not taken into consideration - s121(2)(b)&(c).
- [18] The status of the children were unknown as of current.
- [19] Father is paying child maintenance.
- [20] Father took TWO (2) children to an outer island in the north and now mother is leaving for overseas on medical issues and intending to leave the TWO (2) children with the father.
- [21] Ask court to grant Contact Orders now when the mother is absent from Fiji on medical treatment overseas.
- [22] The case to be remitted for Hearing before another Resident Magistrate.
- [23] Children issues are paramount interest.
- [24] At the lower court, it was brought into evidence that when the Mother left the matrimonial home, she left with the female child only and not the male child (refer to Magistrates' Court Ruling at Paragraph 5 Line 4 onwards).
- [25] The Magistrate did not take into consideration at the time of making the Order that the male child was still with the Father.
- [26] On 23 November 2018, Interim Order as to Residence was made that the TWO (2) children to the Mother with Reasonable Access to the Father.
- [27] Both parents are working.

MOTHER'S CASE

- [28] Reasonable access given by Resident Magistrate but not defined.
- [29] Both parties are teachers.
- [30] Orders were varied by Resident Magistrate on Variation Application as per the Court Record and Contact was defined.
- [31] Reasonable Access not defined in the Final Judgment, but both are teachers and continued with Variation Order Access.
- [32] Variation of Interim Order was not sealed. However, both parties exercised the Reasonable Access.
- [33] Mother allowed more access to Father even though it was not in the Court Order.
- [34] No Contempt of Orders and Access Order was working well.
- [35] Wish to inform Court that the Mother will travel overseas for medical treatment and since the Father had not replied to Mother's text messages for the TWO (2) children to remain with the Father in her absence, now the Mother will leave the TWO (2) children with the Grandfather when the Mother is on overseas medical treatment.
- [36] Still, the mother has been allowing the TWO (2) children to remain with the Father when she is on overseas medical treatment.
- [37] There is no merit in the Father's Appeal.

ANALYSIS and DETERMINATION

- [38] The issues for this honourable court to determine are:
- (a) Whether the learned trial magistrate in fact erred in law in arriving at the decision of 4th July 2019; and
 - (b) Whether the court ought to set aside the parenting Orders made on 4th July 2019 and in lieu make other appropriate parenting Orders in the circumstances
- [39] I have perused the Judgment of the learned Magistrate delivered on the 4th of July 2019.
- [40] I note that the learned Magistrate has not stated and/or made reference to any particular sections of the law within the FLA 18 of 2003 when dealing with parenting Orders.
- [41] In deciding whether and what appropriate parenting Orders should be made in respect of the TWO (2) children herein, the court must regard the best interests of the TWO (2) children as the paramount consideration in terms of Section 66(4) of the FLA.
- [42] Further, in determining and/or deciding in what is in the best interest of the TWO (2) children herein, the court must consider the matters set out in Section 121(2)& 121(1) of the FLA.

First Ground of Appeal

The Learned Trial Magistrate erred in law and in fact in relying heavily on the Social Welfare Report in arriving at a finding regarding the residence of the children on the Social Welfare Report which was not disclosed to the Father.

[43] **In support of the 1st ground of appeal, the counsel representing the father gave the following reasons**

-

- (a) **The Learned Magistrate relied heavily on the Social Welfare Officer's Report when arriving at the finding regarding the Residence of the TWO (2) children;**
- (b) **The Social Welfare Officer's Report and its content was not disclosed to the father;**
- (c) **The Social Welfare Officer's Report was an important document in the circumstances;**
- (d) **There is nothing in the Learned Magistrate's Judgment about the Social Welfare Report; and**
- (e) **Contact Orders were not defined by the Learned Magistrate in his Judgment.**

[44] **The Social Welfare Officer's Report was ordered by the Learned Magistrate in terms of Section 54(2) of the FLA. This Report may be received in evidence in any proceedings under the FLA. Any recommendations made by the Author of the Report is neither a decision nor binding on the Court. The Court would make a decision on the pending issues independently after consideration of all matters including documentary and oral evidence tendered into evidence in this case.**

[45] **The Learned Magistrate has said in his Judgment at paragraph 7 that "the Social Welfare Officer's Report has recommended for the Residence of the children to be granted to the mother with reasonable contact to the father. This report was not challenged or disputed".**

[46] **The counsel for the mother has also confirmed in his written submissions that the counsel representing the father "The Social Welfare Officer's Report was not challenged by any of the two parties where both agreed to the assessment done by the Social Welfare Officer".**

[47] **Be it may, it should be borne in mind that the Social Welfare Officer's Report is not binding on the court and therefore the court is not bound to accept the Report on its face value when received into evidence.**

[48] **For the aforesaid rationale, the 1st ground of appeal fails.**

2nd and 3rd Grounds of Appeal

The Learned Trial Magistrate erred in law and in fact in not taking into account the provisions of Section 121(2)(b)&(c) of the Family Law Act as the male child had an attached and close relationship with the father and has been in continuous residence of the father from 11th October 2017 after the mother deserted the matrimonial home.

The Learned Trial Magistrate erred in law and in fact in not considering the likely effect and the change of circumstances of the male child born on 23rd January 2008 by granting the residence of the male child to the mother.

[49] **Appeal Grounds 2 and 3 can be dealt with together since both are interrelated.**

[50] **Section 121(2)(b)&(c) sets out matters that should be taken into consideration in determining what is in the best interests of a child.**

Section 121(2)(b) -

The nature of the relationship of the child with each of the child's parents and with other persons;
and

Section 121(2)(c) -

The likely effect of any changes in the child's circumstances, including the likely effect on the child from any separation from

- (i) Either of his or her parents; or
- (ii) Any other child, or other person, with whom the child has been living.

- [51] The father submitted that the male child was 12 years of age had an attached and close relationship with the father and has been in continuous residence of the father from 11th October 2017 after the mother deserted the matrimonial home.
- [52] The Learned Magistrate has in his Judgment at page 5 stated "*the mother planned to move out of the matrimonial home with the female child aged 14 years , she had informed the children and the male child his wish to reside with the father*".
- [53] The father in his evidence before the Magistrates' Court (as appears at paragraph 6 of the Judgment) "*that the mother has moved out with the female child 14 years of age and the male 12 years of age resides with him*".
- [54] Both children are schooling together in the same school. The father financially supports both children.
- [55] In terms of the Social Welfare Officer's Report, the female child expressed her wish to reside with the mother but had the desire for all to stay as a complete family unit. She also added that her brother accompanies her from school, and they spend afternoons together until the mother returns from the school and takes her away to the place where they are renting.
- [56] On the other hand, the male child when interviewed by the Social Welfare Officer, he preferred to reside with the father as he believed that his father loves and cares for him. His wish is for his mother and younger sister to come back home to the family so that they live as a stable and complete family unit.
- [57] Taking all above into consideration, the father succeeds with the 2nd and 3rd grounds of appeal accordingly.
- [58] However, during the Appeal Hearing, I also had the opportunity to interview both children on a one-to-one basis in the presence of my two court officers.

The male child told me that he wished to stay with the father, not to separate him from the sister and wish to stay together so that we can work and play together.

Whereas the female child told me that she wishes to stay with her father. Mother and father both looks after her well. Brother wishes to stay with father. Father takes her everywhere and wishes to stay with father. When the mother leaves for overseas they want to stay with the father and grandfather.

[59] Taking into consideration all above together with the wishes of the TWO (2) children expressed in the Social Welfare Officer's Report and my personal interview of both children, it only prompts me to make some appropriate Parenting Orders which would befit the best interests and the current circumstances of both the children herein.

[60] I note further that the Learned Magistrate failed to define the Reasonable Contact Order he made for the benefit of the parties to these proceedings.

[61] Accordingly, I set aside the Learned Magistrate's Orders of 4th July 2019 and in lieu of that Order grant the following final Orders -

FINAL ORDERS

- 1) Both parties to the proceedings [Father and the Mother] is granted with a joint Residence and Contact of the male child and female child accordingly.
- 2) The Contact Order herein is defined as follows:
 - (i) Father to drop the male child to the mother's residence on Friday's of alternative weeks at 4pm commencing on Friday 06th March 2020 at 4pm and to pick the male child from the mother's residence on Sundays at 4pm commencing 08th March 2020.
 - (ii) Likewise, as above at 2(i) the mother to drop the female child born on 23rd October 2010 to the father's residence on Fridays of alternative weeks at 4pm commencing on Friday 13th March 2020 at 4pm and pick the female child on Sundays at 4pm commencing 15th March 2020.
 - (iii) During every school holidays the contact Orders at 2(i) and (ii) to be abided by and continued without any confusion.
- 3) Both parties are at liberty to apply for variation of Residence and Contact Orders as enumerated hereinabove if it becomes necessary.
- 4) Each party to bear their own costs.

VISHWA DATT SHARMA
JUDGE
SUVA
04th Day of March, 2020

cc: Messrs Samusamuvodre Sharma Law, Labasa.
Legal Aid Commission, Labasa.