

**IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA**

**APPELLATE JURISDICTION**

<b>ACTION NUMBER:</b>	Family Appeal Case Number 0003 of 2020 [original Case Number: 20/NAS/0226]
<b>BETWEEN:</b>	<b>KAPINDRA</b> <b>APPELLANT</b>
<b>AND:</b>	<b>AKANSHA</b> <b>RESPONDENT</b>
<b>APPEARANCES:</b>	Mr. A. Sen for the Appellant. Mr. M. A. Khan and Ms. Kant for the Respondent.
<b>DATE/PLACE OF JUDGMENT:</b>	Friday 20 October 2023 at Suva.
<b>CORAM:</b>	Hon. Madam Justice Anjala Wati
<b>CATEGORY:</b>	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.

**JUDGMENT**

**Catchwords:**

***FAMILY LAW – CHILD RECOVERY ORDERS – should only be issued in the best interest of the child – no reasons cited why the orders were issued – when a parenting order application is pending then the proper proceeding in which the child’s best interest should be determined is that proceeding: a party should not hastily use child recovery proceedings to fast track the parenting order proceedings unless the child’s life, safety and well-being is compromised that his or her recovery is warranted pending the determination of the parenting order application.***

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Cause

1. On the 15 June 2020 the Family Division of the Magistrates’ Court in Nasinu had granted child recovery orders in respect of the only child of the marriage. The recovery orders were made against the father of the child. On 17 June 2020, the father filed an appeal against the said orders and sought urgent ex-parte stay of the recovery orders.

2. I heard the application for stay and through an ex-tempore ruling issued on the same day stayed the orders of the Resident Magistrate. It was in the interest of the parties that I heard the appeal on an expedited basis. This is the substantive judgment on appeal.
3. The basis of the appeal is that the court erred in making:
  1. *An order for child recovery on an ex-parte basis without ascertaining the circumstances and the best interest of the child.*
  2. *An order for child recovery when there was pending proceedings for residence of the child in Labasa Court.*
  3. *A child recovery order when there was no substantive application taken into consideration.*
  4. *A final order for child recovery on an ex-parte basis and only considering forms 12 and 23.*

#### Background

4. The parties had been living in Labasa with the child until May 2020 when they came to Suva for a holiday.
5. On 14 May 2020 the mother sought a domestic violence restraining order against the father of the child. The protected persons were the mother and the child. The application was dismissed on 11 June 2020.
6. The father returned to Labasa and the child stayed with the mother in Suva. On 22 May 2020 the father filed a parenting order application in Labasa Court. On 12 June 2020 the father took the child back to Labasa from Suva. The mother says that she gave him the child so that the child could have contact with the father but the father took the child back to Labasa without informing her.

7. The mother then applied for a child recovery order knowing very well that a substantive parenting order application was pending for determination in Labasa Court.

#### Law and Analysis

8. I will start of by saying that both parents have a primary duty to maintain their child. Both were in this case the primary caregivers of the child. When they separated, the father filed an application for residence of the child in Labasa and served the proceedings papers on his wife, the mother of the child, well before she made an application for child recovery.
9. It was the final parenting order application in which the court would have decided which parent could look after the interest of the child and what parenting orders should be made.
10. The mother ought to have waited for that parenting order proceedings to conclude and not use the child recovery proceedings to fast track the final parenting order proceedings unless the child's life was in danger or his safety or well-being compromised by the father taking the child away to his home where the child had always lived and was familiar with the environment. It must be noted that the child was looked after and cared for by the paternal grandmother in Labasa all along until the parties came to Suva for a holiday and there was this disruption in the family.
11. In absence of any threat or compromise to the child's physical, mental or spiritual health, the issuance of the recovery order proceedings was an abuse of the process of the court. Child recovery order proceedings are temporary orders until final proceedings decide the best interest of the child.
12. There was already a case pending in which the child's best interest was to be determined. Bypassing that, the court considered the application for recovery in absence of any threat to the child's life and well-being. This was an error of law and fact on the courts part.

13. When the court granted the recovery orders, it did not state a single reason why it considered that it was in the interest of the child to be recovered and handed over to the mother. Both the parents had equal responsibility for the child. The court was yet to make a finding on the best interest of the child. What was then the basis to issue the recovery orders? No threat or compromise was cited as the reason for child recovery orders. On this basis, the child recovery orders were only issued to support the interest of the mother of the child and not in the best interest of the child.
14. The Nasinu Court was made well aware that the parenting order proceedings were pending in the Magistrates' Court Labasa. In accepting the child recovery proceedings in Nasinu and granting the orders, the court promoted the abuse of the process of the court in allowing duplicate proceedings to be on foot in two different jurisdictions.
15. If the mother wanted to exercise her rights honestly to protect the interest of the child, she would have issued child recovery proceedings in Labasa Court and not in Nasinu Court. The child was in Labasa and the substantive proceedings were in foot in Labasa. There was no urgency in issuing proceedings in Nasinu Court.
16. Further, the issuance of the proceedings ex-parte and granting of the orders ex-parte is an indication that the mother wanted to defeat the child's rights in not wanting to have the child's rights determined by the court. She only wanted to make the proceedings as one that serves her interest. If she wanted a proper determination on who should have the child's interest in the interim, she would have attended the Labasa Court proceedings scheduled in Labasa before the child recovery order application was filed. She did not attend that proceeding and used the child recovery proceedings wrongly to take residence of the child.
17. I cannot fathom the basis on which the court decided on an ex-parte basis that she should have the residence of the child in the interim instead of the father of the child. The father had as much right and responsibility as the mother to look after the child. If he was alleged to be not suitable for the child's safety and well-being then he should have been heard at least by a returnable date granted on the ex-parte application.

18. The court did not even give the father a chance to vindicate his rights. It granted final orders on the child recovery application. The effect of granting recovery orders had a prejudicial effect on the child as the father's interim parenting order application became redundant. Attached to the final order application was an interim order for parenting orders. The Labasa Magistrates Court would be reluctant to grant any interim orders in light of the recovery orders of another Court. This would mean that for some years, there would not be an interim order to cater for the child.

19. The recovery orders also did not state anything about the child's right to have contact with the father or for the father to come back to court to argue the issuance of the ex-parte recovery orders. This meant that the child was not able to have contact with the father until the Labasa Court proceedings decided anything otherwise in regards to the residence and contact. Like I have said, it would be quite some time before the final order proceedings would be heard and any orders for contact made. This defeats the interest of the child as he has a right to be maintained, looked after and cared for by both the parents.

#### Final Orders

20. I find that there is merits in the appeal and as such I set aside the recovery orders issued by the Magistrates' Court in Nasinu. The parties are at liberty to have the child's best interest determined in the Labasa Magistrates' Court where the final order proceedings for parenting orders are currently pending.

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

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Hon. Madam Justice Anjala Wati

20.10.2023

To:

1. Maqbool & Company for the Applicant.
2. M.A. Khan Esq for the Respondent.
3. File: Family Appeal Case Number: 0003 of 2020.