

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA

APPELLATE JURISDICTION

ACTION NUMBER:	FAMILY APPEAL CASE NUMBER 3 OF 2020
BETWEEN:	MADAN APPELLANT
AND:	TASMIYA RESPONDENT
APPEARANCES:	Appellant in Person. Ms. Diroiroi, V. for the Respondent.
DATE/PLACE OF JUDGMENT:	Tuesday 23 April 2024 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 similarity to any persons is purely coincidental.

JUDGMENT

A. Catchwords:

FAMILY LAW – PARENTING ORDERS – APPEAL – *Did the court below err in making the parenting orders it did in the best interest of the children – should the orders for contact be specified for meaningful contact and for the parties to know the clear orders to follow.*

B. Legislation:

- 1. Family Law Act 2003 (“FLA”): s. 54.**

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Cause

1. This is an appeal by the father against the order of the Magistrate's Court wherein it had granted the residence of the 3 children to the mother. The father was granted "open" contact. The children are 2 boys, aged 13 and 10, and a girl aged 9 years.
2. The application for residence of the 3 children was filed by the father. The mother had also applied for the residence vide her response.

Magistrate's Courts Findings

3. There are various reasons why the residence of the children was given to the mother. The reasons are contained in the judgment.
4. The first was why the court was not going to implement the wishes of the children. The court found that children were not mature enough as a result of which they were coerced by the father causing them to reflect their father's views.
5. The court endorsed the report by the Social Welfare Officer that the father had coerced the 2 boys to express their wishes to reside with him in return for purchase of a television and computer if their mother leaves. The court was concerned at the father's conduct of brainwashing the children. It stated:

"This is not right and reflects negative parenting style of the Applicant. The differences he has against the Respondent should not be passed onto the children. Children are not trump cards to be used in pursuing personal interests in residence and contact applications. The children's maturity is not sufficient in order for the court to accept it, thus their views of wishing to reside with their father in light of coercions made will not be accepted".

6. The court also found that the initial arrangement that existed for the 2 boys to live with the father and the daughter to live with the mother was not in the interest of the children. The court stated that unity of siblings was in their interest.

7. The court also accepted that the father had been violent to the mother. It accepted that the violence took place in the presence of the children. . The court stated that it was not in the interest of the children to be exposed to violence and that they needed protection.
8. The court also found it affected the children that his father was not an exemplary father. It based its findings on the evidence that the father was a social welfare recipient. Yet he told the court in evidence that he was working on a farm. The court stated that poverty allowance is reserved for the very poorest in society. The father could not claim that allowance whilst working. The court found that this conduct of the father puts in question his credibility and caliber on whether he could be an exemplary father to his children.

The Appeal

9. The father says that the court erred in:-

(1) law and in fact when determining that the father had coerced the children.

(2) law and in fact in determining the best interest of the children and not taking into account that the mother does not have a permanent place to stay.

(3) law in giving full residence to the mother when the children were mostly residing with him for the last few months.

(4) law and in fact in not giving to the father overnight weekend contact to the father.

10. On appeal, the father required that the children be interviewed by the social welfare officer and that he be given full residence whilst the mother be given open contact.

Analysis

11. I will start off with the first ground of appeal which complains about the impropriety in the trial court accepting the Social Welfare Officer's evidence that the father had coerced the two children in expressing their views to live with him.
12. The report stated that when the children were interviewed individually, the two sons expressed wishes to live with the father and the daughter wished to live with the mother. The eldest child had indicated that the father had informed him that if the mother leaves them, he will buy them a television and a computer.

13. The Social Welfare Officer Nadi, was of the view that the sons expression of their wishes to live with the father were as a result of coercion by the father. This view was formed as the children had told the Officer during home visit assessment that they wished to reside with their mother. Further the eldest son indicated that the father will buy them a television and a computer. This, to the Social Welfare Officer's mind, amounted to coercion.
14. The Social Welfare's Officer was not challenged on her report. The report was ordered under s. 54 (2) of the FLA. A report given to the court pursuant to orders made under s. 54(2) of the FLA, may be received in evidence: s. 54(8) of the FLA. It was therefore open to the trial court to attach weight to the report in view of the fact that the father did not challenge the social welfare officer on the report.
15. The parties knew that the social welfare officer had been directed to prepare a report and that one was submitted to the court. Before the trial, the parties were entitled to ask for a copy of the report and decide whether any parts of it will be challenged. Nothing in the report was challenged. The parties therefore accepted the observations and views noted in the report.
16. After 2 ½ years of the judgment of the trial court, the parties requested that the children be interviewed by the court.
17. This was mainly to reflect on the children's wishes and given the deep acrimony between the parties resulting in allegations that the children were mistreated by the mother and her partner. The children were interviewed twice on two different dates within a span of 6 months. The report of the interview appears in the official records.
18. The children have very honestly informed the court that they wish to continue living with the mother as she does not mistreat them in anyway but they love their father very much and wish to have contact with him on a regular basis.
19. When they were asked whether they prefer weekend contact with the father, they were very excited and said that it will give them time with both parents. I could see genuine happiness when they realized that they can spend time with their father and also be able to live with their mother.
20. The children have informed the court that the father guides them in life, teaches them life lessons, helps them, gives them advice, loves them, looks after them and enjoys social activities with them. They deny any abuse from the father as alleged by the mother.

21. I will take into account the views expressed by the children in making the final orders. I do not find that the children were speaking on behalf of nay one of the parents. I do not doubt for a moment that what they told the court reflected their wishes free of any influence.
22. The second ground of appeal says that the mother does not have a permanent place to stay and it does not support the interest of the children that they live with her. During the trial, the parties were living under the same roof. The mother had secured a rented flat for herself and the children. The evidence indicated that it was a 2 bedroom flat. She had not moved in that flat at the time because the parties were living under the same roof. Now that she has moved out to live away from the husband, there is no evidence before me that her current place of residence is not conducive to the upbringing of the children.
23. At the time of the trial, there may have been concerns that the mother does not have a place to live. She had not moved in any particular residence. That concern is now not valid.
24. The remaining grounds of appeal are on why the court had changed the residence orders when the father says he had been looking after the children and why he was not given weekend overnight contact.
25. When the trial took place, the parties were living together under the same roof. They had started living together because they had reconciled. Before the reconciliation, there were interim orders in place for the 2 sons to live with their father and the daughter to live with their mother. The father's assertion that he was looking after the children does not hold merit as both parties were living under the same roof and the children were in the care and custody of both. The orders giving residence to the mother did not suddenly change the status quo to affect the children.
26. The interim orders prior to the separation had caused the siblings to separate. I agree with the court below that this did not support the best interest of the children. I noticed from interacting with them that they were very closely bonded. They still are. They have each other for various things. They have each other for day to day matters, to play with each other, to help each other and to depend on each other. There was no sound basis to split them.
27. I now turn to the ground of appeal on the issue of open contact. I do agree with the father that open contact was meaningless. It caused further acrimony between the parties as there were no specified orders to follow. This caused the children to be away from the father. They did not want this. They

wanted time with their father. They are desperate for their father's love and guidance. Coherent orders specifying regular contact therefore was going to promote the interest of the children.

28. An order for open contact would require the parties to discuss the day and time for contact. The trial would have established the feud between the parties. In such instances, leaving matters in the hands of the parents to promote contact and to work in the best interest of the children is not workable. The court below ought to have specified contact.
29. The mother discouraged the contact. The children had reflected on this. It was only proper that clear defined contact order was made for the parties to follow it.
30. On 25 January 2022, I made interim weekend contact orders as desired by the children. I intend to make those orders final.

Final Orders

31. In the final analysis, I allow the appeal in part and make the following orders:

(1) The mother to have residence of the children.

(2) The children to have weekend contact with their father from every Friday 4pm to Sunday 4pm. The exchange point shall be Nadi Police Station.

(3) During two weeks school holidays, the father to have contact of the children for 1 week starting Friday at 4pm being the last day of school to Sunday the following week until 4pm. The exchange point remains the same.

(4) During the end of school holidays, the father to have contact of children beginning last day of school at 4pm to 5 January the following year until 4pm. The exchange point remains the same.

32. Each party shall bear their own costs of the appeal.

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Hon. Madam Justice Anjala Wati

23.04.2024

To:

- 1. Appellant in Person.**
- 2. Legal Aid for the Respondent.**
- 3. File: Family Appeal Case Number: 3/2020.**