

IN THE FAMILY DIVISION OF THE MAGISTRATE'S COURT AT SUVA

FILE NO.: 14/SUV/340

BETWEEN

HK
Applicant

A N D

MB
Respondent

APPEARANCES/REPRESENTATIONS

R. Patel Lawyers for the Applicant

Vaniqi Lawyers for the Respondent

RULING

Introduction

1. The Applicant/Lady, biological mother of the child, namely ASK who was born on 11 April 2014 [hereinafter "**the child**"] initially filed applications for Residence of the child and Maintenance along with an application for interim residence and interim Maintenance.
2. On 01 September 2014, both parties entered into interim Residence and contact arrangement by consent. ["the Consent Order"]
3. Further, the mother filed a Form 12 and 23 applications on 20th February 2015 seeking orders which I wish to quote in verbatim;
 - a) "An Order for recovery of the child ASK born on 11th April 2014.

- b) That the child be recovered from the Respondent and handed to the Applicant in compliance with the Consent Order dated 1st September, 2014.
- c) Costs.
- d) The Consent Order dated 1st September, 2014 be varied to include.
 - a. That the Respondent shall pay maintenance for the child at the rate of \$200.00 per week to the Applicant. The \$200.00 shall be deposited into the Applicants Bank of South Pacific Account Number xx”.

Case Background

- 4. Pursuant to the consent order the Applicant mother had Interim Residence of the child and the Respondent had supervised access on Mondays; Wednesdays; and Fridays between 12:00pm and 3:00pm.
- 5. The Applicant stated in her affidavit in support that she was stopped from seeing the daughter sometimes in mid-December, 2014 which has prompted her application for recovery.

Relevant Documents

- i. The Applicants Form 12 Application to Recover Child filed on 20th February 2015.
- ii. Affidavit of HK in Support of Form 12 sworn on 19th February 2015 and filed on 20th February 2015.
- iii. Affidavit of JS sworn on 27th February 2015 and filed on 4th March 2015.
- iv. Affidavit of MB sworn and filed on 4th March 2015.
- v. Affidavit of MB sworn on 03rd March 2015 and filed on 4th March 2015.
- vi. Statement of RD sworn and filed on 4th March 2015.
- vii. Affidavit of TK sworn on 27th February 2015 and filed on 4th March 2015.
- viii. Affidavit of VK sworn on 27th February 2015 and filed on 4th March 2015.
- ix. HK's answering Affidavit in Response sworn and filed on 12th March 2015 to the Affidavit of JS.
- x. HK's answering Affidavit in Response sworn and filed on 12th March 2015 to the Affidavit of MB.
- xi. HK's answering Affidavit in Response sworn and filed on 12th March 2015 to Affidavit of MB.

- xii. HK's answering Affidavit in Response sworn and filed on 12th March 2015 to the Statement of RD.
- xiii. HK's answering Affidavit in Response sworn and filed on 12th March 2015 to Affidavit of TK.
- xiv. HK's answering Affidavit in Response sworn and filed on 12th March 2015 to Affidavit of VK.
- xv. HK's answering Affidavit in Response sworn and filed on 12th March 2015 to submission of the child representative.
- xvi. HK's supplementary Affidavit dated 31st March 2015.
- xvii. Written Submissions by both parties.

CHRONOLOGY OF EVENTS

- 6. Before analyzing the evidence, the court wish to note the following timeline of events;-
 - i. 10/7/14 Applicant files Form 12,9,23 and 5 seeking residence.
 - ii. 24/7/14 Respondent files Form 13, 10, 6 and 23 also seeking custody.
 - iii. 8/8/14 Parties put before Registrar and Counselor. Cannot settle, father not willing to reconcile.
 - iv. 1/9/14 Matter set for hearing, but could not proceed pending Social Welfare report. However Consent Orders regarding interim Residence and Contact were made.
 - v. 14/9/14 baby ASK is returned to Respondent man, who has had residence to date.
 - vi. 20/2/15 Form 12 Child Recovery application filed.

The Legislation

- 7. The law to be applied in recovery proceedings is found in Subdivision 8 of the Family Law Rules and **Division 8, Subdivision B of the Family Law Act**. I wish to reproduce relevant provisions for clarity.
- 8. **Rule 8.23** provides that an application for recovery order must be in accordance with Form 12.
- 9. **Subdivision 8.22** provides the Interpretation for “recovery orders”

10. **Rule 8.22.** In this Division, “recovery order” has the meaning given by **section 105** of the Act.

11. Section 105 of Family Law Act 2005 (FLA) sets out the criteria and principles objectives underlying objects and *Nature of recovery orders*.

12. **S.105.** of FLA recovery order is an order made by a court which does one or more of the following-

(a) requires the return of a child to-

(i) a parent of the child;

(ii) a person who has a residence order or a contact order in relation to the child; or

(iii) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development;

(b) authorises or directs a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to stop and search any vehicle, vessel or aircraft, and to enter and search any premises or place, for the purpose of finding a child;

(c) authorises or directs a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to recover a child;

(d) authorises or directs a person to whom a child is returned, or who recovers a child, to deliver the child to-

(i) a parent of the child; or

(ii) a person who has a residence order or a contact order in relation to the child; or

(iii) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development; or

(iv) some other person on behalf of a person described in subparagraph (i), (ii) or (iii);

(e) gives direction about the day-to-day care of a child until the child is returned or delivered to another person;

(f) prohibits a person from again removing or taking possession of a child;

(g) authorises the arrest, without warrant, of a person who again removes or takes possession of a child.

13. **S. 108** of FLA provides a recovery order in relation to a child may be applied for by-

(a) a person who has a residence order in relation to the child; or

(b) a person who has a contact order in relation to the child;

(c) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development; or

(d) any other person concerned with the care, welfare or development of the child.

Court's power to make recovery order

14. **S. 109.**-(1) provides that in proceedings for a recovery order, the court may make any recovery order it thinks proper. (2) In deciding whether to make a recovery order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

15. **Section 66(4)** of the Family Law Act States that when making parenting orders, the Court must have regards the best interest of the children as paramount Consideration.

16. **Section 121 (2)** FLA identifies the matters that are relevant to the determination of what is in a child's best interests.

“121 – (1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).

(2) The court must consider -

- a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
- b) the nature of the relationship of the child with each of the child's parents and with other persons;
- c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of 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
- d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of the child) and any other characteristics of the child that the court thinks are relevant;
- g) the need to protect the child from physical or psychological harm caused, or that may be caused, by –
 - (i) being subjected or exposed to abuse, ill treatment, violence or other behaviour; or
 - (ii) being directly or indirectly exposed to abuse, ill treatment, violence or other behaviour that is directed towards, or may affect, another,
- h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

- i) any family violence order that applies to the child or a member of the child's family;
- j) any other fact or circumstance that the court thinks is relevant.

17. Sections 116 (1) & (2) also applies in the case. It reads:

- "116 - (1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.
- (2) in deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration".

18. It is also important to mention that when there is a pending proceeding, consent orders may be made orally.

19. The terms of which are agreed by all parties or his or her legal representative and may pronounce the orders in Court. Order 10 Rules 10.06 and 10.07.

20. A consent order is taken to be the same force and validity as if had been made after a hearing by the court: Order 10 Rule 08. I wish to reproduce the Rule for clarity;

"Effect of consent orders

10.08. A consent order made under this Division is taken to be of the same force and validity as if it had been made after a hearing by the court. (Emphasis added)

EVIDENCE AND ANALYSIS

21. I will not reiterate the entire evidence on the court but reference would only be made to the relevance of evidence to the present application and for analysis purpose. Also I wish to emphasis some portion of evidence with intention of analyzing the same potions later without reproducing the same.

22. The application dated 20/02/15 (F23) of the mother reads inter alia that: which I quote in verbatim as follows:-

"That sometime in October 2014, I returned to work in order to support ASK and myself financially. I asked MB, if it was possible for ASK to spend time with him while I travelled to the West for work. I felt this was better than ASK staying with a nanny or housekeeper I could hire. In the beginning this arrangement worked well; and whenever I was out of Suva overnight, ASK would spend between 1 to 3 days at a time with MB's family that is at MB's parent's home. That while at MB's parent's home, ASK had a nanny, VK.

That after a few weeks MB started making excuses for ASK to continue to stay with his family and that he would return her to me later and that eventually MB refused to return ASK to me.

However, MB continued to let me see ASK until mid-December 2014 on the condition that:

- [a]. If MB was available, then I had to meet him for lunch and he would then bring ASK for me to have access during that short period of time; and
- [b]. If MB was unavailable then I had to go the nanny's home in Raiwaqa to see ASK.

That in mid-December 2014 MB stopped letting me see ASK. He called and told me that since I was working so much I didn't deserve to have ASK with me. I believe MB refused to let me have ASK since I do not wish to reconcile with him.

That I am unable to get ASK since the MB's family home at 00 xx Road, Suva is guarded by security persons.

That I did manage to see and take ASK from the nanny's home on 2nd January 2015, but the nanny's daughter, AS, then sent me abusive and threatening messages, a copy of which is annexed and marked "**HBI**". The nanny and her family now physically stop me from removing ASK and taking her with me.

That in reality it is not MB but the nanny and her family who are caring for ASK since:"

23. The mother also stated that "when the Consent Order was made on 01st September 2014, the Respondent was supposed to provide maintenance for ASK in kind such as to provide diapers and groceries to the value of \$100:00 per week and while he did so for the first two weeks, he stopped thereafter.
24. The Applicant gave evidence in Court on Friday 13th March 2015 inter alia that: She used to take ASK to Dr. K at Suva Private Hospital for consultations; and to the Health Centre at Toorak for Immunizations; and ASK's Immunizations were up to date; and a further immunization was due around the time the Respondent refused to return ASK to her; She also testified that; She breastfed ASK until the time the Respondent took her away; She also said that she did not have an extra-marital affair; She also had a permanent address and She was financially independent.
25. The Father has filed a Form 13 and six affidavits in reply, of which only five have been tendered as evidence during the hearing. He seeks dismissal of the Applicants' recovery application and a variation of the Consent Order giving him interim Residence pending the Form 9 application for Residence hearing.
26. The Respondent called 4 witnesses:

- I. JS
- II. TB
- III. MB
- IV. VK

27. T K testified in court and also filed an Affidavit filed on 04.03.15. TK was the second witness called by the Respondent. She is the ‘cousin-in-law’ of the Applicant.
28. In her affidavit she stated “that on several occasions in the months of July, August and September, HK would bring ASK to their family home in Raiwaqa for her to breastfeed baby because she claimed that she had no milk.
29. She also gave evidence that baby ASK was in her care for at least 3 times a week for 3 months (July, August, and September 2014) whereby she would also be required to breastfeed ASK. As such she would be wet-nursing to baby ASK. She also said that she had to use her daughter's own supply of diapers and clothes as the Applicant failed to provide these except on one occasion.
30. JS filed an Affidavit on 04.03.15. JS, who is the cousin of the Applicant, gave evidence that the Applicant and baby ASK moved into her top flat shortly after the separation of the parties and that the Applicant kept the flat very dirty.
31. She also submitted in her affidavit that during the months of July, August and September 2014, HK and her daughter ASK moved in with us temporarily after a domestic case with her husband MB (Respondent herein)
32. In cross examination she said that she worked for F1 Mobile, which assisted in xx Party's September 2014 Elections Campaign.
33. VK filed an Affidavit filed on 04.03.15 which reads amongst others ; That MB contacted me on Sunday 14th September, 2014 to ask if I could be Nanny to ASK while ASK was at MK as he was working, to which I gladly responded. On Monday 15th September, 2014 I arrived at MK where I proceeded to have dinner with ASK, her father and the whole family. I resided at ASK’s Grandparents home for the duration of the Elections week as HK advised that she was working up until Monday 22nd of September, 2014 when as HK called and requested that MB drop ASK at an address that MB did not recognize. It was at this point that MB informed HK that he would not drop ASK off with strangers and would keep baby until HK returned to the address that he picked her from.”
34. VK gave evidence that the Respondent brought fish so that the Applicant could eat and be able to produce breast milk however the Applicant refused to eat stating that her doctor had advised her not to eat fish.
35. Mrs. VK also gave evidence in Court on Friday 13th March 2015 that:
- a. She took ASK to her home in Raiwaqa for weekends;
 - b. She took ASK to her family's home in Navua and stayed over the weekend

- c. She took ASK to her family's home in Sigatoka and stayed over the weekend;
 - d. When she took ASK to her family's home, she normally travelled in a taxi; but on one occasion they travelled on a bus to Navua;
 - e. When she took ASK to her family's home to Raiwaqa; Navua; and Sigatoka, she normally sought the Respondent's consent and he gave his consent;
 - f. The Respondent has employed her to be ASK's nanny and is paying her wages;
 - g. The Respondent is a working dad and sometimes when he comes home at night, ASK is already asleep; and
 - h. When she the Applicant, the Respondent and ASK were living together, ASK was attached to the Applicant.
36. Ms. Brown gave evidence in Court on Friday 13th March 2015 that: She wanted to give evidence on behalf of ASK. She said that the Applicant neglected ASK.
37. However, she admitted in cross examination that she had not reported to the Department of Social Welfare or any other agency, her allegations about the Applicant's neglect of ASK.
38. In cross examination She admitted that she was giving evidence to support the Respondent's opposition to return ASK to the Applicant; she also said that she knew the Respondent before she met the Applicant; and while she was still friends with the Respondent, she was no longer friends with the Applicant;
39. She was of the opinion that the Applicant was a compulsive liar but in cross examination she admitted that she was not a Psychologist to form that opinion;
40. Mr. B gave evidence in Court on Monday 16th March 2015 that he had searched for "WPL" at the Companies Office; and "LM" at the Copyright Office, and did not find any formal registration for them.
41. RD Smith also submitted an affidavit narrating in detail an account of the Applicant's alleged neglect of ASK while they all stayed at a mutual friend's place at Denarau without mentioning the date of the incident.
42. The Respondent and MB both gave evidence that the Applicant did not eat properly which led to her not being able to feed baby ASK. According to them the Applicant was more concerned about her figure and how she looked rather than the well- being of the child.

APPLICATION LAW TO FACTS

43. As discussed above, The Applicant comes by virtue of s.108 of the FLA (Form 12 and 23 applications on 20th February 2015) for the recovery of the 10 month old Child; which provides for child recovery by a person who has a residence in relation to the child;
44. Pursuant to the Consent Order dated 01 September 2014, the Applicant has Interim Residence of the child. As a result, pursuant to section 108(a) of the Family Law Act 2003, she is entitled to apply for recovery of ASK.
45. The Respondent is defending this application and seeks its dismissal in reliance on s.109(2) which states; *“In deciding whether to make a recovery order in relation to a child, a court must regard the best interests of the child as the paramount consideration.”*
46. As already noted, it is very clear that on 01 September 2014, both parties entered into interim Residence and contact arrangement by consent. [“The Consent Order”], pending the Social Welfare Home Examination Report to fix a hearing date to determine final orders.
47. The mother asserted the father contravened the consent orders made by this court on 01 September 2014.
48. According to the mother’s evidence that in October 2014, the father refused to return the child. However the father continued to let the mother see the child until mid-December 2014. From the chronology of events it is obvious that it was only two weeks after getting the Consent Order in her favor that the Applicant handed baby over to the Respondent man for him to care for while she worked, which ultimately led to the current proceedings.
49. Affidavit filed on 04.03.15 by father also apparent that on his own motion refused to return the child. The affidavit reads amongst others, That;
50. *“The reason I refused to return baby ASK to the Applicant was because of the information I started to receive from the Applicants circle of friends informing me of the Applicants life style and how she was negligently taking care of our daughter.*
51. That I was informed by MB and I verily believe that when the Applicant was living with Miss MB at K, Sigatoka, my daughter was left with the bar maid while the Applicant drank alcohol with guests staying at the B resort.
52. Further in his evidence he said that it was because of information received from reliable sources like the Applicants friends that he was led to believe that his daughter was being put at risk by the irresponsible behaviour of the Applicant, and this was why he thought its best that ASK remain in his care and custody.”
53. Father also testified that the only reason he consented to the Applicant having residence of ASK was because the Applicant said that she was breastfeeding ASK. The father also not disputed as noted, that the child “was returned to him, who

has had residence to date”.

54. The court also note that under cross examination he was reminded that he was in breach of Court order to which he responded that whilst Court procedures are important, his daughter's safety superseded all that.

55. He also said that he did not doubt that the Applicant loved ASK, however, there was a difference between love and being able to care for ASK. According to him, the Applicant was not a good mother and not in a position to care for ASK.

56. Affidavit filed on 04.03.15 by Father also admitted that he stopped paying interim maintenance without seeking a *Modification of child maintenance orders pursuant to s.97 (1) FLA* from the court. I wish to quote the relevant paragraph in verbatim as follows:-

“I confirm I was supposed to provide \$100.00 child maintenance in kind only and had done so for more than 2 weeks, however I stopped making the \$100.00 per week payments because ASK was living with me.”

57. In this scenario it is practical to address the interim maintenance as well. In the event of any potential JDS application, the registry would face difficulties to calculate the arrears and for that purpose there has to be records in the registry. Therefore I wish to modify the maintenance order as well for the best interest of the child.

58. Although, it was granted by consent, the object of ‘Resident and Contact’ is to enable the parent and child to keep in touch with each other by allowing periodically visits as specified times to avoid potential conflicts.

59. Given the tender age of the child and also considering the child representative’s application the court adjourned the matter to 15 October 2014 for review (before Deputy Registrar) of the Consent order and also for case assessment conferences (division 9.2 of FLA rules) and case assessment conference conciliation conferences (division 9.07 FLA rules)

60. Upon perusing the court record, it was revealed that on the Review date the mother was absent and unrepresented while Ms Vaniqi appeared before the court, not before the Deputy Registrar.

61. Accordingly, both the mother and the father did not appear before the Deputy Registrar on 15th October 2014.

62. The Respondent stated that he had refused to return the child to the Applicant for the best interest or for the wellbeing of the child. If the Respondent really had concerns over how the child was been treated by the Applicant, he could have attended before the Deputy Registrar and raised his concerns; or instructed Ms. Vaniqi to do so.

63. After the mother filed for child recovery, father through his response (Form 13) inter alia sought to review the orders and submits to consider “best interest of the

child". The father relies on s.121 which defines what "*best interest of the child*" is, and includes;-

- likely effect of separation with whom child lives with,
- capacity of each parent to provide for the needs of the child,
- attitude to the child and the responsibilities of parenthood demonstrated by each parent.

64. Given the above application, it is prudent that for consistency purpose to address the above mentioned criteria for the purpose of this application.

65. First, father seeks to consider the "likely effect of separation with whom child lives with." I am of the view that here is nothing much to analyse rather than posing the same question to the father. It is not certain that whether he thought about "the likely effect of separation with which the child lived with" when he decided on his own motion not to return the child to her mother?

66. It is also not certain whether the Respondent really had concerns over how the child has been affected or the likely effect when the child had been absolutely away from the mother since she was just 6-7 months old. It is also not certain whether the father ever had a second thought about his child's best interest or emotional needs prior to separating the child from the mother.

67. The father testified in court that he does not even want to give the Applicant supervised Contact of ASK. Does this reflect that the father is not mindful about Right of the child to be bonded with both parents?

68. Sec 121 of Family Law Act provides the criteria to determine the best interest of the children. Without any doubt, it is one of the roles of the Court to determine the best interest of the child. It is apparent that, the respondent father decided the best interest of the child by himself and deprived the mother to have interim residence and later contacting the child deliberately disobeying the court order.

69. The father without doubt may be a very concerned father worried about his baby daughter. When he knew at 05 months his daughter was not "breastfeeding", before he decided the mother not to have "any sort of contact" But, the rule of Law implies that every citizen is subjected to the law, (including law makers themselves.)

70. The father did not comply the court order now seeks the court to consider the "likely effect of separation with whom child lives with as discussed. "In this circumstance, I wish to highlight two important maxims. It is often stated that"**He who seeks equity must do equity.**"

71. **There is another maxim to say "He who comes into Equity must come with Clean Hands."** (Or alternatively, equity will not permit a party to profit by his own wrong).

72. The principles of equity and justice are universal in the common-law courts of the world. They are flexible principles aimed at achieving justice for both sides in each case. No maxim is ever absolute, but all of the principles must be weighed and fitted to the facts of an individual controversy.

73. The principles of equity and justice does not require every party to have an unblemished background in order to prevail, but the court will refuse to assist anyone whose Cause of Action is founded on his or her own misconduct toward the other party.
74. Second, the father also seek to dismiss mother's application and submits that to give the Applicant interim residence will mean upsetting baby's schedule, putting her in an unfamiliar environment, with a mother and nanny she has not bonded with for the past few months.
75. If the conduct of the father in relation to the interim residence in respect of which he is claiming (relief) has been inequitable, or tainted in some manner to which a court applying principles of equity should have regard, he may be refused relief.
76. But this does not mean that the court will refuse the relief that the father sought simply because his conduct in some respects has been less than admirable: the inequitable behaviour relied on must relate in some way to the subject matter of the proceedings.
77. At this stage as noted above it is important that I address rights of a child according to Law. It is principal right of a child to to know and be cared for by both their parents.
78. PART VI of the FLA extensively sets out the principals that the court to consider when granting orders in respect to CHILDREN.
79. A further important point to be noted about the sec 41(2) (b) of Family Law Act inter alia that) "children have a right of contact, on a regular basis, with both their parents".
80. Sec 41.-(1) of FLA reads the objects of this Part are-
- (a). to ensure that children receive adequate and proper parenting to help them achieve their full potential; and
 - (b).to ensure that parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests-
- (a). children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together;
 - (b). children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development;
 - (c). parents share duties and responsibilities concerning the care, welfare and development of their children; and
 - (d). parents should agree about the future parenting of their children.
81. It is immediately apparent that, in the light of child's right, no longer to speak of only parents' rights, either father or mother has an absolute right to have the residence of the child. Because, whatever his or her wishes may be, children have

the right to know and be cared for by both their parents.

82. It will be seen that this provision is very much wider than the above mentioned Sections about parents' rights to be bonded with their children, because it applies not merely to parents, but also to "the children".

83. The Respondents stance has been that he denied the Applicant residence or even access for "good reasons".

84. As it is normally the basic right of both Parent and Child to have each other's Companionship, it is only in the most exceptional circumstances that the court will sever the link between them by denying the parent Residence or Contact altogether.

85. In defending this recovery application the Respondent has produced five witnesses who demonstrate that the best interest of the child will not be met should the Recovery Order be allowed.

86. As correctly identified by the mother, there is no injunction against the Applicant in relation to the child pursuant to s. 118 (1) (a) of the Family Law Act, nor is there any Domestic Violence restraining order against the mother for the wellbeing of the child. Pursuant to Sec. 28 of the Domestic Violence Decree. On the same note, it is prudent to consider the definition of "*child abuse*" in the context of *FLA.S.42.*-(1) reads, "In this Part, unless the context otherwise requires-

"Abuse", in relation to a child, means-

- (a) an assault, including a sexual assault, on the child which is an offence under the law;
or
- (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person;

87. Consequently the reasons by the witnesses' that a mother allegedly neglected her child in the past (some allegations as such goes way before the consent order on 01st September 2014). Also the fact that the mother left the child with her father to secure an income to survive, have been held to be insufficient reason for refusing mother's right and also child's right to be bonded with each other.

88. I have no doubt that the father has the socio economic capacity to provide a "safe, stable, loving home with him" as he submitted, but he denies the mother of the child to be part of child's life at all. Thus, the child would be deprived "the bond between the mother and the child; the Companionship between the mother and the child, and also the mother's love, to the child.

89. Also, as discussed above, neither the father/mother nor their respective Counsel made any application to the court to review the interim order on the mention date

given for the same purpose. At least they failed to liaise with the child representative for appropriate action.

90. The Court also appointed a Child Representative pursuant to Sec. 125 of the Family Law Act.
91. The court also perused the child representative's observations and recommendations. Inter alia the submission reads that "From what has been obtained so far through evidence of this witness, it may seem that the Applicant has no fixed address and no permanent residence. "The recommendation further reads that, "At this young and vulnerable age, baby ASK needs a permanent and stable home environment." The child representative also brings into questions about the financial stability of the Applicant to look after baby ASK.
92. As noted both the father and the child representative seek to consider mothers ability. The Father was of the view that the Applicant was neither financially independent nor had a permanent home and therefore could not look after. The child representative also then brings into question whether baby ASK should be returned to the Applicant who does not have a permanent residence but rather tends to relocate every now and then as she has done so since her separation with the Respondent.
93. The mother testified in court this was because she was trying to "get her life back together again" after it fell apart. She testified under cross examination that she has now got her life together, has a permanent address (which she has yet to move into) and a job with a magazine she is part owner of. The Applicant gave evidence that currently she is financially independent and has a permanent home.
94. In this comment, I wish to address briefly some of the observations, which is relevant to the current proceedings.
95. It is important to note, though that relativities of bargaining power depend on many different sources of power (wade, form of power in family mediation and negotiation (1994) & AJFL. The above concern leads to some questions. Also while considering the different bargaining power of the parents, I also consider the "capacity of each parent to provide for the needs of the child" Apparently mother has unequal bargaining power. What is the basis of mother's inequality of bargaining power? Is it possible to close the gap?
96. Though it is beyond the scope of this Ruling to fully explore them all, the major ones identified now to address the above concerns are, disparity in socio economic power.
97. From mother's evidence it was revealed that the mother trying to get her life back together again after it fell apart. She has looked for a stable accommodation and employment while the father has a stable accommodation (of his parents), a permanent job, nanny and a chef including his family members to support.
98. The court also noted that on 5th July 2014, when the parties separated, the Applicant had

to leave her matrimonial home and the respondent refused to provide any spousal maintenance for the applicant; and at the time the parties separated, the applicant was a full time mother to her daughter and therefore was not working.

99. The mother, who lived under the same roof with the father, did move out from the “matrimonial home” after the separation and before granting the consent order.

100. At the point of separation mother may have little money and property rely available, and very likely less than her husband

101. It is not disputed that parents have the primary obligation to maintain their biological children. In this case the parties have the primary obligation to maintain the child, the subject of this case. (Sec. 45, 46 and 86 of FLA)

102. In the light of above sections, it is apparent that among other things; “A party is unable to support herself or himself adequate, by reason of having the Care and Control of a child of the marriage who has not attained the age of 18 years”.

103. The reason as to why I intended to address this section, in this child recovery proceeding as father led evidence and submitted about mother’s financial insecurity and his financial security. In this scenario as noted above mother sought spousal maintenance and child maintenance may be she was unable to support herself and child. However, the father sought to dismiss her application stating that “they have only been married for 7 months; he does not feel the Applicant is entitled to spousal maintenance. That as she states, she is a journalist and therefore is able to find gainful employment to support herself. “Also in respect to the application for child maintenance father was “willing to pay \$100 per fortnight for child maintenance. He felt this was sufficient to support his daughter, as at this age all she requires is formula milk and toiletries like diaper, wipes, etc. He also agreed that until the child custody matter is resolved, he would preferred to buy \$100 worth of diapers and formula milk per fortnight which he felt was sufficient.

104. In this note it is prudent to draw my attention to Section 155 of the Family Law Act 2003 which reads as follows under the heading of the “*Right of spouse to maintenance*” in order to understand the criteria for the purpose of the current application. The section provides that;

“A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party if reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately, whether-

- (a). by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
- (b). by reason of age or physical or mental incapacity for appropriate gainful employment; or
- (c). for any other adequate reason,
- (d). having regard to any relevant matter referred to in section 157.”

105. In these circumstances, it is not fair if the court consider economic instability of the mother or economic stability of the father as a prime yard stick to determine the “best interest of the child”.
106. Third, the court had noted as he father also submitted the fact that it took almost 5 months to file a complaint for Child Recovery. According to the evidence given by the Applicant the child has been taken away from her when the child was 7 months. The child is born on the April 2014. The Applicant has filed this application for custody on the 20 February 2015.
107. It is also apparent that the Applicant has been coerced and cajoled the Respondent to recover the child or at least to have some sort of contact with the child prior to filing for recovery to justify the delay for such application.
108. Finally, wish to address the respondent’s witness’s evidence briefly. In the nutshell all the witnesses’ of the father came forward to say that they do not think the mother is fit to care for a 10 months old baby, based on their observations (and may be on their perception) of how they saw the applicant caring for the child when she was 04 months old.
109. In fact, both Rw4 VK and Rw6 MB started that when the couple were still living together at Bayview Heights, this was a source of concern. That the Applicant was more worried about her figure and going on a diet, then eating nutritious meals so she would have a healthy supply of breast milk. This was also what MB said she noted when the Applicant was living with her, that she would not eat so ASK was not able to breastfeed well.
110. I wish to emphasis that, most of the observations and experiences the witnesses; testified before granting of the consent order on which is subjected to this “Recovery Application”.
111. The consent order granted on 01 September 2014 and therefore, most of the evidence of the respondent and his witnesses is irrelevant to this current recovery application as highlighted above. As an example, as to what T stated about the mother including the months of July August and September.
112. The court also notes that while the Respondents witnesses may be her relatives or friends, she was no longer on good terms with them. On this same token I also note that the father failed to substantiate his allegation of mother failed to take the child for immunisation.
113. Also on the same note I wish to draw my attention to the below mention observation by Lord Denning in his book “Due Process of Law,” “that a woman feels as keenly ,thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom-develop her personality to the full-as a man. When she marries, she does not become husband’s servant but husbands equal partner .If his work more important in his life of the community, hers is also important in the same manner. Neither can do without the other. Neither is above the other or under the other. They are equals.”

114.As discussed in above paragraphs, equity will not permit a party to profit by his own wrong. But on the same token, if this court did not consider the fact that the likely effect of separation with which child lives with, then that would become a miscarriage of justice given the fact that the child did not contribute to breach the order, but is a victim. I am of the view that the child should not become a victim to parent's conflicts.

115.Currently, mother has virtually no relationship with the child and that nanny VK is the primary carer with the father.

116.The child's interests are the most significant consideration and that they would best met by facilitating the establishment of a relationship with her mother. This is reasonably practicable by granting the relief sought by the mother and varying the consent order as below addressed. Because I have to consider of how a meaningful relationship for the child with both of her parents.

IT IS HEREBY ORDERED THAT:

(I). Application for Recovery granted to the mother in compliance with the Consent Order dated 01 September 2014.

(II). Handover:

(a). That within 48 hours of the making of these orders, father shall advice the mother through the independent Child representative of a location at which, the child shall be collected and delivered for the purpose of recovery and thereafter a place of exchange at the Commencement and conclusion of interim contact or for the purpose of interim contact or for the purpose of these orders.

(III). Interim Residence; In addition to the time specified in order, dated 01 September, 2014, to be varied as follows;

(a).That unless the parties otherwise agree in writing both parents shall have joint residence of the child.

(b).The child shall spend time with the mother and the father equally. As an example three days and 12 hours with one parent including one of the weekends to commence within the first 78 hours following the making of these orders.

(c).That unless the parties otherwise agree in writing the child shall spend time one day of the weekend with each parents , as an example Saturdays with the mother and Sundays with the father. Vice versa, each weekends, to commence on the first Saturday following the making of these orders.

- (d). That unless the parents otherwise agree in writing, the location nominated by the child representative in accordance with the above order (if there is any disputes as to the location father nominated) shall thereafter be the place of exchange for the purpose of these orders.
- (e). That unless the parents otherwise agree in writing, both parents shall cause the child to be delivered to each parent or a nominee by the independent child representative at the place of exchange at commandment and of conclusion of time the both parents time.
- (f). In the event, the parents do not nominate a handover location in accordance with these orders, the place of exchange shall be at the Reception area of the Legal Aid Commission (the current place of exchange) and during public holidays the place of exchange shall be the main gate of the Legal Aid Commission, Suva.
- (g). That in the event the Mother/Father have to work on during their respective Interim residence days, they shall inform each other at least three hours prior to contact time and advise each other on a time in which they will be in a position to pick the child for their contact/ weekend contact and the parties will endeavour to make alternative arrangements that is suitable to the child and both parties.
- (h). That the child will reside with the mother at a her current residence and in the event Applicant/Lady should move from her current residence the father, child representative and the court shall be given prior notice of the same. The mother also shall give her current residential address today to the court and to father.

(IV). Interim Maintenance

That the father shall pay \$150.00 per fortnight forthwith to the Maintenance section Suva forthwith as interim child maintenance as it is not practical in all the circumstances to extent the interim maintenance order in kind.

(V). Medical

- (a) That each party shall advice the other at the first available opportunity in the event that the child requires medical attention or hospitalisation while the child is in that party's care.

- (b) That, in any event parties are not willing to communicate with each other, they shall advise the other through their respective counsellors and must advise the independent child representative.
- (c) That the father shall arrange, and ensure that the child attends to the Health Ministry Children Clinical and for the immunization clinics.

(VI). Parents Unavailability

That both parents shall inform each other through their respective counsellors in the event that, due to medical reasons, overseas travelling or due to any other reasons, if the each parent are unable to provide full time and on-going care for the child. Also parties shall inform the independent child representative as well.

(VII). Sections 105-112 of FLA requires the parties to consider the procedure articulated in the sections and respectively comply with this order.

30 days to appeal.

LAKSHIKA FERNANDO

RESIDENT MAGISTRATE

On this 07th day of April 2015
