

IN THE FAMILY DIVISION OF THE MAGISTRATES' COURT AT SUVA

FILE NO. : 12/SUV/0115

BETWEEN:

KRS

Applicant

A N D

NRW

Respondent

APPEARANCES/REPRESENTATIONS

Ms. R.S Naidu (Sherani & Co) for the Applicant

The Respondent- Absent and unrepresented

JUDGMENT

Introduction

1. The Applicant who is the mother of the child namely *CEW born on 26th February 2010*. [Hereinafter “**the child**”].
2. The Applicant commenced proceedings in this Court by way of a Form 9 filed on 13th June 2013 seeking residence orders of the child with Skype communication to be permitted to the Respondent father.
3. The court record shows that the respondent was duly served. In particular; I note that the application was served by way of substituted service at the last known address of the Respondent man. Moreover, an Affidavit of Service was filed on the 26th of September 2013 and also on the 31st of October 2013 pasting a copy of the newspaper cutting showing the substituted service.
4. That the Applicant also stated that the Respondent man was also in communication with the applicant’s Solicitors after being made aware of the applications filed in Court, and submitted copies of some relevant emails between the Applicant’s Solicitors and the Respondent. The Applicant also submitted that her solicitors also have written letters dated 31st October 2013, 11th November 2013 and 28th March 2014 informing the Respondent of the applications filed. Applicant submitted copies of the said letters to the court for perusal.
5. The applicant has attended the case assessment conference with the Deputy Registrar on the 17th of December 2013.
6. The matter listed for mention for several dates waiting for legal representation from the respondent but for no avail. The Respondent has not engaged any Solicitor in Fiji and neither has he personally appeared and represented himself.
7. The counsel for the Applicant sought a Formal Proof date in regards to her Form 9 where she sought full custody of her daughter.
8. The Social welfare officer has also interviewed her and the Report has been furnished to the Court.
9. The Court noted all necessary procedures have been followed as required by the Applicant to obtain a formal proof date to consider her application (Form 9) for the residences of the child.

The Evidence

The Applicant

10. The Applicant relied on her Form 9 Application for Final Orders and the court proceeded with the formal proof. Subsequently, The Applicant, filed affidavit evidence in chief with the leave of the Court to reflect the below mentioned findings;
11. The Applicant seeks residence of her child. I also perused the affidavit evidence in chief and the social home environment report and considered the same carefully.

12. That the Applicant was married to the Respondent on the 21st day of January 2010 in Tokyo, Japan. The applicant is a Fiji Citizen whilst the Respondent was and still is a Canadian Citizen of Jamaican descent.
13. They have been divorced on the 18th of December 2013 with conditional orders granted which became final in 30 days.
14. That there is a child from the said marriage, namely *CEWborn on 26th February 2010*.
15. January 2010 she left Japan for Fiji on a three-month leave, and to give birth in Fiji. Though the Respondent said that he was going to come later, he did not come to Fiji to see his new born daughter.
16. Two months later, Applicant returned to Japan with her daughter, CEW and her younger sister, LBD who was staying with the parties and babysitting the daughter.
17. In July 2010, Applicant's younger sister, the said LBD left for Fiji and her older sister, TA arrived to look after the daughter.
18. That the child CEW lives in Fiji and is a Fiji citizen. Applicant's mother and sisters are looking after CEW and the applicant frequently visit her in Fiji, when she can.
19. That the applicant has not taken CEW to live with her in Japan because the applicant fears that the Respondent may make an attempt to take CEW away from her forcefully. The Applicant submitted that the child is more protected with the applicant's family members in Fiji than she would be with the applicant in Japan.
20. The Applicant also stated inter alia that during the marriage, the Respondent had been violent towards the applicant on several occasions which was the reason the applicant had to apply for Domestic Violence Restraining Orders in Japan which lapsed after 6 months in June of 2011. The applicant has not commenced any Family Court proceedings in Japan.
21. On Thursday 02nd September 2010, the applicant sent CEW to Fiji with her older sister, TA. She also moved out of the apartment. CEW was only six months old at that time.
22. The Applicant also submits inter alia that the respondent has been sending threatening emails to the applicant, her work colleagues, the Embassies, the Prime Minister's office in Fiji.
23. The applicant further stated that she has been in contact with the Respondent's mother, Ms CT who lives at 00 Mountzille, Maple Heights, Ohio 44137 in United States of America where she informed about all proceedings that the applicant have filed in Fiji.

THE CURRENT STATUS

24. That CEW currently resides with applicant's mother and sisters at Nakausoqo Subdivision, Naulu. She has been taken care of by the applicant's family members, especially her older sister TA. She looks after her, takes her to school and baby sits her on a daily basis.
25. From the age of 3, CEW had been attending St. CIM Kindergarten in Nakasi. She is now in

class 1 at BPS now which is just 2 minutes' walk from applicant's mother's home. She also attends Sunday Schools and church services at Bainivalu Church in Naulu.

26. The applicant submitted that upon the grant of this custody order, she intends to live with CEW and further provide for her upbringing and growth. Once she has been granted the Custody of CEW she wishes to apply for child's visa through her work visa and take her to Japan, or alternatively reside in Fiji if she does not continue with her posting in Japan.
27. The applicant also submitted that she would make arrangements that CEW attends a primary and high school close to her work location.
28. The applicant has concerns about CEW seeing her father because:
 - (a) He has not had care of her since her birth - he had never bought her milk and diapers.
 - (b) They have no attachment or emotional bond since he was hardly home.
29. However she does know that CEW needs to know who her father is and be in contact with him and that is why she has always encouraged the Respondent to maintain Skype communication with CEW.
30. Applicant submitted that her Solicitors emailed and notified him of the Skype address of her sister where he can communicate with CEW. The Respondent did have one or two Skype sessions with the Respondent but after that she was not keen to communicate with him, and the Respondent himself did not make any further attempts.

The Respondent

31. The Respondent has not engaged any Solicitor in Fiji and neither has he personally appeared and represented himself.
32. It is also prudent to note that the Senior Court Officer of the Family Court sent an email to the email address xx@gmail.com as a response to the person who identified himself as the respondent, advising inter alia that the sender may instruct a solicitor in Fiji to represent him in the court proceedings.

The Law and the Determination

33. Part VI of the **Family Law Act 2003** [hereinafter "**the Act**"] deals with Children wherein the object of the Part is stated at section 41 and provides as follows:

(1) 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.*

34. At Section 120 and 121 of Division 10, part VI of the Act, provision is made for how the court is to determine the best interest of a child as follows:-

120.-(1) This subdivision applies to any proceedings under this Part in which the best interests of a child are the paramount consideration.

(2) This Subdivision also applies to proceedings, in relation to a child; to which section 60(6) applies.

How a court determines 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 may 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 person;*
 - (iii) *the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;*
 - (iv) *any family violence involving the child or a member of the child's family;*
 - (v) *any family violence order that applies to a child or a member of the child's family;*
 - (vi) *any other fact or circumstances that the court thinks is relevant.*

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).[Emphasis added]

EVIDENCE AND ANALYSIS

35. 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.
36. As discussed above Section 121 deals with the various considerations that the court must consider the "best interest of the child".
37. The Applicant seeks residence of the child with Skype communication to be permitted to the Respondent father.
38. The applicant also stated that the child has been in her sole custody since September 2010.
39. As discussed above Section 121 deals with the various considerations that the court must consider the "best interest of the child".
40. Due to the absence of the Respondent during the Hearing, the evidence of the Applicant has not been contested and is admitted without challenged.
41. Section 121(2) (c) allows the court to consider the effect of any changes in the Child's circumstances including any separation from either of the parents.

42. The child in the present case has been living with the Applicant and her immediate family members and not with her biological father since 2010. It is noted that for the past few years, the child has only been surrounded by her maternal aunts and mother's relatives.
43. Applicant submitted that her Solicitors emailed and notified him of the Skype address of her sister where he can communicate with CEW. The Respondent did have one or two Skype sessions with the Respondent but after that she was not keen to communicate with him, and the Respondent himself did not make any further attempts. The Applicant in her evidence in chief stated that the Respondents very rarely utilised the contact offered to him by herself and her lawyers.
44. Considering the evidence adduced in court it is suggested that the Respondent have failed to keep in contact with the child despite the development of technology.
45. Section 121(1) (b) of the Act also allows the court to consider the nature of the Child's relationship with each of the parties to the current proceedings.
46. Section 121(1) (g) of the Act allows the court to take into consideration the attitude to the child and the responsibilities of parenthood demonstrated by each of the child's parents. To this end, the Applicant has taken responsibility of the child.
47. Accordingly, it appears for the reasons articulated above that the Applicant and her family have been the constant, consistent and primary care givers of the child.
48. I have considered the report submitted by the Social Welfare Officer. The contents of the report inter alia confirm the evidence given by the applicant. The Social Welfare Officer observed a close bond the child shows with the Applicant and her family.
49. In light of the above discussed paragraphs and considering the entire evidence, the relevant law and the and most importantly the best interest of the child I find the Applicant is capable and can provide for the needs of the child, including emotional and intellectual needs and therefore is the best person to have Residence and take care of the child.
50. The Court also, wish to highlight, that the child should be bonded with her biological father as it is a right of the child as well.
51. The object of 'Residence 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.
52. It is important that I address rights of a child according to Law. It is principal right of a child to know and be cared for by both their parents.
53. As discussed PART VI of the FLA extensively sets out the principals that the court to consider when granting orders in respect to CHILDREN.
54. A further important point to be noted about the sec 4(1) & (2) of Family Law Act provides inter alia that; "children have a right of contact, on a regular basis, with both their parents".

55. 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.
56. It is immediately apparent that, in the light of child's right, no longer to speak of only parents' rights, either father or mother not has an absolute right to have the sole residence of the child. Because, whatever her wishes may be, children have the right to know and be cared for by both their parents. 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.
57. The Court also, wishes to highlight, that the child should be bonded with her biological father as it is a right of the child as well. The child's interests are the most significant consideration and that they would best met by facilitating the establishment of a relationship with both her parents.
58. As noted there is little known information available on the respondent. But the distance and spaces between them should not be a bar for the relationship between the father and the child. But it should not be a reason to defy the right of the child to be bonded with both the parents. In order to address the distance between the parties, I wish to grant the father 'virtual visitation' until he establishes face to face contact with his daughter. In the same token, I would briefly discuss about virtual visitation.

What is Virtual Visitation?

59. "Virtual Visitation," also known as electronic communication or e-access, is an electronic form of "face time" or other electronic communication between parent and child. Examples include: email, instant messaging, interactive game playing, video conferencing, video clips by email or posted on the web. With increasing speed of transmission and falling prices for equipment, parents and children can enjoy high quality electronic communication for moderate cost. The popularity of smart phones has made video conferencing more accessible and easy to use.
60. Virtual access is intended to enhance and supplement but not replace face-to-face parenting time with a child. This can help parents and other relatives stay connected with the child, for

example, when away on business, traveling on vacation, or on military deployment. In the current matter, when parents live in different countries.

61. Virtual Visitation reduces the time and space separation between parents and their children. Video conferencing allows parents and children to see each other as well as hear each other. Even children too young to use the phone on their own can participate (with some help) in a video call. It's a bonus for parents to see their child frequently during the early years when the child is growing so rapidly. Bonding is enhanced when a young child can relate the face and voice of a parent or other relative who is not physically present on a daily basis. Frequent contact helps reduce a child's separation anxiety, sadness and feelings of abandonment. Older children are accustomed to the virtual reality of electronic communication and appreciate the increased access to their parents, filling in the gaps between face-to-face contacts. Electronic access can be used for a parent and child to discuss their day, read stories, play games and help with homework.

Social Media Security

62. Parents to ensure that every social networking site has various privacy settings for your account. And also to be sure to set the Default setting to "Friends" to restrict access to your account. It is also helpful to revisit the accuracy of your account settings periodically.

ORDERS

63. Accordingly, the Applicant mother shall have Residence of the child namely **CEW** born on 26th February 2010.
64. The Respondent father shall have reasonable contact, including face to face contact with the child. As the father was absent and unrepresented and hence the court not in a position to finalize the face to face contact arrangement. Therefore, both the parties mutually arrange the place of contact and duration of contact.
65. The Respondent is also allowed to have virtual contact with the child via telephone, video, Skype or other electronic contact with the child while the child with the mother or under the care of the mother, during reasonable hours, for as long as such contact is not disruptive to the child's schedule.
66. The respondent father shall have reasonable telephone, email, video or other electronic contact with the child at least three days per week.
67. Each parent shall keep the co-parent advised of a current home address, telephone numbers (including cellular phone numbers), email addresses, IP addresses and other addresses at which electronic contact may be made, and advise the co-parent within forty-eight hours whenever a change is made or may occur. Each parent shall immediately advise the co-parent of any upgrade in equipment or electronic transmission service that would impact electronic communication or access between the co-parent and the child.
68. Any equipment failure shall be reported to the other parent within 24 hours and shall be repaired within 2 days. If electronic communication is unable to proceed because of unintentional equipment failure, the parent scheduled for electronic access with the child shall

be entitled to elect a telephone call or other electronic communication method available as a substitute form of contact at the scheduled time. Any video conference that is unable to proceed because of an unreported equipment failure or failure of the equipment to be turned on and ready within 30 minutes of the time scheduled for the session.

69. If a dispute arises about the number of contacts, the Father shall be entitled to place [3] telephone calls and initiate [4] other electronic communications to the child each week. The parents shall attempt to resolve all other disputes regarding electronic access through Family Court Registrar or the Family Court prior to initiating any litigation on the matter.
70. The privacy of the parents and the child are of paramount concern. The parties shall undertake such parental control measures as will safeguard the child while engaging in internet activities but shall not interfere with the right of either parent to communicate with the child. Each parent shall refrain from monitoring computer or electronic communication activities, personally or through any third person or entity acting at the parent's direction, that occur between the co-parent and any other person or entity.
71. The applicant may take the said child, out of the jurisdiction of this Court for vacations and other travelling purposes. But should the child removed from the jurisdiction of this court for migration purposes it would be by consent of both the Applicant and the Respondent, or by a way of a Court order.
72. The applicant also should not change the name of the child on her own motion. But should the applicant wishes to do so, it would be by consent of both the Applicant and the Respondent, or by a way of a Court order.
73. Biological father of the child is at liberty to file for variation of Contact of the child, in this Court.
74. Optional; A website page or Viber / Whatsapp group shall be created for the child by mother, to include all current schedules, activities and information regarding the health and educational progress of the child and appropriate photographs of the child. The mother shall immediately inform the father how to access the webpage created. The website shall be maintained by the mother. Both parents shall have complete access to the webpage.
75. The court finds that it is in the best interest of the child for the parents to coordinate and share information regarding communication by these methods until the father establishes a face to face contact with the child.
76. The order to be served on the Respondents by the Applicant within 30 days and the Affidavit of Service to be filed in the Registry.
77. Right of Appeal – 30 days.

LAKSHIKA FERNANDO

RESIDENT MAGISTRATE

DATED AT SUVA on this 19th day of January 2016.