

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

FILE NO.: 0357 of 2012

BETWEEN

AS
Applicant

A N D

AVL
Respondent

APPEARANCES/REPRESENTATIONS

Ms. Anisha Singh (LAC) for the Applicant

The Respondent – Present in Person

JUDGEMENT

1. The Applicant, father of the child namely; **GLL**, a female child born on 14th May 2012 out of wedlock [hereinafter “**the child**”] filed a Form 12 and 23 Applications dated 01st December 2015 and Form 9 dated 17th December 2015, seeking orders which I quote in verbatim as follows:-
 - a. “That the consent orders made on the 9th day of August, 2012 be varied.
 - b. That the residence of the child namely GLL, a female born on 14th May 2012, be with the Applicant man and the Respondent lady to have reasonable access to the child.
 - c. Any other orders that the Court deems fit and just.”
2. In response the Respondent who is the mother of the child filed Form10 on 23rd March 2017, seeking orders which I quote in verbatim as follows:-
 - a. “The full custody of our daughter GLL be given to me as she resides with me most of the time.
 - b. Reasonable access to AS.”
3. On the 18th November 2016, an Interim Order were made as follows;
 - a. THAT the Respondent/lady shall continue to have residence of the child namely, *GLL, a female born on the 14th May, 2012.*
 - b. THAT the Applicant/man shall have access to the child from Friday 8pm to Sunday 5pm on a weekly basis.
 - c. THAT the exchange point for the purposes of access shall be Nasinu Police Station.
 - d. THAT access to commence forthwith.
 - e. THAT Respondent/lady to file and serve Form 10 by end of business day today.
 - f. THAT the matter is adjourned for review on social welfare report and compliance on 28th January, 2017 at 9 am before Registrar.
4. The Applicant/man also filed a Form 7 on the 02nd March 2017, alleging contempt that the Respondent did not comply with the Interim Order on the following dates:
 - a. 28th of December 2016;

- b. 28th of January 2017;
- c. 03rd of February 2017;
- d. 10th of February 2017;
- e. 18th of February 2017.

5. The Social Welfare Report dated 24th March 2017, has been furnished to the Court.

ISSUE

6. Residence and Contact of the child.

7. F7 Contempt outcome.

THE EVIDENCE

8. 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.

9. I also perused the Social Home Environment report and considered the same carefully.

THE LAW AND THE DETERMINATION

10. 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.

11. 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** is 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

12. According to the above paragraph that the Section 121 deals with the various considerations that the court must consider when determining the "best interest of the child". Section 121(2)(a) allows the court to consider 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; In this matter the child is matured enough to express her wishes and the Court considered her expressed wishes. But her wish is not the determinative factor considering her tender ages.
13. 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.
14. Section 121(2) allows the court to **consider the effect of any changes in the Child's circumstances including any separation from either of the parents and The nature of the relationship** of the child with each of the child's parents and with other persons:
15. Applicant and Respondent were in a de-facto relationship for about 08 months and resided at a rented flat at 4 Miles, Centre point and then they rented one room in the Respondent's fathers place in Samabula.
16. The child is currently living with her mother, at Gaji Road, Samabula in which the respondent is occupying for the time being. Currently, the Respondent is unemployed and her father is financially supporting her and her two daughters. She will be moving back to her home in Raiwaqa with the children, once she is in good health. The Respondent used to sell fish and cassava and earns \$60.00 per week.
17. The child studies at MK Pre-school just close by to the Respondent's parents' house in Gaji Road, Samabula.

18. The child stays with her mother since **separation** surrounded by maternal grandparents and excluding father's weekend contact. Applicant confirmed in his evidence that he is separated for more than **6 years**. But date of separation seems inaccurate when considering the date of birth of the child. (**GLL** was born on 14th May 2012).
19. I quote the Applicant's evidence Inter alia he testified that "*Honestly, our relationship didn't work out because the child's mother was unbearable to stay with. Her state of mind was totally different. After work when I come back home there was nothing cooked. My child was not at home, when I ask her she said at the neighbour's house here and there.....*"
20. The Applicant stance has been that he denied the residence of the child for the Respondent. He wants the child to be with him or else seek the child to be removed from the Respondent's living environment and place under Social welfare or some other institution. Because, the environment is not favourable for the child's overall wellbeing and it is detrimental too. There is sewage pit and child is often unsupervised.
21. The Applicant further said the the Respondent also "is in a lesbian relationship while she has a new born child from another man and he doesn't want his child to witnessing this kind of life style every day, when the child is living with the mother. His allegations was declined by the Respondent stating that her lesbian relationship broken up 2 years ago and now her partner is just a friend and she used to help the Respondent a lot. As a friend she visits her.
22. 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". This Court needs to consider practical solution considering all the circumstances of the case not forgetting that the children are schooling. And their education and the daily routings should not interrupt.
23. 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.
 - (3) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests-
 - (4)
 - (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.**

24. It is immediately apparent that, in the light of child's right, no longer to speak of only parents' rights. **Neither the father nor the mother has an absolute right to have the residence of the children.** Because, whatever his or her wishes may be, children have the right to know and be cared for by both their parents.
25. 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".
26. According to the Interim order father spends weekend with the child from the date of the said Order.
27. The capacity of each parent, or of any other person, to provide for the needs of the children, including emotional and intellectual needs; The child is residing with the mother and there is no evidence to establish that the mother provides for the needs of the children, including emotional and intellectual needs. Father alleged that the child is left at neighbours' houses and underweight. He also said that the Applicant failed to take the child to immunisation clinics which are free of charge.
28. There is a necessity to consider the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from –either of his or her parents: or any other child, or other person, with whom the child has been living:
29. The Applicant states that the Respondent lady does not comply with the Interim Order. When the child is with the Respondent, the Applicant Man is unable to contact the child because the she does not bring the child to the place of exchange. The response was from the mother was that the child was sick at times and she refused to go.
30. The Court considers all the factors in s.121 as a whole which includes the Court also considered 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; the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs; 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; the need to protect the child from physical or psychological harm caused, or that may be caused by:-being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect another person; the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
31. The father earns approximately \$323.00 per week and is currently working as a Welder Boy at Fiji Fish Market, Wailekutu. He wants the child access to be equal. Per week

each or monthly each, however it works out best for the child because, he thinks about the child's Health, education, and food. On the other hand the mother is not working at the moment and her father is financially supports her and her two daughters. She stated that when she is fit to go back to work after the child birth, she will then find work to support GLL.

32. The Court considers the observations in the SWHE report. Inter alia the Social Welfare officer observes that **“the child had poor hygiene and clothes were old compared to what other children were wearing..”**
33. The Social Welfare Officer recommends inter alia that “...in this situation that the child is in, her mother cannot financially support her since she just gave birth and does not have fixed employment...however the child needs to be removed from the mother since mother neglects duty of care for the child and is not in a stable position to financially support the child for a better future...”
34. Apparently, due to child's tender age, any drastic change in the status quo may be detrimental therefore any change must be gradual to allow her to adapt at her age.
35. As noted child is residing with the mother. Their intellectual, Development and welfare is being looked after by her is challenged. The SWHER also suggests mother neglects the duty of care and observed while visiting the child at her pre-school had poor hygiene. The Respondent rather testified that she wanted child to have good education. Child is going to a pre-school which is closer to their residence. Mother does not have a stable home. Her answers most of them regarding her future plans including her employment, residence, marriage were “ifs”. Lot of unknowns. Apparently the Mother is not stable. This is not due to her child birth. This Court not considers the brief recovery period after the child birth as the reason to consider her lacks of stability. To be precise, this Court does acknowledge the motherhood and consider a mother needs a recovery period after a child birth and it is not a reason to determine that the Respondent lacks stability.
36. It was evident during the hearing of this application that adults dwelled on past differences and personal attacks thereby were distracted from what is best for the child's development and wellbeing.
37. The aforementioned Social Welfare Report recommends that the Residence to be given to the father. The child was interviewed and the home in which she lives was inspected. This report was not challenged. Apparently, due to child's tender age, any drastic change in the status quo may be detrimental for the physiological well-being of the child therefore any change must be gradual to allow the child to adapt at her age.
38. Most importantly mother lacks stability to provide the child financially, emotionally and intellectually as she is yet to “settle” in an employment and there are uncertainty about her residence and future as well. As an example, if she gets an employment she will reside in her friend's house in Wailea Settlement Raiwaqa with the child”. The Court also wishes to highlight that the either party's financial status is not the determinative factor to determine this application. The Court also did not consider about the alleged lesbian relationship.

39. The Social Welfare report (SWHER) which was done during the course of proceedings in this case. It was noted at last page under the heading of Summary and Recommendation states that “With regards to the best interest of the child, is in great need of support from both parties; the child wants to stay with her mother, but in this situation she is in, her mother cannot financially support her since she just gave birth and does not have a fixed employment, she might spend less time with GLL since she also needs to spend time with her new born baby. GLL’s needs and wants cannot be met since her mother is not working. The only assistance she is getting is the social welfare assistance which is \$45.00 (monthly). However the child needs to be removed from the mother since mother neglects duty of care for the child and is not in a stable position to financially support the child for a better future.

As per the above findings, it is recommended in the best interest of the child the residence of the child be awarded to the applicant (Mr AS) and reasonable contact to the respondent (Ms.AV L)”

40. I agree with the recommendation as it is also the view of the Court. It is no doubt that the mother must be allowed the opportunity to bond with her daughters better access that will not hinder her from performing her role imposed by law must be put in place. This will also be in children’s best interest. But, The Court cannot justify change the orders dramatically granting the residence of the child to the father. The bond and the relationship have to be built and worked on. It cannot be imposed on the child. This relationship building deems to be a gradual exercise. Therefore, there is a necessity to consider practical orders.
41. The below quoted evidence by the father confirms that the bond and the relationship between the father and the child have to be built and worked on first.

“My relationship with my child is good. Frequently my child has not been visiting me so whenever she sees me or meet up suddenly somewhere, she gets surprised. She don’t want to respond. After a while like she takes minutes then she gets normal then she come to me. During our conversation she told me that she is not allowed to see me. her mother don’t like her to come and see me.”

42. There are two sets of Orders. The later orders shall be continue until such time that the child is comfortable to have Residence with the father.
43. I invite both parents to put their child’s best interest first and focus on her future wellbeing rather than lingering in the past conflicts and continue their lives without disputes. I advise both the parties to be flexible when necessary by consent, make some compromises, and comply with the orders. Remember: This is about your *responsibilities* as a parent, not your "rights."

ORDERS

- a. The Respondent/Mother shall have residence of the child namely, GLL, a female child born on 14th May 2012 until **15th December 2017**.
- b. The Applicant/Father shall have contact to the child from 5pm on Friday till 5pm on Sunday until **15th December 2017**.
- c. Father shall collect the child from Raiwaqa Police station and should the Respondent failed to comply; the Applicant shall collect the child from Respondent's residence in Gaji Road. Father shall drop back the child at the Mother's residence at Gaji Road, Samabula.
- d. The Applicant/Father shall have residence of the child namely, GLL, a female child born on 14th May 2012 from **16th December 2017**.
- e. The Respondent/Mother shall have contact to the child from 5pm on Friday till 5pm on Sunday from the week starting from **18th December 2017**.
- f. Mother shall collect the child from Nasinu Police Station or from father's current residence (should arrange by consent by Thursday) and Mother shall drop back the child at Father's current residence.
- g. The parties' whist the child is with either party, the other parent is may telephone contact between 7am and 8pm except that there is an emergency.
- h. That for school holidays, the child will spend alternative weeks with each parent starting from the first week with the Respondent/Lady from January 2018.
- i. The Respondent lady may take the child to her residence/ her parent's for the weekend contact.
- j. Each party shall keep the co-parent, advised of a current home address, telephone numbers (including cellular phone numbers), email addresses, and other addresses at which electronic contact may be made, and advice the other party within 7 days whenever a change is made or may occur. (if applicable)
- k. When the child is with the parties both the parties must supervise the child by themselves or by a trustworthy close family member.
- l. Medical; 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.If the child is sick both parties are to communicate with each other and attend to the children's needs mutually.
- m. That the father shall arrange, and ensure that the child attends to the Health

Ministry Children Clinical and for the immunization clinics.

- n. Father also may involve in the child's pre-school education and her day today wellbeing including her nutrition and hygiene while the child is under mother's residence.
- o. Should the mother failed to comply with the Court Orders; The Father may apply for a recovery Order pursuant to s.105 of FLA.

Contempt Of Court;

The Law

44. ***The Family Law Rule 7.08 (1) of the Family Law Rules 2005 states that;***

“Where a person alleges that another person has committed contempt of the Court, other than contempt in the face of the Court, the Registrar may file an application in a Registry of that Court for the other person to be dealt with for that contempt”.

45. **Rule 7.10 of the Family Law Rules 2005 states that;**

“On the Hearing of an application under rule 7.08 (1), and in proceedings for contempt in the face of the Court, the Court shall –

- (a) cause the person against whom the contempt is alleged to be orally informed of the contempt with which that person is charged and call upon that person to plead thereto;
- (b) hear such evidence as the Court requires;
- (c) require that person to make any defence that the person may wish to make to the charge;
- (d) after hearing that person and any evidence that that person adduces, determines the matter of the charge and whether that person had purged his contempt; and
- (e) make such order as is considered just in all circumstances.

46. I also consider Section 196(1) of Family Law Act 2003 which provides as follows;

A court which has jurisdiction under this Act may punish persons for contempt in the face of the court when exercising that jurisdiction or for willful disobedience of any order made

by the court in the exercise of jurisdiction under this Act. (2) The Rules of each Family Division may provide for practice and procedure as to charging with contempt and the hearing of the charge. (3) Where a person in contempt is not a corporation, the court may punish the contempt by committal to prison or fine or both. (4) Where a corporation is in contempt, the court may punish the contempt by sequestration or fine or both. (5) An order under this section may include an order for -

- (a) punishment on terms;
- (b) suspension of punishment; or
- (c) the giving of security for good behaviour.

Determination

47. The Respondent initially pleaded not guilty for the charge but during her evidence she admitted that she failed to take the child to the point of exchange. The Respondent has not raised any reasonable or lawful defence for breaching the Court order repeatedly other than stating that at times the child was sick and sometimes she refused to go. This Court also refuses to accept that position as a mitigating factor. The matter was before the Registrar and was open for variation of the interim Order.
48. The Respondent re-offended without seeking intervention either by the Registrar or the Court to revisit the Interim Order.
49. Accordingly, after the trial of **contempt**, the onus is on the Applicant of the form, the standard is a criminal one of proof beyond reasonable doubt. The disobedience must be wilful. I find that the applicant has discharged the burden of proof that lay upon him. Accordingly, I find the accused guilty for the offence of **Contempt** of Court contrary to section 196 (1)) of the Family Law Act 2003.
50. Considering all the circumstances' of this case, I am of the view of that a fine would sufficient. Therefore, I order the Respondent to pay a fine **\$50.00** (0.5 penalty units) to be fine to be paid within 30 days; In default 05 days imprisonment.
51. Parties to bear their own costs.

30 days to appeal.

LAKSHIKA FERNANDO
RESIDENT MAGISTRATE

On this 07th day of July 2017