

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER: 17/Suv/ 0004

BETWEEN: LAISA

APPELLANT

AND: SETA

RESPONDENT

Appearances: Ms. Cavubati for the Appellant.

Ms. S. Prakash of LAC for the Respondent.

Date/Place of Judgment: Friday 31 January 2020 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

Category: All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.

JUDGMENT

A. Catchwords:

FAMILY LAW – PARENTING ORDERS – No reason identified why it is in the best interest of the child for the residence to be with the biological mother than the paternal grandmother – judgment is bad in law – the status quo ought to be maintained in that the paternal grandmother to have residence of the child and the biological mother contact when she wishes to during daytime until the matter is properly heard and determined if it is going to be continued to be contested.

B. Cases:

1. *Flannery and Another v. Halifax Estate Agencies Ltd. (C.A.)* [2000] 1 W. L. R 377.

C. Legislation:

1. *Family Law Act 2003 (“FLA”): s. 121(1).*

1. The paternal grandmother appeals against the decision of the Family Division of the Magistrates' Court when it heard her application for parenting orders and awarded the residence of the child, a male, born in 2011 to the biological mother.
2. The court had ordered that the child was to have contact with the paternal grandmother every week from Friday 5pm to Sunday 3pm. The grandmother was to pick and drop the child from the biological mother's residence. Both the parties were permitted telephone access of the child when the child was not with them.
3. The brief background to the matter is that the child was living with his biological mother at his paternal grandparents place since his birth. It is undisputed that the child's paternal grandparents had supported him both mentally, physically, and financially throughout his life.
4. The child's father and the appellant's son had died in a car accident in November 2011. The child was about a month old then. Despite his death, the biological mother and the child lived with the paternal grandparents.
5. When the child was 4 years old, the mother removed the child from the paternal grandparents place with the help of a recovery order only on the basis that she was the biological mother of the child.
6. As it is, the child is living with the paternal grandmother as I had ordered on appeal the status quo in respect of the child's stable home environment to remain.
7. The paternal grandmother is aggrieved at the decision of the magistrates' court and has raised concerns that the judgment does not identify why it is not in the best interest of the child that she has residence of the child and why the mother should have it.
8. The paternal grandmother also raises her concerns that there was clear evidence of the mother abandoning the child and lack of assessment of the interest of the child. It is also raised as a concern that the report by the Social Welfare Department was not given any regard.

9. I have perused the judgment of the Magistrates' Court at length. I am concerned at the manner in which the child's matter had been handled. The judgment outlines the evidence of the parties in details. It then identifies what the law stipulates are the considerations in determining the best interest of the child. Then in two lines the Court states that having analysed the evidence it finds that the best interest of the child requires that the residence be given to the biological mother.
10. The judgment lacks analysis of how the court arrived at the best interest of the child. It lacks analysis of what factors support that the biological mother would be able to best serve the interest of the child. There is no analysis of any factors except for it being dumped in the judgment as outlined by s. 121(1) of the Family Law Act.
11. The lack of analysis of the factors makes the entire 5 page judgment meaningless and unjustified on the basis that there are no reasons to satisfy the verdict.
12. The case of *Flannery and Another v. Halifax Estate Agencies Ltd. (C.A.) [2000] 1 W. L. R 377* makes it very clear that a judgment which lacks reasons and analysis is a judgment which ought to be set aside on appeal.
13. In that matter it was held that *“a judge was under a duty to explain why he had reached his decision; that the scope of what was required to fulfil that duty depended on the subject matter of the case; that where reasons and analysis were advanced on either side a judge had to enter into issues canvassed and explain why he preferred one case over the other; that failure to supply reasons in those circumstances offended against requirements inherent in the duty of showing fairness to both parties and of producing a decision soundly based on the evidence and constituted a free-standing ground of appeal; that, accordingly, since the judge heard reasoned analysis and accepted the defendants' expert evidence, he was under a duty to supply reasons in the form of a coherent rebuttal of the plaintiff's expert evidence; and that his failure to do so justified setting aside of his judgment and remitting case for retrial”*.

14. The evidence tendered by the parties, which I examined ta length, does not justify why the child who had been living with his paternal grandparents place ever since he was born should live in another environment with his mother who had indisputably abandoned the child twice when she found a partner to live with.
15. The biological mother had once left the child with the paternal grandparents without informing them. She had gone to live with her partner in Labasa. The child then cried for his mother and the paternal grandmother provided him with the love, care and comfort and brought him up. When the mother decided to come back, she removed the child from the paternal grandparents place and took the child to her parents place.
16. Subsequently, she found another partner in Lautoka. She again abandoned the child and left him with the maternal grandparents. She came back again.
17. The biological mother would only look after the child if she had no commitment of her own in terms of her relationship. On the other hand, the grandparents have always been around for the child. They are both working and earning and they spend the income on the child. They also have a rented premises. They wish to use the income derived from it on the child as well.
18. There is clear evidence that the child had been morally and spiritually stable with the paternal grandparents and they were financially very capable of bringing their grandson up. The child's paternal aunties and uncles are all very well educated and this child's education is their priority too.
19. There is no factor identified by the Court below that influenced the decision to change the child's residence from the paternal grandparents to the biological mother. I do not find that the judgment was justified in the best interest of the child who had been in steady and stable hands for most majority of his life.
20. It is improper to disturb the child's residence unless a proper finding is made that it is not in the interest of the child that the paternal grandparents who have had the residence of the child after their son died should be changed. Since the child has been living with the paternal grandparents for most of his life, the status quo should remain.

21. I therefore allow the appeal and set aside the orders of the Court below. I further order as follows:

- (a). *That the residence of the child shall be with the paternal grandmother until the matter is properly heard and determined or is left uncontested (see my directions in paragraph c below).*
- (b). *The biological mother shall have contact of the child whenever she wishes to during the daytime until the matter is properly heard and determined or is left uncontested (see my directions in paragraph c below).*
- (c). *The matter should be properly heard and determined by the Resident Magistrate in Nausori. I note that there is now a different Resident Magistrate in Nausori. If the parties do not wish for a re-trial and are content with the orders issued from this Court, then only the defined contact needs to be worked out for the benefit of the child. This is a matter for the Magistrates' Court.*
- (d). *The Registrar shall forward a copy of this judgment to the Nausori Court and require an early hearing date to be fixed. The parties are to be informed of the new dates in the Nausori Court.*

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Hon. Madam Justice Anjala Wati

Judge

31.01.2020

To:

1. *Emunah Lawyers for the Appellant.*
2. *Legal Aid Commission for the Respondent.*
3. *File: Appeal Case Number 2017/Suv/0004.*