

IN THE FAMILY DIVISION OF THE HIGH COURT APPELLATE JURISDICTION	
CASE NUMBER:	FAMILY APPEAL NO. 02 OF 2020
BETWEEN:	AMITA
AND:	ANAND
Appearances:	(Ms.) Priyanka for the appellant Mr. Timoci Varinava for the respondent
Date/Place of judgment:	Friday, 22nd January, 2021 at 9.00am
Coram:	Honorable Mr. Justice Jude Nanayakkara
Category:	<i>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.</i>
Anonymised Case Citation:	AS V AS

J U D G M E N T

INTRODUCTION

- (01) This is an appeal from the decision of the Resident Magistrate at Lautoka, delivered on 30th December, 2019. In his decision, the Resident Magistrate granted residence of the female child born in January 2012 to the respondent.
- (02) The respondent filed Form 9 application for final orders in July, 2017 whereby he sought variation of the following:-

To have full residence of the child namely, Aditi born in January 2012.

- (03) And further to the said Form 9, the respondent further filed Form 12 and Form 23 application in October, 2018, due to some greater change of circumstances in surrounding the welfare of the child in question.
- (04) There is concern raised by the respondent regarding the welfare of the child who is with the appellant's /mother's custody. The respondent says that the continued residence will not promote the welfare of the child because of the exposure of the child towards appellant lady's drinking habits together with appellant lady's niece entertaining men at home (See; paragraph 12 of the Form 23).

The Response

- (05) The appellant did file response and has fully denied the allegations raised by the respondent against her and claims that the allegations were made to annoy or vex.

The Background

- (06) The parties were married with one child namely, Aditi born in January, 2012. The said child namely, Aditi, was living with the appellant lady after the respondent man withdrew his application for residence of the child consenting to lady to have custody to their child.
- (07) The parties have been separated and the appellant/lady had gone and stayed in the Central Division to pursue her studies at a tertiary institution. She is renting a two bedroom flat residing with her niece and the child of the marriage.
- (08) The matter proceeded to hearing in the lower court on the variation of residence application filed by the respondent and the court heard the respondent's evidence under oath on the 13th of September, 2019 as well as the evidence of the appellant.
- (09) The appellant relied on three (03) grounds of appeal as follows;
- (1) *That the Learned Magistrate erred in law and in fact whilst exercising his discretion on the social welfare report.*
 - (2) *That the Learned Magistrate erred in law and fact whilst relying on the evidence of the man in relation to the photos presented.*
 - (3) *The Learned Magistrate erred in law and fact by failing to consider that the paramount interest of the child of the marriage request that proper and formal evidence be received as to the present and future welfare of the child before making any orders.*

CONSIDERATION AND THE DETERMINATION

- (10) As to the grounds of appeal, which are in **general terms**, the following matters come into issue; how did the Resident Magistrate err in law and fact in taking into consideration the contents of the Social Welfare Report in deciding what parenting orders should be made? How did the Resident Magistrate err in law and fact in making the assessment as to weight that should be attached to the Social Welfare Report? How did the Resident Magistrate err in law and fact by admitting the photographs tendered by the respondent showing that the appellant lady consuming alcohol with her friends in the presence of the child?

As stated, the three grounds of appeal are in general terms. They have not been particularized. They are unintelligible and vague and difficult to respond to. The issues that are raised in Counsel for the appellant's submissions are not stated in the grounds of appeal. On the appellant's grounds of appeal, it is difficult to discern any serious issues. It is not only placing an unnecessary burden on the court to ask it to search through the transcript of hearing to find out what they may be to complained of; but it is also unfair to the respondent who is entitled to know what the case he has to meet.

- (11) On the hearing of the appeal, Counsel for the appellant submitted that the Social Welfare Report clearly states that the appellant lady had denied the allegation of giving her child any alcoholic beverages. She further submitted that the respondent had coached the child to say that the appellant gave wine and tribe drinks to the child to consume. Counsel alleged that the respondent had manipulated the evidence. Counsel further submitted that the Social Welfare Report states that the respondent swears at the appellant in the presence of the child. **She contended that the Resident Magistrate has erred in law and fact by failing to take into consideration the contents of the Social Welfare Report.**
- (12) First, turning to the appellant's argument in relation to the contents of the social welfare report, it is important to remember that the contents of the social welfare report is not substantive evidence. Only the evidence which is adduced in court under oath is substantive evidence. The parties can make use of the contents of the social welfare report to corroborate the evidence adduced before the court under oath.

His Worship clearly proceeds from the correct base. He refers to Section 66(4) of the Family Law Act, and proceeds to look at the substantive evidence of the case on the basis that the Welfare of the child is the paramount consideration.

The constant emphasis of the cases is that before reversal an appellate court must be well satisfied that the primary judge was plainly wrong, his decision being no proper exercise of his judicial discretion. While authority teaches that error in the proper weight to be given to particular matters may justify reversal on appeal, it is also well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion. When no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a

difference of view as to weight: it follows that disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge. Because of this and because the assessment of weight is particularly liable to be affected by seeing and hearing the parties, which only the trial judge can do, an appellate court should be slow to overturn a primary judge's discretionary decision on grounds which only involve conflicting assessments of matters of weight.

The whole attack in this appeal is the question of "weight". There is no attack (or no attack which convinces me) as to any finding of fact, or as to the law applied. How then can it be said his Worship's discretion miscarried? In my view it did not, and the appeal should be dismissed.

- (13) It was the court's duty to arrive at a decision which is in the overall best interest of the child. Thus each case must be determined on its own facts with the welfare of the child being the paramount consideration.

The evidence before the lower court satisfies that the child would be at risk if she remains in the appellant's care. In deciding the appropriate parenting order, the Resident Magistrate in paragraph (23) of his ruling made reference to evidence adduced before the court by the respondent which would conflict with the child's best interest. The Resident Magistrate expressed himself accurately when he stated at paragraph (23) of the decision that;

The evidence and the photographs presented by the Applicant/man had clearly exposed scenes that are not in the best interest of the child in terms of her care, safety, welfare, development, physical and moral welfare. The child has been exposed to drinking scenes between the Respondent/lady and her friends. The respondent lady in her evidence admits that she drinks when her friends are around. There is also evidence that the respondent/lady's niece who lives together with them have been entertaining men at their home. There are also photographs which supports the evidence.

How then can it be said his Worship failed to give proper weight to the evidence adduced before the lower court?

- (14) The findings of the Resident Magistrate is based on the evidence adduced before the Court. These are findings to which I attach reasonable weight. The child is at risk because of her mother's (appellant's) alcohol consumption. During cross-examination, the appellant conceded that she consumed alcohol with her friends in the presence of the child. **Therefore, the evidence regarding the appellant's alcohol consumption is not wrong or manipulated.** The appellant's alcohol consumption may compromise her parenting ability. Besides, the photographs which support the evidence that the appellant's niece who lives with her has been entertaining men at home is emotionally and psychologically harmful for the child. These are factors to which I attach reasonable weight. There are no similar risk issues which arise concerning the respondent father and the paternal grandmother and this factor weighs in favour of orders consistent with the respondent's application before the lower court. It is clear from matters I have discussed

in this paragraph that there are cogent reasons to justify the view that continued residence will not promote the welfare of the child – that whatever may be the disadvantages of depriving the child of residence with the appellant are outweighed by the disadvantages of continuing it.

- (15) I accept the appellant’s contention that “the child is more content to the environment of living with the mother”. But I place a greater weight upon the appellant’s admission of her alcohol consumption with her friends in the presence of the child and particularly significant to the fact that the child has witnessed the appellant’s niece entertaining men at home.
- (16) Considering the evidence in its entirety, I am satisfied in the respondent’s care. As must be apparent, I am persuaded the child’s best interests are promoted if the child predominantly lives with the respondent father and maintains meaningful relationship with her mother- the appellant.
- (17) The order of the Resident Magistrate is in the child’s best interest. The order of the Resident Magistrate is just and I do not see any reason to overturn the order. The grounds of appeal lack merits.

ORDERS

- (01) The appeal is dismissed.
- (02) I make no order as to costs.

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Jude Nanayakkara
[Judge]

High Court- Lautoka
Friday, 22nd January, 2021