

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER:	007/22 <i>Original Action Number (21/Nas/0203)</i>
BETWEEN:	VISHAL APPELLANT
AND:	RUPALI RESPONDENT
APPEARANCES:	Mr. A. Ali for the Applicant Mr. Nambiar for the Respondent
DATE/PLACE OF JUDGMENT:	Friday 03 February 2023 at Suva
CORAM:	Hon. Madam Justice Anjala Wati
CATEGORY:	<i>All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.</i>

JUDGMENT

Catchwords:

FAMILY LAW – **CHILD - INTERIM PARENTING ORDERS - APPEAL** - *whether the interim application for residence of the child by the maternal grandmother should have been heard in absence of the father who had the primary responsibility to care for and look after the welfare and development of the child both under the law and on the basis that the father had the residence of the child and there was no imminent danger to the child or that the child’s safety was at risk – whether proper factors were taken into account in granting the interim residence orders – whether the wishes of the child were properly extracted when the matter was heard in absence of the father – whether the court had erroneously denied the child her right to have contact with her father – whether the child’s interest required the orders for interim residence to be made in favor of the maternal grandmother- the propriety of the Human Rights Commission getting involved in this case - how applications for transfer of proceedings are made and handled in the Family Division of the Magistrate’s Court.*

A. Legislation:

- 1. Family Law Act 2003 (“FLA”): ss. 28, 41, 54, 121, 122, 177 and 178.**

Cause and Background

1. The father of the only child of the marriage has filed this appeal against the order of the Family Division of the Magistrates Court, Nasinu. On 28 June 2021, the maternal grandmother had obtained an order for interim residence of the child in absence of the father and without serving him with the application. The application was filed inter-parte but heard and determined ex-parte.
2. The application was filed 4 days after the child's mother had died by committing suicide on 24 June 2021. The mother died by setting fire to herself which engulfed the matrimonial home of the parties to the marriage. Prior to the death of the mother, the child used to live with her parents. The maternal grandmother was paid to look after the child when the parents were working and not at home and during times were the parents were committed or had their own issues to deal with.
3. When the child's mother died, the father allowed the child to live with the grandmother for that period as he was attending to various issue that affected him like making arrangements for the funeral and looking for alternative residence for himself.
4. It is axiomatic that the father was going through a very difficult time in his life and understandably could not drag the child to face the issues he was going through. He considered it proper to allow the child's maternal grandmother to look after her as she was the one who the child was comfortable with. He did not agree or consent that the maternal grandmother should have the residence of the child. He had no knowledge that the maternal grandmother was intending to apply for the residence of the child.
5. The applications that were filed by the maternal grandmother on 28 June 2021 were:
 1. ***A final order application for the residence of the child to be given to her and reasonable contact to be granted to the father.***

2. *An application for interim residence to be granted to her and an affidavit in support of the application for interim residence. By the same application, an early court date was being sought.*
3. *A letter dated 28 June 2021 seeking an early court date.*
6. The child was 8 years old when the application was made. The final order application for parenting orders filed by the maternal grandmother is still pending in the Family Division of the Magistrate's Court, Nasinu.
7. The basis on which the maternal grandmother made the application is outlined in her affidavit in support of the interim application. I will outline that in full as it will indicate whether that was sufficient to consider and grant an order without hearing the father and whether there existed an immediate need to attend to the application. The maternal grandmother deposed as follows:

The Child and Her Parents

- *The child is attending Learning Center in Suva. Her mother died by committing suicide which she believes arose as a result of the marital differences between the child's parents.*
- *Since the child was born, she has been looking after the child. She was employed on a full time basis but the father requested her to leave her job and look after the child. She agreed as her daughter and the child's father were both working full time and they did not have the time to look after the child. The child would be dropped at her residence in the morning and picked in the afternoon after they finished the work. There were times when the child will not be picked and she would prepare the child for school next day.*

- *She was paid \$100.00 weekly by the mother of the child to look after the child. The payment was not on a consistent basis. With the help of her son she accommodated for the additional expenses of the child as and when needed.*
- *In 2019, the child's parents stopped paying her due to their financial problems. She still catered for the child with the help of her son.*
- *Everything was going well until the child's parents started experiencing issues with their married life. The child's mother had also filed an application for Domestic Violence Restraining Order against the child's father. They had differences due to the father having an extra-marital affair. After that incident, the child and the mother came to reside with her. The parents then reconciled and the mother returned to live with the respondent.*
- *Since last year the child would be dropped at her place on Sunday afternoon and picked by either of her parents on Friday afternoon. There were many occasions when the child will not be even picked up on Friday due to their differences so the child will even spend the weekend with her.*
- *After the mother applied for the Domestic Violence Retraining Order, the mother and the child had come to live with her. The child's father had then stopped communicating with her and would only come to her place to pick or drop the child.*
- *Despite having limited knowledge on the new education trends, she does her best to assist the child with her school work and classes.*
- *The child has online Math's class, Google class and has online test with her teacher every Wednesday whereby she assists her in all these activities with the help of her son.*
- *To her knowledge, neither parent is aware of the child's educational needs and what she does on a daily basis.*

- *She believes that due to the difference between the couple, the mother of the child has committed suicide.*

Child's Father and Instability

- *The father is not able to look after the child as he would never pay attention or spend time with the child.*
- *The child would complain to her that the father has been scolding her and talks to her in a very rude manner.*
- *When the child spent the weekend with her parents, the child noticed that the parents would always fight. The child would message her on viber and inform her that the parents are fighting.*
- *There are emails sent by the mother of the child stating that the father had always been neglecting the child because of his extra marital affairs.*
- *The father would scold the child and the child would come to her and cry. This traumatized the child and impacted the child emotionally and mentally. The father failed to give emotional, financial and mental support to the child.*

Best Interest of the Child.

- *When the mother of the child was alive, the parents did not look after the child as they should have as parents. The child has been subjected to emotional and mental torture due to the differences between the parents and she does not want this to continue as it is not good for the child's mental wellbeing.*
- *She has looked after the child since her birth and she has also bonded with the child. The child spends a lot of time with her. She is the one who has provided the child with emotional, mental and financial support as and when needed. Her family has also been supportive of this and always encouraged this as they understand how difficult it is for*

the child to deal with a situation like this which she should not be subjected to as it is of no fault of hers.

- In comparison to the father, she will be able to provide better care for the child in terms of taking care for her special needs, giving her food on time and provide her with a better and clean environment to live in since that is the most important thing she needs.*
- The child needs support from her during this emotionally stressful time of losing her mother. She believes that she will be able to provide her with that support and time which she requires as she has been doing that in the past and is capable of doing that in future. She is aware of the child's day to day routine, her likes and dislikes.*
- If the child stays with the father, she will be staying in the same house where the incident occurred and that will cause psychological harm to the child and it will be difficult for her to recover from her mother's grief. The father has never spent enough time with the child to know how to look after the child and what she needs on a daily basis. She fears that if the child is forced to live with the father, she will suffer mentally and emotionally.*
- She will be able to provide the child with emotional and intellectual needs whereas the father will not be able to do so. She has brought up both her children and educated them and cared for them sufficiently. Hence doing the same for the child is not a difficult task for her. It is rather comforting for the child to stay with her.*

The Suicide Incident

- The child's mother had written an email to the father before committing suicide in which she clearly stated that he was the reason for her to take such a step. She was looking after the child when the mother was alone and committed suicide. The contents of the email sent by the mother to the father indicates the torture, stress, trauma and neglect that the mother had gone through. It is a clear sign of the depressing atmosphere that she lived in. The pain denoted in the email clearly speaks out that the mother's wish was that the child be cared for and clearly the father was not capable of doing that.*

- *From the time of the mother's death, the father did say that he will come and visit the child. He failed to do so and neglected his duty as a father especially at a time when the child needs to be comforted the most.*

Child's Wishes

- *The child has expressed her wishes to her that she does not want to stay with the father. She does not feel comfortable and clearly is not in the current state of mind to be with the father. The child would start crying once she is told that she has to stay with her father. For a child who has just lost her mother, it would be extremely difficult and traumatizing to be around a person with qualities of the father who shows no sign of care and affection towards the child who needs the most now.*
- *The court can interview the child if it deems appropriate.*

Urgency

- *She was informed that the father of the child wishes to take the child away and apply for residence of the child. The child does not wish to reside with the father as she is already going through mental and emotional breakdown due to passing away of her mother.*
- *She does not have any issues with the father meeting the child as she understands that he is the father and he has that right. However the current situation requires that the child be protected from any psychological harm that may be caused to her.*
- *The emotional trauma of losing a loved one is a serious matter. Losing a mother is something that is very difficult to come to terms with. A child needs to be comforted and cared for. That is the only thing that would matter the most.*
- *Since the incident, the father was engaged in removing the burnt debris from the premises. He did not have the time or rather did not make the effort to console, comfort*

or speak to the child and see what she is going through and how she is coming to terms with the loss of her mother.

- *The father has never shown any sign of care or affection for the child. The child finds more comfort at her home rather than anywhere else as that is where she always has been.*
 - *The internal issues that transpired between the parents indicates that the father was involved in all other things apart from the mother and the child.*
 - *Given the father's previous conduct and his current behavior, she fears about the child's vulnerability. The child needs the care and comfort in that stage of her life.*
 - *The child is her granddaughter and the last living memory of her dear child. With the support of her family and with all the capacity that she has, she assures that she will do her best to ensure that the child has what she needs and that she is cared for and like many other children has a bright and successful future.*
 - *The trauma caused to the mother of the child by the father was a very emotional and depressing state and she does not want the child to ever go through or experience anything close to that.*
8. The father was not able to file a response to the above application as he was not aware that an application was filed in court. He later did file his response but since the appeal before me concerns the procedure in hearing the interim order applications for parenting orders and the evidential basis for granting interim orders, the response by the father, I find, is more relevant to the final parenting order proceedings.

Grounds of Appeal and Issues Arising

9. The father has raised that the Court below has made the following errors:

1. *Error in law in hearing the maternal grandmother's application ex-parte in absence of due and proper reasons for the matter to be heard ex-parte being urgency and/or mischief.*
2. *Error in law in arbitrarily depriving the child and the father contact with each other despite the maternal grandmother seeking reasonable contact to be granted to the father of the child.*
3. *Error in law when the court granted the maternal grandmother the interim order in the absence of urgency without first obtaining a social welfare report and without giving the father an opportunity to be heard.*
4. *Error in law in not ensuring on the subsequent court dates on whether the father had been duly and properly served with all the documents and whether he was advised of the court dates.*
5. *Error in law and in fact in not requiring evidence of where the child was in fact residing prior to the maternal grandmother's application being made and evidence pertaining to the father's whereabouts.*
6. *Error in law and in fact in acting to supersede the right of a natural parent with those of a grandparent when there was no documentation, including but not limited to the birth certificate of the child.*
7. *Error in law if any credence was given to the letter written by the Human Rights and Anti-Discrimination Commission dated 7 July 2021 during the progress of the proceedings.*
8. *Error in law by the Acting Chief Magistrate when she sent the matter back to the Nasinu Magistrate's Court after the parties had consented to the matter being moved to the Suva Magistrates' Court following the hearing of a Form 12*

application by the father to transfer the matter to another Court, due to the Deputy Registrar having recused herself from the matter, on the basis that the Chief Magistrate's consent is required for the transfer of any matter to another Magistrate.

10. I find that the issues that arise from the appeal are as follows:

- 1. Should the matter have been heard and determined ex-parte when the application was made inter-partes?*
- 2. What is the proper directions the court is under an obligation to make after hearing such an application ex-parte to ensure that the party deprived of being heard is given due process to vindicate his rights in court?*
- 3. Was an interim order necessary and should it have been made without hearing the father and without a social welfare report?*
- 4. What are the factors that the court needed to have evidence on to even determine and grant the interim application when it was heard ex-parte?*
- 5. Whether the court failed in its duty to consider the issue of the best interest of the child when it totally disregarded the issue of interim contact of the child?*
- 6. Should the court have the child's birth certificate and other relevant documents in dealing with an application regarding any child?*
- 7. Did the court, at the time of granting the interim orders or any other time in the proceedings consider a letter written by the Human Rights Commission on 7 July 2021 and was it proper for the court to have regard to that letter.*

***8. What is the procedure to have a matter transferred from one court to the other?
Does the Chief Magistrate have any powers to deal with matters regarding transfer
of files in the Family Division of the Magistrate's Court?***

11. I will now deal with the issues arising on the appeal.

Analysis

12. Some of the grounds of appeal can be dealt with collectively as it overlaps and dealing with it separately will be not be effective. Other grounds are either peripheral or not related to the substantive question on the interest of the child and therefore can be dealt with individually. Let me first deal with the issue of hearing the application ex-parte.
13. The child's mother died on 24 June 2021. At that time the child was 8 years 6 months old. The application for interim residence was made on 28 June 2021, just 4 days after the death of the child's mother. A final order application was also filed on the same day.
14. Through the interim application, the maternal grandmother had requested for an early court date. There was no application or request by her for the matter to be heard ex-parte or that the service of the application on the father be dispensed with.
15. Apart from the application not being filed ex-parte or seeking the matter to be heard ex-parte, there was a letter written to the Senior Court Officer of Nasinu Court Registry on the day the interim application was filed. Even that letter did not request that the matter be heard ex-parte. All it requested was that the matter be heard urgently.
16. If an applicant does not request a matter to be heard ex-parte, irrespective of the fact that an urgent and expedient hearing is sought, the court has no basis in law or on the facts of the matter to hear the case ex-parte. The court cannot choose to deprive a party of being heard if the applicant does not wish to.

17. Whenever a request is made for a matter to be heard ex-parte, the court then decides whether the same should be heard ex-parte. The court erred in converting this application to an ex-parte application when it was not made ex-parte. That deprived the father, whom the child had been living with prior to the death of her mother, of his right to be heard on the matter. Consequently, the court created a situation for itself where it could not be well and properly informed about the best interest of the child.

18. If the father was heard, the court would have been able to hear why the child should not be removed from the father's care and be given to the maternal grandmother who was only looking after the child when both parents were working and not on the basis that the parents either jointly or individually could not look after the child. If that was the case, then the grandmother ought to have made the application long before the death of the child's mother that both were not capable of looking after the interest of the child as she alleges in her affidavit.

19. When the matter was heard on 28 June 2021, the court recorded that the child was 8 years old. The court also recorded that the child told the court that her father drops her to the Learning Centre. The child further informed the court that she wishes to stay with her maternal grandmother as she keeps her well. On that basis the court made the following orders:

- 1. Interim Residence be granted.***
- 2. Social Welfare Report to come in.***
- 3. Legal Aid Counsel to act as Child Representative.***
- 4. Matter adjourned to 8 July 2021 for 9.00am.***

20. When the matter called, the court was obliged to see if the father was served with the application as the same was filed inter-partes. There was no evidence of service. It then became the duty of the court to order service on the father before even proceeding to hear the matter.

21. If the maternal grandmother insisted that the application be heard without serving the father, the court ought to have enquired why it was not necessary to serve the father and what was so urgent and necessary that he be excluded from the hearing. That finding was necessary to proceed with the application ex-parte. In absence of that finding, I find that matter was improperly heard ex-parte and determined ex-parte.
22. It is only in cases of cases of emergency requiring urgent intervention of the court to immediately protect the child from serious mental, physical and emotional harm that a biological parent should be denied the right to be heard. I have read the grandmother's affidavit. I do not see that the child was under any form of risk with the father for the maternal grandmother to proceed in the way she did. Indeed, the entire family was going through a very rough patch. Everyone would be emotionally disturbed including the child as her mother had died and they had lost a home. That was due to the circumstances that the child's mother had created for the family. Based on the affidavit, I do not see that the father had created a situation that was going to risk the life of the child or threaten her safety. I will now deal with the issue of service on the father after the grant of the interim orders.
23. After granting the interim orders, the court adjourned the matter to 8 July 2021. There was no order for service made. The court failed in its duty to ensure that a person who has been deprived of his right to be heard is served with the application promptly and before the next call date to be able to come to court. I do not understand the purpose of the returnable date being given when no order for service was made.
24. It was the duty of the applicant grandmother and the court to ensure that the party deprived of being heard knew about the exact returnable date. What needed to be done was simple. No extra effort was needed on the part of the applicant or the court. The court ought to have ordered that the next returnable date in the interim order application be changed to reflect the new date or that the order that was to be served on the father included the next court date. How else would the father know when to come to court? He cannot be expected to be given an interim order application which bears the court date

which has already passed or a sealed order which did not even indicate when he was to appear in court.

25. I have seen the interim application. I have also seen the order that was sealed. The interim application does show the next returnable court date. The court order also does not indicate when the father was to come to court even though the court had given the next court date. It was incumbent upon the counsel for the applicant to have included that date in the order. Was the failure deliberate to continually deprive the father?

26. The affidavit of service and the acknowledgment of service both indicate that the final order application by form 9 and the interim order application by form 12 supported by an affidavit by form 23 was served on the father on 6 July 2021. The affidavit of service does not indicate that the order was served on the father. Why the maternal grandmother chose to exclude the order from the service is very suspicious.

27. When the matter was called in court on the next date, that is, on 8 July 2021, the court noted that the affidavit of service was filed without ensuring when the application was served and whether the father knew about the correct date. The father's absence from court should have triggered the issue of whether he knew about the court date and whether he was properly served and if that care and caution was exercised, the court would have found out that the father did not know about the court date.

28. The court should have then imposed very strict orders for service of the interim orders and the applications bearing proper court dates. Once again the court did not pay attention to what it ought to have done. It just causally again made an order for the interim orders to continue and adjourned the matter to 14 July 2021. Even on this date there was no proper enquiry by the court or any evidence from the court records that the father was properly served with the application. The court made an order for the interim orders to continue and adjourned the matter to 5 August 2021 at 12 pm. This date was perhaps allocated because the final order application was listed for this day before the counsellor and the registrar for counselling and case assessment conference.

29. Then Fiji was affected by the global pandemic Covid 19 and the courts were not in session except to deal with urgent matters. The matter was therefore adjourned from 5 August 2021 to 16 September 2021. It was again adjourned for the same reason to 11 November 2021. It is on this date of 11 November 2021 when the father appeared with her counsel Ms. Ali and orders for filing of the response was given. The matter was adjourned to 25 November 2021.
30. Due to the court not ensuring that the father was properly served in the case, he was not able to be present in court for at least the next 4 months. I can understand that there was no court sittings in between but if there was an order for proper service, after the making of the initial orders, there would not have been such delay in the father being able to come to court.
31. A person who obtains an order ex-parte and subsequently prevents the right of another party from being heard should not be allowed to continue to have the benefit of the order which is given on a very short term basis. To allow an ex-parte order to continue for 4 months against a father who is not able to vindicate his rights is alarming and not in the interest of the child and the principles of access to justice.
32. I will now deal with the evidential basis necessary in this case to grant the interim order. I will start with the legal rights of any child and the legal obligations of the parents under the FLA. S. 41 (2) (a) of the FLA states that children have a 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 unless it is contrary to the child's best interests.
33. S. 41 (2) (c) and (d) states that the parents share duties and responsibilities concerning the care, welfare and development of their children; and parents should agree about the future parenting of their children unless it is contrary to the child's best interests.

34. Arising from the principle on the child's right to be cared for by the father unless it was not in the child's best interest to do so, the court had to ensure that it was not in the interest of the child that she remains with her father when her mother died by suicide. The notes of the day's proceedings when the interim application was granted indicates that the court did not make any interim finding on the basis on which the child was being handed over to the maternal grandmother.
35. The court had to determine the best interest of the child on the day it made the interim orders depriving the child of the right to be cared for by the surviving parent, that is, the father. All the court did was to base the finding on the child's wishes which was not even properly obtained by the court. It appears from the court's notes that the child was asked whom she wants to stay with and she mentioned that she wanted to stay with her maternal grandmother. I presume that the child was asked this question in court in presence of the maternal grandmother as there is no indication from the records on how the court extracted the child's wishes.
36. The court below ought to have made notes of how the child expressed her wish and also made notes of other relevant matters for example whether someone was present to prevent the child from freely expressing her wishes, whether she was asked the right developmental questions, why she did not wish to stay with her father, what was the fear that she apprehended, whether there was any immediate abuse to the child, and other matters of essential importance like whether the child's response can be questionable/is tainted or arises suspicion. No records of how the child was interviewed was kept by the court. In that regard, I cannot attach any weight to the child's wishes as it was not properly obtained.
37. I will identify some specific and basic errors that the court made and the consequential effect of the same. It was the duty of the court to ensure and arrive at a finding that the child was not reflecting the wishes of the maternal grandmother because she was present when the child was asked about her preference. Further, the court did not make any

finding whether the child was not under any form of duress when the child was being questioned on her wishes.

38. There was no urgent and immediate need for the court to get involved in obtaining the wishes of the child. The allegations that the father could not provide the proper emotional, mental and physical support to the child when her mother died and even before she died, did not create an urgency to intervene immediately. The court could have waited for a proper report on the child's wishes to be placed before it. In absence of any emergency and urgency, the report ought to have been ordered under s. 54 of the FLA.
39. Section 122 of the FLA states how a child can express his or her wish. It states that a court may inform itself of wishes expressed by a child by having regard to anything contained in a report given to the court under s. 54 (2) or by any other means the court thinks appropriate.
40. I fail to see why the court did not wish to employ the services of independent persons and bodies to obtain the wishes of the child in light of the fact that there was no serious urgency in dealing with matter. Indeed the child's mother had died by blaming the father. That was a matter between the parents. If their conflict and way of bringing the child affected the child emotionally, mentally and physically then the grandmother ought to have made the application for residence when the child was going through the trauma and not when the child's mother died.
41. The grandmother deposes that the child did not receive proper parenting from both parents. Why did she keep quiet and not take any action for so long? She only took action when her daughter died. This indicates that her actions were designed not for the benefit of the child but to avenge the death of her daughter and keep the grandchild close to her to minimize the effect of the loss of her daughter. She herself deposes to this effect in her affidavit.

42. In this case, it was proper to send the child to qualified persons who were able to deal with the child according to her need and development rather than dealing with the matter itself. The way the court dealt with the child in obtaining the wishes of the child does not indicate that the court had proper conduct of the matter. Whether it is arising from its lack of knowledge in handling a child and determining the wishes of the child, I cannot comment on that. I must however state for the purposes of this proceeding that the child was not properly interviewed by the court. Apart from the inaction on the part of the court that I have outlined earlier, I must add that the court failed to make a finding on why the child expressed her wishes not to stay with a parent who had the legal responsibility under the law to do so.

43. The father had been the primary care-giver of the child with the child's mother. There has to be some strong reasons on the child's interest to deprive the child the right to be cared for by her biological parents who have a primary duty under the law to look after their welfare and development.

44. I have stated that the only reason based on which the maternal grandmother was given residence of the child was based on the child's wishes. S. 121 (2) of the FLA also states other factors that needs examination to arrive at a finding on the best interest of the child. The court did not consider any one of those factors and deviated from it without any explanation or reason why it did so. I do not think that the rules are relaxed or should be ignored in determining interim applications ex-parte unless there is prima facie evidence of child abuse to the extent that the safety of the child demands that an interim order be made pending the determination on the remaining best interest factors.

45. The court also deprived the father of his responsibility to look after the child. That is the responsibility bestowed on the parents and that should not be easily taken away by a mere expression of a wish by the child or allegations made against a parent without the parent being informed of the allegations and being heard.

46. Apart from the above, the court went ahead and made very draconian orders in depriving the child of any contact with the father. S. 41 (2) (b) of the FLA states that children have a right of contact, on regular basis, with both parents and with other people significant to their care, welfare and development.
47. When the maternal grandmother filed the final order application, she had sought in her prayers that the child be given contact with the father. In her interim application which was supported by an affidavit, she again asked for the child to have contact with the father. The court did not grant any orders for contact without stating the basis for depriving the child of any contact. The order that was made was done in haste, without any regard to the interest of the child and without any care expected by the court. The order was made callously and without following the principles mandated under the FLA.
48. The next matter that I am required to answer is *did the Court, at the time of granting the interim orders or any other time in the proceedings consider a letter written by the Human Rights Commission of 7 July 2021 and was it proper for the court to have regard to that letter.*
49. The contents of the letter which was addressed to the counsel for the maternal grandmother is as follows:

“Greetings from the Human Rights and Anti-Discrimination Commission.

The Human rights and Anti – Discrimination Commission is in receipt of a complaint from the maternal grandmother of the above mentioned child, ...who has raised concerns about the safety of her grand – daughter.

According to Mrs. ..., the child is under her care following the death of the child’s mother (this matter is under police investigation). The father of the child called this morning and insisted he take her out shopping. Mrs. ... then contacted the Commission to seek advice about the child’s safety.

Pursuant to section 41 (2) of the Fijian Constitution, the best interests of a child are primary consideration in every matter concerning the child.

Based on this provision, the Commission advised her that the child should remain at home under her care given the high number of COVID19 cases in the Lami – Suva – Nausori corridor. Children need to be protected and it is highly irresponsible of any adult to encourage or entice children to go out shopping in the current circumstances.

We will be informing the Department of Social Welfare about this development. The child's safety is paramount and we strongly believe that she should remain with her grandmother given the emotional pain she is going through at such tender age after losing her mother. She has been staying with her grandmother prior to her mother's death so there is bonding, trust and familiarity in that relationship.

Thank you.

Kind Regards

Mithleshni Gurdayal

Manager, Complaints and Resolutions (Actg.)”

50. Before I deal with the question that I have posed, which of course arises from the grounds of appeal, I must deal with two preliminary matters. The first is the concern as to why that letter made its way into the records if it was not meant to be used in the court proceedings? The letter should have been only copied to the father and/or his counsel and not the court as the court had not ordered any intervention by the Human Rights and Anti – Discrimination Commission.

51. The second preliminary matter is for me to give a general reflection on the proper institutions who should get involved when issues regarding a child's welfare, development and safety is concerned. The proper institutions are either the office of the

Attorney General or the Social Welfare Department. Those two institutions are the prescribed authorities under the Family Law Act: *Ss. 177 (1) (b) and s. 178 of the FLA.*

52. The above two institutions are given specific powers to intervene in any proceedings for the benefit of the child. There is no right or power given to the Human Rights Commission to deal with children who are subject to court proceedings. If that institute wishes to take part in any matter regarding children who are subject to court proceedings then the court must be sought leave from. I say this because it is expected that persons who are trained to deal with the children are best to protect their interest. One cannot expect or presume a person, no matter how qualified on paper he or she may be, to be of such experience, personality and practicality to deal with the children and their issues.
53. Specifically on this case, the Human Rights Commission, of course wrote a letter to the counsel for the maternal grandmother because she asked for their assistance during Covid times. She needed to know whether she could send the child with the father for shopping. My concern is that she should have sought guidance from the court as the matter was sub-judice or in absence of that at least seek guidance from a relevant agency(s) bestowed with the mandate to look after the interest of children. It also surprises me that Ms. Dayal from Human Rights Commission did not seek assistance from the court knowing that the matter was pending in court or direct the maternal grandmother to obtain guidance from the relevant institutions.
54. I cannot say that the letter was written in good faith. Ms. Dayal talks about the pain and trauma the child is suffering and about the bonding she has with the maternal grandmother. This statement reflected one party's views. Ms. Dayal did not have the benefit of any investigation report, psychological assessment report, conference report, a report on the wishes of the child, the position of the father or any other material to rely on to come to that opinion. Her letter therefore is questionable and not free from bias and impropriety.

55. In any event the more important question is whether this letter impacted on the child's right to be given contact with the father at the time of making the interim orders or subsequently.
56. Since the letter was written post the grant of the interim orders, it would not have in any way made its way into the court's consideration of the orders it made on the first day.
57. The court minutes of 8 July 2021 indicates that Ms. Singh, the counsel for the maternal grandmother, had informed the court that the matter is with the Human Rights Commission. Apart from that, nothing else appears in the records for me to make a finding about what effect the letter had. However that letter appears to be the basis why the maternal grandmother did not provide any contact to the father. The country was going through a serious situation and most movements were restricted. If physical contact was not possible at this stage, I would have expected the maternal grandmother to have facilitated meaningful contact with the father. There are other means for example video calls where the father could engage with the child. To that end I find that when the court did call the matters subsequent to granting the interim orders, it was incumbent on the court to facilitate other meaningful contact if physical contact was not possible during the pandemic.
58. The father also needed to know how the child was doing during the pandemic and whether she needed any medical or any other attention. He needed to know that his daughter was safe and he needed to provide day to day guidance and advice on how to keep safe. To deprive a parent of fulfilling his or her responsibility under the law when it was not contrary to the interest of the child is an order that is made in ignorance of the law and the facts of the matter.
59. I will now need to address the issue of how a matter should be transferred from one Magistrate to another. In this case, the parties had by consent agreed to have the matter transferred to Suva. The order was made by consent on 3 February 2022. The Resident

Magistrate then sent the matter to the Chief Magistrate who refused to have the matter transferred to Suva but sent it back to Naisnu before another Magistrate.

60. If an application is made before a court to transfer the matter to another court, it is the presiding court which determines whether the matter should be transferred: *S. 28(2) of the FLA*. The Chief Magistrate does not determine and has absolutely no role in determining whether the matter should be transferred or not and whether he or she will sanction the order or set it aside.
61. The role of listing matters in Family Court is the responsibility of the Registrar. The Registrar ought to have listed the matter in Suva before a Resident Magistrate who was scheduled to receive the next case.
62. I find it improper that after the orders for transfer to Suva was made, the matter was sent to the Chief Magistrate who reverted the matter to Nasinu Court.
63. I finally wish to deal with one last concern of the father's counsel which is that when the paternal grandmother made an application for the interim residence, she did not produce to the court proper documentations establishing the relationship of the child to her and the death certificate of the mother. I cannot derive from the records at to which documents were filed together with the application for final and interim orders. In absence of that I will remark generally that in applications concerning children, their birth certificates are necessary. Further, if a person is seeking parenting orders on account of being a child's relative than the relationship must be established through proper documents. Where death is pleaded and made a ground for seeking parenting orders than the death certificate is necessary. Mr. Nambiar argued that even if the necessary documents were not there, there was nothing incorrect about the details of the child, the relationship and the death. Everything was factually correct.
64. This matter was heard in absence of the natural parent of the child. Even though there was nothing incorrect regarding the details of the child, her relationship to the maternal

grandmother and the death of her mother; that does not alleviate the requirements of the law that the necessary documents be filed. The court will not be able to ascertain the facts from one person's deposition unless all parties are heard. If the court is to presume that the deponent who is heard alone has not made any false statements, then even a person who does not know the child can seek and obtain an order for interim residence and cause damage to the child's health and safety. By the time the court discovers that the person who took the interim residence of the child had no locus to even make any application, the child would have been subject to immense issues. The requirements therefore cannot be relaxed in my view.

65. I have covered the main grounds of appeal and have allowed it. I now propose to make the interim orders pending the determination of the final order applications and in doing so I have considered the need for the child to have continued contact with her maternal grandmother as she is used to her. The grandmother can be a very essential person to attend to the child's needs as and when required. It would be improper to suddenly deprive the child of people who she is used to and has known as her close ones. If I do not consider that, I will be making the same errors that the court below had made.

Final Orders

66. For the reasons I have identified, I allow the appeal and make the following orders:

- 1. The status quo regarding the residence of the child prior to the maternal grandmother filing the application for interim residence on 28 June 2021 is restored.*
- 2. Pending the final determination of the action, the child shall reside with the father from Sunday 4pm to Friday 4pm and with the maternal grandmother from Friday 4pm to Sunday 4pm. This latter order in favour of the grandmother is to ensure that the child maintains the bonding with the grandmother for her to attend to any*

other needs of the child if the child is uncomfortable to allow the father to address those issues.

3. The father shall make day to day decisions regarding the child and if the parties want to make any other arrangement regarding the child apart from or in addition to my orders, they are at liberty to do so but in case of any conflict due to non-compliance, my orders shall prevail.

4. The maternal grandmother is to handover the child to the father tomorrow 4 February 2023 at 12pm. The father shall pick the child from the grandmother's residence. The obligation to calm, console and prepare the child for handing over is on the maternal grandmother.

5. The grandmother shall handover the child's school related belongings to the father on 4 February 2023 at 12pm.

6. The picking and dropping of the child on Sundays and Fridays shall be the responsibility of the father. The orders for exchange is with effect from 10 February 2023.

67. The parties must bear their own costs of the proceedings.

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Hon. Madam Justice Anjala Wati

Judge

03.02.2023

To:

- 1. InterAlia Consultancy for the Appellant.*
- 2. Nambiar Lawyers for the Respondent.*

3. *File: Appeal Case Number: 0007/22 (21/Nas/0203).*