

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER:	Family Appeal Case Number 0020 of 2013
BETWEEN:	RITHIK APPELLANT
AND:	SHARIFA RESPONDENT
APPEARANCES:	Ms. J. Lal for the Appellant. Ms. S. Nayacalevu for the Respondent.
DATE/PLACE OF JUDGMENT:	Friday 20 October 2023 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 similarity to any persons is purely coincidental.

JUDGMENT

A. Catchwords:

FAMILY LAW – PARENTING ORDER APPLICATION – mother applies to have residence of the child and to remove child out of the jurisdiction of the court – application for residence not objected to but the application to remove child out of jurisdiction of the court opposed- whether the facts of the case reveal that it is in the best interest of the child to leave the jurisdiction of the court with her mother.

B. Legislation

1. Family Law Act 2003 (“FLA”): s. 81.

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Cause

1. The father has appealed the decision of the court granting permission to the mother to take the child out of the jurisdiction of Fiji. The order was made pursuant to the mother's application to have residence of the child and to remove her out of the jurisdiction of Fiji. The application for residence of the child to be given to the mother was not contested however the application to remove the child out of the jurisdiction was.
2. There were other orders made on the same day which is not subject to an appeal. The orders were:
 - (a) *The mother to have residence of the child.*
 - (b) *The father to have reasonable access to the child. The mother to provide the father with her contact in New Zealand or anywhere else that they may be residing to enable the father to have contact with the child via skype, the internet or telephone.*
 - (c) *The father is at liberty to visit the child in New Zealand or wherever they may reside. If the child visits Fiji, the mother to notify the father beforehand and he shall have access to the child.*
3. The parties were in a de-facto relationship and they had a subject child out from that relationship. The relationship broke down and the parties separated. The child has been living with her mother since she was 4 ½ years old. She is now almost 15 years old.
4. The father of the child is now married to some other party and has a son out of that relationship.

Grounds of Appeal

5. The father has raised several grounds of appeal asserting that the Court erred in law and in fact in:

- a. *Admitting the evidence of the child counsellor Ms. Selina Kuruleca as it was prejudicial, biased and not independent.*
- b. *Failing to accept the independent home environment report by the Social Welfare Officer especially when it was contradictory to Ms. Kuruleca's report.*
- c. *Not giving weight to the fact that there was no actual supporting documentary evidence of any financial status of the respondent's mother's and brother or any other family members to support the mother and the child in New Zealand.*
- d. *Not considering that there was no evidence of the home environment in New Zealand.*
- e. *Accepting that the mother's family will support her when her own evidence showed that the child's father had been supporting the child.*
- f. *Failing to wholly or properly consider the best interests of the child as set out in the FLA in that:*
 - (i) *The child shares a close bond with her father and his family members through regular physical and phone contact.*
 - (ii) *The child's level of maturity is that she is of a tender age which commands constant love and affection from both her parents.*
 - (iii) *The likely effect of the child being uprooted from her settled life in Fiji and the effect of separation from her father at the tender age.*
 - (iv) *The practical difficulty in the child maintaining a strong relationship with her father by communicating through limited electronic means at this tender age.*

- (v) *The practical difficulty and expenses involved in the father having contact with the child when she is out of the jurisdiction of Fiji.*
- (vi) *The need for the child to maintain a connection with the lifestyle, culture and traditions considering that the child is a practicing Hindu since birth to her current age of nearly 5 years.*
- (vii) *The financial means of the father was assumed without any evidence of his financial ability to exercise contact with the child once she is out of the jurisdiction.*
- (viii) *The wishes of the child.*
- (ix) *The ability of the father to continue providing for the child when she is out of the jurisdiction of Fiji.*

Issues on Appeal and Determination

6. The main issue on appeal is whether the court was correct in arriving at a finding that it was in the best interest of the child to be taken out of the jurisdiction of Fiji. That is also the consideration that I will have when deciding all the grounds of appeal: Does the facts of this case justify the order to remove the child out of the jurisdiction of Fiji?
7. The law does not permit a person having residence of the child to remove the child out of the country unless permitted by the other parent or by the Court. S. 81 of the FLA is the relevant provision of the law. It states:

“Obligation if residence order, contact order or care order has been made

81. (1) If a residence order, contact order or care order (the “Part VI order”) is in force, a person who was party to the proceedings in which the order was made, or a person who is acting on behalf of, or at the request of, a party, must not, intentionally or recklessly, take or send, or attempt to take or send, the child concerned from the Fiji Islands to a place outside the Fiji Islands except as permitted by subsection (3).

*(2) Subsection (1) does not prohibit taking or sending, or attempting to take or send,
the child from the Fiji Islands to a place outside the Fiji Islands if –*

(a) it is done with the consent in writing (authenticated as prescribed) of each person in whose favour the Part VI order was made; or

(b) it is done in accordance with an order of a court made under the Part at the time of, or after, the making of the Part VI order.

(3) A person who contravenes subsection (1) commits an offence and is liable to a fine of \$10,000.00 or to imprisonment for 3 years”.

8. The mother in this case intended to migrate to New Zealand. She has her family living there since 2004. Her mother and brother have a Permanent Residence status in New Zealand. The child’s paternal grandmother and aunt also live in New Zealand.
9. The mother has been the primary care-giver of the child for over 10 years now. When she made an application for residence of the child, she simultaneously made an application to remove the child out of Fiji. The father consented to the mother having residence of the child but objected to the child being removed out of Fiji. The pertinent concern is why he agreed to her having the residence when the mother also wanted to remove the child out of Fiji? The father could have objected to the application for residence and require that he have the residence of the child. He wants the mother to have residence and at the same time does not want her to leave the country with the child. His motive then appears improper and is designed more towards causing an obstacle to the mother migrating.
10. His consent that the mother has the residence of the child establishes that it is in the interest of the child that she lives with her mother. This means that the child should live with her either in Fiji or in New Zealand. If he did not want her to live in New Zealand with her mother, he would have defended the application for residence as it was made at the same time as the application for relocation was made. It would be a different situation if the application to remove the child out of Fiji was made after the parenting orders were made. He still does not challenge the residence order on appeal

despite the orders for removal of the child out of Fiji. This reinforces my finding that the child should live with the mother wherever she goes.

11. When the order for residence was made, the mother was only earning \$13,000.00 in Fiji. The child's father did support the child.
12. The child's mother now wishes to migrate to New Zealand where her mother and brother live. It is not absurd to say that when she migrates, she will find work there and she will get better paid than she is now. It is not unknown that New Zealand has better minimum wage rate than Fiji. Given that she already has her close family members there for almost twenty years now, her initial costs for shifting to New Zealand in terms of food and accommodation will be taken care of as the evidence of the maternal grandmother and uncle establishes. The child's maternal grandmother and uncle have also given evidence that they will support the mother and the child but the child's mother has given evidence that she will eventually be independent. There is no reason to disbelieve her. If she wants to move abroad, she will have to look after the child's interest. She has been doing that all along. There is no reason why she would neglect on her duties when she migrates. There is no evidence of her neglecting the child at any stage.
13. I do not think it is proper to stop the mother from migrating as she wants to leave for a progressive life for her child. The father's objections is effectively stopping the mother from moving for better opportunities and yet he agrees that she should have residence of the child. How can she move without the child when she has been the primary caregiver of the child for years? Indeed the father has been seeing the child and providing her financially but that can continue even when the child moves to New Zealand. He can have contact of the child every day virtually and as and when time permits, physically as well. In that way he can continue with the love and bonding.
14. The father says that the child's migration will affect the child as she is of tender age and needs his love and affection too. The father forgets that the parties have already separated and that they are living in different places. Living in different places does not mean that his love or bonding for the child should change. His own submission

that he continues to provide the love affection establishes that the separation has not changed his love and affection and the bonding with the child. In that case, the child migrating should not cause a major disruption. New Zealand is close to Fiji and given the age of technology and easier ability to fly, the relationship between the child and the father can be maintained.

15. It is not proper to stop the child from leaving Fiji with her mother as her mother has looked after her and provided the child with mental, physical and spiritual support all the time.
16. The child is now almost 15 years old. Soon she will be an adult. In 3 years' time she will be able to decide for herself and she might leave for overseas even without requiring anyone's permission. If she leaves now, she will be able to complete her final stages of the secondary school properly and fit in the foreign education system to able to attend the University there.
17. I do not think that the father's claim that the child has a settled environment in Fiji should stop the child from leaving. So many children leave to study abroad. If the environment which the child was going to live in was not proper then there would be issues for the child. I do not think that one needs a home environment report from New Zealand. The child's maternal grandmother is settled in New Zealand for years. The child will eventually adjust to the new place. There is no evidence to suggest that the maternal grandmother is not living in a proper arrangement to affect the child's life or well-being.
18. The facts of the case suggests that it is in the interest of the child to live where her mother stays as she has been looking after the child. Removing the mother from the child is definitely going to affect her.
19. The only balancing exercise that the court had to carry out was to ensure that the child's right to have contact with the father was not taken away or diminished in any way. For that, the lower court made proper orders for contact. I do not find that the child's going to New Zealand will affect the child's right to have contact with the

father. The child will also have the benefit of contact with both the grandparents – maternal and paternal.

20. New Zealand is not far away from Fiji and it is also not so expensive to travel to New Zealand. If carefully planned, the travel costs can be minimized. The father can always travel to New Zealand to see his child.

21. I find that the order to remove the child out of this court factually in the best interest of the child.

Final Orders

22. In the final analysis, I do not find any merits in the appeal and I dismiss the same.

23. I affirm the orders of the Magistrates' Court.

24. Each party shall bear their own costs of the appeal proceedings.

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Hon. Madam Justice Anjala Wati

20.10.2023

To:

1. Neel Shivam Lawyers for the Appellant.
2. Shekinah Law for the Respondent
3. File: Family Appeal Case Number: 0020 of 2013