

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA

APPELLATE JURISDICTION

CASE NUMBER:	21/LTK/0005
BETWEEN:	RAJNESH and SEEMA
AND:	ROHIT and KAJAL
Appearances:	<i>Ms. S. Ravuikadavu for the Appellant. Ms. K. Boseiwaqa for the Respondent.</i>
Date/Place of Judgment:	<i>Tuesday 13 August 2024 at Suva.</i>
Judgment of:	<i>Hon. Madam Justice Anjala Wati</i>
Category:	<i>All identifying information in this ruling have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.</i>
Anonymized Case Citation:	RAJNESH and SEEMA v ROHIT and KAJAL – Fiji Family High Court Case number: 21LTK0005

A. Catchwords:

FAMILY LAW – APPEAL – PARENTING ORDERS – Residence orders given to the biological parents - it was for the appellants to establish why the biological parents could not care for and provide for their child and why is it contrary to the child's interest for them to have residence– the appellants could not establish that they had cared for and provided for the child exclusively since he was 3 months old and that any change in the arrangement will disturb the child's welfare and interest – no arrangement for the appellants to look after the child exclusively shown on the evidence.

B. Legislation:

- 1. Family Law Act 2003 (“FLA”): s. 41.**

Cause and Background

1. The appellants are appealing against the decision of the Resident Magistrate for granting residence of a male child to the respondents who are the child's biological parents. The child is now 9 years old.
2. The appellants are the child's paternal aunt and uncle. They had instituted child recovery proceedings when the child was 3 ½ years old. The order was granted ex-parte in their favour.
3. When the application for child recovery was made, the appellants had deposed an affidavit outlining why they sought child recovery orders. Their position was that the child had been in their care and custody since he was 3 months old.
4. The appellants alleged that the biological parents were not financially capable enough to look after their child and so gave the child to them and promised them that they could proceed with the adoption application later.
5. The appellants contended that the child thinks that they are his biological parents. They contended that the child is not familiar with the biological parents.
6. According to the appellants, the biological parents had called them one morning and asked if the child could be taken over to the biological parents place. That was the first time the biological parents had asked them to take the child to their place.
7. The appellants deposed that when the child was dropped, he cried and did not want to stay with the biological parents.
8. According to the appellants, the biological parents had told them to pick the child in the afternoon around 3-4pm. They had agreed to this. At 2.30pm, the first named appellant called the biological father on the phone and informed him that they will be picking the child up at 4pm. The biological father had agreed to that. The appellants said that they called again at 3pm and confirmed the same.

9. When the appellants went to pick the child up, the biological parents were not there and they did not answer the phone too.
10. Two days after, on a Monday, the first named appellant called the biological father. He answered and said that the child is with him and could be picked from his place.
11. The first named appellant said that when he went to pick the child up, he saw that the gate was locked. He called out several times but to no avail. He then called the child's name from the gate. The child heard his voice, saw his car and tried to come out of the house but could not as the door was locked. The landlord who was sitting outside told the appellants that they were inside with the child.
12. On the next day, the Tuesday, the gate and the house was closed. The child saw the appellants from the window and started crying.
13. The appellants said that they called the biological parents several times to open the gate for them to take the child but to no avail.
14. The appellants contended that the biological parent's financial status was not stable. They always fought amongst themselves and ended up in the police stations.
15. They said that they feared for the safety and the wellbeing of the child as he had never been away from them and they did not know in which condition the child was in as they did not have any form of contact with him.
16. They feared for the child's wellbeing. They feared that the child would be subjected to a lot of stress and thus in danger. This, they alleged was due to the respondents actions which has caused them sleepless nights.
17. After the recovery order was served on the biological parents, they applied for a setting aside of the same. Simultaneously, they applied for the child's residence.

18. The biological parent's position was that the child was never given to the appellants in their lawful custody and/or for adoption. They said that they raised their child since his birth. Since the appellants did not have children of their own, they would allow the child to spend time with the appellants during the weekends.
19. The biological father said that since he was working, the paternal grandmother and the biological mother would look after the child at the paternal grandparents place.
20. The biological parents said that appellants had started convincing them to give the son to them for adoption. The appellants even offered a considerable sum of money in exchange for their consent. This is when the dispute between the parties started.
21. The biological father said that he had to chase the appellants from his house. They were no longer in talking terms but the child used to visit them. They had sent the child to the appellants place for 2 days and they kept the child for 4 days. This made them ask for the child's return from the appellants. The appellants then applied for recovery of the child.
22. After 5 months of the recovery order, the biological parents were granted contact on every Sunday from 9am to 3pm. They were to pick and drop the child and have contact with the child at the paternal grandparents place. The paternal grandparents could have contact with the child at any time.
23. The substantive parenting order application was heard. After the trial, the court granted the residence to the biological parents. It also cancelled the interim residence order in favour of the appellants.
24. Aggrieved at the decision, the appellants appealed.

The Court's Findings

25. The court found that the appellants claim that the child was given to them in their lawful custody since he was 3 months old was not supported by any evidence. In fact, It was discredited by the evidence of the paternal grandmother.

26. The paternal grandmother, who was the mother of both the first named appellant and first named respondent was treated as an independent person. She had testified that the appellants were not correct in saying that the child was given to them since he was 3 months old. She testified that the child had lived with her and his biological parents. The child would visit the appellants as they did not have any child of their own.
27. The grandmother had also testified that initially every one of them was living under the same roof. After a while, all of them had separate houses. When they had separate houses, she and the parents would look after the child. The child only visited the appellants.
28. The grandmother had further testified that the appellants had proposed to the parents that the child be given to them for adoption in exchange for money which the parents refused. This caused animosity between them. She testified that the parents were capable of looking after their child.
29. The court had regard to the grandmother's wisdom and experience and attached weight to her evidence that the biological parents could look after the child.
30. The court also said that the paternal grandmother was not discredited in her evidence.
31. The court found that the evidence did not reflect that there was any agreement for the appellants to adopt the child or to look after him. The court basically found that the reason the appellants wanted the child was simply because of the allegations on the biological mother which it did not find correct.
32. The court found that it was in the interest of the child to be cared for by his own parents.

The Appeal

33. The appellants say that the court erred in law and in fact:

- (1) In failing to consider the relevant matters in the best interest of the child;*
- (2) In failing to give due weight to s.121(2) of the FLA and placed more weight on the rights of biological parents;*
- (3) In accepting the Social Welfare report and declaring that the child is not of age to express his view;*
- (4) In accepting the Social Welfare report which was biased and failed to consider the residency of both the parents; and*
- (5) In misconstruing the evidence of the paternal grandmother and rejecting the evidence of the appellant that the child was brought up by them since he was 3 months old.*

Law and Analysis

34. S. 41 of the FLA states that:-

Objects of Parts

- “41 (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 interest –*
- (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”.

35. There is no dispute that the respondents are the biological parents of the subject child. There is not an iota of evidence that the biological parents cannot look after their child.

36. It is important that the child knows his parents, is cared for by them, and that the biological parents fulfil that responsibility unless it is contrary to the interest of the child.

37. The only basis for the appellants to seek the residence of the child is that they have cared for the child since he was 3 months old. They say that the biological parents had given the child to them to look after and care for. They contend that the child knows them as his parents.

38. It is not disputed that the parties lived together for some time under one roof. The paternal grandparents lived with them too. Then they all had separate houses. After that, the paternal grandmother looked after the child during daytime.

39. The grandmother testified that after they had separate houses, it was her and the parents who looked after the child. The child only visited the appellants. She said that that there was no agreement for the appellants to look after the child since he was 3 months old or that he will be given for adoption.

40. I find that it was open to the court to accept the evidence of the paternal grandmother. The paternal grandmother does not have any animosity with any of her children. Her evidence is more acceptable that the child was always looked after by her and the biological parents. It is only because the appellants did not have a

child of their own, that the subject child would be with them whenever they were free and not occupied.

41. If the appellants had been looking after the child since he was 3 months old and the agreement was for them to have the residence of the child and later adopt him, the appellants would have applied for a residence order and/or for an adoption order when the child was given to them. This did not happen until the parties relationship soured in 2018. Why did the appellants wait for so long? It is only because there was no such arrangement for them to have residence or to adopt the child.
42. Further, if they had had the child all along, the appellants would have the child's medical card. They would have been able to give evidence on the particulars of the child's immunization.
43. The 2nd named appellant testified that the card is with the grandmother. Why would it be so, if they had the child all along and had separate dwellings? This supports the grandmother's evidence that she and the biological parents took care of the child and not the appellants. That is why the grandmother has in her possession a very relevant document in respect of the child.
44. The appellant's contention that the court did not take into account the best interest of the child is without any merit. The court went on the basis of a child's right to be cared for and provided by the biological parents unless it was contrary to his interest.
45. It was for the appellant's to show that it was contrary to the interest of the child to be cared for and provided for by his parents. That was not established in the evidence. Even the question of disturbing the child's settled environment did not arise. The child was not fully dependent on the appellants. They were not his primary caregivers.
46. The appellants also argued that the Social Welfare Report was biased. The Social Welfare Report had recommended that the child should be cared for by the biological parents. If the views and recommendations were to be challenged, the appellants

ought to have cross-examined the maker of the report. They failed to. There is no evidentiary basis to find that the report was biased.

47. On the question of not taking into account the child's wishes; that did not arise in respect of the issue of residence, until it was established that the appellants had been the primary caregivers of the child. However since they had been having contact with the child over a period of time, I had enquired with the child on this continued contact with the uncle and aunt. It was apparent that there will not be any harm to the child to have contact with the appellants at his grandmother's place.

Final Orders

48. The appeal against residence orders in favour of the biological parents is dismissed. I uphold the order of the court below that the biological parents have residence of the child.

49. The appellants to have contact with the child at the child's grandparents place on every Saturday between 12-2pm. The parents are to pick and drop the child at the grandparents place. The parties can agree to a change in the date and time for contact to suit the child.

50. Each party is to bear their own costs of the appeal proceedings.

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Hon. Madam Justice Anjala Wati

13.08.2024

To:

- 1. Messrs S. Nand Lawyers, Lautoka for the Appellant.***
- 2. Legal Aid Commission for the Respondent***
- 3. File: Family Appeal Case Number: 05 of 2021.***