

IN THE FAMILY DIVISION OF THE MAGISTRATE'S COURT AT SUVA

FILE NO.: Maintenance 0531 of 2014

BETWEEN

**R S
Applicant**

A N D

**R L
Respondent**

APPEARANCES/REPRESENTATIONS

Ms. Prakash A. (LAC) for the Applicant

The Respondents – Present in Person

JUDGEMENT

1. The Applicant who is the father of the children namely; **TRS**, a female child born on 01st June 2007 and **SJS**, a female child born on 14th April 2010 [hereinafter “**the children**”] filed a Form 9 dated 23rd January 2015, seeking residence of the children.
2. In response the Respondent who is the mother of the children filed Form10 on 19th March 2015 seeking residence alternatively to have shared residence of the children.
3. On the 04th May, 2015, an Interim Order were made before the Family Court Registrar as follows;
 - a. The Applicant/Man will have residence of the children namely, TRS, a female born on 1st June, 2007 and SJS, a female born on 14th April, 2010.
 - b. The Respondent/Lady will have contact to the children from 9 am on Saturday till 5 pm on Sunday.
 - c. The Respondent /Lady to pick the children up from the Applicant/Mans house at lot. 00 Waimanu Road, Samabula.
 - d. The parties agree that whist the children are with either party, the other parent is to have telephone contact between 7 am and 7 pm.
 - e. The parties agree that for school holidays, the children will spend alternative weeks with each parent starting from the first week with the Respondent/Lady.
 - f. The parties agree that if the children are sick, both parties are to communicate with each other and attend to the children’s needs mutually.
 - g. The parties agree that the children’s birthdays will be celebrated on Saturday at the Applicant Mans residence and the Respondent lady will take the children to the Applicant Mans residence for the day.
 - h. The Respondent lady will take the children to her place thereafter for weekend contact.
 - i. The medical issues, each party shall advice the other at the first available opportunity in the event that the child requires medical attention or hospitalization while the child is in that parties care.
 - j. That in any event parties are not willing to communicate with each other, they shall advice the other through their respective counsels.

4. The Social Welfare Report dated 16th February 2017 has been provided to the Court.

ISSUE

5. Residence and Contact of the children.

THE EVIDENCE

6. I will not reiterate the entire evidence on the court but reference would only be made to the relevance of evidence to the present application and for analysis purpose. Also I wish to emphasis some portion of evidence with intention of analyzing the same potions later without reproducing the same.

7. I also perused the Social Home Environment report and considered the same carefully.

THE LAW AND THE DETERMINATION

8. Part VI of the Family Law Act 2003 [hereinafter “the Act”] deals with Children wherein the object of the Part is stated at section 41 and provides as follows:

(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 interests-

(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.

9. At Section 120 and 121 of Division 10, part VI of the Act, provision is made for how the court is to determine the best interest of a child as follows:-

120.-(1) This subdivision applies to any proceedings under this Part in which the **best interests of a child** is the paramount consideration.

(2) This Subdivision also applies to proceedings, in relation to a child; to which section 60(6) applies.

How a court determines what is in a child's best interests.

121- (1) Subject to subsection (3), in determining what is in the child's best interests, the court may consider the matters set out in subsection (2).

(2) The court **must** consider-

- (a) Any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
- (b) The nature of the relationship of the child with each of the child's parents and with other persons;
- (c) The likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from –
 - (i) either of his or her parents: or
 - (ii) any other child, or other person, with whom the child has been living;
- (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of the child) and any other characteristics of the child that the court thinks are relevant;
- (g) the need to protect the child from physical or psychological harm caused, or that may be caused by:-
 - (i). being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or
 - (ii). being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect another person;
 - (iii). the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
 - (iv). any family violence involving the child or a member of the child's family;

- (v). any family violence order that applies to a child or a member of the child's family;
 - (vi). any other fact or circumstances that the court thinks is relevant.
- (3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).[Emphasis added]

EVIDENCE AND ANALYSIS

10. According to the above paragraph that the Section 121 deals with the various considerations that the court must consider when determining the "best interest of the child". Section 121(2) (a) allows the court to consider any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes; In this matter the children are matured enough to express her wishes and the Court considered their expressed wishes. But their wishes are not the determinative factor considering their tender ages.
11. The object of 'Resident and Contact' is to enable the parent and child to keep in touch with each other by allowing periodically visits as specified times to avoid potential conflicts.
12. Section 121(2) allows the court to consider the effect of any changes in the Child's circumstances including any separation from either of the parents and The nature of the relationship of the child with each of the child's parents and with other persons:
13. Applicant and Respondent got married in year 2005 and resided at Applicant's house along with his father, mother and elder brother. After the children were born the Applicant built a separate room and kitchen in the same residence and his parents looked after the children.
14. The children are currently living with their father, paternal grandparents and uncle at Waimanu Road, **Samabula** since separation of the mother. Applicant and works as a Carpenter. The Children attend Arya Samaj Primary School at **Samabula** and in Class 05 and Class 01 respectfully. Since kindergarten the both children has been in that school. When the Applicant goes to work his mother takes care of the children. His father or brother picks them from school.
15. The children have close relationship with their grandparents.The children travel to school by bus, since the school is ½ km from home.
16. The child stays with her father since **separation** surrounded by paternal grandparents and relatives excluding mother's weekend contact. Applicant confirmed in her evidence that she is separated for **4 years**.

17. **TRS** born on 01st June 2007 and **SJS** born on 14th April 2010 meaning that before 4 years when TRS was **6 years of age and SJS when she was just 3 years old.**
18. I quote the Respondents evidence *“I left them and went but they are my daughters. I want the residence now because they are my daughters and i can’t leave them and go. I left my husband 2 times and i went to my mums place. When i went to my mums place i took my younger daughter with me after that i returned her back to husband.”*
19. The Court also wish to note that it was the Applicant father who commence this Application not the mother after long 4 years of separation.
20. The Applicant stance has been that he denied the residence of the Respondent. He wants the children to be with him. He also wants the mother to be with him at his residence to look after the children while he is at work. He also anticipates perusing an overseas employment to secure a better future for the children. His invitation was declined by the respondent stating that her parents arranging a marriage for her and explained that there is a person that she wish to marry. Both have their reasons and lot of allegations regarding each other somewhat tainted with bitterness and malice.
21. A further important point to be noted about the sec 41(2) (b) of Family Law Act inter alia that) “children have a right of contact, on a regular basis, with both their parents”. This Court needs to consider practical solution considering all the circumstances of the case not forgetting that the children are schooling. And their education and the daily routings should not interrupt.
22. Sec 41.- (1) of FLA reads 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.

(3) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests-

(4)

 - (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.**

23. It is immediately apparent that, in the light of child's right, no longer to speak of only parents' rights. **Neither the father nor the mother has an absolute right to have the residence of the children.** Because, whatever his or her wishes may be, children have the right to know and be cared for by both their parents.
24. It will be seen that this provision is very much wider than the above mentioned Sections about parents' rights to be bonded with their children, because it applies not merely to parents, but also to "the children".
25. According to the Interim order mother spends weekend with the children from the date of the said Order.
26. The Court cannot justify change the orders dramatically granting the residence of the children to the mother.
27. The capacity of each parent, or of any other person, to provide for the needs of the children, including emotional and intellectual needs; The Applicant provides financial needs for the children. He gives their food and \$1.00 pocket money. He feeds them in the morning and helps them to get ready to school. He said that the Respondent refused to pay child maintenance; rather she would spend in person for the children. He also said that the Respondent refused to attend "Parents day" telling that she doesn't have time.
28. There is a necessity to consider the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from –either of his or her parents: or any other child, or other person, with whom the child has been living:
29. The Applicant testified that "the younger daughter is good in studies and his elder daughter is very quiet in school. The teacher has told him that between the Applicant and Respondent's separation is affecting the children." The Respondent also testified that and "when it's time to return back to father after the weekend contact the children ask her if they can stay bit longer and they stay bit longer then i go and drop them off to the fathers place. I don't want to leave my daughters and will never leave them because they are my daughters. I want to stay with my 2 daughters but i don't want to stay with the father."
30. The Applicant states that the Respondent lady does not comply with the Interim Order. When the children are with the Respondent, the Applicant Man is unable to contact the children, because the she does not pick up the phone. The response was from the mother was that he tries to talk to her and she declined to reconcile with him.
31. The Court considers all the factors in s.121 as a whole.
32. The Court also considered the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis; the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs; the child's maturity, sex and background

(including any need to maintain a connection with the lifestyle, culture and traditions of the child) and any other characteristics of the child that the court thinks are relevant; the need to protect the child from physical or psychological harm caused, or that may be caused by:- being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect another person; the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

33. The father earns approximately \$150.00 to \$200.00 per week and it depends on the contract of his carpenter job. He wants the Respondent lady to return to his home and stay with the children because he thinks about the children and their future.
34. The Court considers the evidence of BL (Applicant Man's mother) testified that she is 66 years old. She states when the children are at home she use to look after the children. Before separation the Respondent also looked after the children. She cooks food for children, dress them for school and when they return back she cook food for them.
35. The Court also considers the evidence of RL (Respondent lady's Sister) that she is 30 years old. She stays at 8 miles, Narere and is currently unemployed.
36. She states that every Friday the Respondent lady goes and pick the daughters. Daughters stay with Applicant's mother, since Respondent is renting with a girl. But when the flat mate is not there the Respondent takes her daughters to her parents' house. Sometimes the children stay with the witness.
37. She states that the children are happy to stay with them. When the children had to return on Sunday to Applicant's home the children used to cry and say that they don't want to go home. She also stated that she was at Applicant's home for 01 year. She said that the Applicant ask money from wife for smoke and yagona and everything. Also stated that the daughters were good with the mother and the father.
38. The aforementioned Social Welfare Report recommends that the status quo remain. The child was interviewed and the home in which she lives was inspected. This report was not challenged. In the report, the Welfare Report favours current status quo which is that children continue to reside with the father with contact to the mother.
39. Apparently, due to children's tender age, any drastic change in the status quo may be detrimental therefore any change must be gradual to allow them to adapt at their ages.
40. As noted children are residing with the father. Their intellectual, Development and welfare is being looked after unchallenged. The Respondent rather testified that she wanted children to have good education. Children are going to a school which is closer to their residence. Mother does not have a stable home. Her answers most of them regarding her future plans including her employment, residence, marriage were "ifs". Lot of unknowns. Apparently the Mother is not stable.

41. I quote from her evidence *“If i am having affair outside, but when my kids are with me i spend time with my kids. If i go outside i tell my kids where i am going they know it. 2 days Saturday and Sunday i always take time with my kids’ whole day and night i stay with my kids. I don’t go here and there, but middle week i go. Like my husband said when i have affair my kids will be in problem, i don’t think there will be problems.”*

“I am separate from my husband for 4 years. I had an affair with one boy Mohammed Rahat, so we were planning to settle down but it’s already 6 to 7 months i am separated from him. Its life, and i was in a relationship with one man. He used to meet my daughters give stuff to my daughters and even when i was working i used to buy dresses, toys for my kids. When i go home and give things to my kids sometime my husband used to take it and throw it. “

42. I also wish to quote from Cross examination for clarity.

Ms Prakash: During the week you stay in your flat?

Respondent Lady: yes sometime at my place sometimes at mums place, because it’s near i just go my mums place. At the moment i am not working so most of the time i am at my mums place.

Ms Prakash: But you still have a place in Narere.

Respondent Lady: Yes just for one more month.

Ms Prakash: Isn’t it true that each time you take the children for contact you always take them to your parents’ house

Respondent Lady: Yes.

Ms Prakash: My instructions are that sometimes, when the children are at your mothers place, you have actually left them for the night and gone somewhere else.

Respondent Lady: Yeah i have done that one or 2 times because when my flat mate goes somewhere so i have to go at my flat. But my kids they mostly like to stay with my family. With my parents, they are happy they play and everything. I used to call and talk to them.

Ms Prakash: You said that after a month, you are going back to your mother's place.

Respondent Lady: Yes I’ll go to my mum.

Ms Prakash: But there is no guarantee is there

Respondent Lady: Yes i am sure i have to go there. If within 1 month i have a Job then i can rent but if not then my mum told me to stay with her.

Ms Prakash; So the chances are you will continue to rent if you find a job.

Respondent Lady: **Yes chances are there.**

Ms Prakash; You are not in a relationship with him at present

Respondent Lady: I am in a relationship. We are separate for 4 years. I don't know about him, but for myself i am telling that I am in a relationship with someone. He is also looking after the kids. He always talks to my kids.

Ms Prakash: This person is Mohammed Rahat

Respondent Lady: No, because he was a Muslim and my parents don't want me to get married to a Muslim and he wanted to get married to me. After sometime we had problem and his family was also having problems with me because i am Hindu. So we just separated.

Question: So if you get married are you intending to stay at your parents place

Respondent: No, I'll stay with my partner but with my kids. I have discussed everything about my kids. Since my parents seen a boy. The first thing they told was that I have 2 kids. Anywhere I go I have to take my kids with me because they are my kids.

With children I ll go to the boys place.

Question; Do you have any idea where your prospective husband reside

Respondent: He is staying in Nausori.”

43. There is a DVRO in place against the Applicant-father as the same was granted in children's mother's favour. But there is no any alleged abuse against the children.
44. It was evident during the hearing of this application that adults dwelled on past differences and personal attacks thereby were distracted from what is best for children's development and wellbeing.

45. The aforementioned Social Welfare Report recommends that the status quo remain. The children were interviewed and the home in which they live was inspected. This report was never challenged. Apparently, due to children's tender ages, any drastic change in the status quo may be detrimental therefore any change must be gradual to allow them to adapt at their age.
46. The Court concludes that the children are bonded with the paternal grandparents than their biological father and it is for the best interest of the children should the court allow the children to continue their residence with them with reasonable contact to the biological mother.
47. Most importantly mother lacks stability to provide children financially, emotionally and intellectually as she is yet to "settle" in an employment and there are uncertainty about her residence and future as well. As an example, if she marries she will reside in Nausori with children at the future husband's home.
48. The Social Welfare report (SWHER) which was done during the course of proceedings in this case. It was noted at last page under the heading of Summary and Recommendation states that **"... However in the best interest of the children and with the investigation on both parties, it has been suggested that the children are suffering and are victims of parental conflict. The children need to be in a stable home, family support and is financially secured. He can afford in providing the necessary care for both the children.**

As per the above findings, it is recommended in the best interest of the children the residence of the children be awarded to the applicant (Mr RS) and reasonable contact to the respondent (Ms.R L)"

49. I agree with the recommendation as it is also the view of the Court. It is no doubt that the mother must be allowed the opportunity to bond with her daughters better contact that will not hinder her from performing her role imposed by law must be put in place. This will also be in children's best interest. Therefore, I confirm the interim Order as a final Order with minor amendments.
50. I invite both parents to put their children's best interest first and focus on their future wellbeing rather than lingering in the past conflicts and continue their lives without disputes.

ORDERS

- a. The Applicant/Man shall have residence of the children namely, TRS, a female born on 1st June, 2007 and SJS, a female born on 14th April, 2010.
- b. The Respondent/Lady shall have contact to the children from 4 pm on Friday till 5 pm on Sunday.

- c. The parties' whilst the children are with either party, the other parent is may telephone contact between 7 am and 8pm except that there is an emergency.
- d. That for school holidays, the children will spend alternative weeks with each parent starting from the first week with the Respondent/Lady.
- e. The Respondent lady will take the children to her residence/ her mother's for the weekend contact.
- f. The medical issues, each party shall advice the other at the first available opportunity in the event that the child requires medical attention or hospitalization while the child is in that parties care and if the children are sick both parties are to communicate with each other and attend to the children's needs mutually.
- g. Each party shall keep the co-parent, advised of a current home address, telephone numbers (including cellular phone numbers), email addresses, and other addresses at which electronic contact may be made, and advice the other party within 7 days whenever a change is made or may occur.

CONCLUDING REMARKS;

- 51. Making decisions about where children will live is one of the most difficult tasks of separation/ divorce. The prospect of no longer being with the children *all* the time is bad enough. The fears – and the conflicts that can stem from them – often are compounded by traditional legal language: One parent wins Residence, while the loser gets only "visitation" with his own child. In order to avoid this, whenever possible, this court would like to take the approach of joint Residence.
- 52. Good parenting is not a contest. Parents can take a different, more child-friendly approach to comply with the court orders. I prefer to think about this challenging task as devising a (*parenting plan*) order that spells out a clear, specific schedule for child as well as guidelines for each parent's co-parenting responsibilities and role in decision making. The court and the parties need to recognize several key issues.
- 53. There is *no* single ideal schedule for joint physical residence all of these arrangements can work, or none of them can. Making the orders work depends upon you, the other party, and **your co-parenting relationship.**
- 54. Neither Magistrate nor the Registrar possesses mysterious tests. That was the reason, the Registrar encouraged you to consider the best approach by a way of a settlement/ consent orders, the parents, are in the best position, by far, to make these decisions. And you did not agree, you tried again but in futile.

55. I advise both the parties to be flexible when necessary by consent, make some compromises, and comply with the orders. Remember: This is about your *responsibilities* as a parent, not your "rights."
56. View time with your child in terms months and years not just hours, days and weeks. Your parenting responsibilities can be a "living agreement," one that you are likely to alter as your children grows older and your family circumstances change. After all, what you decide for a 7 year old may not be best for the child when the child is 13 or 15. And you probably want to experiment with your ideas about a schedule a bit now. Why? So you can see how your child reacts to a schedule instead of guessing what will or won't work. If you are willing to experiment a bit, you can make changes as needed to create an even better schedule for your child with an application for variation of the order.
57. Different schedules work better for children of different ages. In general, younger children benefit from having more of a "home base." School aged children can manage more complicated schedules – as long as the parents can help them negotiate the complications. And you need to consider a third schedule for teenagers considering their wishes too.
58. Parties to bear their own costs.
- 30 days to appeal.

LAKSHIKA FERNANDO

RESIDENT MAGISTRATE

On this 27th day of June 2017