

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER:	<i>Family Appeal Case Number 13 of 2015 Original Action Number 12/Nau/0335</i>
BETWEEN:	<i>ORJITH</i> <i>APPELLANT</i>
AND:	<i>VAISHANVI</i> <i>RESPONDENT</i>
APPEARANCES:	<i>No Appearance for the Appellant. Mr. A. Chand (LAC) for the Respondent.</i>
DATE/PLACE OF JUDGMENT:	<i>Friday 3 November 2023 at Suva.</i>
CORAM:	<i>Hon. Madam Justice Anjala Wati</i>
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 – **PARENTING ORDERS** – *appeal against the residence order made in favour of the mother- the issue on appeal being whether the overall balancing of the best interest factors indicated that it was in the best interest of the child that his residence be given to the mother – the appellate court has no evidential basis to interfere with the findings of the court below.*

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Cause

1. The father appeals against the residence order made in favour of the mother in respect of the only child of the marriage.

2. The parties to the marriage had separated since 2015. The child is now 13 years old. He was 5 years old at the time of the trial and the primary judgment.

Trial Court's Findings

3. The court examined the best interest of the child and came to a finding that it was in his paramount interest that his residence be given to the mother. It gave its reasons for arriving at that finding. I will reflect on the reasons.
4. The trial court reflected that it accepted the mother's evidence over the evidence of the father and his taxi driver witness on the issue of whether the child demonstrated that he did not want to go to the mother when he was being dropped at her place and that the child cried refusing to go to her.
5. The court stated that the taxi driver was getting paid by the father and his interest was to give evidence in his favour. It found that the father was always blaming the mother for not being a suitable parent to look after the child when the mother did not do the same.
6. It found that the mother was the person who was able to grant the child an undivided attention unlike the father who had another infant from his new partner to look after. The mother had not moved on in her life and her sole focus was the subject child whom she had been looking after without any divided attention.
7. The court also found that the father would not be able to make an adequate and proper commitment towards the care, welfare, and development of the child. He was doing his farming work and would, as the evidence suggested, rely on third parties to look after the child. These people who were engaged to look after the child were all from his de-facto partner's side who did not have any real relationship to the child nor people who were formally engaged to look after the child.
8. In making that finding, the court referred to the de-facto partner and stated that she had an infant child of her own. She was committed to looking after her own child.

9. It also referred to the father's evidence that his partner's sister-in-law would look after the child and found that the sister-in-law had admitted to the court that she would not be able to look after the child once she gives birth to her own child in the next 4 months.
10. The court found that everyone that the father had engaged to look after the child had their own personal commitments.
11. It found that the mother was a more suitable person to look after the child and provide for his emotional and intellectual needs. It found that the child has always had a more settled life with the mother as he had always been looked after by her or by the nanny who the mother had engaged since the child was 1 ½ years old. The court found that the nanny was formally engaged on a salary and given that arrangement, it was assumed that the nanny would carry out her job responsibly.
12. The court also found that the mother was living with her brother who was the child's maternal uncle. It stated that that was a real and close relationship and said that it expected that the maternal uncle would care for the child unlike the third parties the father had proposed who had no real relationship or attachment to the child.
13. The court also found that the child was in preschool and his teacher gave evidence that he was very irregular to school. He would not go to school on the days his father was looking after the child. The court said that this was due to the father's retaliation because he did not want the child to have gone to the preschool so early. It referred to the evidence of the teacher where she had testified that the father had gone to the preschool and spoken harshly to the child's teacher for allowing enrolment of the child at such a young age and without his consent.
14. The court found that the father had been more interested in retaliation against the mother's decision than being concerned about the disturbance it was causing to the child's early education.

15. The court stated that the child needed stability in his life and the arrangement for the child to stay a week with each parent was going to disturb the child psychologically and could impact on his education. The court stated that it noted the evidence of the preschool teacher where she described the child's behaviour after the return from his father's place. The preschool teacher had testified that the child felt left out at school and was naughty and inattentive in class. The court stated that the child needed a permanent place of residence and that it would be in the child's interest to go to school from one settled home in absence of which the arrangement could be very disturbing to him as he goes to higher class.
16. It further found that when the father had changed the child's school, the mother did not let that affect the child. She did not retaliate and continued to send the child to that school which showed her interest in supporting the welfare and wellbeing of the child than to put her personal issues before the child.
17. The court found the mother to have shown a lot of responsibility for having moved ahead from the problems she faced when her marriage broke down. It commented on the commendable effort of the mother to have found work to provide for herself and the child.

The Appeal and Analysis

18. The father asserts that the court erred in law and in fact:
- (a) In not taking into account the best interest of the child regarding his psychological and emotional needs.*
 - (b) In not properly weighing the evidence of each parties ability to care for the child.*
 - (c) In failing to properly consider the evidence of the father's witness on how he reacts when he is dropped at the mother's residence.*
 - (d) In failing to find that the father was the best parent to have residence of the child.*

19. The father's main complaint is that the mother did not have child's interest at heart when she sent the child to preschool at the age of 3 ½ years old. He asserts that she did this only to strengthen her legal position without realizing that the child was not even properly trained to go to preschool, was in the middle of legal proceedings and that he as the father had not given consent for the child to be sent to preschool at such an early age.
20. The nature of the complaint on appeal is ignorant of the fact that early childhood is in fact an advantage for children. It provides for children to have an early stability and development. In Fiji, early childhood education begins from 3 years. If it was not an age proper to start early education, the Ministry would not have endorsed the policy. I see no reason why sending the child to school at an early age should be a factor that ought to play against the mother.
21. In fact, it is the father who showed that he did not want the child an early stability and development even after the child had started going to the preschool. The evidence indicated that he stopped the child from going to preschool on the basis that the child was scared to go there since he was not properly toilet trained and was bullied.
22. It was the duty of the father to continue the child in the preschool to allow the teachers to attend to his needs and train him. So many children throughout the world attend early education institutions and it is considered good for their development. I do not find that the father's assertion on appeal has any merits to impeach the findings on the best interest of the child.
23. The father says that the child should not have been sent to preschool when legal proceedings were pending. This is once again a view that does not support the interest of the child as legal proceedings cannot put on hold the affairs of the children.
24. I also wish to reflect on the father's assertion that the child was enrolled in preschool without his consent. The evidence of the mother is that she could not secure his consent as he refused to talk to her. How can the father then blame the mother? In any event, the mother's actions did not go against the interest of the child.

25. In any event, this issue about the child having early education is now far behind. The child is 13 years old now and has been living with the mother for a long time. The father's complaint that the child did not want to go to the mother was not accepted by the court on the basis of credibility. It did not believe the evidence of the father and his taxi driver witness. It was open to the court to come to the finding that the taxi driver's evidence was not independent. I have no evidential basis to impeach that finding.
26. The remaining appeal grounds require me to examine whether the court had correctly arrived at a finding that it was in the best interest of the child that the residence be given to the mother. I do not find that there was any evidence to suggest that the mother was not the best person to look after the child when compared to the father.
27. I concur with the court that she was the person who gave an undivided attention to the child when he was small. She attended to his needs without any other commitment of looking after any other child. If she engaged anyone else to look after the child, it was a person who the child was stable with and that was her nanny who had looked after the child since he was 1 ½ years old. She did not expose him to strangers and people who would not be able to fully focus on the child's welfare and needs as they had their own commitments to attend to.
28. The mother also never disrupted the child's school and was concerned of his welfare even after the child's school was changed by the father. She did not let her personal issues affect the child when the father clearly used the child to blame the mother. He would argue with the child's preschool teacher and not send the child to school. It was his duty as a father to let the child be introduced to the school.
29. The child would not be in school for long as preschool education is not for more than 4 hours. Unless the child was made used to friends and students in school, he would be behind in his stages of development. The father did not focus on this and his parenting skills became very questionable which was resolved against him as the parent who

could not look after the interest of the child. I do not have a different view of the father.

30. I also agree with the court that joint residence was not a suitable option in this case. The father was hindering the child's progress by not sending the child to school. His change of environment every week would cause instability for him to attend school and have good focus. He needed an environment from where he could concentrate and attend school. That was going to assist him when he was attending higher classes.

31. The overall balancing of the best interest factors established that the mother was the best person to look after the interest of the child. I have no reason to disturb the findings of the court below.

Final Orders

32. I do not find any merits in the appeal and I dismiss the same. I affirm the orders of the court below. Each party shall bear their own costs of the appeal proceedings.

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Hon. Madam Justice Anjala Wati

3.11. 2023

To:

1. Vaniqi Lawyers for the Appellant.
2. Legal Aid Commission for the Respondent.
3. File: Family Appeal Case Number: 13 of 2015.