

HELEN CHOI -v- CHOI MYUNG O

High Court of Solomon Islands

(Palmer J.)

Civil Case No. 249 of 1990

Hearing: 25 February 1993

Judgment: 4 March 1993

C. Tagaraniana for Applicant

A. Radclyffe for the Respondent

PALMER J: The applicant, Mr. Choi Myung O applies by way of summons filed on the 21st of January 1993 to (i) vary the order made by the Registrar of the High Court dated 18/3/92 and,

(ii) that the custody of the child Hyiwon Choi be granted to the Applicant on the grounds stated in the applicant's affidavit and supported by the applicant's wife's affidavit.

The parties were married to each other at the Central Magistrates Court, Honiara on the 23rd of July 1986. There were issues of that marriage namely:

1. Hyiwon Choi (f) born on 23/2/87
2. Chang Min Choi (m) born on 1/10/89

A decree nisi for the dissolution of the marriage was issued on the 15/3/91 and to be made absolute if no objections were raised after 3 months. On the 2nd July 1991 the decree absolute was issued.

Interim custody of the child Hyiwon Choi was granted to the respondent, Choi Myung O whilst interim custody of the child Chang Ming Choi was given to the applicant, Helen Choi now Helen Iro at the date of dissolution.

On the hearing before the learned Registrar of the High Court, custody of both children was granted to the applicant, Helen Choi.

The respondent Choi Myung O now applies to have that order varied seeking custody of the eldest child Hyiwon Choi.

The grounds on which the application for variation is made are set out in the affidavit of Choi Myung O, the applicant in this case.

The grounds briefly can be listed as follows:

- (i) That the applicant has not been given reasonable access to the children.
- (ii) That the child Hyiwon is not now attending school.
- (iii) That the respondent does not sleep with them on a regular basis.
- (iv) That Hyiwon had been in the custody of the applicant until she was removed by order of the court
- (v) That the respondent does not buy any clothes for the children and generally does not care.

GROUND 1:

In the hearing held before me on the 25/2/93 it became clear that the applicant did have reasonable access. The reference in paragraph 5 of the applicant's affidavit of having been chased away by the respondent's mother was an isolated one off situation. The respondent explained that he was chased away because her mother felt that it was not proper for the applicant to go to her house as the applicant and the respondent were now divorced. I cannot say if this was done deliberately to obstruct and hinder and discourage the applicant to see the children or it was a genuine concern in custom. The mother of the respondent however should know that the applicant's visits were for the children. And if she does not welcome or want the applicant to come and see the children at her home then alternative arrangements could be made.

I do note that was a one-off situation and there has been sufficient evidence given to show that the child Hyiwon sometimes stayed on weekends at the applicants home and that the applicant could see the child Hyiwon on a reasonable basis.

GROUND 2:

Evidence was given by the respondent that Hyiwon was on her first day at Bokonavera School when the ex parte order obtained from this court was executed granting an interim variation to the custody arrangements so that Hyiwon was to be in the custody of the applicant until this court could sit and hear the application inter partes.

There has been little evidence to contradict this. The respondent did explain that at one stage, the child went with the respondent's sister to Malaita for a holiday. The child is now at school at Vura, put there by the applicant.

GROUND 3:

The respondent stated in evidence that she works at the Super Club during the evenings. This would explain why the respondent hardly sleeps with the child as is alleged in the affidavit.

GROUND IV:

This ground merely states the facts as they existed before the learned Registrar of the High Court heard the application for custody between the parties.

GROUND V:

The general allegation is that the respondent does not look after the children well and that she does not buy clothes for the children for instance. I cannot say whether there is any truth in this allegation or not.

However, one needs to consider to a certain extent the factual circumstances of the respondent. She is required to work during the night hours. She stated in evidence that she takes 1 day off each week. During the day time therefore this respondent will spend most of her time resting or sleeping. If she is not resting or sleeping she will be quite tired to effectively attend to the needs of her child. I am not saying that she does not spend time or see her child, but a child has needs which can be quite taxing and if a person is not on her best then he/she will not be able to give the best. The respondent has taken on a lifestyle which generally speaking is more suitable to a single person or to that of a family unit where there is one parent around at least during the night time to attend to the child's needs.

The primary concern naturally is that the interests of the children are considered and placed over and above those of the parents or parties in this case.

What has come out quite clearly is that there seems to be a closer bonding between the applicant and Hyiwon. At least this is the impression that has been painted before me.

Hyiwon is now 6 years old and should be able to express herself in terms of her likes and dislikes and her personal feelings as to where she would want to stay. Several times it has been suggested to me that she prefers to stay with the applicant and not the respondent. But the respondent has also stated that at times the child refuses to go to the applicant when requested to go.

The parents should never have to force or put fear in a child or dominate the child in such a way that she is forced to say something which she doesn't want to say.

The child Hyiwon does not belong to either party separately. She belongs to them on an equal basis and footing. She should be free to stay and live with whoever she wants to stay as between the parties. The parties should have the strength and the love to accommodate their child at all times.

It is not proper to impose restrictions unless there is good ground. Of course a child at such a tender age is not able and is not in a position to make wise decisions. She is easily influenced and may be so influenced for the wrong reasons.

The present circumstances of the applicant as compared to that of the respondent in my view outweigh her objection to have the child placed in the custody of the applicant. I say this with caution because there are disadvantages as well as advantages to be noted on either side.

It seems obvious that most of the day to day work being done in respect of this child would be done by others. I do note that the same may be said of the applicant.

However, there are a few points that I feel I need to make mention of as well in arriving at the appropriate order.

First, the respondent does not have a home of her own. She lives in her mother's house. The applicant on the other hand has a home or a house, of which he is the head and the boss or father of.

This factor in my view can be quite significant in a very subtle way in terms of providing a safe, secure base or background or environment from which the child's

growth takes place. There is a place she calls home and that she can be confident about it, that it belongs to one of her parents.

The respondent does not own the house she lives in. She is not the boss. She can be chased out if something happens. She is no longer a little girl attached to her mother as a single, young and unmarried daughter may be seen, accepted and considered. In a home, there are all sorts of pressures and forces, good and bad, kind and selfish, mean or loving at work and her living in her mother's house is so dependent on all these. It may be that her mother and others in the house do not find any problems in having her and her children and looking after them for her whilst she is away, also bearing in mind the culture and customs of the respondent.

Despite this, the applicant's situation in my view outweighs her on this. He has a home that the child can call home and be secure and confident about it. No one else can turn her or her father out from that home apart from the normal circumstances of moving house or being asked to leave by the landlord of the employer etc.

The second factor that I've also looked at is the age difference and in that respect, the maturity gap of the parties.

The applicant is in his 40s. He appears to me to be a settled and stable person, and is more aware in a realistic and practical manner of the needs of Hyiwon and what should be done.

The respondent is a young person, in her twenties. Her attitude and approach in life to a certain extent is reflected in the job she has chosen to take up. There is nothing wrong with that, but she gives the impression of someone who is aware of the glamour of life around her and at her age perhaps is not very serious about what her future plans should be, and in a way this ultimately will affect her child.

I know I have to be careful about age differences and making comparisons as to maturity and responsibility and making conclusions from the physical appearances of the parties.

But age does have in some people, a sobering effect, to a certain extent perhaps it is the realisation that one does not have much longer to go or live or spend on this planet earth and that perhaps it is time to settle down, plan and prioritise one's objectives and goals and become responsible in one's behaviour. The applicant does give me that impression more than the respondent. This is important, because then a child's needs, emotional, mental and spiritual needs will more likely be attended to in a balanced way.

There is a third point which I've looked at. The applicant is now remarried and has a family in that respect. It is not the best, because his new wife is not the mother of Hyiwon, but at least, in the minimum there is a family in which Hyiwon can be raised and be exposed to the pressures, the joys and disappointments, the good and bad times of a family unit.

The respondent is still a single parent. She may have a boy friend. But that is not the best environment within which this child should be exposed to and be subject to. Boy friends can come and go and especially when the respondent is a young adult at her age and her recent experience with the applicant she may not be in a hurry to settle down. There is nothing illegal about this and she is at liberty to chart the course of her own life. But the chart of the life of her child, Hyiwon is of concern, and in weighing these factors together I am of the view that the custody of this child should be granted to the applicant.

I am aware that the applicant is a Korean and is here under a work permit. And that it is possible that he may leave the country. But that is a conjecture at this stage. The applicant has stated that he intends to remain in this country. But even, if he does choose to leave the country, both parties should have the sense and love and integrity to come to some sort of arrangement about their child.

Mention was also made about the questionable nature of the second marriage of the applicant. I am not satisfied that should be a ground for not granting custody to the applicant. There is evidence before me that the marriage was celebrated innocently by the applicant. He is still with his new wife at this stage and she has expressed a willingness to be responsible for Hyiwon as her stepmother. There is no evidence to the contrary to show that she is unkind, or uncaring or cruel to Hyiwon.

It is always a possibility that the orders of a court may turn out not to be in the best interests of the child. The court does try to minimise that possibility from happening in its judgment and subsequent orders made.

Ultimately, the responsibility lies with the parties. They brought this child into the world. They therefore should have the character, the love, and the strength to make decisions, and sacrifices for the good of this child.

I hope it is clearly understood by the applicant that the fact that custody is given to him does not mean that the child now belongs to him at the exclusion of the respondent.

The order places a responsibility on him. The court believes he can carry out that responsibility well and on the balance of probabilities better than the respondent. If he fails then it is always open to the respondent to seek a variation.

Reasonable access therefore must be given to the respondent. If this cannot be satisfactorily worked out by the parties then the matter may be brought up again before me to work out some sort of schedule.

The maintenance order in respect of Hyiwon therefore should have been stopped.

The order of the learned Registrar of the High Court of the 18/3/92 accordingly is varied so that custody of the child Hyiwon Choi is granted to Choi Myung O with reasonable access given to the respondent.

(A. R. Palmer)
JUDGE