

Fonua v Fonua

10 Supreme Court, Nuku'alofa
Martin CJ
Family Case No.162/91

28, June, 1 July, 1991

Children - custody - welfare paramount - general principles

Custody of child - welfare paramount - adoptive child

20 *Adoption - separated adoptive parents - competing claims for custody*

The 6 year old child had been adopted by her mother's brother and his wife, having lived with them from a few days old. They later separated, the child staying with the mother. 14 months later the father took the child away. Both applied for custody. Both parents worked. The father's family were prepared to look after the child.

HELD:

Awarding custody to the mother.

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1. The child's welfare is the paramount consideration.
 2. The mother was the child's mother figure for 6 years and was the only mother figure she had known.
 3. The blood ties to the father's family were less important than the 6 years continuous care by the mother.
 4. The father had failed to fulfill his financial obligations to the mother and the child; and his conduct in taking the child displayed no understanding of the child.

40 Counsel for Applicant : Mr Fakahua
Counsel for Respondent : Mrs Taufaeteau
Guardian ad Litem : Mrs Taumoepeau

Judgment

This case concerns a little girl, Katalina Fonua, born 7 June 1985 and now aged 6. She was adopted by the parties (to whom I shall refer as "the mother" and "the father") on 5 August 1985. She had been the illegitimate child of the father's sister. She has lived with the mother and father since she was a few days old. Also living with them were the father's mother, and his brothers and sisters.

The parents separated in February 1990. The child remained with the mother; the father moved away and now lives at the other end of the same village; his relatives moved to join him a little later.

On 22 June 1990 the mother obtained a maintenance order in the Magistrates' Court. The father did not comply with it, and she issued distress warrants on 16 July and 24 August 1990. He has all but ignored the order, and offered various excuses for not paying, none of which I believe. I would have been more inclined to believe him if he had made some effort to pay something. He could have paid something, but he decided not to do so.

There was considerable delay in enforcing the warrants, but on 11th March 1991 the father was notified of the intention to execute them. This appears to have moved him to action.

On 14th April 1991, while the mother was conducting singing practice at church and the child was playing with other children outside, he took the child away to his own home. On 22 April the mother filed this application seeking custody of the child. The father has filed a reply also seeking custody.

On 30th April the child made her way back to her mother's home. She took her with her to a church meeting. While she was there the father came and took the child away again. An independent witness, Misi Pama, described how the child was clinging to her mother's neck but the father prised her hands away and took her off; she was crying and calling her mother's name.

The Guardian ad Litem has visited both families and recommends that the child should go to her father's family. The father's mother is there all the time and can care for the child, whereas the mother goes out to work. So does the father. The mother has older children by a previous marriage, in particular Katalina who is 22 and who used to care for the child in her mother's absence until she was taken away. Katalina is pregnant, but that does not make her incapable of looking after the child.

The alternatives

This dispute must be determined by what is best in the interests of the child. Her welfare is the first and paramount consideration. Only if her welfare would be equally well served in either home is it permissible to take into account other matters, such as the behaviour of either parent.

Everything in this case points to the conclusion that the child should be with her mother.

She is only just 6 years old. Until a few weeks ago Vika was the only mother figure she had ever known. The father says that the mother is not able to look after the child because she goes out to work. She has been obliged to go out to work because he has failed to pay her the maintenance as he was ordered. He has created that situation himself and it would be unjust to allow him to take advantage of it. If he were to pay, it is at least possible that the mother would not have to go out to work.

It is said that the child should go to the father because of the blood tie. That relationship was cut when the adoption order was made, but even if it were proper to take it into account it is much less important than 6 years of continuous care by the mother.

It is to be noted that the father took no steps to obtain custody of the child until it was made clear to him that he would have to pay the maintenance ordered by the Magistrates' Court. If he had been genuinely concerned about the welfare of the child, he would have made that application much earlier.

100 The balance clearly tips in favour of the mother. And even if the case were evenly balanced I would have to take into account the behaviour of the father. I do not criticise him for the break-up of the marriage; I know too little about the circumstances. But I criticise him strongly for his refusal to meet his financial obligations; and for his conduct with regard to the child, which has been deplorable. He has behaved as if she were a piece of property to which he is entitled by virtue of his position, and has displayed no understanding that she is a little person with needs and wishes of her own. The behaviour witnessed by Misi Pama is the clearest possible evidence of his attitude.

110 The only thing which has caused me to hesitate is the recommendation of the Guardian ad Litem that the child would be "safer" with her father's family. I have a very high regard for the opinions of Mrs Taumoepeau in these matters, and would be slow to disagree with her assessment. I therefore asked her why she should make a recommendation which is so clearly against all the evidence. She mentioned fears for the child's safety which, while genuine, are based on no more than a feeling of unease for which she could not give a definite reason. I have come to the conclusion that in the absence of something much more definite to justify her unease, I would be wrong to place much weight on it.

In any event, if the father sees the child regularly, he will quickly become aware of any cause for concern, and can apply immediately for this order to be reconsidered. I stress that he must NOT take the law into his own hands; it is the court, and not he, who will decide these issues.

120 Conclusions

Custody of Katalina Fonua is granted to the mother with reasonable access to the father. The parties should be able to agree arrangements for access, but if not either can apply to the court to define access.

130 As to maintenance, I find that the father has wilfully failed to comply with the maintenance order, and in accordance with section 6 of the Maintenance of Deserted Wives Act (Cap 31) I order that he be committed to prison for 3 months; but that his committal be suspended so long as he pays the amount ordered each week. If he thinks that he can justify a variation of the order, he has the right to apply to the Magistrates' Court for this to be done. But unless the order is varied, he must comply with it or face the consequences.

The mother also applies for an order prohibiting the father from leaving the Kingdom. The law is clear: he must not do so without making arrangements for the payment of the maintenance order. But he says that he has no such intention, and there is no real evidence that he intends to do so. I therefore make no order on this application.

This being a domestic matter, I make no order as to costs.