Sugar v Fatafehi (No.2)

Supreme Court, Nuku'alofa
Dalgety J
Family Case No.141/1991

18, 19, 20 & 26 October, 1993

Custody - variation - change of circumstances - failure of duty by mother

This was a review of the custody order made in favour of the mother some 9 months earlier (see earlier report in 1993 Tonga L.R 4.) of 2 young girls.

The children had started staying with the remarried father, his new wife being available to care for them. The mother had not been properly tending to the children's health, cleanliness and education.

Held:

1. The children's best interests lay in a change of custody to father; reserving generous access to mother.
2. Children should not be split unless for some compelling reasons.
3. Children are not to be used as a weapon in an adult dispute.

Counsel for Petitioner : Mr Appleby
Counsel for Respondent : Mr Tu'ivai

Judgment

On 19th January 1993, after a six day Trial, I divorced the Respondent from the Petitioner on the ground of her adultery with another man; awarded the Respondent custody of her two children by the Petitioner; ordered that the Petitioner enjoy regular residential access to these children; and required the Petitioner to aliment each child at the rate of 125 pa'anga per month. Some nine months later on 29th September 1993 the Petitioner applied to the Court to vary that Order by awarding him custody instead of the Respondent. A trial was fixed on custody alone. There remains other matters of dispute such as Access, unpaid maintenance, future maintenance and a claim by the Respondent for Damages which will be considered at another Hearing fixed for 1st November 1993.

The grounds upon which the Petitioner's Application were made were fivefold namely that

(ONE) : the Petitioner has now re-married and he and his new wife are able to care full-time for the children.

(TWO) : the children are living in an unsatisfactory and damaging physical

and emotional environment with the Respondent:

(THREE) : the Respondent has seriously neglected her duties as a custodian because she only took the elder child Rebecca to school for 4 days in the first term of 1993:

(FOUR) : on 18th September 1993 the Respondent refused the Petitioner access to the children: and,

(FIVE) : the younger child Tanya has been diagnosed as having a contagious disease and the Petitioner has been refused access to obtain medical treatment for her.

It is undisputed that the Petitioner has re-married since the date of his divorce from the Respondent. On 17th April 1993 he re-married 'Ioana Sekesi or Sugar, a twenty-four year old accounts clerk. They are happily married and both have been caring for the Petitioner's two female children Rebecca Fatafehi born 9th January 1987 and Engelina Tanya Sugar born 6th February 1989 on a regular basis from the time of their marriage. 'Ioana satisfied me that she genuinely wishes to care full-time for Rebecca and Tanya were their custody to be awarded to the Petitioner. She is prepared to give up working to do so. I consider that she is well able to look after children. She has established a very close bond with Rebecca of whom she is inordinately fond and is prepared to lavish the same love and affection on Tanya were she given an opportunity to do so. She is prepared to treat these children as her own. I believe she would. I consider that she is likely to be an excellent "mother" to these children. Her marriage to the Petitioner is obviously a relevant factor if, but only if, there are circumstances of a material nature which warrant the Respondent being regarded as no longer a fit and proper custodian of her two daughters.

Since the divorce much has changed concerning the children. They started off by coming for weekend access with the Petitioner, arriving Friday evening and returning Monday morning. The Respondent stated in evidence that the access frequently extended into the week, sometimes the children not being returned until Thursday. This would have been in blatent breach of the access order and is something I would have expected a concerned mother to report to the Court. She never did. She never said anything about this until after the present Application had been filed. I cannot accept her evidence in this regard as truthful or reliable.

From weekends only, the Petitioner acquired virtual full-time care and control of the children after the time of his re-marriage. He says that the Respondent told him then to keep the children, a statement of intent she repeated in September of this year (prior to the Application). He did keep them and in late September saught to regularise the position with the present Application. On the other hand the Respondent would have me believe that she never consented to him keeping the children and that he kept them from her against her will. Yet she did nothing to remedy that situation. In particular, she made no application to the Court for their return. In these circumstances I have no reason to disbelieve the Petitioner's evidence. That of the Respondent I reject as untrue. Likewise I believe the Petitioner's evidence that the Respondent agreed to the Petitioner and his new wife taking the two girls for a vacation in Europe, to meet their paternal grand-parents who live in Sweeden. They left on 4th May and returned some four months later on 7th September, a month late due to medical treatment being administered to Tanya in Sweden (a matter which I shall return to later.) Two weeks later she removed both children from

the Petitioner but he was able to recover care and control of Rebecca soon afterwards. Tanya she kept. Thereafter he came to Court with the present Application.

A considerable problem in this case was the evidence of the Respondent which in many material respects was factually diametrically opposed to that of the Petitioner. She had no supporting witnesses. Much of her evidence was a tissue of lies and I have already highlighted certain areas where I disbelieved her and accepted the testimony of the Petitioner. I shall do the same when considering Rebecca's schooling and Tanya's health. Overall though I must say that I found her evidence unconvincing, unreliable and devoid of the truth. Even on simple matters she would attempt to mislead the Court. For example she stated that she never consented to the children being issued with Swedish passports but when confronted with copies of the applications therefor which Counsel for the Petitioner had faxed from the Swedish embassy at Wellington, New Zealand she as much as said that her signature was a forgery (see Productions 8 and 9). They certainly seem similar to her signature on a rental agreement (Production 10). Anyhow I believed the Petitioner's evidence which was that the Respondent had signed these passport applications in his presence. He identified the signature as hers. Even when staring her in the face she refused to recognise the truth and persisted in her denial that she had ever signed these documents. The divorce in this case was bitterly contested and neither side has forgiven the other. With time such bitterness usually passes, or at least recedes, but in this case the preferred gambit is continual guerilla warfare. As between Petitioner and Respondent there is not much to choose between them. Each is still vituperative towards the other How they conduct their own lives is a matter for them but it becomes the concern of the Court if such conduct affects the children. In some countries in the Commonwealth serious consideration would have been given before now by the welfare authorities to taking the children into care and fostering them out on a temporary basis while the parents were counselled as to the conduct expected of responsible parents. Children are not to be used as a weapon in any adult dispute! The parents in this case must understand that elementary fact otherwise the day might come when this Court has to decide whether or not it is in the best interests of either parent to care for Rebecca and Tanya. I am willing to give them one last chance. The Respondent's conduct in this regard is particularly distressing. She stated to the Guardian ad Litem that the prime reason she did not wish the children to be with their father was her belief that they were at some risk of sexual abuse. This allegation she founded upon one alleged incident in their married life together when she claims her husband became sexually aroused at the sight of the two girls playing naked together. She made no such complaint in the divorce action when custody was being considered. She allowed residential access between January and April of this year without protest; and she did not object to the Petitioner having sole control over both children for most of the ensuing five months. The Guardian in her report states that she "was rather skeptical about this allegation for it would seem inexcusable not to have mentioned it earlier if she was genuinely concerned for her daughter's safety." The Respondent claimed to have forgotten this incident until now but, quite frankly, that is not the sort of thing a mother easily forgets. I regard this allegation as a blatent lie intended solely to try and blacken the Petitioner's character qua father. It is without any foundation in fact and is symptomatic of the Respondent's approach to the truth: if convenient tell the truth, if the truth be not convenient then fabricate. In my opinion this is a woman who is predisposed to lie whenever it suits her, even about the welfare of her children

Earlier this year when the Petitioner had the girls for week-end residential access he stated in evidence that they were always in an unhealthy condition when they came to him on Friday not having bathed since he returned them to their mother on Monday and, that their hair was infested with lice. When the Respondent gave evidence she made a similar allegation against him. I believed the Petitioner and refused to believe the Respondent. She obviously was not caring for them properly between January and April 1993.

Since the divorce both parties have moved home, each into temporary accommodation. Materially, there is little to choose between them. The Petitioner however certainly has the better prospects. He presently lives with his in-laws where the girls would have a room to themselves, has been given a piece of land by his father-in-law upon which to build a house and has had discussions about what he plans to build. He is now considering the financing thereof. He has reasonably well paid employment and ought to be able to secure the necessary funding. The Respondent now lives with her sister at the Police Training School, where Tanya sleeps in the same bed as her mother. If Tanya and Rebecca were both with their mother all three would require to share the same bed or one of them would require to sleep on the floor or elsewhere in the house with leave of a member of the extended family. The Respondent is unemployed, appears to have no immediate plans to seek employment and is keen to pursue a relationship with a German resident in Fiji who she met recently and would like to marry. He is an unknown quantity to the Court, the two of them have not known each other long, indeed she does not even known his surname. For what it is worth he has not yet proposed marriage to her. At best it can be said that her future prospects are unclear. She certainly has no proposals to build a house nor any intention of returning to the house she used to occupy with the children from which she removed herself solely because she was there on his own (sometimes with the children) but missed the company of members of her extended family.

Prior to the divorce the Respondent had been fairly lax attending to Rebecca's schooling although matters did improve as the Hearing date approached, a matter I commented on in my Judgment dated 19th January 1993 at page 5 where I remarked -

> "In the past the Respondent has not taken care to ensure that (Rebecca) attended school regularly. There has been a material change for the better in this regard in recent months, which is just as well otherwise the Respondent's case for custody would have been seriously weakened."

In the months of March and April 1993, the Respondent reverted to form. Out of 20 possible attendance days in March Rebecca attended school on 6 days only, a 70 per centum non-attendance record: in April she attended on only 3 out of 16 possible days, an 82 per centum record of absences. To the Guardian the Respondent explained these absences as due to persistent ill-health, but in Court she claimed that most of the days the children missed school they were with their father who had augmented the week-end access into the school week. I have already said that I did not believe the Petitioner kept the children during the week (at least not prior to his leaving for Europe in early May 1993). The Respondent's earlier alternative explanation to the Guardian that the child Rebecca was frequently ill is no more than a figment of the mother's imagination. Rebecca was not ill when with her father at week-ends. She was healthy when she attended school according to the class teacher Mrs Tukutuku. The Respondent failed to produce any medical evidence, such as a certificate, to the school authorities to explain Rebecca's absences and they seem to have been remarkably lax in following up what was on any

view an awful attendance record. The child was never taken to see a Doctor according to the Respondent but treated at home by her with what she was want to describe as traditional medicine. She had to say this for there was nothing else credible she could have said. What she said I do not believe. This child appears to have been as healthy as the next and I am not persuaded that there is any justification for her failure to attend school regularly. I am reluctantly forced to the conclusion that the Respondent just cannot be trusted to ensure that the child receives a proper and regular education. This would happen were she with her father.

Rebecca in fact is now living with the Petitioner and 'Ioana and is contented in their company. She is a happy child, obviously well cared for.

When in Sweden this Summer with her father, the younger child Tanya was disgnosed as suffering from Shigellosis which required treatment there. I heard evidence from Dr Macdonald that this was a parasitic disease of the intestine, endemic in Tonga, the bacteria being spread by oral-faecal route. The onset of the disease can be mitigated by enhanced standards of hygene. In its mildest form the disease causes stomach cramps and results in diahorrea: at its more virulent it develops into dysentry, sometimes fatal. It may be cured by a broad spectrum antibiotic taken over a period of 10 days but several stool tests (3, 1 every two weeks) are required thereafter for testing to ascertain whether the patient is disease free. The Petitioner gave evidence that the information he received in Sweden was that these tests indicated Tanya was still positive. He is keen for further tests to be made in Tonga but the Respondent refuses to co-operate. She just cannot accept that Tanya is infected in this way. She is putting her child at risk just because she will not believe what the Petitioner is telling her. Further early testing is required, and thereafter medical advice must be followed. I have no confidence that the Respondent will seek proper advice or follow any prescribed course of treatment.

Tanya is presently with her mother and they appear to be happy together. However I am not satisfied that the mother's influence on this child is altogether a healthy one. Tanya used to display a friendly face to the world but now runs and hides whenever anyone calls at the Respondent's home. She did this when the Guardian arrived ostensibly because she thought the Guardian was there to remove her. The Guardian is a kindly lady and would not I believe have given her this impression. The change in the child's attitude I am satisfied, on the evidence, is the deliberate handiwork of the Respondent. It was mischief on her part to lead Tanya to believe that someone would come to remove her and that the child should be wary not only of strangers, but of her father as well. I do not accept that the father has ever done anything to alienate his younger daughter. The mother's conduct in this respect is quite reprehensible and certainly not in the best interests of the child.

The one redeeming feature in the Respondent's evidence is that she considered that both girls should be brought up together. The Petitioner wants this as well. I agree. It is natural for children to be brought up together and the Courts will invariably prefer this unless there are compelling reasons for splitting the family which, in this case, there are not. The more especially should the children be kept together in this instance as that is apparently what they would prefer. Each misses the company of the other. I have seen them together, conversing and playing, and fully enjoying each other's company.

In the whole circumstances of this case I am persuaded that it is in the children's best interests to vary the existing custody arrangements and to award their custody to the

Petitioner. I have not lightly come to this conclusion but the disruption to the lives of the children is minimised as Rebecca has been almost continuously with her father since early May 1993, as was Tanya until about late September 1993. When reunited with her elder sister I believe she will readily adjust to her new environment. The Petitioner and 'Ioana are well able and willing to provide for both children and in my opinion will provide them with a stable loving home. There is of course a strong maternal bond between the Respondent and her children, especially Tanya, but this properly can be catered for by generous access, provided always that she cares for the children in a fitting manner while they are with her. But I am not convinced, on the evidence, that she is able to exercise the duties of custodial parent in a proper manner: the Petitioner is and that is why I have varied the Custody order.

Accordingly I shall pronounce an ORDER in the following terms -

> IT IS ORDERED AND ADJUDGED THAT [1] Paragraph (Two) of the Judgment Order dated 19th January 1993 be recalled with effect from today: [2] The Petitioner now be granted custody of the two female children of the parties' marriage, namely Rebecca Fatafehi born 9th January 1987 and Engelina Tanya Sugar born 6th February 1989.