

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Matrimonial Case No. 01 of 2011

BETWEEN : GEOFFERY KAUSEI
Petitioner

AND: ASHLEY JACKSON
Respondent

Date of Hearing: 23rd June 2011

Coram: Justice J. Weir

Counsels: Mr. A. Bal for the Petitioner
Mr. E. Nalyal for the Respondent
Mr. D. Thornburgh for the Children

JUDGMENT

1. This case revolves around the question of who is to be responsible for the day to day care and control of two children George and Rebeca Kausei born on the 12th April 2005 to the Respondent Ashley Jackson and the applicant Jeffrey Kausei.

BACKGROUND TO THIS APPLICATION

2. The Applicant and the Respondent apparently began a relationship from about 2000 although they only commenced living together in 2004.
3. Prior to 2004 the Respondent had been living with Henrick Kettner since 1993. She has two children with him from that relationship. They were born in 1994 and 2001 therefore are now aged 17 and 10 (both of them are girls).
4. The actual period of time that the Applicant and the Respondent lived together was from 2004 until about September 2006, a relatively short time.
5. The Respondent Ashley Jackson then went back to live with Mr. Kettner where she remains today along with the two daughters from that relationship and also two children of her brother who are aged approximately 10 and 11.

6. Shortly after the Applicant and the Respondent split, the Applicant formed a new relationship with Michel Brazel, an Australian citizen who came to work in Vanuatu in June 2006. She is the team leader of a development program that is funded by the Australian Agency for International Development (Aus AID) and that position is known as the Vanuatu Legal Sector Strengthening Program (VLSSP).
7. Ms. Brazel and the Applicant commenced their relationship in about March 2007 and have been living together since April 2007. It is clear that she is the major income earner in their relationship. She is currently earning 13, 000 AUD per month plus a generous allowance for rent and utilities.
8. In so far as the Applicant himself is concerned the only evidence in relation to his income is that he has worked part time as a trainer since October 2008. Indeed Ms. Jackson confirmed in her evidence that one of the reasons that she gave for leaving the Applicant was that he didn't earn enough money.
9. Ms. Jackson has just obtained a job as a telemarketer earning approximately VT14, 000 per week. It seems that she relies on her partner. In her evidence she said that she did not know how much he actually earned per month but Mr. Kettner said that this was between VT300 to 400,000 per month.
10. The reason for this current application is because Ms. Brazel's contract is due to conclude this month and there is no likelihood of that contract being renewed. She has to move on. When the application was originally filed, it was her intention to relocate to New South Wales and take up her old position with the Government. She was seconded to the position she had in Port Vila. She has now recently obtained a 2 years leave of absence from her employment with the New South Wales government.
11. The current plan is to move to the Solomon Islands where she will take on a position similar to that which she has held here but on even more advantageous financial terms. She will be receiving a salary of 15, 700 AUD per month again with a generous living allowance on top.
12. The Applicant Mr. Kausei and Ms. Brazel are now engaged and wish to take the children with them which Ms. Jackson in the circumstances opposes.

13. The paramount consideration which the Court must bear in mind in cases such as this is the benefit and welfare of the children. The interests of the parents have to take second place to the interests of the children.
14. In cases such as this, particularly when children are going to another country, so important is the emphasis on protecting those interests, that it has become the norm in other jurisdictions to appoint a lawyer to represent the interests of the children.
15. Mr. Thornburgh has been appointed to that role and I am grateful to him for taking it up at short notice and attending so assiduously to his task.
16. He interviewed the children and the Applicant and his partner. He unfortunately through no fault of his own prior to Court has not had the opportunity to interview the Respondent or her partner.
17. In his able submissions, there are a number of objective factors which the Court should look at in reaching its decision.
 - The children themselves and their wishes;
 - The existing caring arrangements;
 - The living arrangements as proposed;
 - Financial considerations.

THE CHILDREN

18. He reported and indeed I don't think it is disputed by anyone that the children are now aged six and are happy, well adjusted children. It was clear to him that they are loved very much by everyone. He reported that they referred to Ms. Brazel as "Mommy" and Ms. Jackson as "Mommy Ashley".
19. Because of circumstances beyond his control he did not get the opportunity to see the children with their natural mother. But there is nothing to suggest that they do not have a good relationship with her. On the other hand Ms. Jackson concedes that the Applicant and his mother and Ms. Brazel have done a good job with the two children.

EXISTING CARING ARRANGMENTS

20. It is undeniable that the children have been in the care firstly of the Applicant's mother Rebeca Kausei. The Applicant and the Respondent lived with her when they began living together in 2004. The children were born there and they only lived apart from Mrs. Rebeca Kausei for about a period of 6 months in a rental house before they separated in 2006.
21. Subsequent to the separation the Applicant then shifted back to live with his mother with the children and Mrs. Kausei continued to be fully involved in the upbringing of the children until 2009 when the Applicant and Ms. Brazil took over the day to day care and control of the children. There continued of course to be ongoing contact between the Applicant Ms. Brazel and Mrs. Kausei. The relationship was and is clearly a comfortable relationship.
22. Mrs. Kausei remains a central figure in these children's lives, and it is of some concern that a shift to the Solomon Islands will to some extent remove her from their lives. On the other hand Mrs. Kausei was questioned about that, and she supports the move herself and sees this as a great opportunity for the two children.
23. Throughout the period of time since the parties separated, contact by Ms. Jackson with the two children has been sporadic. It is not helpful to blame anyone for this. There is obviously poor communication between her and the Applicant but the fact remains that the children have not had a lot of contact with her. It would seem that faced with this factual scenario, the Applicant and his partner are the psychological parents.

THE LIVING ARRANGMENTS AS PROPOSED

- Ms. Jackson is now back living with her partner at Malapoa in a 2 bedroom house.
 - He occupies one bedroom with the youngest daughter. The 17 year old daughter occupies the other bedroom. Ms. Jackson sleeps in the living room with the other 2 girls who are the daughters of her brother.
24. Although both her and Mr. Kettner said that his living arrangements were suitable, they could not be anything other than cramped. Those physical living

conditions have to be contrasted with the current living conditions of the children with the Applicant and his partner.

25. They are clearly very comfortable. It is a 3 bedroom house and there is nothing to suggest that this would not be continued when the couple move to the Solomon Islands bearing in mind the generous living allowance that is available to Ms. Brazel as an expatriate Australian working in a Managerial position in the Solomon Islands.

THE RESPECTIVE RELATIONSHIPS

26. All of the evidence in relation to the Applicant and his partner points to the fact that they are very much a couple committed to each other. They are now engaged to be married and appear to be certainly involved in a long term plan for the future.
27. I have to say that I am uncertain about the nature of Ms. Jackson's relationship with Mr. Kettner. It seems to me that they are still going through some re-adjustment in their relationship as evidenced by the sleeping arrangements.
28. I do not doubt Mr. Kettner's good intentions but the facts remains that he has had little to do with the two children, the subject of this application. That should be contrasted with the fact that he looked after the two children of their relationship when she left him for the Applicant. In his evidence he volunteered the fact that Ms. Jackson came to see the two girls occasionally but it didn't happen very often.

FINANCIAL CONSIDERATIONS

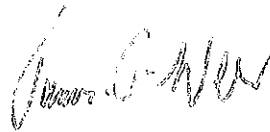
29. They really speak for themselves. It is difficult to see how it would not be a strain, if not intolerable for the Applicant and her partner to financially look after the two children the subject of this application.
30. The clear submission by Mr. Thornburgh, counsel for the children, is that the children should be able to continue to live on a day to day basis with the Applicant and his partner and that there be no disruption to that relationship.
31. In the ordinary course of events, if the children were to remain here, this would not be a difficult decision to make.

32. However in this case, the decision is complicated by the fact that the children will initially be re-locating to the Solomon Islands and then perhaps Australia.
33. Nevertheless in my view, having carefully evaluated the evidence, listened to the parties and observed them, and having listened to counsel for the children, I have come to the conclusion that it is in the best interest of the children that Mr. Kausei has custody of them.
34. I have to say that this is based largely on the credentials of his partner Ms. Michel Brazel, and the opportunities that will be available to the children while this relationship subsists. Should that position change, then the children's position might also need to be reviewed.
35. I am concerned however that the children have as much contact with their mother as possible and also of course their grandmother Mrs. Rebeca Kausei. In other words it is in their interests that they return frequently to their country of birth so that they can maintain contact with their extended family here.
36. Because the Applicant and his partner are making the move, and they clearly are in a much stronger financial position, they should be primarily responsible for paying to ensure that this takes place.
37. I therefore making the following orders:
- i. That the children live with the Applicant;
 - ii. He will be responsible for making decisions in relation to the day to day care of the children;
 - iii. That the children will spend time with Ms. Jackson as agreed but failing agreement they should spend no less than half of every school holiday period with her. Similarly at Christmas time, the children should spend alternate Christmases with each parent;
 - iv. Telephone access should be allowed as agreed between the parties but should be no less than 15 minutes every Tuesday and Thursday and those calls should be promoted and initiated by Mr. Kausei the Applicant.
 - v. The Applicant should also forward all school reports to Ms. Jackson within 14 days of receipt. If there are any health issues, then Mr. Kausei should immediately notify Ms. Jackson of those issues;

- vi. Because of the disparity of the financial position of the parties, all the costs of all travel are to be paid by the applicant.
 - vii. When the children are in Ms. Jackson's care she will be responsible for the day to day expenses of the children.
38. I grant leave to apply to the Court for further orders in relation to these arrangements if necessary, but at the conclusion of this case I will leave it to counsel for the children to talk to the parties to ensure that these arrangements are practical. If they require an amendment then I will rely on Mr. Thornburgh to put those before me for further approval.
39. Finally there is the issue of his costs. Initially the agreement was for the parties to equally pay his costs. Ms. Jackson and Mr. Kettner are clearly not in a position to do so. On the other hand, the Applicant through his partner clearly is in a very strong financial position.
40. I therefore make the order that his costs of VT400, 000 are to be paid by the Applicant and his partner.

DATED at Port Vila this 23rd day of June, 2011.

BY THE COURT



J. WEIR
Judge