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

Civil Case No. 95 of 2015

BETWEEN: NIKITA TAIWIA
Claimant/ Applicant

AND: SERAH (NASWETU) IAMUL
SOLOMON IAMUL
First Respondents

AND: LOREEN IAMUL
Second Respondent

AND: GEORGE VUTI
Third Respondent

Coram: ***Mr. Justice Oliver A. Saksak***

Counsel: ***Nigel Morrison for the Claimant/ Applicant***
John Malcolm for First and Second Defendants/ Respondents (No appearance)
No appearance by Third Respondent

Hearing: ***1st October 2015***
Judgment: ***10th November 2015***

JUDGMENT

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1. This Judgment provides reasons for the orders appointing a guardian dated 1st October 2015.

2. The application to appoint a guardian was filed on 13th May 2015 together with a sworn statement in support deposed to by the applicant. The application and sworn statement were served by Johnny Laau on the Solicitors for the First and Second Respondents on 13th May 2015, the same date. A sworn stament as to service was filed on 2nd June 2015 by Johnny Laau.

3. The application was unopposed by the respondents. Indeed the respondents had expressed their consents to guardianship and care on 21st April 2015. The Consent is annexed to the sworn statement of the applicant as Annexure **"B"**. It is certified by Mr Malcolm as Solicitor for the respondents.

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4. When the application was called for the first hearing on 23rd September 2015 Mr Morrison indicated he had filed written submissions and draft orders. Unfortunately these documents were not before the Court and Counsel sought an adjournment in order to refile them. Counsel indicated that the main issue for consideration was whether the Court had jurisdiction to make orders of guardianship.

5. On 23rd September 2015 Mr Morrison re-lodged his legal submissions. The Court heard Counsel in relation to those submissions on 1st October, 2015 prior to granting the Orders sought in the application.

6. Mr Morrison submitted that in light of Vanuatu not having any specific legislation relating to the custody or guardianship of children, that the Court must look firstly to the laws of the United Kingdom (and France) currently in force as at Independence.

In that regard Counsel submitted that-

a) As to a custodial order, the Children Act (UK) 1975, and

b) As to additional guardianship and to the direction sought governing overseas travel, the Children Act (UK) 1989 and Article 47(1) and Article 49 (1) of the Vanuatu Constitution should be applied.

7. Section 33 of the Children Act (UK) 1975 provides for Custodian Orders as follows:-

"(1) An authorised Court may on the application of one or more persons qualified under subsection(3) make an order vesting the legal custody of a child in the applicant or, vesting the legal custody of a child in the applicant or as the case may be, in one or more of the applicants.

(2) An order under subsection (1) may be referred to as a custodianship order, and the person in whom legal custody of the child is vested under the order may be referred to as the custodian of the child.

(3) The persons qualified to apply for a custodianship order are-

(a) A relative or step-parent of the child-

(i) Who applies with the Consent of a person having legal custody of the child, and

(ii) With whom the child has had his home for the three months preceding the making of the application,

(b) Any person-

(i) Who applies with the Consent of a person having legal custody of the child, and

(ii) With whom the child has had his home for a period or periods before the making of the application which amount to at least twelve months and include the three months preceding the making of the application"

8. The material and relevant and undisputed facts before the Court were that-

a) The applicant is a *"relative"* of the children. She is the adopted daughter of Mary's parents and the aunt to Anita.

b) The applicant makes the application with the expressed and informed Consent of the girls' parents.

c) The children have been in the applicant's care since April 2014, a period exceeding 3 months preceding the making of the application.

d) Although named in the proceeding, the Third Respondent is not concerned or involved in this matter.

I was satisfied that the provisions of section 33(3) (a) and (b) of the Children Act (UK) 1975 have been complied with by the applicant.

9. The applicant sought a "custodial order" in terms of the Children Act (UK) 1975. This Act and the Guardianship of Minors Act (UK) 1971 and the Guardianship of Minors Act (UK) 1973 have all been repealed and replaced by the Children Act 1989 so that the *" custodial order"* is now known as a *" residence order"*

10. In deciding whether or not to grant a *"residence order"* which in effect and in my view the same as a *"custodial order"*, I accept that the childrens' best interests and welfare must be and ought to be of paramount consideration in order to maintain a consistent approach as in other similar jurisdictions.

11. But against what factual circumstances should this paramount consideration be weighed? Again it is an undisputed fact that the two children the subject of this application have been sexually abused within their own family. That is particularly distressing and is a serious concern to the Court especially when the children's parents or other family members show little depth in understanding the serious nature of the offending and its future implications on the children. Furthermore in a culture where such behaviour is not necessarily frowned upon but is generally an accepted practice, the Court would be neglecting its duty to protect the vulnerable and weaker members of our society, if it fails to act appropriately to safeguard the best interests and welfare of the two children in this case, and in any other case of a similar fact and circumstance.

12. Mr Morrison referred the Court to the observation of the Court of Appeal in the case of **Swanson.v.Public Prosecutor** [1998] VUCA 9. Where the Court of Appeal said: *"Vanuatu as (sic) a common law country which as the benefit of drawing on the wisdom and jurisprudence from a whole range of common law countries in search for precedent appropriate to Vanuatu conditions. The common law is constantly developing and any suggestion that it ossified as at the date of independence must be rejected".*

13. Counsel submitted that the Court should adopt this view and in light of Article 47 (1) and Article 49 (1) of the Constitution fill the current lacuna to suit the society needs and expectations, and in particular to protect children who are the most vulnerable members of our society.

14.1. Article 47)1) of the Constitution states:

"(1) The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom." (emphasis by underlining)

14.2. Article 49 (1) of the Constitution states:

"(1) *The Supreme Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings, and such other jurisdiction and powers as may be conferred on it by the Constitution or by law". (emphasis by underlining)*

14.3. Following these constitutional provisions the hierarchy of the legal sources to be resorted to by the Courts in cases of this nature and circumstances are in my considered view the following, in order of priority-

a) The Constitution,
b) Vanuatu Statutes
c) Substantial Justice,
d) Local (Vanuatu) customs, practices and usuages,
e) Case law and common law.

14.4. It is accepted that Vanuatu has no specific statute which is applicable to custody and/or guardianship of children, minors or young persons. Therefore the source in (b) above is not available. But we have the source in (a) being the Constitution itself. Article 49(1) of the Constitution grants unlimited jurisdiction to the Supreme Court. That power includes the power to hear and determine the applicant's application in this case. Article 47 (1) of the constitution states clearly that the judiciary which is vested with the administration of justice….. *"are subject only to the constitution and the law…."* (emphasis added)

Based on these constitutional provisions I concluded that this Court has jurisdiction to grant residence orders and guardianship orders.

14.5. We look next at the source of "substantial justice" in the absence of statute law. Against the factual circumstances of the two children the subject of this application stated in paragraph 11 of this judgment, would this Court be doing or be seen to do substantial justice if it declines to grant the orders sought by the applicant? The answer is in my view "NO". If the Court did so, it would be denying these two children their fundamental rights to life, security of the person,

protection of the law and to equal treatment under the law or administrative action as enshrined in Article 5 (1) (a), (c), (d) and (k) of the Constitution. And why would that be so? Simply because Vanuatu does not have specific legislation providing for the welfare, protection or advancement of children and young persons as anticipated in Article 5(1) (k) of the Constitution. It is therefore incumbent upon the Court to exercise its unlimited jurisdiction under Article 49 (1) of the Constitution to fill that lacuna and in doing so, that is substantial justice not only done, but in reality is seen to be done.

14.6. Next we look at the source of "custom, practices and usages". I pose the question whether the granting of residence orders or custodial orders to the applicant would be seen as incompatible or inconsistent with local or Vanuatu custom, practices and usages in terms of children or young persons? And my answer to this question is **"NO"**.

14.7. In my mind it is a safe inference to assert that in Vanuatu for many generations past has recognised and accepted this notion or concept of custody care and rearing children by extended families and relatives within the same tribe or *"nasara"* in situations where a father or mother predeceased the other and left the surviving spouse incapable of maintaining or caring well for the child or children. An uncle or an aunt would step in to take custody or guardianship until the child is old enough to return to the surviving parent.

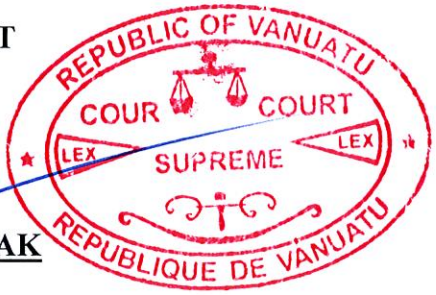
14.8. In the present case, the applicant is the adopted daughter of Mary's mother and is Anita's aunt. It is an arrangement made within the family context. Further it is being made with Consent and blessing of the parents of the children. And further still it is being made on clear understanding between all parties or stakeholders, that this is not an adoption which would server all their relationships. For the Court to endorse such an arrangement would not in my view be contrary to local custom, practices and usages.

14.9. And finally the source of case law and common law. The **Swanson Case** exists and is acknowledged and accepted as supplementary to the hierarchy of sources

that have been identified at paragraph 14.3 of this judgment. It is in this regard that the UK statutes 1971, 1973 and 1975 although repealed but made extant by the 1989 Children Act, do lend support and assistance to this Court to create precedent based on constitutional provisions protecting fundamental rights of children and young persons, substantial justice and custom, to come to the conclusion that a residence order or custodial order coupled with an order appointing the custodian as additional guardian in this case was and is warranted. Accordingly the Orders dated 1st October 2015 were granted.

DATED at Port Vila this 10th day of November, 2015,

BY THE COURT



OLIVER.A.SAKSAK

Judge