

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA 8/2013

Appeal from Family Tribunal Decision 323/2011

[2013] SCSC

VAB

Appellant

versus

MOA

Respondent

Heard: 29 July 2013
Counsel: William Herminie for appellant
No appearance for respondent
Delivered: 22 October 2013

JUDGMENT

Egonda-Ntende CJ

[1] The parties separated in July 2011. Their only child, a daughter, was six years old. She has lived with her father since the separation, but the mother has had alternate weekend access since September 2011. She has also spent several school holiday periods with her daughter, mostly pursuant to orders of the Family Tribunal. The Social Services Committee provided a report to the Tribunal on custody, access and maintenance issues in November 2011. The Family Tribunal did not make a final decision until March 2013,

when it confirmed its interim orders of custody for the father and alternate weekend access for the mother. The mother has appealed that decision.

- [2] Both parents gave evidence in the Tribunal and the mother (who was represented by counsel for part of the hearing) also called two witnesses. The mother instructed new counsel, Mr Herminie, for the purpose of this appeal. The father was served with the appeal documents but did not appear at the preliminary hearing. I fixed a hearing date and, when the father did not appear on that date, I proceeded to hear the appeal ex parte. It is unfortunate that the father did not take up the opportunity to explain why he should retain custody of his daughter.

Decision of the Family Tribunal

- [3] The Tribunal gave three reasons for awarding custody to the father:
- a. First, while the child had said to the Social Services representative that she likes to spend time at both her father's and mother's, she also said that she has chosen to stay with her father as she likes it there.
 - b. Secondly, while a change in the status quo would not require the child to move to a different school or district, it would "involve a change in [her] sense of security of not having a father figure in her daily life".
 - c. Thirdly, the father is able to take care of the child notwithstanding her age and gender, and awarding custody to the father does not prevent the mother from performing acts like "following on her education, washing her hair and school bag and dropping her home from school". While the Tribunal acknowledged that "as a school teacher the [mother] may be in a better position than the [father] who is a mason to meet the educational needs of the [child]", it found that there was no evidence that the father has failed to meet the child's educational needs.
- [4] The Tribunal clarified that it had given "particular consideration" to the principle that "disruption of established bonds is to be avoided whenever it is possible to do so". In this regard the Tribunal emphasised that there are no presumptions of law, "but merely

considerations”, that a child of a certain age and gender should be with one parent or the other.

[5] As regards the conduct of the parents, the Tribunal found that:

- a.** The child has not been and is not likely to be physically harmed by either parent.
- b.** As regards allegations of violence by the father and “lesbianism” by the mother, there is no evidence of any adverse impact on the child, for example disturbance in her emotional state or academic performance or bullying and teasing at school.

[6] Neither the Social Services Committee nor the Tribunal identified grounds for disqualifying either parent as being unfit to care for the child.

Arguments on appeal

[7] The grounds of appeal are as follows:

- a.** The Tribunal erred in both law and facts. (No explanation of the alleged errors is given.)
- b.** The Tribunal relied too heavily on the evidence of the child.
- c.** There is “insufficient evidence to support the allegation that the [mother] is unfit to have custody of the child because of allegations of lesbianism against her”.
- d.** There is “ample evidence to show that given the child[‘s] age, gender education and emotional needs that the [mother] was the best person to have custody”.

[8] As to the evidence of the child, Mr Herminie, learned counsel for the appellant, submitted that the circumstances and conditions of Social Services’ interview with the child are unknown, and that both mother and father should have had the opportunity to be present at the interview to ensure that no one was unduly influencing the child. He suggested that the impression to be taken from the report is that the child, of “very tender age”, had been “coached” prior to the interview.

- [9] Mr Herminie submitted that the Tribunal was “heavily influenced” by the allegation of lesbianism against his client, despite the absence of any evidence whatsoever to support this allegation (or for that matter the broader allegation that lesbians are unfit parents). He submitted that if the concern was with the mother’s alleged participation in a threesome, then the father was equally culpable for having participated himself. Mr Herminie urged the Court to reject the father’s claim that he was “forced” into this threesome.
- [10] Mr Herminie also emphasised the fact that this child had been “snatched” by the father after a quarrel with the mother. That was how the status quo confirmed by the Tribunal arose.
- [11] Finally Mr Herminie submitted that, bearing in mind the conclusion of Social Services that both parties were fit to parent this child, the Tribunal has failed to explain why it was in the best interests of this child to confirm the status quo. In this regard he emphasised that the mother is a highly educated teacher who lives in a decent house and that, while not a legal rule, “it has been a practice that the child of tender age being a female is best placed with the mother”.
- [12] As noted above, the father was served with the appeal documents but did not attend Court or take any active part in the appeal.

Analysis

- [13] In making any decision concerning the upbringing of a child, the wellbeing of that child is the primary consideration: section 2A Children Act, Cap 28. The Court or Tribunal making the decision must have regard to a number of factors including the child’s wishes and feelings (as far as they can be ascertained), the likely effect on the child of any change in her circumstances, the age, gender and background of the child, any harm which the child has suffered or is at risk of suffering, and the capacity of each of the parents.
- [14] I note that the Court is not required to consider the conduct of the parents except in so far as that conduct is relevant to their parenting capacity or risks harm to the child.

- [15] Having reviewed the Tribunal decision against the record of evidence and the report of the Social Services Committee, I consider that the decision is unsatisfactory in several respects.
- [16] First, the Tribunal referred in passing to “the circumstances in which the [father] took custody of the [child] on the night of his separation from the [mother]” (that is, by waking her up and physically removing her from what had previously been her home). However it does not appear that the Tribunal gave any weight to this factor as counterbalancing its reluctance to disturb a now-settled state of affairs. This is of concern, to the extent that it might appear to endorse the unilateral moving of a child with a view to creating a new “settled” environment by the time a custody case is heard. While the Court is not primarily (if at all) concerned with punishing a guilty spouse or partner (see *Revera v Sims* [1989] SLR 130), it is rightly concerned with avoiding the creation of perverse incentives for parents facing the prospect of a custody dispute. Stability and continuity are undoubtedly important considerations for the wellbeing of any child. However, the child in this case has not already been subjected to repeated significant upheavals (as for example in *Revera v Sims*), and awarding custody to the mother would not even require a change in school, let alone a new district or island.
- [17] Secondly, while the Tribunal stated that its decision was not based solely on the expressed wishes of the child, I agree with Mr Herminie that this factor may have received disproportionate weight. The child was very young and clearly susceptible to “coaching” from her father and his new girlfriend. I note in this regard the mother’s claims about the father saying unpleasant things about her to the child. While there is no positive evidence that coaching occurred here, the Social Services report lacks sufficient detail about the circumstances of the interview to allow me to exclude the possibility. It is also notable that the report of the interview begins by recording that the child likes spending time at both her father’s and her mother’s. So this is not a case where the child expressed aversion to staying with her mother.
- [18] Thirdly, this case involved allegations of “lesbianism” by the father, on one hand, and of physical violence against the mother, on the other hand. Those allegations are hardly

comparable, but they are effectively lumped together in the Tribunal's decision as factors capable of "affecting" the child. The Tribunal concluded that no evidence of such adverse effects had been adduced. But it is difficult to resist the conclusion that, while the allegations of violence appear to have been more or less disregarded, the allegations of "lesbianism" may have exerted a subtle influence on the Tribunal in coming to the "overall" conclusion that it was in the child's best interests to stay with the father.

[19] Dealing with the allegations of violence first, these allegations were made by the mother and corroborated by two witnesses (her friend and current housemate, and a cousin) whose evidence was materially consistent. The specific allegations related to the night on which the parties separated and involve an altercation which resulted in the police being called. It seems to be common ground that the police were in fact called, that the father was asked to leave the house, and that at this point he woke up the child and took her with him. The father cross-examined the mother and her witnesses in person but did not specifically deny their version of events. Without making any firm findings about those events, I consider that there is ample evidence on record to raise a concern about the father's capacity for aggressive behaviour (towards the mother, her friends, and potentially even police officers), which concern should have been at least taken into account by the Tribunal for its potential effects on the child.

[20] As to the father's allegations of "lesbianism" against the mother, these were described on several occasions as his main ground for seeking custody. Indeed these allegations were the only real ground he advanced before the Tribunal. He claimed that the mother had watched "inappropriate movies" in the house and that he had personally witnessed her performing "lesbian acts". He then alleged that he had participated in a threesome with her and her friend, but had been "forced" into this by the mother. He said that if she was "a good mother" she would not have done these acts.

[21] The father's allegations were flatly denied by both the mother and the friend in question. The mother insisted that they separated because he became aggressive (not because of anything sexual she had done) and that the friend, with whom she is now sharing a house, is no more than a friend. The friend gave evidence that the father had initially asked her

to sleep with him (which she declined to do), and that it was only after the separation that he accused her, the mother, and the cousin of “removing him from the house so we can do ‘kalala’ among the three of us”.

[22] As Mr Herminie put it, there is not a thread of evidence to support the father’s allegations against the mother. She called witnesses to support her position. He did not. More to the point, even if these allegations were supported by the evidence, it is difficult to see their relevance to the issue before the Court. It should not be necessary in 2013 to state that sexual orientation per se is not relevant to fitness to be a parent. Alleged “deviant” sexual behaviour like a threesome cannot provide a ground for favouring one parent over the other where both are participants. Social Services raised no concerns about the mother’s present living arrangements, including the fact that she is sharing a two bedroom house with this female friend (and the friend’s daughter). The child has been sharing a bedroom with her father so it can hardly have been a matter of concern that she would have to share with her mother.

[23] Returning to the wellbeing of this child, which is the real issue before the Court, the Tribunal acknowledged (as I have already noted) that the mother may be in a better position to meet the child’s educational needs. The Tribunal also acknowledged that the mother is already performing several functions normally associated with the primary caregiver, like washing the child’s hair and school bag and driving her to school. Presumably that is because those functions are not being performed by the father. While perfection is not to be expected of any parent, the Tribunal should have given at least some weight to these indications that the father is not fulfilling all the responsibilities which accompany the grant of legal custody.

[24] While it is true that there is no legal presumption in favour of placing young girls in the custody of their mother, it is also true, as the then-Chief Justice observed in *Revera v Sims*, that “young children, particularly young girls, have generally been put into the custody of the mother and all things being equal I believe that should be done”. In *Revera* the mother was a proven adulterer who had in the past unilaterally removed her children from Seychelles, showing a willingness to flout the orders of the court and a risk

of further disruption to the children in question. To take another example, in *Pothin v Pothin* [1986] SLR 86, the mother (also a proven adulterer) had abandoned the family and was now living with another man, to whom she had borne another child. In those circumstances it is understandable that the Court was reluctant to remove the children from their father's custody.

[25] This case is quite different. This father secured de facto custody by physically removing his child from her former home. There is no evidence of any misconduct by the mother (although there is evidence of aggressive behaviour by the father). The mother is more educated than the father, has shown commitment to supporting her child's educational and other needs during the period in which she has not had custody, and has also shown diligence in pursuing this appeal. The father grounded his application for custody on his former partner's alleged immorality, failed to substantiate his allegations in that regard, and has failed to take the opportunity on appeal to produce any other evidence that he is in a better position to care for the child.

[26] In all the circumstances I cannot agree with the conclusion of the Tribunal that it is in the best interests of the child to remain in the father's custody. I consider that the statutory factors weigh clearly in favour of custody for the mother and that the only real countervailing factor, the avoidance of disruption to the status quo, must be considered in a context where the disruption will be relatively minimal and the status quo itself was effectively brought about by force.

[27] The father has confirmed his willingness to pay SR 1,000 per month in maintenance if custody is awarded to the mother. That is the sum requested by the mother and I am satisfied it is reasonable in the circumstances. I am also satisfied that it is reasonable to provide access to the father on the same terms previously awarded to the mother.

Decision

[28] The judgment of the Family Tribunal dated 4 March 2013 is set aside.

[29] Custody of Axxxx Ayyyy [name redacted] is granted to the appellant, her mother.

- [30]** The respondent, her father, is to have access on alternate weekends (to be collected from school on Fridays and returned to school on Mondays) and for half of the school holidays.
- [31]** The respondent is to pay SR 1,000 per month in maintenance with effect from the date of this judgment.
- [32]** The parties are free to make further applications to the Tribunal in light of any change in circumstances after this judgment is delivered.

Signed, dated and delivered at Ile du Port on 22 October 2013

F M S Egonda-Ntende
Chief Justice