

IN THE SUPREME COURT OF SEYCHELLES

CIVIL SIDE: CA 35 /2017

(Arising from FT Case No 307/2010)

[2018] SCSC 505

F.M.

Appellant

Versus

1. P.L.

2. DIRECTOR OF SOCIAL SERVICES

Respondents

Heard: 4 April 2018

Counsel: Mr. Nichol Gabriel for the Appellant
Ms. Karen Domingue for the Respondents.

Delivered: 29 May 2018

JUDGMENT

M. TWOMEY, CJ

Background facts and appeal

[1] The Appellant was denied custody of his minor son in a decision by the Family Tribunal on 15 November 2017. Aggrieved by this decision, he filed a notice of appeal with the following grounds in the Supreme Court:

1. The Family Tribunal erred in entering judgment against the Appellant without giving the Appellant the opportunity to be heard by the Tribunal during the hearing.
2. The Family Tribunal erred in entering judgments against the Appellant in the absence of a proper investigation by the Second Respondent.
3. The Family Tribunal erred in denying custody of the minor child to the Appellant who is more willing and capable and under no physical or mental incapacity to be granted such custody.
4. The Family Tribunal erred in entering judgment against the Appellant and keeping the child in the custody of the First Respondent without a proper investigation of the physical and mental capacity of the First Respondent to be granted custody.
5. In all the circumstances of the case the decision of the Family Tribunal was wrong in law.

The law

[2] Matters regarding custody are essentially the province of the Family Tribunal. Section 78 of the Children Act provides in relevant part that :

“The Tribunal shall have the jurisdiction and functions conferred on it by this Act or any other written law and without prejudice to the generality of the foregoing the Tribunal shall -

(a) hear and determine matters relating to the care, custody, access or maintenance of a child under this Act and a written law specified in Schedule 3;

...

(2) When exercising its jurisdiction and functions under this Act -

(a) the Tribunal shall have as its paramount consideration the interest of the child who is the subject of the matter before the Tribunal;

(b) the Tribunal shall, where it is able to do so, take into consideration the view of the child who will be affected by its decision; ...”

[3] Schedule 3 concerns other relevant legislation but has no bearing on the present appeal.

[4] The above legal provisions are relevant in terms of understanding the approach taken by the Family Tribunal and the complaints raised in the appeal.

Discussion

[5] Before I turn to the substantive issues raised by the grounds of appeal I note that no grounds of appeal directly concern the Second Respondent. The appeal is against a Family Tribunal decision and not the Department of Social Services. It is not explained why they have been joined as a respondent in this appeal. I therefore dismiss the appeal against the Second Respondent in its entirety.

[6] I now turn to the grounds of appeal. The first two grounds of appeal concern the lack of opportunity for the Appellant to be heard and for a proper investigation carried out in respect of the welfare of the child at his residence in the President’s village.

[7] I have studied the proceedings of the case in the Family Tribunal. I note the following:

1. This is a very acrimonious dispute concerning the custody and care of a 15 year old.

2. Applications by both the Appellant and the First Respondent have concerned the Tribunal since 2010 when the child was only 7, very young and vulnerable.
3. The child has been in the custody of the Appellant solely, then at the President's Village and then in the interim custody of the First Respondent.
4. There have been numerous reviews of the custody arrangements of the child.
5. Social Services have been involved from the first application.
6. There are reports of behavioural difficulties in respect of the child.

Ground 1 - Hearing in the absence of the Appellant.

[8] With respect to ground 1 of the appeal, the case was fixed for hearing on 6 September 2017. On that date Mr. Gabriel for the Appellant failed to put up appearance. Since the matter had been adjourned several times previously and since notification had been issued to Mr. Gabriel regarding the hearing date, the Tribunal proceeded in his absence to hear the matter. The Appellant was present and the child's evidence was being adduced by video link. The Appellant chose to walk out of the Tribunal hearing.

[9] The right to a fair hearing is a fundamental human right guaranteed by Article 19 (1) of the Constitution of Seychelles. It includes the right to be tried with the accused being present. This right, although unenumerated, can rightly be extended to civil hearings, in the Constitution, as it emanates from the principle that a party to proceedings must be present to conduct his defence.

[10] However Article 19 (2) also provides that:

“...a person who has, in accordance with law, been served with a summons or other process requiring the person to appear at the time and place appointed for

the trial and who does not so appear shall be deemed to have consented to the trial taking place in the person's absence."

[11] Hence, a person who voluntarily absents himself from court proceedings cannot in the circumstances state that he was denied the opportunity to be heard. Equally, after Counsel has been warned that proceedings will go ahead despite his non-appearance, he cannot then through his client be heard to state that no opportunity was given for his client to be heard. The first ground of appeal has no merit and is accordingly dismissed.

Ground 2 – hearing in the absence of a proper investigation by Social Services

[12] I have stated already that I have examined the records of proceedings. I am unable from these transcripts and the documentation on file to agree with Counsel for the Appellant that there was no proper investigation regarding the child's welfare at the President's Village. As Ms. Domingue has submitted three social reports had been made by the Second Respondent before the Tribunal came to a decision. More to the point, the social workers involved in this matter testified at the hearing.

[13] I am therefore unable to find any merit at all in this ground of appeal which is also dismissed.

Grounds 3, 4 and 5 - the Tribunal's decision to grant custody to the First Respondent was wrong

[14] With respect to these grounds I note the reasoning of the Tribunal when granting custody to the mother after stating the law as laid out supra. It bore in mind the "interest of the child" and stated:

"All custody decisions are made with the ultimate goal of fostering and encouraging the child's happiness, security, mental health and emotional development into young adulthood. It is also in the interest of the child to maintain a close and loving relationship with both parents, but the practicalities of promoting and maintaining such relationships can be the main challenge in resolving a child custody dispute."

- [15] It then went to consider the child's views in the matter. The child had expressed a wish to be with his mother.
- [16] The Tribunal considered past events including the aggressive conduct and behaviour nature of the Appellant. The aggression of the Appellant in the Tribunal towards the tribunal members and the social workers were in their view indicative of his character which was not conducive to him being a role model for the child. They could not find any indication of any positive role played by the Appellant in the child's life.
- [17] The Appellant has submitted no evidence of the physical or mental incapacity of the First Respondent. There was therefore no reason for the Tribunal to explore these facts absent any evidence.
- [18] Having reviewed the Tribunal decision against the record of evidence and the report of the Social Services Committee, I am of the view that the decision of the Tribunal is satisfactory in all respects and cannot be faulted.
- [19] In the circumstances I dismiss this appeal in its entirety.

Signed, dated and delivered at Ile du Port on 29th May 2018

M. TWOMEY
Chief Justice