IN THE SUPREME COURT OF BELIZE, A.D. 2005
(APPELLATE DIVISION)

MAGISTRATE COURTS APPEAL NO.9 OF 2005
APPEAL FROM THE CAYO JUDICIAL DISTRICT

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| (YESENIA CONSTANCIA | APPELLANT |
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| (AND | |
| ( | |
| (VICTOR CONSTANCIA | RESPONDENT |

Ms. Velda Flowers for the applicant.
Mr. Orlando Fernandez for the respondent.

AWICH J.

15.3.2006. JUDGMENT

1. *Notes:* *Appeal from Family Court; custody of child; mother and father separated. Appeal by rehearing- rule 60.8 of the Supreme Court (Civil Procedure) Rules, 2005, and generally, SS: 107 to 121 of the Supreme Court of Judicature Act, Cap. 91.*

*2.* This is an appeal case against the judgment and order made by his worship the magistrate, Linden Flowers, of the Family Court, on 23.9.2005. The order granted custody of the child, Victor Nair Constancia, to his father, Victor Constancia, the respondent. Subsequently the magistrate granted access to the mother, Yesenia Constancia, the appellant, in the form of visits every Tuesday and Thursday from 7:00 am to 5:00 pm. The mother wants the orders quashed and asks this Court to make an order granting custody of the child to her.

3. The grounds of appeal on questions of facts were that, the magistrate erred in findings of facts that the mother had abandoned the child; and that, "the father was a fit and proper person to have custody of the child". The grounds on points of law were that: (1) the magistrate took "irrelevant factors" into consideration and failed to take into consideration "relevant factors"; (2) "the appellant was not given a fair hearing, she was prevented from properly presenting her case to the trial court" and (3) the magistrate "failed to consider the welfare of the child as first and paramount". At the hearing of the appeal the appellant also complained that "the visitation right" of two days in the week did not allow for special occasions such as Christmas and holidays, and in any case, was inadequate. That late addition was not objected to and I allowed it to be argued. The grounds were well presented by learned counsel Ms. Velda Flowers for the appellant.

4. The response by learned counsel Mr. O. Fernandez, for the respondent, were

as follows: (1) the magistrate was entitled to conclude that the appellant had abandoned the child for 28 days, she left the child with the grandmother and the respondent when the appellant who was pregnant by another man, left to live with the man; (2) the appellant attended the hearing at the Family Court and put her side of the case forward; (3) the magistrate took into consideration the social welfare report which could not recommend that custody be granted to the appellant alone; (4) the magistrate took into consideration the welfare of the child which was dealt with in the social welfare report, the magistrate referred to the report; (5) the respondent is gainfully employed and lives in "a functional home", has no other child to look after and maintains the child well; and (6) the man with whom the mother lives has not come forward to accept the presence of the child in his home.

5. Given the brief notes of proceedings made by the magistrate, it was necessary for this Court to call for affidavit evidence from both parties so that a just view may be formed as to where the best interest of the child lies. In the determination of the best interest of the child, consideration must be had to the welfare of the child. And in deciding the question of custody of the child, the best interest of the child and the provision of S: 4 of the ***Families and Children Act, Cap 173,*** must be taken into account. Section 4 provides that *"a child is entitled to live with his parents",* that is both parents. When it is not possible for both parents to have custody together, the best interest of the child must be taken into consideration -see ***S: 3 of the Act***, and the first schedule made thereunder.

6. If it is necessary to point out the authority for calling evidence on appeal to the Supreme Court, I shall point out no further that ***rule 60.8 of the Supreme Court (Civil Procedure) Rules 2005.*** Which states:

> "60.8 (1) Unless an enactment otherwise provides, the appeal is to be by way of rehearing".

That, in my view, was a departure from what was the usual practice that an appeal court would only allow evidence to be called in exceptional circumstances. It is my view in any case, that in a case such as this, where the main issue is the best interest of a very young child who is not a party in the case, and the court cannot inquire of his view anyway, sufficient evidence, whether at trial or on appeal, should be obtained.

7. ***Factual Background.***

The background to this case is this. Appellant and the respondent married young on, 21.12.2002. Their ages were stated in the notes of proceedings as 22 and 23 years respectively on 23.9.2005. They would be 19 and 20 years when they married. They had met earlier in the year and moved to live together in the home of his parents, and then in the home of her parents where the child was born on, 23.9. 2003. The child is now about 2 years and 6 months old.

8. From their divergent stories and the social welfare report, I made these findings of facts. Mr and Mrs Constancia had early disagreement in their marriage when they lived at his parents' home, mainly because the wife

objected to the husband drinking and returning home late, which was in the company of the father-in-law. They moved to the home of the wife's mother. The drinking abated, but was resumed. The child was born in the home of the wife's mother, when the disagreement about drinking continued. The wife also suspected the husband of having an extra-marital affair. The husband as well suspected her of having extra-marital affair. She became pregnant and kept it secret. The husband discovered a positive pregnancy test, and the wife left her parents' home which was their place of cohabitation. She also left behind the child who was 1 year and 3 months old. The husband remained at the home of the wife's mother, but later returned to his parents' home.

9. While the wife was away, the husband commenced proceedings for custody of the child and for judicial separation. On 14.2.2005, the Family Court granted judicial separation order to him, and interlocutory custody of the child, jointly to him and the wife's mother. On 23.9.2005, after the Family Court had heard the mother and the father, the court made a final order granting custody of the child to the husband alone. The mother was granted access order every Tuesday and Thursday from 7:00 am to 5:00 pm. The father and the child now live in the home of the father's parents.

10. In the beginning from birth, the child had been in the care of the husband and the wife together. The husband went to work during daytime. When the child was 1 ½ months old, the mother started employment, care for the child was shared between the wife's mother during daytime and the father and the

mother in the evening and night time. That continued until the child was 1 year and over 3 months old, when the mother who was pregnant by another man, left the home. She may have visited the child when the father would be at work. She returned on 14.2.2005, some 28 days later.

11. The notes of the proceedings at the Family Court on 23.9.2005, was very brief. It is as follows:

> "36/05
>
> Victor Constancia
>
> 23 Years - date of Birth 27th may 1982
>
> 8 Minerva Lane - San Ignacio
>
> VS
>
> Yesenia Constancia
>
> 21 years - date of Birth 6th October 1983
>
> Hillview Blvd - Santa Elena.
>
> Application for legal Custody for the child Victor Nahir born 22nd September 2003:
>
> Decision:
>
> Mr. Constancia's application for Legal Custody. Social Report obtained from Nestor Novelo. This court is ordering and granting Legal Custody of the child Victor Nahir born 22nd September 2003, to father Mr. Victor Constancia.

It is the believe of the court that the child will be best cared for if it is in custody of its father.

Q Who will baby sit child now that you have custody?

A My mother 39 years old.

Respondent already, mother of a second child out of wedlock and is separately living from that father.

Legal Custody granted to applicant with effect from 23rd September 2005.

Magistrate: Mr. Linden Flowers."

12. ***Determination.***

The magistrate did not err in the finding of facts identified. Even on the more full facts provided by affidavits for both sides on appeal, a tribunal considering all the material facts, would be entitled to conclude that the mother left the child behind on, 16.1.2005, and returned on 14.2.2006. The child was 1 year and over 3 months old. That may well be regarded as abandoning. The mother admits that she left home on 16.1.2005 and returned on 14.2.2005. That is 28 days. She however, explained that she went to live at the home of a relative. It was open to the magistrate to accept or reject that explanation. He rejected it.

13. As regards the ground that the magistrate erred in finding that "the father was a fit and proper person to be given custody", I have to say that the magistrate was not required to consider whether the father was a fit and

proper person generally, he was required to consider whether he would grant custody to the father or the mother or to both, and so was called upon to only compare the conduct and circumstances of the wife *vis a vis* those of the father. The question there was not the removal of the child from the father, or the mother, for that matter, for the purpose of *separating* the child from him or her to be placed at "*the best substitute staying place*", as provided for in ***S: 4 of the Families and Children Act***, or for the purpose of *removing a child in need of care and placing him with a foster parent or at an approved children's home,* under ***SS: 106 to 121 of the Act.*** The magistrate, in fact, did not state specifically, "that the father was a fit and proper person to have custody of the child". His decision was to grant custody of the child to the father based on a comparison of the conduct and circumstances of the mother and father. From the comparison he concluded: "it is the belief of the court that the child will be best cared for if it is in the custody of the father". On the facts, he was entitled to decide that better care for the child and therefore the best interest of the child lies with the father, and so grant custody of the child to him.

14. On questions of law, I start with: taking "irrelevant factor" into consideration. Ms. Flowers pointed to the reason given by the father that he did not want his child cared for by another man, as the irrelevant factor. First, I do not consider that view or what might be a corresponding one by a mother, irrelevant in deciding custody of a child. If the question arises, it may be necessary to know the view of the other man or woman about looking after the child fathered or mothered by the competing parents, and

include that fact among other facts for consideration. In this case, that view of the father was relevant, but not the only relevant fact made available for consideration. As his ground for the application, the father made much of what he said was abandonment of the child and him by the mother. Moreover, the one fact that was predominantly decisive in the mind of the magistrate was what he stated in these words: "Respondent already mother of a second child out of wedlock, and is separately living from that father". Those words must have weighed much in the mind of the magistrate when he reached the conclusion which he stated in the words: "It is the belief of this court that the child will be best cared for if it is in the care of its father".

15. The relevant factor said not to have been taken into account was that, the welfare of the child was not taken, "as first and paramount". What the magistrate stated, brief as it was, disproves that. He categorically stated that it was the belief of the court that the child would be best cared for if it was in the custody of the father. He then went on to state the circumstances of the mother, which circumstances he obviously considered not good for care (part of the welfare) of the child. Those considerations were relevant in deciding what Ms. Flowers described as the, "first and paramount" question namely, the best interest of the child which best interest includes welfare. The magistrate also referred to the social welfare report, another relevant material. The medical documents and what the mother deposed about the health of the child were short of proof of neglect of the child. The medical papers were inconclusive. In any case, the papers were not presented to the magistrate, they were new evidence presented to this Court.

16. The respondent did not resist the complaint that the access granted to the appellant was inadequate. That ground succeeds.

17. All that Mr. Fernandez said in submission had merits, except about the downside of the conduct of the father. From the evidence, the father is not perfect, he has a drinking tendency and may have another woman in his life. The mother has her downside too. It was a question of balancing them, starting from the presumption that, all being equal, a child of tender age would be better placed in the custody of the mother. In this case, I cannot say the magistrate ignored that presumption. The magistrate assessed that the downside of the mother weighed more adversely against the care for the child, the best interest of the child. From the facts assembled, I have found no fault in that assessment.

18. The evidence as a whole, in my view, suggests that the welfare of the child will be better served when the child is with the father. That is where the best interest of the child lies.

19. I dismiss the appeal against the order giving custody to the father. I allow the appeal against the order granting access. I vary the terms of access order as follows:

    1. The mother may visit the child every Tuesday and Thursday from 7:00 am to 5 pm, and one weekend in the month.
    2. The mother may take the child every other Easter holiday, every other Christmas holiday and every other independence anniversary holiday.

3. When the child has started attending school, the mother may take the child for one half of each school holiday.

4. Costs of access will be borne by the mother.

It is always possible to apply, on new facts, to have these terms varied.

20. In the circumstances of the parties, I order that each shall bear own costs.

21. Pronounced this Wednesday the 15th day of March 2006.

At the Supreme Court.

Belize City.

Sam Lungole Awich

Judge

Supreme Court of Belize.