

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE FAMILY COURT DIVISION**  
**OF THE HIGH COURT, FIJI**

**CRIMINAL APPEAL ABU 146 OF 2016**  
**(FC 15/APP/0005)**

**BETWEEN** : **MUKESH KUMAR** *Appellant*

**AND** : **ROSHNI DEVI** *Respondent*

**Coram** : **Calanchini P**

**Counsel** : **Mr S Kumar for the Appellant**  
**No appearance for the Respondent**

**Date of Hearing** : **15 November 2017**

**Date of Ruling** : **18 December 2017**

**RULING**

- [1] This is an application by the Appellant for an order that the Appellant be granted leave to appeal an Order made by the Judge sitting in the Family Division of the High Court (the Family Court) on 13 December 2016. The application was made by summons filed on 23 December 2016 and supported by an affidavit sworn on 24 December 2016. The application was opposed. The Respondent filed an answering affidavit sworn on 28 April

2017 by Roshni Devi. The Appellant filed a reply affidavit sworn on 15 May 2017 by Mukesh Kumar. Both parties filed written submissions prior to the hearing.

[2] When the application was called on for hearing on 15 November 2017 there was no appearance by or on behalf of the Respondent. It would appear from the file that the legal practitioner on record for the Respondent, Nilesh Sharma Lawyers, was served by facsimile with a notice of hearing receipt of which had been subsequently acknowledged. The matter proceeded ex parte.

[3] The right to appeal to the Court of Appeal from a judgment or order of the Family Court is provided by section 182(1) of the Family Law Act 2003 which states:

*“(1) An appeal lies as of right to the Court of Appeal from an order or decision of the Family Division of the High Court exercising original jurisdiction under this Act or under any other law.”*

[4] It is clear that there is no distinction between an interlocutory order or decision and a final order or decision when appealing to the Court of Appeal from an order or decision of the Family Court in the exercise of its original jurisdiction. It follows that the Family Law Act does not require an appellant seeking to challenge an interlocutory order or decision of the Family Court to obtain leave to appeal. The appeal is as of right from any order or decision of the Family Court in the exercise of its original jurisdiction. This position must be contrasted with the requirement under section 12(2) of the Court of Appeal Act that an appellant obtain leave to appeal an interlocutory decision of the High Court in civil proceedings. In the present case the Appellant is seeking to appeal the decision of the Family Court refusing an application to vary a consent order made by the Court on 7 November 2016. In my judgment the decision refusing the variation application was given in the exercise of the Family Court’s original jurisdiction. This application is therefore misconceived and must be dismissed. Rule 11.1 of the Family Law Rules provides that a notice of appeal must be filed within one month after the day on which the order appealed from was made. The application for leave, although misconceived, was filed within time.

[5] As a result I am prepared to order that the Appellant file and serve a notice of appeal within 14 days from the date of this Ruling and that thereafter the appeal proceed in accordance with Rules 17 and 18 of the Court of Appeal Rules.

Orders:

1. *Application is dismissed.*
2. *Appellant to file and serve a notice of appeal within 14 days from the date of this Ruling.*
3. *Appeal to proceed in accordance with Rules 17 and 18 of the Court of Appeal Rules.*
4. *Costs in the appeal.*



*W. Calanchini*  
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Hon Mr Justice Calanchini  
**President, Court of Appeal**