

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: 09/SUV/0004

BETWEEN: PAUL

APPELLANT

AND: ANA

RESPONDENT

Appearances: Mr. S. Valenitabua for the Appellant.

No appearance for the Respondent.

Date/Place of Judgment: Tuesday, 25th January, 2011 at Suva.

Judgment of: The Hon. Justice Anjala Wati.

Category: All identifying information in this Judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any person are purely coincidental.-

Anonymised Case Citation: PAUL v ANA Fiji Family High Court Case Number: 09/SUV/0004.

JUDGMENT

APPEAL - MAINTENANCE MODIFICATION ORDERS - appeal filed by father of child against orders varying maintenance - father and his appointed surety failed to give evidence on appellants financial circumstances-father relied on the ground that the court failed to consider his financial circumstances before making an order for variation- the statutory grounds for variation are different from the statutory considerations for granting fresh orders for maintenance-magistrate considered the correct statutory provision and granted an increase-the appeal dismissed with no order as to costs.

Legislation

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The Family Law Act No. 15 of 2003.

The Appeal

1. The appeal is against an order for variation of maintenance made in 2008 whereby his

worship had varied the earlier child maintenance orders from 100 pounds sterling per month to 175 pounds sterling per month. Aggrieved at the order for increase, the father of the child appealed against the said order.

The Grounds of Appeal

2. The Appellant raised 4 grounds of Appeal but Iris counsel withdrew 2 grounds, being ground 1 and 2.1 will therefore only state the remaining grounds. They are as follows:-
 - The sum of 175 pounds sterling per month was excessive considering that the appellant has a family of his own to support.
 - The 100 pound sterling per month was sufficient maintenance for the child.

The Appellants Submissions

3. The appellants counsel, in support of his existing ground of appeal, submitted as follows:-
 - The appellant's financial circumstances were not taken into consideration when an order for increase was made. The court should have considered the appellants income and expenses before granting an order for increase of maintenance.
 - The appellant has financial commitments because he has a family. The counsel also said that he does not know what commitments the appellant has but there was in fact failure by the Magistrate to consider the appellants circumstances.
 - The appellant's surety was present but that was of no assistance to the appellant. The surety could not have said anything.
 - The court must have taken into account s. 90 and s. 91 of the Family Law Act.

The Law and Determination

4. Modification of child maintenance orders are governed by s.97 of the Family Law Act 2003.
5. S. 97(2) of the Act states that the Court has power to vary an order for maintenance by increasing or decreasing the same. S. 97(3) states that the court must not increase or decrease the maintenance unless the court is satisfied as to any one of the conditions mentioned in s. 97(3) of the Act. One of the conditions to vary maintenance is change in the circumstances of the child. Page | 2
6. Mr. Valenitabua stated that the court should have considered s. 90 and 92 of the Family Law Act 2003.1 do not agree with him as s. 90 and s. 91 are only to be considered when the

court is making a fresh order for maintenance. In this case the court was considering a variation application and the relevant provision is s. 97 of the Act.

7. The court records clearly show his worship was very correct in considering the change in the child's circumstances before making an order. His worship considered the right provision of the Act and did not go into the details of s. 90 and 91 of the Act. His worship considered that the child was 10 years old and going to class 6. The mother has been spending money on his school expenses.
8. In 2005 the appellant in writing authorised his sister to represent him as he was and is abroad. The surety was present in court and she did not think fit to challenge the evidence in court.
9. In the circumstances his worship had not erred in law or in fact in considering the right provision of the Act to vary the maintenance and the factual circumstances that necessitated an increase.
10. Mr. Valenitabua submitted that the appellant's financial commitments were not taken into account. His worship was bound by the Act to consider one of the circumstances and that is what he did. Further the surety did not care to give any evidence on behalf of the appellant. The appellant also chose not to oppose the application and file a response to the variation application. He was the one who appointed his sister to represent him in court as his surety because he is in UK. It was incumbent on him to present the necessary evidence that he wanted the court consider. The court had of course considered the necessary requirements for variation. Having failed in its obligation to put additional material before the court to defend the matter, the appellant cannot state that -the magistrate erred in law or in fact in increasing the maintenance. Consequently the ground stating that 100 pounds sterling per month was sufficient for the child also hold no merits. It was not. -The magistrate considered the receipts tendered in court for the child's expenses before increasing the maintenance.
11. There is no error of law or fact. The appeal must be dismissed.

Final Orders.

12. The appeal is dismissed.
13. There shall be no order as to costs.

ANJALA WATI
Judge
25.01.2011

To:

1. *The Appellant.*
2. *The Respondent.*
3. *File: 09/Suv-/0004.*