

**IN THE FAMILY DIVISION OF THE HIGH COURT  
APPELLATE JURISDICTION  
LABASA**

<b>CASE NUMBER:</b>	<b>19/Lbs/ 0009</b>
<b>BETWEEN:</b>	<b>DEEPAK</b>
<b>AND:</b>	<b>RADHEEKA</b>
<b>Appearances:</b>	Ms. M. Tuiloma for the Appellant.  Ms. K. Bosewaqa for the Respondent.
<b>Date/Place of judgment:</b>	<i>Thursday 12 March 2020 at Labasa.</i>
<b>Coram:</b>	<i>Hon. Mr Justice M. Javed Mansoor</i>
<b>Category:</b>	<i>All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.</i>
<b>Anonymised Case Citation:</b>	<i>Deepak v. Radheeka - Family High Court Appeal Number 0009 Lbs of 2019</i>

**JUDGMENT OF THE COURT**

**Catchwords**

*FAMILY LAW: APPEAL                      Child maintenance – Assessment of the child’s financial needs–Assessment of evidence – Failure to provide documentary evidence – Earning capacity – Factors to be considered by court – Sections 45, 46, 86, 89, 90 and 91 of the Family Law Act 2003*

*Case referred to:*

- a. *P. K.V v R. I.C, Fiji Family High Court Appeal Case No. 12/SUV/0005*

1. The respondent filed an application for child maintenance on 8 March 2019, seeking a sum of \$100.00 every week from the appellant for the three children of the parties. Following the response filed by the appellant and after hearing both parties, Judgment was delivered by the Magistrate Court of Labasa on 29 August 2019, ordering the appellant to pay a total of \$40.00 per week as child maintenance for the three children commencing from 29 August 2019. This appeal is against that order.
2. The appeal is on the grounds that the Magistrate incorrectly assessed the financial needs of all the children, that there was no evidence in the form of receipts to help the court in its adjudication and that the appellant's financial capacity to pay child maintenance was incorrectly assessed without consideration of his other expenses. The appellant stated that he could not submit his pay slip to the court to show his income.
3. It was submitted on behalf of the appellant that the respondent's sister was willingly assisting the respondent to maintain her children and that the respondent was employed and earning an income of \$80.00. It was submitted that the respondent's accommodation and payment of utility bills are also taken care of by the respondent's sister. The appellant contended that education costs are subsidised by the government and that the respondent failed to submit the requisite documentary evidence.
4. The appellant's contention is that he has to support other members of his family, that his weekly income is \$149.00 and that the Magistrate had failed to take into account the earning capacity of the appellant as required under section 91 (1) (c) of the Family Law Act 2003 (the Act). On behalf of the appellant, the Court's attention was drawn to the decision in P.K.V v R. I.C Fiji Family High Court Appeal Case No. 12/SUV/0005, which was a decision that

related to the payment of child maintenance. It was held in that case that it “was incumbent on the party claiming maintenance to establish its case on the evidence and not on speculation”, and that, “the court cannot be sympathetic and make awards”.

5. Counsel for the respondent submitted that although the respondent sought a sum of \$200.00 as child maintenance every fortnight, the respondent was satisfied with the Magistrate’s order for the payment of \$40.00 a week for the three children, although the sum ordered was insufficient to maintain the children. Counsel submitted that the evidence of both parties was deficient in that necessary documents were not submitted in proof of income and expenses of the parties. However, the respondent in her testimony set out the financial requirements, which the court has taken into consideration. As such, the respondent’s counsel submitted, the order of the Magistrate should be affirmed.
6. Because of the insufficiency of relevant documentary evidence, the Magistrate has rightly relied upon the oral evidence of the parties. It is not essential for the Magistrate to solely rely upon documentary evidence such as receipts in order to arrive at a conclusion. Certainly, there are difficulties caused to court, in the absence of documentary evidence that could establish the respective incomes and the expenses of the parties. But, the court has to make findings of fact, and draw necessary inferences from facts, after weighing the available evidence, which may be either oral or documentary. The Magistrate appears to have done that. He has drawn his findings on the available evidence.
7. A look at the evidence reveals this. The appellant was willing to pay \$20 for his three children. He gave his fortnightly income as \$149. No pay slip was tendered by the appellant. That omission was not explained. The appellant’s

income was a matter within his knowledge. In cross examination he said he was living with his mother, his de-facto partner and their son. He was spending on medication for his mother and grandmother, but there were no receipts. The proceedings, which lack clarity, shows that he spends \$80 on food, \$30 to \$40 on medicine, \$56 per month on hire purchase, \$120 on his sick mother, \$20 on water, \$30 fuel, \$25 for electricity, \$30 towards a settee (presumable instalment payments), \$80 per month on child maintenance (stemming from another court order), a weekly payment of \$25 shown as his brother's wedding loan and \$36 for the monthly consumption of grog. The last mentioned item has caught the attention of the Magistrate, who has opined that a part of the monies spent on grog could be channelled for the maintenance of his children.

8. Some of these payments of the appellant are given as weekly, some on a monthly basis while other expenses are not specified as to the period. Bills for some expenses and the pay slip – which must have been available being an employee of the Ministry of Agriculture – could easily have been furnished to facilitate the task of the Magistrate.
9. The Magistrate has expressed doubt about the appellant's declared income as his expenses exceeded his declared earnings. The finding of the Magistrate is that the monthly expenses aggregate approximately \$700 as opposed to the claimed monthly income of about \$600 (based on his weekly income of \$149). In regard to the appellant's claim that he incurs expenses on behalf of his grandmother, the Magistrate has noted that she receives social welfare assistance as a senior citizen.
10. At the hearing, counsel for the respondent submitted that her client is happy with a weekly maintenance payment of \$40 for three children even though she

asked for much more: \$200 every fortnight. In her evidence before the Magistrate, the respondent said that two of the children are attending school, while the other is at home. At the time of the maintenance inquiry, the children were 3, 13 and 17 years old. All of them resided with the respondent. She worked as a sales girl for 6 days a week, and received a weekly income of \$80, which she said was insufficient to maintain the children. The monthly expenses for the eldest child are given as \$30 for schooling, \$20 for clothing, \$20 for food and \$7 for the mobile phone. For the second child, clothing expenses were \$15 to 20 and the medical bill for all three children was \$10. The financial requirements of the youngest child is not clearly stated. When totalled, those expenses are not entirely consistent with the sums shown in the forms meant for disclosure. However, the Magistrate was in the best position to make sense of the figures and make an appropriate order. In form 5, the respondent has given the food expenses for the children as \$80 and total expenses as \$114; if her weekly income is \$80, the balance expenses must have been met by the respondent's sister. She resided in a flat built by her sister.

11. The appellant made much of the assistance received by the respondent from her sister, which was admitted by the respondent. But such assistance can never be relied upon over a long term, and it could cease for numerous reasons. The respondent's sister has no obligation to support the three children of the parties. Such benevolence must not take away the appellant's parental responsibility<sup>1</sup> to maintain his children.
12. Prior to the child maintenance inquiry on 25 July 2019, the Magistrate inquired into a child recovery application by the appellant. This was taken up on 28 March 2019 as an urgent child recovery application. In his evidence, the appellant stated that he filed the application because the respondent was

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<sup>1</sup>Section 45 of the Family Law Act 2003

working. He said he feared for the safety of his children, and wanted a good future for them. To make such an application, the respondent must have been confident of properly maintaining his children. In fact, subsequently, at the child maintenance inquiry, he told the Magistrate that he would be able to maintain his children.

13. Although a mathematically precise calculation is not evident from the Magistrate's order, such an attempt is not required in this case. The Magistrate heard the evidence and saw the parties testify. He has assessed the overall evidence. The three children have to be maintained, irrespective of with whom they are living, with each of the parties having parental responsibility<sup>2</sup> and the primary duty<sup>3</sup> to maintain their children, and the Magistrate has found a way to make a reasonable direction to that end. His assessment is that as a whole the three children require \$80 every week, and that the parents should share this responsibility. In my view, the Magistrate has not exercised his discretion unreasonably. He has ordered each parent to bear half of that sum every week. Hence, the direction that the appellant pays \$40 every week to maintain his three children. I do not think the order needs to be disturbed. The Magistrate has broadly considered the matters set out in sections 86, 89, 90 and 91 of the Act. If, at some future point, there is a change in the circumstances of the parties or the children, either party may apply to vary the order in terms of the Act<sup>4</sup>. For these reasons, the appeal is dismissed with costs.

### Orders

- A. The appellant's appeal is dismissed.

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<sup>2</sup>Section 46 *ibid*

<sup>3</sup>Section 86 *ibid*

<sup>4</sup>Section 93(3)(a)(i)

- B. The appellant is ordered to pay the respondent costs summarily assessed in a sum of \$500 within two weeks of the judgment.

Delivered at Labasa this **12th** day of **March, 2020**

Justice M. Javed Mansoor  
**Judge of the High Court**