

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

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| ACTION NUMBER: | 0006 of 2016 (15/Nau/0141) |
| BETWEEN: | RENUKA APPELLANT |
| AND: | SURESH RESPONDENT |
| APPEARANCES: | <i>Mr. A. Chand (LAC) for the Appellant.</i> <i>Ms. R. Tuivaga for the Respondent.</i> |
| DATE/PLACE OF JUDGMENT: | <i>Wednesday 08 March 2023 at Suva.</i> |
| CORAM: | Hon. Madam Justice Anjala Wati |
| CATEGORY: | <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> |

JUDGMENT

A. Catchwords:

FAMILY LAW – Appeal from an order dismissing child and spousal maintenance – respondent who was sought to be made liable to pay maintenance died before the appeal judgment- the death of the person liable to pay maintenance terminates any action seeking future maintenance - can interim maintenance be discharged retrospectively under the FLA and whether the issue arising from the discharge of the interim orders survives on appeal irrespective of the death of the respondent?

B. Legislation:

- 1. Family Law Act 2003 (“FLA”): ss. 95, 97, 98, 99, 162, 165, 167 and 172.**

Cause and Background

1. This is an appeal against the order of the Family Division of the Magistrate's Court dismissing the wife's application for maintenance of the 2 children and herself. The Court had also ordered that the interim order for the maintenance for the children and the wife be discharged retrospectively from 29 October 2015 and consequently ordered that any monies paid in the Registry after that date be returned to the respondent.
2. The reason for refusal of the maintenance was based on the ground that the respondent did not have the ability to pay child maintenance and that the wife was capable of gainful employment to support herself. He has had one leg amputated owing to severe diabetes and was on wheelchair. He received rent from two houses totaling to \$500.00 per month which was his sole income that he needed to support himself. It was found that he was also not able to be gainfully employed in the future.

The Appeal

3. Aggrieved at the decision, the wife appealed. She raised 4 grounds of appeal. The grounds are that the court erred:
 - a. *in law when it failed to address the law on the duty of step parent.*
 - b. *in law and in fact when it failed to consider all the financial resources available to the respondent.*
 - c. *in law when it vacated the interim child maintenance retrospectively from 29 October 2015 without stating any valid reasons.*
 - d. *in law when it directed to withhold child and spousal maintenance without stating any valid reasons.*
4. The wife seeks the following orders on appeal:

- a. *That the child maintenance orders be granted for the two children as per the interim orders.*
 - b. *That the interim child and spousal maintenance be effective until the date of the judgment, that is, 12 April 2016.*
 - c. *That the wife be entitled to claim all pending maintenance from 29 October 2015 until 12 April 2016.*
5. The parties agreed to deal with the issues on appeal by way of written submissions. The counsel for the respondent did not file the written submissions despite several opportunities being granted. I decided to proceed to rule on this matter with the appellant's submissions and all other information available in the court records.

Law and Analysis

6. Before I deal with any ground of appeal, I must state that the respondent man died before the appeal judgment in the matter was delivered. I was informed by a letter from the respondent's daughter about the death of the respondent when she wrote and wanted a ruling to be delivered in this case.
7. I called for the death certificate and the original death certificate was provided to me. Since the respondent has passed away, the part of the appeal that requires an order for future maintenance against him cannot be maintained. The right to continue the appeal proceedings does not survive against the estate.
8. In that regard I need not deal with the issue of whether there should be an order for payment of future maintenance for the children and the spouse. All that survives from the grounds of appeal is whether it was proper to cancel the interim maintenance orders retrospectively from 29 October 2015 and whether it was proper to direct the Registry on 13 January 2016 to hold the monies paid after 29 October 2015.
9. The issues of cancellation of interim maintenance retrospectively from 29 October 2015 and of withholding the maintenance monies survives the death of the respondent due to

the operation of ss. 99 and 165 (5) of the FLA. These sections states that the recovery of arrears due under an order which has ceased to be in force is not affected due to the death of the party liable to pay maintenance. I will deal with these surviving issues later. Let me first outline the law based on which I find that any issue for future maintenance cannot be maintained.

10. There are certain provisions of the law which states that an order for payment of the maintenance stops after the person liable to pay dies. S. 98(1) of the FLA states that a child maintenance order in relation to a child stops being in force on the death of the person liable to make payments under the order. S. 165 (1) (b) of the FLA also states that an order with respect to the maintenance of a party to a marriage ceases to have effect upon the death of the person liable to make payments under the order.
11. The above provisions have the effect of terminating any pending applications for maintenance against the deceased person. If an order ceases to have effect upon the death of the person liable to pay maintenance, then the proceedings too cannot continue under the FLA. There is no point in making an order just to terminate it on the grounds that the person liable to make the payments has died.
12. However, if the parties had entered into any financial arrangement to make lump sum payments and the agreement was approved by the court then the same could be enforced against the estate. Further, an agreement which states that periodic payments can be enforced on the legal representative of the person liable to make the payments, is binding on the legal representative. This is clearly spelt out in s. 172 (11) of the FLA. It reads:

“Where a maintenance agreement has been approved by a court as provided by this section, then –

(a) Unless the agreement otherwise provides, the agreement (other than a provision in the agreement providing for the payment by way of maintenance of a periodic sum) continues to operate notwithstanding the death of a party to the agreement and operates in favour of ,and is binding, the legal representative of that party; and

(b) If the agreement so provides in the agreement providing for the payment to the person by way of maintenance of a periodic sum continues to operate notwithstanding the death of any party to the agreement who is liable to make payments pursuant to that provision and is binding on the legal representative of that party, notwithstanding any provision in the agreement, does not continue to operate after the death of the person who is entitled to receive those payments”.

13. The appeal before me does not concern a maintenance agreement that was approved by the court. The action before the lower court was a claim for maintenance for the children and the spouse which cannot be continued against the estate now.
14. There are some matter that remains for me to resolve. The first is that of the cancellation of the interim order retrospectively. This needs to be looked at from both the legal and factual position.
15. The second issue that survives and needs consideration is whether the court had properly ordered the Registry to withhold the monies paid after 29 October 2015? The order to withhold the monies was made on 13 January 2016. The hearing was completed on that day and the respondent had informed the court that he had not paid the interim maintenance from October 2015 as he was unable to do us given his financial constraints.
16. There is a provision for modification of child maintenance orders. The provision is s. 97 (9) which allows for a second order to discharge the first order retrospectively. If that is the legal provision on modification of child maintenance then there is nothing wrong in applying that legal provision to interim orders. The court is simply varying the interim orders by discharging the same. If the respondent did not have the means to pay the maintenance all along the proceedings, then the order in the first place was unjustified. There is a similar provision for spousal maintenance which is s. 167 (9) of the FLA.
17. Now to the facts of the case. I need to examine whether the court was correct in fact in making the discharge of interim orders retrospective. If yes, then the order for

withholding of the monies is only to the advantage of the appellant as she will now not need to look for funds to pay back the same. She would otherwise have to pay back the monies. S. 97 (9) states that ***“if an order discharging the first order is expressed to be retrospective to a specified day, amounts paid under the first order since the specific day may be recovered in a court which has jurisdiction under this Part”***. S. 167 (9) has similar provisions.

18. The respondent has had his knee amputated in 2015. He was not working and solely reliant on income from his rent which totaled to \$500.00 per month. He was a sickly man. He needed that money himself to survive. He was not able to work. He had a dairy shop which was run by the wife but he cannot be expected to run the dairy shop given his health condition. He needed assistance himself as he was on a wheelchair. Running a shop requires physical energy and stability. The respondent did not have that to be expected to derive income from his resources.
19. His wife could support herself and the two children from the chicken business that she has had experience in running and managing. She also has a business under the style of Pacific Professional Tiling. She had been given time to give evidence that this business was not running and she failed to give evidence to this effect. That cannot go in her favour. She clearly mentioned in her evidence at page 154 of the records that she is well and capable to find an employment.
20. I find that the order for interim maintenance was wrongly made and the wife had been collecting the same on an improper order to the financial disadvantage of the respondent. When the court heard the matter completely on 13 January 2016, it had an inclination of the unfairness the respondent had been suffering under an interim order and therefore it made a prudent decision to order that any monies paid after 29 October 2015 be withheld in the Registry and it had also vacated the interim order on the same day. The respondent had clearly informed the court that he did not pay the maintenance after October 2015. In that circumstance, any order to vacate the interim orders from 29 October 2015 was fair to both the parties.

21. The court did not discharge the orders retrospectively from the date it was made, that is, 21 May 2015. If the order was made retrospective from that date, then the wife would have had to return a large sum of money. The court did not make any orders for her to return the money she had wrongly received from 21 May 2015. She had been uplifting the monies under an erroneous interim order. I see no reason for her complaints. There is unjust enrichment on her part and not the respondent.

22. I find that the appeal for future maintenance cannot proceed due to the death of the respondent. In respect of the payments made under the interim order and the discharge of the same retrospectively from 29 October 2015, I find that the orders were made based on the respondent's means and is justified in the circumstances of the case.

Final Orders

23. In the final analysis, I make the following orders:

(a) The appeal is dismissed both on the grounds that the death of the respondent terminates any proceedings for future maintenance and that it was just and fair to cancel the interim orders from 29 October 2015.

(b) Each party shall bear their own costs of the appeal proceedings.

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Hon. Madam Justice Anjala Wati

Judge

08.03.2023

To:

- 1. Legal Aid Commission for the Appellant.***
- 2. Ms. Noleen Karan -Legal Aid Commission for the Respondent.***
- 3. File: Appeal Case Number: 0004/2016 (15/Naw/0141).***