

IN THE FAMILY DIVISION OF THE MAGISTRATE'S COURT AT SUVA

FILE No: Maintenance 0725 of 2007

BETWEEN:

JC
Applicant

AND:

ML
Respondent

APPEARANCES/REPRESENTATIONS

Mr. Nawaikula N of Nawaikula Esquire for the Applicant

Ms. Vulimainadave K. for the Respondent-.

RULING

BACKGROUND FACTS

1. The Applicant man filed a Form 5 Application dated 09th September 2011, seeking an order “for **variation of revocation** of spousal maintenance” \$50.00 per week dated on the 19th December 2007.
2. The Respondent lady was duly served and the Respondent lady filed her Form 6 Response on the 19th September 2011. The respondent in her Form 6 inter alia states that she is not a live-in house girl and the money received from Applicant/man is not sufficient for her and also disagrees for the maintenance to be ceased or revoked as she does not have any other means to support herself.
3. The matter was set for Hearing on the 11th of June, 2014.

Issue

4. Whether the spousal maintenance should be ceased as sought by the Applicant(or to continue as sought by the respondent)?

The Evidence

Applicant's Evidence

5. The Applicant man gave sworn evidence on the 11th June 2014. In Examination-in-chief and stated that he is currently unemployed and is 56 years old. He stated that he had devoiced from the Respondent/lady on 30th December 2008 and remarried to one Ms. A on the 19th March 2009.
6. Further stated that he was working at Social Welfare Department and received more than \$600.00 a fortnight and he retired at the age of 55 on the 12/03/13. On retirement he got his FNPF and paid \$26,000.00 to the Respondent as ordered by court. Currently he is studying at the University of the South Pacific and his wife provides for his basic needs.
7. The applicant also stated that after his retirement he worked in an NGO and then stopped working in June 2013.
8. Further the Applicant stated that the Respondent lady was working as a "house girl" (domestic help) at 00 Fletcher Road, and earns \$50.00 a week. Also he stated that "he heard" she is earning \$100.00 from a Doctor as she works at a doctor's house as well.
9. Furthermore the Applicant man stated that he cannot afford to pay \$100.00 as his state of health is not stable. He is suffering from headache and sometimes has shortness of breath. He said that he went to a Doctor today, on the date of hearing (11th of June, 2014) as he was sick yesterday. He also stated that on 10th of June, 2014 he was sitting for the exam (Bachelors of Law) in the USP.
10. On cross-examination the applicant stated that he is unemployed and sickly so it is difficult to pay maintenance. But failed to produce any evidence/ supporting documents/ medical report when requested evidence to support his inability to pay maintenance.
11. He also stated that he pays his tuition fees per Semester to the USP, in the sum of \$2383.00 and there are 2 semesters to complete to obtain his Law Degree and also said that he gave a loan (\$10,000.00,) to a friend from his FNPF he is paying now and from that money he caters for his studies.

Respondent's Evidence

12. The respondent gave evidence on oath. She stated that she is 53 years old and currently lives with a cousin of hers at Nasova.

13. She further stated that she is suffering from diabetes, high blood pressure and poor vision.
14. She stated that she used to babysit but stopped babysitting from 2011, because she was sick and was not strong enough to look after children. She also said that she has no property or no any source of income.
15. Furthermore Respondent lady stated that she wants the maintenance to be continued, because she cannot work and also stated that when she reach the age of 55, she can get her FNPF money.
16. The Respondent lady stated that she buys clothes and food from the maintenance she gets and contributes to utility bills.
17. In cross-examination the respondent referred her clinic book to the counsellor in regarding for high blood pressure, but she didn't have proof of evidence for the alleged poor vision.

The Law

18. Section 167 of the Family Law Act enables a party to seek modification of **spousal maintenance** orders and so far as material to the present application, reads as follows:

(2) The court must not make an order increasing or decreasing an amount ordered to be paid by an order unless it is satisfied –

(a) that, since the order was made or last varied –

(i) the circumstances of a person for whose benefit the order was made have so changed;

(ii) the circumstances of the person liable to make payments under the order have so changed;
or

as to justify its so doing:

(b) that, since the order was made, or last varied, the cost of living has changed to such an extent as to justify its so doing;

(c) in a case where the order was made by consent-that the amount ordered to be paid is not proper or adequate.

...

(3) Subsection (2) does not prevent the court from making an order varying an order made before the date of the commencement of this Act if the first-mentioned order is made for the purpose of giving effect to this Part.

(4) In satisfying itself for the purposes of subsection (2) (b), the court must have regard to any changes that have occurred in the Consumer Price Index.

(5) The court must not, in considering the variation of an order, have regard to a change in the cost of living unless at least 12 months have elapsed since the order was made or was last varied having regard to a change in the cost of living...

(10) For the purpose of this section, the court must have regard to the provisions of **section 157** or 162 as the case may be. (Emphasis added)

19. I now draw my attention to Section **155** of the Family Law Act 2003 which reads as follows under the heading of the “*Right of spouse to maintenance*”

A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party if reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately, whether-

- (a). by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
- (b). by reason of age or physical or mental incapacity for appropriate gainful employment; or
- (c). for any other adequate reason,
- (d). having regard to any relevant matter referred to in section 157.

20. The above mentioned sec 155 referred to in section 157 and retrieve to consider any relevant matters referred to the section.

21. Section 157 provides that in "*exercising jurisdiction under section 155, the court may take into account only the following matters-*

- (a). The age and state of health of each of the parties;
- (b). The income, property and financial resources (including any interest in leasehold or real estate which is inalienable) of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;
- (c). Where wither party has the care or control of a child of the marriage who had not attained the age of 18 years;
- (d). Commitments of each of the parties that are necessary to enable the party to support-
 - (i). Himself or herself; and
 - (ii). A child or another person that the party has a duty to maintain;
- (e). The responsibilities of either party to support any other person;
- (f). The eligibility of either party for a pension, allowance or benefit under.
 - (i). Any law of Fiji Islands or of another country; or
 - (ii). Any superannuation fund or scheme, whether the fund or scheme was authorized or operates within or outside of the Fiji Islands.

- (g). The rate of any such pension, allowance or benefit being paid to either party;
- (h). A standard of living that in all circumstances is reasonable;
- (i). The extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earnings capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;
- (j). The extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity property and financial resources of the other party;
- (k). The duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;
- (l). If either party is cohabitating with another person, the financial circumstances relating to the cohabitation;
- (m). The terms of any order made or proposed to be made under Section 161 in relation to the property of the parties”.

22. In taking into account the income, earning capacity, property and financial resources of a party to the proceedings, the Court must have regard to the capacity of the party to earn and derive income, including any assets of, under the control of or held for.

Brief Analysis:

23. In this matter the applicant rely on the fact that the respondent lady is engaged in an employment as a house maid. He is of the opinion that the respondent has capacity for appropriate gainful employment and is able to support herself adequately. This was disputed by the respondent.
24. Now, the court to consider whether the applicant establish in court or proved on balance of probabilities that the applicant is able to support herself and the applicant is unable to support her. And also the court also to consider the criteria under section 167, 155 and 157 of the FLA.
25. The respondent stated that she is currently unemployed and she is not a live-in housegirl and the money receives by Respondent as maintenance is not sufficient for her maintenance. She is staying with a cousin of hers and has to give her contributions for the day to day living expenses. She also submitted that she does not have any other means to support her.
26. Australian cases point to the view holding that a maintenance order is a personal liability which ceases on death. The Australian position was summarised by Jacobs, P in *Lake v. Quinton* [1970] 1 NSWLR 111, 113-4. This case also was adopted in *Doyle v Doyle* [1999] FJCA 63; [1999] 45 FLR 262 (12 November 1999)

27. “Section 87(1) (h) of the Matrimonial Causes Act provides that the Court in exercising its powers under the part of the Act dealing with ancillary relief may do any or all of a number of things, including making a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order. One of the powers which the court can exercise under that part of the Act is that referred to in s.84(1), namely, to make such order it thinks proper in proceedings with respect to the maintenance of a party to a marriage....It is strongly arguable that a majority of the Court, which of course would bind this Court, held as part of the *ratio decidendi* of the case that any order made under the Matrimonial Causes Act is purely personal to the parties, and, whatever its terms, comes to an effectual end upon the death of one of the parties. The decision was considered at some length by this Court in *Felton (formerly Oser) v. Oser*. It was held by this Court in the latter case that *Johnston v. Krakowski* is authority for the view that under the Act orders for maintenance must be made during the lifetime of the spouses. The High Court was divided upon the question whether, provided the order was made during the lifetime of the spouses, it could in any way be enforced after the death of the party against whom it was made. Kitto J. with whom Windeyer J. and Owen J. agreed took the view that the order could have no force whatsoever after the death of the party.”
28. The dissenting judgment of Hutley, JA in *Lake v. Quinton* [1973] provides a contrary view on s.104(2) of the Australian Act.(i.e. s.101(2) of the Fiji Act)
- “An order for the ex-spouse’s life should mean what it says. Nor should decrees of courts, particularly of superior courts be qualified or cut down so as to have an effect other than their transparent effect, unless imperatively necessary. A decree of a court should be an instrument that parties are able to act upon without any suspicion of hidden limitations. This is particularly so in the field of divorce. The property arrangements and orders for maintenance may be the divorced spouse’s sole support for the rest of his or her days.”
29. It is also a duty of the court taking into account the income, earning capacity, property and financial resources of a party to the proceedings, the Court must have regard to the capacity of the party to earn and derive income, including any assets of, under the control of or held for.
30. In making a spousal maintenance variation order under section 167(2), the court is required to consider the criteria laid down in section 157, that are susceptible to change such as "*the age and state of health of each of the parties*"; "*the income, property and financial resources...and the physical and mental capacity of each of them for appropriate gainful employment*" and "*if either party is cohabitating with another person-the financial circumstances relating to the cohabitation*". See *Sigamani v Pati* [2013] FJHC 317; Appeal LBS0002.2012 (24 May 2013) by Hon. Justice A. L. B.Brito Mutunayagam.
31. As discussed above, there are 03 statutory tests in S.155 of the FLA. Now, the court to consider whether the applicant is unable to support herself adequately pursuant to section 155 of the FLA. The spousal maintenance is based on section 155 of the Family Law Act 2003. The Court should consider followings before ordering spousal maintenance. Those are the incapability’s of the Applicant lady and these are as follows;

32. By reason of having care and control of a child of the marriage who has not attained the age of 18 years: In this matter the parties have no issues out of the marriage and the parties do not have a child in their care and control.
33. By reason of age or physical or mental incapacity for appropriate gainful employment: The Applicant did state that she has medical problems but no evidence was provided to substantiate.
34. For any other adequate reason: The Applicant is living with family where she needs to contribute and has to solely cater for the food and also other expenses.
35. The evidence before me is narrow to show to the educational, professional qualifications, capacity to earn and derive income by the respondent. The respondent is 53 years of age and was married to the applicant for 25 years. The spouse seeking spousal maintenance should be “unable to adequately support herself” for one the reasons set out in section 155; and on the other hand the Respondent must be reasonably able to maintain the Applicant spouse.
36. In this backdrop, I consider Judgement dated 19th December 2007 (maintenance) and Judgement dated 24th October 2008. The Judgement inter alia read that the wife was basically a homemaker throughout the 25 year of marriage life with the applicant husband. The court ordered that \$20,300.00 together with prevailing rate of interest payable by FNPF calculated with effect from date of said judgment to be paid to the wife for an application of distribution property by wife. So, the monies in the FNPF of her share of property distribution.
37. It was contended that the applicant is incapable of paying maintenance, since he is 56 years and is sickly.
38. I wish to recap above analysis; the applicant had testified that his ailments prevented him from working. He testified suffers from shortness of breath and pressure when there is a weather change. He also said that he “was sick yesterday (10th of June, 2014) and also he sat for the exam (Bachelors of Law) in the USP. He also said that he went to a Doctor today, on the date of hearing (11th of June, 2014) as he was sick day before. The applicant also failed to provide any medical certificate or report to show about the medical condition in him. He failed to establish that how his alleged medical condition prevents him to engage a gainful employment. He also failed to establish that he is medically unfit to work. In other words, the applicant did not adduce any evidence to say that he is not in a correct physical and mental state to engage in a gainful employment. I also note that there is no need for production of medical certificates to believe or disbelieve that a party has gone through any medical condition. But the medical reports would have substantiated the statements but omission of the same does not discredit a party’s evidence. See paragraph 34 of JC v MTL FLA, HCT case No. 07/SUV/0725 by her Ladyship Justice A. Wati.
39. But, the applicant’s evidence shows that he sat for an exam at the USP despite of his alleged sickness. It is clear that the alleged sickness did not prevent him from his studies and

examination. Therefore; I reject his evidence in respect to his medical condition. In short, there is no evidence before me to indicate that the respondent was medically unfit to work

40. It is also noteworthy to consider that the applicant is perusing higher education to become a legal practitioner. According to him the respondent only has qualification to become a house maid.
41. He also failed to produce any admissible evidence as to how he is paying his tuition fees for the Degree. There is no any evidence before this court to show that the applicant lend \$10,000.00 to a friend of his and the said friend is paying back his money to him to cater for his education. I find that the respondent's testimony as regards his health conditions, income, his further studies and as to how he pays the education related expenses is contradictory and lacks credible.
42. The applicant also failed to adduce any evidence as to his financial commitments to support himself or another person. He stated his current wife provided for the family. Thus, he does not have any responsibility to support anyone else other than the respondent.
43. In the *Marriage of Beck* (No. 2) [1983] FLC 91-318 which was referred to in the *Rokobuli v Douglas* FJMC Family Court Case Number 09/LTD/0082, the Court had specified that "...ability to pay...must be judged in the light of all circumstances, mental and physical resources, money of his disposal, capital position and current necessary expenditure..."
44. It is to be noted that the applicant is paying maintenance as \$50.00 per week. On one hand, it is also noted in the respondent's form 6 dated 13th September 2011 shows her weekly income was \$60.00 but she is currently unable to engage in a gainful employment and is unable to support herself adequately. On the other hand, I also note that when the order for maintenance granted the applicant was employed alas a Social welfare officer and earned net fortnightly salary of \$587.27 and he was retired when he attained age of 55. After his retirement he worked in an NGO and then stopped working in June 2013 and now perusing studies to become a legal practitioner. Wherefore, the court also has to consider the changes of the circumstances' of the applicant pursuant to s. 167(2) (ii) of the FLA.
45. The respondent had said that currently she does not receive any income. She is suffering from diabetes, high blood pressure and poor vision due to cataract removals. Though respondent did not produce a medical certificate, I did accept her evidence that at this stage of life she is no enjoying best of health.
46. Currently, she solely relies on the maintenance payment by the applicant. Thus the respondent's day to day survival becomes a matter of paramount importance and consideration.
47. I also note that the applicant seeks to cease maintenance stating that it has become known to him that the respondent is employed as a live-in house girl at 00 Fletcher Road, Vatuwaqa. But, he failed to adduce any evidence before the court to support his position. In particular, the applicant failed to prove on balance of probabilities that the respondent is engaged in a gainful employment.

48. Comparing the, earning capacity of the both parties, I am of the view that the (respondent) is unable to support herself adequately and the applicant if reasonably able to support the respondent to cater for her maintenance.
49. Accordingly, the applicant's contention does not constitute a valid ground to cease paying spousal maintenance. A party is statutorily required to continue to pay maintenance. I am satisfied that the applicant in a position to engage in a gainful employment maintain the respondent.
50. In the attended circumstance, I hold the applicant has ability to earn and pay comparing the earning capacity of the both parties;

THEREFORE, I MAKE FOLLOWING ORDERS:

51. The Application for Spousal maintenance to be reduced forthwith.
52. The Applicant to pay \$30.00 per week forthwith as Spousal maintenance to the maintenance section of Suva.
53. The spousal maintenance to continue until the respondent/lady attains age of 55 years.
54. Parties to bear their own costs.
- 30 days to appeal.

LAKSHIKA FERNANDO

RESIDENT MAGISTRATE

On this 08th day of September 2014