

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

FILE No: Maintenance 0231 of 2008

BETWEEN:

L R

Applicant

AND:

K T

Respondent

APPEARANCES/REPRESENTATIONS

Mr Nainima (Legal Aid Commission) for the Applicant

Mr. Tuberi for the Respondent

RULING

BACKGROUND FACTS

1. The Applicant lady filed Forms 5, 12 and 23 applications dated on the 13th March 2014 seeking an order “for continuation of child maintenance” in the sum of \$300 per fortnight. The 3 children are all above the age of 18 years, that is, LT is 23 years old and attending FNU studying engineering; KRT is 20 years old and attending Fulton College learning to be a teacher; finally, RVUT is 19 years old and studying to become a nurse at Fiji School of Nursing. .
2. The Respondent man was duly served and the Respondent filed his Form 6 Response on the 30th April 2014. The respondent filed his Form 6 disagreeing for the maintenance to be continued.
3. The matter set for Hearing on the 31st of July, 2014 which proceeded and the Applicant case being closed. The Respondent asked for adjournment for his lawyer to be present to conduct his case, thus, it was adjourned to 4th August, 2014, as they were not prepared and further adjourned to 27th August 2014 for continuation of hearing.

Issue

4. Whether the child maintenance should be continued as sought by the Applicant?
5. Whether Respondent KT is capable or having the capacity to pay and continue payment of the same amount of \$300.00 maintenance fortnightly as he was paying previously.

The Evidence & Brief Analysis:

6. The court noted that the learned Resident Magistrate, Mr Maika Nakora on the 08th July 2007 had granted an order increasing child maintenance for the 3 children only until they attain 18 years of age.
7. The evidence of the parties were derived from the following sources:-
 - a. Form 5 Application and the applicant’s oral testimony under oath.
 - b. Form 6 Application and the respondent’s oral testimony under oath.
 - c. Applicant’s submission
 - d. Respondent’s submission
 - e. Examination as to means of the respondent

8. The Parties were separated in 2005, although the Respondent man was ordered to pay maintenance of \$300.00 per fortnight for the 3 children since 1993 while Husband and Wife were still living together.
9. Maintenance order was made in 1993, it continued for 12 years before they were separated in 2005 and continued payment until divorce in 2012, the Applicant mother was receiving \$300.00 maintenance for 3 children per fortnight for the three children, which was deducted directly from source or from his salary.
10. Currently the children are all above the age of 18 years and all attend tertiary institutions. LT is 23 years old and attending FNU studying engineering; KRT is 20 years old and attending Fulton College learning to be a teacher and TVUT is 19 years old and studying to become a nurse at Fiji School of Nursing.
11. The mother testified that she has been the only one supporting the children, with no help at all from the Respondent.
12. She is employed as a market vendor and also sells cakes in D, Bua at Vanua Levu and from the little income she earns and she has to send to Suva for her 3 children to go to school.
13. Due to no financial help from the Respondent, she had to take out a loan from others at Bua to assist the 3 children in Suva pay for their educational expenses.
14. LT is a current student at FNU studying engineering. He is under no scholarship whatsoever. The Applicant has to take out a loan from her family in Bua to pay for his Hostel accommodation and meals that costs around \$2,117.76 per semester. Apart from that she has to struggle to make ends meet and try to pay for school fees that cost around \$1,577 per semester, stationary, books, toiletries, beddings, laptop, practical uniform attires, photocopying and printing money, etc.
15. KRT is a current student attending Fulton College learning to be a teacher. Likewise above, the Applicant has to take out a loan from her family in Bua to pay for his Hostel accommodation and meals. He is not on any scholarship. The Respondent man has not taken part to finance his education, additionally, the Applicant has to bear more loans and seek family help to pay for her child's school fees, stationary, books, toiletries, beddings, laptop, practical uniform teaching attires, photocopying and printing money, etc.
16. RVUT is a current student attending Fiji School of Nursing learning to become a nurse. He is on a government loan scheme that only pays for accommodation and meals at the institution. The loan scheme does not pay for school fees, books, stationary, medical kit, beddings, toiletries, photocopying, printing allowance and neither does it pay for practical nursing uniforms. The Applicant has to obtain loans from family as she faces difficulty with no savings or money at bank and resorts to also selling at the market.
17. The government loan scheme provided for only the accommodation of RVUT, has to be paid back to the Government when he works in the future. It would be an added burden for RV as it restricts him from travelling overseas until he clears his entire bond.

18. Exhibits were also tendered in court as evidence of proof that the 3 children were all attending tertiary institutions and only RVUT was limited to loan schemes which only cover accommodation and meals, whilst the other two were although boarding, the Applicant had to cater to pay for their accommodation and meals.

- Exhibit 1 was the groceries receipts
- Exhibit 2 was the bus fare receipts/travelling expenses
- Exhibit 3 was the stationery receipts
- Exhibit 4 was the Application for Tertiary Loan for LT, however, not yet approved.
- Exhibit 5 was the Carpenters Finance Statement
- Exhibit 6 was the invoice for FNU for LT proving his a private student.
- Exhibit 7 was the stationary receipts for RV
- Exhibit 8 was the invoice for Fulton College for KV
- Exhibit 9 was the stationary receipts for KV
- Exhibit 10 was the ANZ bank statement of the Applicant.

CROSS-EXAMINATION & RE-EXAMINATION OF APPLICANT'S EVIDENCE

19. The Respondent himself when cross-examining the Applicant was able to bring out that;

- The Applicant whilst in Suva was working at FNU
- Throughout the years, the Respondent man has been supporting through child maintenance paying \$300 per fortnight prior to the children attaining 18 years old.

20. The Applicant when re-examined by counsel was asked to clarify and elaborate on the issue above stated in cross-examination. She explained that

- a. Not all 3 children were funded through loan schemes. Only RVUT was funded through loan scheme for only accommodation and meals only. The scheme does not pay for tuition fees, books, stationary, beddings, allowances, printing, photocopying, etc. Because the Respondent does not support in any financial assistance the Applicant has to loan from other family members.
- b. The older 2 children; LT and KRT are not on scholarship or loan scheme, however, they do board and stay at the hostels of which is paid by the Applicant after she has obtained loans from family members.
- c. She is only working in Suva at FNU under a 3 month contract as a cleaner. The reason is because; she has to stay in Suva for this pending court case as she has to come all the way from D, Bua, in Vanua Levu. Thus, she has to work to support her struggling 3 sons and obtain money to pay off the loans which she took from family members to put her children through tertiary institutions and help them obtain a decent education.

- d. The Applicant also stated that although Respondent was ordered by the Court to pay \$300 per fortnight for child maintenance prior to them attaining 18 years, however, he was not even consistent with payments although he had the means.

RESPONDENT'S EVIDENCE

21. The Respondent during the hearing of this matter dated 27th August 2014 gave evidence and also was tested of his means in terms of his capability to continue payment of child maintenance on the basis of special circumstances.

22. The Respondent also whilst giving evidence stated that;
 - a. He was married to the Applicant lady and divorced now.
 - b. He is now married again and his wife is unemployed.
 - c. All 3 children are on government loan schemes.
 - d. On some occasions he meets up with the children and gives them money.
 - e. He said that he does not have enough to pay \$300 per fortnight because he is paying for his legal lawyers service fees, bills to pay and fully supports his elderly mother.
 - f. He is presently terminated from Public Works Department (PWD) his first and previous employer, where he was employed as a Supervisor Technical High Grade. The Respondent is now employed temporarily as a Site Supervisor for PMC Solutions and earns around \$429.89 on an average fortnight with much lesser salary compared to his previous employer.
 - g. The Respondent submits that while employed as a Supervisor with PWD he was receiving above \$600.00 per fortnight, and he was able to pay maintenance of his Family at \$300.00 per fortnight. In comparison to his current employment and salary he is receiving less per fortnight, therefore, he cannot continue payment of his maintenance order previously ordered at \$300.00 per fortnight for his 3 children.
 - h. The Respondent said that the children are schooling and all his three (3) children in Boarding School and all three children's tuition and school expenses are paid under Government Scholarship.
 - i. Furthermore, he said that the Applicant mother is now employed at Fiji National University (FNU) earning salary and submitted that the Applicant lady should now be able to assist in the payment of some of the children's school expenses and daily expenses, rather than depending on him to pay for all expenses. He also said that he is now married again with his own burden to take care of.

- j. He also said that he does not have any savings and when asked how much maintenance could the Respondent pay, in answer, the Respondent said he only can afford to pay \$20.00 per child towards special circumstances per week.

CROSS-EXAMINATION OF RESPONDENT'S EVIDENCE

23. He has 5 other siblings that bear the burden to look after his aged mother. Thus, not only he is the only person fully supporting his mother.
24. There is no proof to furnish to court to show that the 3 children are all on full scholarships or any loan scheme whatsoever to cover their tuition fees and school expenses.
25. The Respondent relies on the fact that the Applicant lady is engaged in an employment. He is of the opinion that the Applicant is able to support the children with the scholarship adequately. This was disputed by the Applicant.
26. 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.
27. The courts also notes that the farther filed a F5 in October 2013 seeking the maintenance of the children to be ceased as them attained age of majority. I note that as it was addressed in the order given on 8th July 2007(child maintenance for the 3 children only until they attain 18 years of age.) .Also notes the maintenance already ceased by the farther when the children attained age of majority. Therefore, that particular matter has taken its own course. Also, more or less some of the concerns in respect to that form 5 also could cover in this same proceeding.

The Law

28. The Applicant made this application for educational purposes pursuant to **Section 92 (1) (a)** of the **Family Law Act 2003** of Fiji.

Children who are aged 18 or over

- 92.-(1)** A court must not make a child maintenance order in relation to a child who is aged 18 or over unless the court is satisfied that the provision of the maintenance is necessary-
- (a) to enable the child to complete his or her education; or
 - (b) ...
- (2) A court must not make a child maintenance order in relation to a child that extends beyond the day on which the child will turn 18 unless the court is satisfied that the provision of the maintenance beyond that day is necessary-
- (a) to enable the child to complete his or her education; or
 - (b)

29. The Court also considered sec 97 of FLA provides the factors that a court has to consider discharge, suspend, revive, increase, decrease or vary a maintenance order which is in force. It is clear that some of the provisions are discretionary while some of the provisions are mandatory.
30. The Court also noted the provisions governing the modification of child maintenance orders is outlined in Division 7 of the Family Law Act No. 18 of 2003 and in particular Sections 97 (1), (2), (3) (c) (i), (ii), (iii) (b) (c) (d) and 5.
31. The respond submits that there is nothing on the Ruling of learned Resident Magistrate (as he was then) Mr Salesi Temo to indicate that the increase maintenance of \$100 per week for the 3 children to continue until they attained 18 years or over 21 years for that matter. The respond submits the eldest child who was always living with Respondent father, was working under employment before he was asked to go back to school.
32. The Court also consider below mention sections for clarity.

Power of the Court

- 89.-(1) in proceedings for a child maintenance order, the court may, subject to this Division, make any child maintenance order it thinks proper. (2) The court must, in accordance with the following sections-
- (a) consider the financial support necessary for the maintenance of the child; and
- (b) determine the financial contribution, or respective financial contributions, towards the financial support necessary for the maintenance of the child that should be made by a party, or by parties, to the proceedings.

Considering what financial support necessary

- 90.-(1) in considering the financial support necessary for the maintenance of a child, the court must take into account the following (and no other) matters-
- (a) the matters mentioned in section 91;
- (b) the proper needs of the child;
- (c) the income, earning capacity, property and financial resources of the child.
- (2) In taking into account the proper needs of the child the court-
- (a) must have regard to-
- (i) the age of the child;
- (ii) the manner in which the child is being, and in which the parents expect the child to be, educated or trained; and
- (iii) any special needs of the child; and
- (b) may have regard, to the extent to which the court considers appropriate in the circumstances of the case, to any relevant findings of published research in relation to the maintenance of children.
- (3) In taking into account the income, earning capacity, property and financial resources of the child, the court must-
- (a) have regard to the capacity of the child to earn or derive income, including any assets of, under the control of or held for the benefit of the child that do not produce, but are capable of producing, income; and

- (b) disregard the income, earning capacity, property and financial resources of any other person unless, in the special circumstances of the case, the court considers it appropriate to have regard to them.
- (4) Subsection (2) and (3) do not limit the matters to which the court may have regard in taking into account the matters referred to in subsection (1).

Matters to be taken into account in determining contributions that should be made by party etc.

- 91.**-(1) In determining the financial contribution, or respective financial contributions, towards the financial support necessary for the maintenance of a child that should be made by a party, or by parties, to the proceedings, the court must take into account the following (and no other) matters-
- (a) the matters mentioned in section 90;
 - (b) the income, earning capacity, property and financial resources of the party or each of the parties;
 - (c) the commitments of the party, or each of the parties, that is necessary to enable the party to support-
 - (i) himself or herself; or
 - (ii) any other child or another person that the person has a duty to maintain;
 - (e) the direct and indirect costs incurred by the parent or other person with whom the child lives in providing care for the child;
 - (f) any special circumstances which, if not taken into account in the particular case, would result in injustice or undue hardship to any person.
- (2) 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 the benefit of the party that do not produce, but are capable of producing, income. (3) In taking into account the direct and indirect costs incurred by the parent or other person with whom the child lives in providing care for the child, the court must have regard to the income and earning capacity foregone by the parent or other person in providing that care. (4....
- (5) In determining the financial contribution, or respective financial contributions, that should be made by a party, or by parties, to the proceedings, the court must consider the capacity of the party, or each of those parties, to provide maintenance by way of periodic payments before considering the capacity of the party, or each of those parties, to provide maintenance-
- (a) by way of lump sum payment;
 - (b) by way of transfer or settlement of property; or
 - (c) in any other way.
- (6) Subsections (2) to (5) do not limit the matters to which the court may have regard in taking into account the matters referred to in subsection (1).

33. The respondent submits to consider that the children are above the age of 18 years and cannot be asked to be maintained under the child maintenance, also submits that they are above the age of a child. The respondent also submits inter alia that the Applicant is now employed and receiving weekly salary and the children should be encouraged to take up part-time employment and to work

to assist themselves rather than depending on others as the Respondent is now married again and he has his own family to support.

34. The respondent also submits that the three children during the school terms or semesters, lived and remain at school as boarders and are well looked after by the Government Education system.
35. He submitted that he also looks after his old parent and extended family who lives in his home and he is attached and required by his elders to take part in his village and Family commitments, and supporting his elderly mother and wife's elderly parents;
36. According to 89(b) the respondent has priority over all commitments to maintain his children subjected to this proceeding.
37. Moreover, Fiji has ratified the Convention on the Rights of a Child and therefore the courts are duty bound to adhere to the covenants which are established therein.
38. Article 27.1 and 2 which virtually says:

“Every child has the right to a standard of living adequate for his or her physical; mental, spiritual, moral and social development. Parents have the primary responsibility to ensure that the child has an adequate standard of living.”

39. Last but not the least Article 41 which says:

“Whenever standards set in applicable national and international laws relevant to the right of the child are higher than those in this Convention, the higher standard shall always apply.”

Conclusion

40. Pursuant to sec.89, above all other commitments the Respondent has prime duty to maintain his children. The court also inter alia considered Sections 90 and 91 of the FLA the matters to be taken into account when the maintenance payment is ordered as above discussed. The court also considered sec.89 of FLA.
41. The Respondent according to the evidence, earned \$650.00 per F/N when he was working in the PWD. Currently he earns \$420.00 per F/N. (difference, less \$230). Part F of his F6 shows that he spends \$250.00 for his expenses and \$150.00 for children and \$50.00 for others totalling \$ 450.00 per week and accordingly \$ 900.00 per F/N. It clearly shows that the respondent spends extra \$480.00 per fortnight.
42. For interest of justice I refer to the evidence the respondent given in his examination as to means. In his evidence he stated that he lives with his wife and no children. But he also caters for his mother's groceries also. It also revealed in evidence that the respondent's mother lives separately with respondent's other siblings.

43. The Court noted that the respondent was evasive and gave evidence to show that he was left with virtually nothing. And, he pays extra \$ 480.00 F/N. Accordingly, The Court finds from the means examination that the respondent has not given his true financial position and is evasive.
44. I take all the circumstances in this case to an account, having noted the evidence of the respondent the court concludes that he had the ability to pay more than the offered to pay. The Respondent deems to have means and capacity to pay the maintenance. Moreover, The Respondent has legal duty to maintain the children. The court also noted the respondent received extra \$230.00 when the order for maintenance was granted.
45. The court notes his obligation to support his family. On the same token, I wish to highlight that the **parents** have a primary duty over the commitments to maintain his children. Section 86 of the Act defines the primary duty of the parents of a child:
- (1) The parents of a child have, subject to this Division, the primary duty to maintain the child.
 - (2) Without limiting subsection (1), the duty of a parent to maintain a child-
 - (a) is not lower priority than the duty of the parent to maintain any other child or another person;
 - (b) has priority over all commitments of the parent other than commitments necessary to enable the parent to support-
 - (i) himself or herself; or
 - (ii) any other child or another person that the parent has a duty to maintain; and
 - (c) is not affected by the duty of any other person that the parent has a duty to maintain; *(Emphasis added)*
 - (d) Furthermore, the children are all in tertiary institutions anticipating completing their education.
 - (e) From the Applicant's evidence in court, it is also clear that the Applicant's financial status and circumstances to support and assist the children has changed, for example:
 - (f) The Applicant mother is now employed and earning;
46. Furthermore, the children are all in tertiary institutions anticipating completing their education.
47. From the Applicant's evidence in court, it is also clear that the Applicant's financial status and circumstances to support and assist the children has changed, for example: The Applicant mother is now employed and earning; On the same breath I wish to highlight that the Applicant mother has to struggle to make ends meet and try to pay for school fees, stationary, books, toiletries, beddings, laptop, practical uniform attires, photocopying and printing money, etc.
48. Furthermore, I note that pursuant to Section 91 (d) the Applicant mother also has to incur indirect cost and other relevant expenses when she is caring for the children. I also note that she provides a shelter for the children and provides their other requirements and labours to up for the success of the children's future.
49. I am also of the view that the application by the Applicant is well within the ambit of the enabling **statute**, therefore the application is meritorious pursuant to **Section 92 (1) (a)** of the **Family Law Act 2003** of Fiji.

50. The court also mindful that the Respondent has been terminated from PWD and although has been working in another company, he does not have the same salary and He is now married again.

51. In the light of above paragraphs, Comparing the, earning capacity of the both parties, I make following orders;

THEREFORE, I MAKE FOLLOWING ORDERS:

52. The Application for Child maintenance to be continued.

53. The Respondent to pay \$ 40.00 per week per child (Total \$120.00) forthwith as Child maintenance to the maintenance section of Suva for the 03 children namely; LT, K RT and RVUT.

54. The Child maintenance to continue until the three children completes their tertiary education. In particular, LT, engineering at FNU; KRT, Fulton College teacher training programme and RVUT nursing studies at Fiji School of Nursing.

55. Parties to bear their own costs.

30 days to appeal.

LAKSHIKA FERNANDO

RESIDENT MAGISTRATE

On this 22nd day of January 2015