

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

FILE No: 16/SUV/0038

BETWEEN:

**L D M B
Applicant**

AND:

**J B R R
Respondent**

APPEARANCES/REPRESENTATIONS

Ms. Savou M. V. (Pacific Chambers) as Counsels for the Applicant

Ms. Raijeli T. (MRV Legal Consultancy) as Counsel for the Respondent

RULING

INTRODUCTION

1. The Applicant lady had filed a Form 5 Application on the 13th July 2016 seeking the Respondent to pay maintenance for the children namely; **TR** a female child born on 17th July 2005 and **ER** a male child born on 25th February 2010 (hereinafter “**the children**”) in the sum of \$200.00 per child per month.
2. This application was opposed and the Respondent has filed an Amended Form 6 application on 20th July 2016, offering \$300 per month for the children.
3. Parties were given an opportunity to agree on an amount however attempts were unsuccessful.

4. The matter initially set for Hearing on the 27th March 2017 and the Applicant case being closed on the said date. Respondent is living in France Applicant lady confirmed her consent for Skype hearing. The Respondent's evidence was adjourned to enable the respondent to be present through Skype. Subsequently the matter was adjourned to 21st April 2017 for continuation of hearing.

ISSUE

5. Child maintenance.

EVIDENCE

The Applicant

6. The Applicant gave sworn evidence on oath and in Examination-in-chief applicant mother stated that the children are currently residing with her at Laucala Bay and their ages are respectively 07 and 11 years and they attends MP and SA respectively.
7. The Applicant stated the below expenses in court.
- a. School Books - \$5.00 p/w (stationaries, books, projects and colouring)
 - b. Taxi fare - \$55.00 p/w
 - c. Shoes – 02 sets per year (beginning of term)
 - i. \$99.00 (girl)
 - ii. \$45.00 (boy)
 - d. Uniform
 - i. \$65.00 (girl)
 - ii. \$55.00 (boy)
 - e. Lunch - \$50.00 p/w
 - f. Homemade - \$90.00 p/w (Fruit Juice , Sandwiches)
 - g. Levy - \$50.00 per year
 - h. Fund raisers - \$50.00 (Family Fun day / School functions)
8. I also note, the below listed expenditure by the Applicant in her Form 5.

ITEM	FOR CHILDREN
Food	100.00
Household supplies	40.00
Electricity	20.00
Water	20.00
Clothing and shoes	7.00
Fares/car parking	60.00
Education expenses, including fees and levies	40.00
Medical	10.00
Entertainment allowance (Weekends)	50.00
TOTAL	347.00

THE LAW

9. I now draw my attention to Section 45 of the Family Law Act 2003. **Parental responsibility** is defined under Section 45 of the Family Law Act 2003, which states:

*“parental responsibility”, in relation to a child, means **all the duties, powers, responsibilities and authority** which, by law, parents have in relation to children.*

10. Section 46 of the Act states that:

- (1) **Each of the parents of a child who is under 18 years has parental responsibility for the child.**
- (2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents such as becoming separated or either or both of them marrying or remarrying.
- (3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

11. Sections 90 and 91 of the Act outline the matters to be taken into consideration before maintenance payment is ordered.

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 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).

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 are 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;
 - (d) the direct and indirect costs incurred by the parent or other person with whom the child lives in providing care for the child;
 - (e) 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) The court also mindful about sec.89 of the FLA as well. I note that pursuant to Section 91 (d) the Applicant mother has to incur indirect cost and other relevant expenses when she is caring for the child. I also note that she provides a shelter for the children and labours to up bring the children.

12. 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)

13. Parental responsibility is defined under Section 45 of the Family Law Act 2003, which states:

“parental responsibility”, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

14. Section 46 of the Act states that:

- (1) Each of the parents of a child who is under 18 years has parental responsibility for the child.
- (2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents such as becoming separated or either or both of them marrying or remarrying.
- (3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

ANALYSIS OF THE EVIDENCE

15. The parties were married on the 14th July 2005 and parties got divorced in 10st April 2016.

16. The parties have 02 children namely; **TR** a female child born on 17th July 2005 and **ER** a male child born on 25th February 2010. The children are currently reside with the applicant mother since separation.

17. Application of Section 90: ;

(a) The age of the children:

The considered the ages of the children.;

(b) The manner in which the child is being, and in which the parents expect the child to be, educated or trained: The children engaged in formal education.

18. Application of Section 91:

(a) the income, earning capacity, property and financial resources of each of the parties:

Applicant:

19. The Applicant is currently working currently based in Suva and earns \$541.64 per week. The Court considers his Form 5 dated (part F) for expenses for the children and also considers the other relevant expenses of the children as per the evidence.

Respondent:

20. Currently based in France working at a GTL company, he works from 7am-12 midday, Tuesday- Friday. He earns £650-710 per month. He informed this Court that he cannot afford \$400 per month in maintenance.

21. According to the Form 6, the Respondent's-Income per week is \$650.00.

“ITEM	FOR YOU
Food	150.00
Electricity	100.00
Telephone	32.00
Clothing and shoes	20.00
Motor vehicle – petrol	30.00
Maintenance	30.00
Fares/car parking	12.00
Cleaning	50.00
Rent	10.00
Sporting Clothes	30.00
Rugby Licence	11.40
Tax	29.00
Medical Insurance	16.50
Children Maintenance	75.00
TOTAL	633.40”

22. Respondent Man was asked about his contract with the Rugby club, and he admitted the club pays for most his expenses as stated in the table above.
23. It was put to him that he is able to afford \$400 per month given the figures, that is, his earnings from the Courier/Freight and payment of his living expenses by the Rugby Club. But he denied.
24. FLA provides that it is the duty of both parents to maintain their child as above quoted. I will consider the income or the earning capacities of both parties and how much each party needs to maintain himself or herself and any other person he or she is required to maintain.
25. Section 86 is authority for the view that a parent's primary duty is to maintain their child and this duty supersedes all other commitments apart from commitments that a parent requires to survive.
26. In the current application this duty should be extended to the Respondent because by law it is mandatory.
27. In addition to this, Fiji has also ratified the Convention of the Rights of a Child therefore courts are duty bound to adhere to the covenants which are established therein.
28. The first of the article which comes into mind is Article 3.1 which reads:
- "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."**
29. Secondly, 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."**

30. Under Section 88(1)(a) of the Family Law Act 2003, the Applicant has a right to apply for child maintenance:

"88.-(1) Unless subsection (2) applies, a child maintenance order in relation to a child may be applied for by-

- i. either or both of the child's parents
- ii. a person representing the child under an order made under section 125: or
- iii. any other person concerned with the care, welfare or development of the child. "

31. It is considered that the application by the Applicant is well within the ambits of the enabling statute and is meritorious.

32. This Court of the view that the amount sought by the applicant is a reasonable amount for two children. Even though when we look at the full amount \$400.00 per month seems to be a bigger numeral but father paying \$50.00 per child is seems not too exorbitant. Even mother contributes \$50.00 per week per child \$100.00 per child per week is a reasonable amount.(as an example)

33. According to Form 6 the respondent earns \$650.00. But his evidence to suggest that the Respondent earns more than that and clearly he has ability to generate income. He also rugby player and the court considered the contract he entered with "SOV". According to the said contract he receives 450 euros for accommodation, gas and electricity 90 euros ,water 13, lodgement tax 40 and vehicle insurance 60 euros per month.

34. I conclude that the Respondent has gainful employments and is in a position to financially assist the applicant with the upbringing of their children as the respondent is their biological father. On the same note, the Court also wishes to remind the mother to utilize the maintenance monies wisely and manage it properly thinking the future of the children.

THE ONUS OF PROOF

35. The onus of proof in family a matter is civil one that is on the balance of probabilities.

36. Accordingly, In the light of above paragraphs, I make following orders;

IT IS HEREBY ORDERED THAT:

- (i) The Respondent shall pay **\$400.00 per month (\$200.00 per child)** forthwith as child maintenance for the children namely; **TRa female child born on 17th July 2005 and ER a male child born on 25th February 2010**, until the children attains 18 years of age or further Order of the Court to the maintenance section Suva.
- (ii) If the child attains the age of 18 and still needs financial support if the child is unable to maintain themselves because of a mental or physical disability then the Applicant is at liberty to apply for the maintenance to continue.
- (iii) Either party is at liberty to apply for variation pursuant to Section 97 of the Family Law Act 2003.
- (iv) Pursuant to sec. 98 of FLA the maintenance for the child stops being in force:

- (a) on the death of the child;
 - (b) on the death of the Respondent;
 - (c) on the death of the person entitled to receive payments under this order;
 - (d) If a child to whom a child maintenance order applies dies, is adopted, marries or a declaration has been made under section 69(3), or the child has entered into a relationship with another person that would render the making of the maintenance order unreasonable
- (v) Should the Respondent fail to pay two consecutive payments; Applicant is at liberty to apply for a Judgement Debtor Summons to enforce the Order.
- (vii) Parties to bear their own costs.

30 days to appeal.

LAKSHIKA FERNANDO

RESIDENT MAGISTRATE

On this 31st day of July 2017