

**IN THE FIRST CLASS MAGISTRATE'S COURT**  
**(WESTERN DIVISION) AT NADI**

**MATRIMONIAL CAUSE**  
**NADI MTCE. C/NO. 41/02**  
**NADI DIV. ACTION NO.57/02**

**BETWEEN:**        **MOLLY ALICE MURPHY**

**COMPLAINANT**

**AND:**                **HUGH NICHOLAS PETRIE RAGG**

**DEFENDANT**

For Complainant        :        Ms. L. Vaurasi

For Defendant         :        Ms V. Patel

**JUDGMENT**

Molly Alice Murphy, the Complainant in the case lodged a Complaint in my Court on 8<sup>th</sup> May, 2002 against her husband Hugh Nicholas Petrie Ragg claiming maintenance for herself and her two children on the grounds that her said husband:

- (i) deserted her in August of 2001;
- (ii) has been guilty of persistent cruelty to her and her two children;
- (iii) has willfully neglected to provide reasonable maintenance for her and her two infant children whom he is legally liable to maintain; and
- (iv) has been guilty of adultery with one Christine Julie Jones of New Zealand since 2000.

Her complaint is pursuant to Maintenance and Affiliation Act, Cap.52 (Act).

Section 3 of the said Act lays down eight (8) grounds upon which any married woman could apply to the Magistrate's Court for order or orders as laid down in Section 4 of the Act.

In Fiji it is commonly said that the maintenance payment is based on the fault factor. In other words if the husband is at fault by breaching any one of the alleged eight grounds as laid down in Section 3 of the Act than he is liable to pay maintenance.

The Complainant in the case has raised four grounds as detailed herein before.

After very carefully assessing all the evidence that has been laid before the Court, I have no doubt whatsoever in my mind that the circumstances under which the husband Defendant in the case walked out of the matrimonial home at Qanville Estate, Nasoso, Nadi on 30/4/2002 leaving the complainant and the two children behind, in my view, tantamounts to desertion.

I say this because both the Complainant and the Defendant in its respective submissions does not dispute that the Defendant left the matrimonial home on 30/4/2002.

Further, in Cross Examination he admitted that he left the matrimonial home on his own accord. In Cross Examination he said "Yes, it is correct that I told Complainant that I wanted to move out of the marriage and wanted a divorce. Yes, I did say in Examination in Chief that I have been seeing my Counsel since November last year. I had brought the divorce issue to Molly in April of 2001".

The above clearly shows that the Defendant had already made up his mind of leaving the complainant from some time back. As such his claim that leaving the matrimonial home was his choice but under duress as Complainant had asked him on numerous occasion when he would be leaving is utter nonsense.

In my view since he had already made up his mind to move out of the matrimonial home therefore it was just a matter of days or months when he would have actually deserted the family and left. In other words he would have walked out of the

marriage any day as he had his intentions known to the complainant as far back as April of year 2001.

I would not by just reading the two e-mails Exhibits 8 and 9 addressed to one Christine Julie Jones of New Zealand at this stage rule that the Defendant had committed adultery with her. However, the two e-mails very strongly suggests the Defendant's motive for wanting to leave the complainant and the two children.

To cut the matter short, I hereby reiterate that the circumstances under which the Defendant left the matrimonial home in the case does tantamount to desertion.

Therefore, in view of this I do not see deem fit to look at the other three grounds.

The next issue which I have to consider now is under the circumstances what maintenance should be payable to the Complainant and the two children.

Our Maintenance and Affiliation Act does not define "Maintenance". However, section 4(c) of the Act specifically spells out:

*"that husband shall pay to any officer of the court for the use of the applicant such weekly sum or sums as the magistrate shall, having regard to the means both of the husband and wife, consider reasonable for the maintenance of herself and of each child ... .."*

Butterworths "Family Law Guide" Fourth Edition in Chapter 5 under the heading of "Maintenance" attaches a meaning of maintenance.

*It reads:*

*"Maintenance is defined as the provision of money, property, and services; and includes*

*(a) In respect of a child, provision for the child's education and training to the extent of the child's ability and talents; and*

*(b) While maintenance is normally in the form of direct periodical payments of money, it need not necessarily be so. Thus the payments of*

*mortgage installments, rates, insurance and other outgoing on the matrimonial home occupied by the non-paying spouse many amount to maintenance (s. 35 Domestic Proceedings Act 1968. C.F s.52, Matrimonial Proceedings Act 1963).*

The "Family Law Guide" also states in assessing the amount payable the Court is required to have regard to five matters in order to determine the quantum of the maintenance payable. These five matters are:

- "(i) means of both the parties;*
- (ii) their needs;*
- (iii) the fact that the paying spouse is supporting any other person;*
- (iv) the responsibilities of the parties; and*
- (v) any other circumstances that make one party liable to maintain the other."*

Further, the amount of maintenance calculated in accordance with these rules could be reduced to a level which ensures the maintenance payer, or any dependent ordinarily residing with him, of a reasonable standard of living.

In considering the "means of the claimant" the Court has to make its decision against the background of changing social attitudes and society expectations at that time, and will have to look at the person's circumstances, including age, health, family responsibilities, employment history, career opportunities, financial position, standard of living, what has been done in the past and what the person's wishes are for the future.

In considering the "reasonable needs" the reasonable needs of the applicant are to be taken into account in determining whether there is an initial liability to maintain. The needs of both parties are relevant in assessing the level of maintenance.

Where the Applicant has the responsibility for paying financial liabilities incurred while the parties enjoyed together a higher than average standard of living, the Court

may then consider there are special circumstances and exercise its discretion to take that standard of living into account.

A special case could also be made out where the liable spouse has considerable means and it would not be unfair for a greater share of these means to be paid out in maintenance.

In considering "financial and other responsibilities" both parties ongoing expenses are to be brought into the balance. These in particular will include liabilities under higher purchase agreements, mortgage, loans, insurance and superannuation.

In considering "other circumstances" the Court may have regard to education or training and any mental or physical disability.

In considering "reasonable standard of living" the Court has to be aware that the maintenance payer and dependants ordinarily residing with that person are entitled to enjoy a reasonable standard of living. A reasonable standard of living is more than a bare level of subsistence but is not to be equated with the standard of living enjoyed by the parties while they were living together.

In my most considered opinion the final assessment of maintenance is not to be on strict arithmetical basis. Nor should there be any rule that as a starting point by which to calculate the quantum of maintenance, the recipient should receive one third of the party's joint income.

Furthermore, I am in total agreement with Complainant's counsel that whilst assessing maintenance it is high time the Courts in Fiji instead of giving lip service should give paramount consideration to the interest and welfare of the child.

Fiji has ratified the Convention on the Rights of the Child (CRC) and as such more emphasis should now be given by our Courts to implement those particular articles whilst dealing with any maintenance or divorce proceedings.

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."*

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."*

Last but not the least Article 41 which says:

*"Whenever standards set in applicable national and international law relevant to the rights of the child are higher than those in this Convention, the higher standard shall always apply."*

When talking of standard of living, the Supreme Court of Fiji in Bisun Dayal v. Surbha Wati [Action No. 16 of 1981] said:

*"The principle to be followed in cases of this kind was stated as follows in Kershaw v Kershaw [1964] 3 A.E.R. 6365 at 637:*

*"In cohabitation a wife shares with her husband a standard of living appropriate to his income, or, if she also is earning, their joint incomes. If cohabitation is destroyed by the wrongful act of the husband, the wife's maintenance should be so assessed that her standard of living does not suffer more than is inherent in the circumstances themselves of separation."*

With the best interest of the child concept in mind I dare to add to the above principle after the word "husband" as follows.

*"the wife's and children's maintenance should be so assessed that their standard of living does not suffer more than is inherent in the circumstances themselves of separation."*

In the case before the Court the Complainant, Molly Alice Murphy is 43 years old, has a Masters Degree in Business Administration and works for CAAF as a Public Relations Officer. She earns \$595.00 fortnightly (Exhibit CE No.1). In other words she earns \$1,190.00 monthly.

She also pays \$374.00 per month being repayment for the MBA course she did. This sum is deducted from her salary at source. The repayment would be completed by January, 2003. As such it could be said that she actually earns \$1564.00 per month (\$1190 + \$374).

The Defendant, Hugh Nicholas Petrie Ragg is 44 years old and is a professional helicopter pilot. Currently he works for Pacific Crown Aviation at Nadi Airport and receives a monthly salary of \$2,961.00 net.

They got married on 10/8/1985 and have two children. Both are boys. The eldest Jamie Denis Petrie Ragg is now 16 years old and attends Form 6 at Shri Vivekananda College.

The younger David Gerald Petrie Ragg is 5 years old and attends Nadi Airport Kindy. He has been diagnosed to be suffering from Attention Deficit Hiperactivity Disorder (ADHD) and which according to Complainant means that he has to be seen by a specialist for his speech development and also how he should be handled CE No.5 confirms this.

After the Defendant had left the matrimonial home at Nasoso Nadi on 30/4/2002, the Complainant was left with the responsibility of maintaining the two children and herself.

She gave evidence of the costs of running the house and looking after the children. She had also prepared a record of the monthly expenditure. CE No.6 refers.

I do not deem fit to go into the knitty and gritty of each and every expenditure as detailed at CE No.6 and what came out in evidence but will look at her major expenses which are as follows:

Food	-	\$600 per month
Housegirl (\$50.00 per week)	-	200 per month
Education (\$573.00 per year)	-	47 per month
Pocket Money/Bus Fare (Jamie)	-	100 per month
Clothing	-	60 per month
Utility bill	-	140 per month
Fuel – David	-	60 per month
Miscellaneous Expenses (Movies/Presents)	-	50 per month
Medical Expenses (Jamie)	-	30 per month
Total	-	<u>\$1,287 per month</u>

The above expenses does not include what it costs to put a roof over the children's head.

Complainant's expenses were as follows:

Food	-	\$200 per month
Utility	-	70 per month
Car Maintenance	-	30 per month
University Loan	-	374 per month
Miscellaneous Expenses (Books)	-	130 per month
Total	-	<u>\$804 per month</u>



In order to put a roof over the children's and her head she claims that she has to retain the matrimonial home which they currently live in at Qanville Estate, Nasoso, Nadi comprised in Certificate of Title No. 17517 being Lot 19 on Deposited Plan No. 4386 as in CE No.3.

The matrimonial home is currently mortgaged to ANZ Bank and the mortgage repayment she would now have to make to retain this house is \$1,851.00 per month plus \$65.00 per month for the house and fire insurance – CE No.4 refers. Besides this she also has to pay the land rate. Unfortunately no figure has been given for this.

Given all above the Complainant's total expenditure adds up to \$4,007.00 per month. Her salary is \$1564.00 per month and she currently receives an interim maintenance of \$800.00 per month which totals to \$2364 per month. If this sum of \$2,364 is subtracted from \$4,007.00 than it comes to \$1,643.00. In other words according to what she told in her evidence and on basis of the documentary evidence, in particular, C.E.6 which she produced in Court she would require further \$1,643.00 per month to adequately maintain her two children and herself inclusive of providing a roof over their heads.

Therefore, her final submission that \$800.00 a month maintenance she is receiving currently is not sufficient to maintain the children and most importantly it does not provide them with the basic necessity of their home. Hence her claim of \$1,600.00 per month as maintenance payment for the two children and herself.

According to the Defendant's evidence he currently temporarily resides with his cousin and pays \$200.00 per month for food and lodging.

He also tendered to Court a "Projected Monthly Expenses Budget" Defence Exhibit No.1 which details his projected monthly expenses as follows:

Food	-	\$400	
Rent	-	500	
Phone	-	60	
Electricity	-	30	
Water	-	10	= 1,000.00

Car Fuel	-	200.00	
Car Oil Changes x 4(Synthetic oil plus filter) \$400 per year	-	33.33	
Tyres (Factory Standard) (\$1,200.00 per year)		100.00	
Repairs Average \$500 per year	-	41.66	
Cleaning Supplies (Detergent, Polish, etc.) \$120 per year		10.00	
Registration/Fitness 5000 cc. \$304.00 per year.	-	25.33	
Third Party \$80 per year	-	6.66	= 416.98
Pilot's Licence Renewals			
(2 per year at \$22.00)	-	3.67	
Pilot's Medical (Two per year at \$130.00)	-	21.67	
Driver's Licence Renewal	-	13.50	= 38.84
Income Insurance Premium (Av. \$155.60 per month)	-	200.00	= 200.00
Clothing (\$400 per year)	-	33.33	
Shoes (\$300 per year)		25.00	= 58.33
Entertainment		2000.00	- 200.00
<b>TOTAL</b>			<b><u>\$1,914.15</u></b>
Children's Maintenance (\$200.00 per week)			866.67
<b>GRAND TOTAL</b>			<b><u>\$2,780.82</u></b>
Net Income Per Month		2961.00	
Balance			<b><u>\$ 180.18</u></b>

**DECISION**

First and foremost I must say that it is rather sad to note that after almost seventeen (17) years of marriage the Defendant has decided to quit.

Nevertheless, it is his choice and I as the adjudicator in the case has been burdened with the task of fixing the maintenance for the Complainant and the two children.

The Defendant has now filed a divorce proceeding suit in the Court and, in Court's view, the maintenance claim would have been best dealt with together with the divorce action.

However, because of the immense difficulties now being faced by the Complainant on Defendant leaving the matrimonial home as she now has to provide basically all the needs of the children and herself and above all she somehow in the interim has to retain the matrimonial property to at least provide a roof over their heads, I decided to deal with the maintenance issue first on request of the Complainant's Counsel.

As such any maintenance order that I would be making in the case would be subject to both the Maintenance and Affiliation Act, Cap.52 and Matrimonial Causes Act, Cap.51.

One further clarification I would like to make at this juncture is that whatever maintenance order I would be making in the case is being done with the matrimonial property settlement in mind pertaining to the divorce proceeding.

To begin with, it is very clear from the evidence before the Court that the parties enjoyed together a reasonable higher than average standard of living. This I say was only possible because both held good jobs with good salary in particular, the Defendant. In the same token I would like to further add that this was the very reason why they were able to build a substantial house at Qanville Estate, Nasoso, Nadi and afford a monthly mortgage repayment of \$1,851.00 plus \$65.00 for the household insurance.

Therefore, this being the case than the Court is deem to take into consideration their standard of living before the break-up in assessing the quantum of maintenance payable to the complainant and the two children in the case. The case of Bisun Dayal v. Subha Wati (supra) citing this principle in the case of Kershaw v Kershaw (supra) also says so.

After looking at the expenses of the Complainant and in particular her exhibit CE.6 I would not say that it is too extravagant. However, I must warn the complainant that in order to meet the cost of running the house and to provide a roof over the two children's head and herself she has to be more discreet in her spending. What I actually mean here is that she has to make few sacrifices, particularly, in the magazines etc., she is buying, her food and meat bills and in the using of the utilities.

By looking at the Defendant's "Projected Monthly Expenses Budget" Defence Exhibit No.1 I must say first and foremost that it is only a projected budget only and as such cannot be taken as his actual expenses for the sake of assessing the quantum of maintenance in the case.

Secondly, it seems to have been hurriedly prepared with little documentary evidence to support it and just for the sake of showing Defendant's possible expenses.

Thirdly, if one looks at it very closely and subject to his own evidence in Cross Examination few of the expenses claimed in it is not quite correct and misleading.

I again reiterate that I would not like to go into the knitty and gritty of each and every expense but would like to point two of his claims which is apparently quite deceiving. First is the claim of \$200.00 per month for "Car Fuel". Secondly \$100.00 per month (\$1,200.00 per year) for the "Tyres".

In Cross Examination he admitted that the company he works for provides him with a vehicle with all expenses paid for inclusive of fuel costs and this is the vehicle that he normally uses. He also stated in Cross Examination that he need to retain his expensive car especially for the use of his two children for access purposes. It is best known to him how many times he did have access to the children during the last four and half months.

Further, I am sure he does not buy tyres every year. It is common knowledge amongst vehicle owners that when a new set of tyres is bought, no matter of how inferior quality, definitely, it is meant to last for more than a year or unless one uses his vehicle excessively.

Here in the case before me the Defendant had admitted in CE that he uses the company vehicle most of the times so where is the justification for claiming \$100.00 per month (\$1,200.00 per year) for the "Tyres".

As to complainant's Counsel contention of Defendant spending \$120.00 per year on detergent, polish etc. I think it is best left to the conscience of the Defendant.

However, as stated earlier Defendant's expenses is a projected budget only. The truth is that at this point in time of deciding the maintenance claim his actual expenses are \$200.00 per month which he pays to his cousin for food and lodging plus some other small miscellaneous expenses.

As such, I am pretty sure as a caring father and person which he professes to be and in accordance with his own evidence that the best interest of his children be of foremost importance, he is currently in a position to fork out a bit more than \$800.00 month interim maintenance for the two children. At the same token I am sure he would like to assist his wife of almost seventeen (17) years by paying her some maintenance until she sorts out and re-organises her life and that of the two children.

So, at the end of the day the Complainant has been left to fend for herself and the two children especially where one child has been diagnosed to be suffering from Attention Deficit Hyperactivity Disorder (ADHD).

I reiterate that the Defendant could or should pay more than \$800.00 per month as he has already acknowledged in his emails to Christine Julie Jones that the Complainant and his two children will need more than \$2,000.00 per month to continue with their lives  
- Exhibit CE8.

Last but not the least both the parties have the capacity to earn more. Complainant has now completed a MBA course and the Defendant has all the experience, skill and knowledge to fill in the vacant post of Chief Pilot at Pacific Crown Aviation.

Further, the Complainant is also eligible for a company house and it is my humble view that she should be exploring this avenue as well.

Therefore, with all above in mind and in particular, the best interests of the children and the Means Report which recommends that the current maintenance be increased to meet children's standard of living and loan repayment, I hereby in upholding Complainant's submission order that the custody of the two children be given to the Complainant and the Defendant pay a maintenance of \$1,600.00 per month, that is, \$150.00 each per week for the two children and \$100.00 per week to the Complainant with effect from today until 31<sup>st</sup> January, 2003 and thereafter at the reduced rate of \$1,200.00 per month, that is, \$125.00 each per week for the two children and \$50.00 per week to the complainant.

I have made this order bearing in mind that the Complainant is currently paying \$374.00 per month towards the cost of completing her MBA course and which repayment should be complete by January, 2003.

Further, that the children and the Complainant for the time being have a roof over their heads.

In passing, I would only like to say that if the Defendant moves out in future on his own and his expenses and conscience dictates that there should be a variation in the present maintenance order than he is most welcome to knock the doors of my court.

Delivered today 19<sup>th</sup> September, 2002 in Open Court.

  
[D. Balram]

Resident Magistrate