

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

**FILE No: Maintenance 0138 of 2011**

**BETWEEN:**

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**Applicant**

**AND:**

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**Respondent**

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**APPEARANCES/REPRESENTATIONS**

Ms. Mishra N.L (Legal Aid Commission) for the Applicant Lady

The Respondent - Absent and unrepresented

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## RULING OF THE COURT

### BACKGROUND FACTS

1. The Applicant mother had filed a Form 5 Application on the 25 June 2014 seeking an Order to vary the child maintenance sum from \$70.00 per fortnight to \$150.00 per fortnight for the child namely; *NG* (“*Child/ NG*”) female born on 19 October 2010. Payment of the maintenance has been done through direct deduction from the Respondent Man’s wages.
2. As per record, the Respondent was duly served the Form 5 application. But the Respondent neither filed his Form 6 Response nor appeared before the court or represented.
3. Matter was then fixed on the 15 March 2015 for hearing/ formal proof on the application. On the date of hearing also the respondent was absent and unrepresented. Subsequently the matter was proceeded on formal proof and the applicant filed her affidavit evidence with the leave of the court.

### 4. Issues and Determinations

- In determining whether the Maintenance Order is to be varied, the Court has to consider whether:
  - (a) the circumstances of the child, the Respondent the Applicant, has changed; or
  - (b) the cost of living has changed in the last 12 months since the Order was made.
- Under what circumstances can the maintenance order be varied; and have the circumstances changed since the Order was made to justify the variation? If affirmative then:
  - (a) What is the financial support necessary for the maintenance of the children; and
  - (b) What is the financial contribution by the Respondent towards the maintenance of the children?
  - (c) Whether the child maintenance should be increased from \$70.00 per fortnight to \$150.00 per week as sought by the Applicant?

### Evidence

5. The Applicant filed Affidavit evidence (evidence in chief).
6. Applicant mother stated that at the time this Court had ordered that the Respondent Man pay \$70.00 per fortnight, *NG* had been 1 years old or was about to turn 1 years old.

7. NG is now 4 years 5 months old and her expenses are increasing due to an increase in cost of living and basic food items and my wages remains constant with no increment or bonuses being paid out to the Applicant which makes it difficult for the applicant to better provide for NG. Applicant submitted a copy of Applicant's payslip from ML, her place of employment, where the Applicant is the receptionist.
8. Aside from the increase in the cost of living which is one of her concerns, the Applicant also concerned about the expenses that NG will start incurring when she starts going to kindergarten and Primary school once she attains the age to do so.
9. As NG is about to turn 5 years old, the Applicant wish to enrol her into kindergarten, which she verily believe will mean that her expenses will further increase and the current maintenance of \$70.00 per fortnight will not suffice.
10. Whilst NG is unable to attend kindergarten until she turns 5 years, applicant enquired into her attending day care to allow her to familiarise herself with other children her age.
11. However, due to it being expensive, that is \$40.00 per week which is equivalent to \$80.00 per fortnight or \$160.00 per month, mother was not able to enrol the child into day care but rather have had to rely on her current husband (whom she recently married in January 2015) and/or her sister her husband be too busy to assist with NG's daily care.
12. Given the applicants inability to enrol NG into day care to allow her to develop her social and inter personal skills, mother has started to buy her educational books to allow her to start her learning process, which she believe is very important for her.
13. As NG is growing older, the applicant having to spend a lot more money on groceries so as to ensure that she is a well-nourished and healthy child. Applicant submitted receipts showing monies spent on groceries.
14. Moreover, as NG is still growing, the applicant having to spend a lot of constantly buys her new clothing and shoes. As applicant is unable to afford brand new clothing, she resorts to buying NG's clothes from pre loved stores such as Bargain Box. Applicant submitted receipts from Bargain Box highlighting monies spent on purchasing NG's clothing. Admittedly, applicant will buy new clothing for NG but only when the applicant sees that there is a need to.
15. Whilst the applicant is particular with respect to how much money is spent and the reason money is spent especially in relation to NG, there are occasions when the applicant will allow for a treat and buy her little trinkets or jewellery and/ or snacks. Applicant submitted receipts highlighting such expenses.
16. Further, before filling the applicants Form 5 application for an increase in maintenance, the applicant had requested the Respondent Man if he could help out a little more in terms of NGs expenses however the Respondent had not been forthcoming in assisting in anyway.

17. At the time when the current maintenance of \$70.00 per fortnight had been ordered, the applicant was aware of the respondent man working as a Police Officer for the Criminal Investigation Department (CID). Applicant verily believes that he still works there.
18. With respect to ascertaining how much the respondent man may currently be earning, the applicant had made attempts but has been unsuccessful as such information is considered confidential and is not released to anyone aside from the employee.
19. **Given the increase of cost of living as well as an increase in basic food items and the fact that the child NG will be starting kindergarten soon which will essentially mean more expenses** will be incurred, the applicant seeks for an order for an increase of child maintenance.
20. The represented applicant also failed to submit any pay advice slip or any other evidence in respect of the respondent's income or financial background.

### **The Law**

21. I now draw my attention to Section 97 (2) of the Family Law Act 2003 (FLA) which provides that the Court can discharge, suspend, revive, increase, decrease or vary a maintenance order which is in force. The section reads that;

The Court may, by order –

- (a) discharge the first order if there is just cause for so doing;
- (b) suspend its operation wholly or in part and either until further order or until a fixed time or the happening of a future event;
- (c) if the operation of the order has been suspended under paragraph (b); revive its operation wholly or in part; or
- (d) subject to subsection (3), vary the order –
  - (i) so as to increase or decrease any amount ordered to be paid by the order; or
  - (ii) In any other way.

22. Section 97 (3) provides that "The Court must not vary the order so as to increase or decrease any amount ordered to be paid by the order unless the Court is satisfied –

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

- (i) the circumstances of the child have changed so as to justify the variation;
  - (ii) the circumstances of the person liable to make payments under the order have changed so as to justify the variation;
  - (iii) the circumstances of the person to receive payments under the order have changed so as to justify the variation;
  - (iv) in the case of an order that operates in favour of, or is binding on, a legal personal representative - the circumstances of the estate are such as to justify the variation;
- (b) that, since the order was made or last varied, the cost of living has changed to such an extent as to justify the Court so doing;
  - (c) if the Order was made by consent – that the amount ordered to be paid is not proper or adequate; or
  - (d) that material facts were withheld from the Court that made the Order, or from a Court that varied the Order, or that material evidence previously given to such a Court was false.”

23. S. 97(3) provides that a maintenance Order may be varied provided that on each occasion adequate grounds are established to justify the variation.

24. S.97(5) provides that 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 last varied having regard to a change in the cost of living.

25. S. 97(11) stipulates that in performing its functions under this section, a Court must have regard to the provisions of Subdivisions A and B (to the extent applicable).”

26. The above mentioned 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.

### **Analysis of the Evidence**

27. In light of above discussed S.97 of FLA now I turn to the case at hand. First of all, I consider the applicant’s evidence in respect to this variation of maintenance. The court notes that the maintenance order was granted on the 15 May 2012.

28. Now, the other issues before me are to consider whether the circumstances of the Child has changed since the granting of the Order, the changes of cost of living and changes to the

circumstances of the child including other determinations which discussed under sec. 97 of the FLA. As noted, The last application for maintenance order was made on 15 May 2012, almost 3 years ago.

29. Given the increase of cost of living as well as an increase in basic food items and the fact that the child NG will be starting kindergarten soon which will essentially mean more expenses will be incurred, the applicant seeks for an order for an increase of child maintenance.
30. Considering the evidence the court consider that she fulfilled the requirements to consider variation of maintenance.
31. The mother also submitted evidence to justify the expenses from \$70.00 a fortnight to \$150.00 per fortnight for the child.
32. The applicant also works as a receptionist and earns \$326.00 per fortnight. I also wish to accept her expenditure for the child is \$ 173.00 per week. Now, I turn to the most curtail question. That is whether this court could grant the variation of maintenance as sought by the mother?
33. 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.

34. The Applicant Lady is employed and she caters for the needs of the children from the maintenance payment of the respondent and from her pay. 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 child and labors to up bring the child.

35. Now, I turn to “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.*

36. 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 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).

37. 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)*

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### **Conclusion**

38. As I have discussed above, I am of the view that it is fair to consider variation of maintenance of the child as circumstances deems to have changed since the granting of the Order since 2012.
39. It is clear that should the court granted the maintenance as sought by the applicant, there would be several mandatory requirements to consider by the court and applicant would need to establish the requirements which has discussed in the above paragraphs. In particular, the Court cannot overlook the provisions of Sections 90 and 91 of the FLA. To do otherwise would be to avoid the clear meaning of section 90 and 91 of the Act. Thus, the Applicant obligated to have regard to sec. 90 and 91 of the Act and tender the necessary evidence to consider by this court. It is a mandatory provision which this court required to regard to consider that the Respondent is capable of paying the child maintenance and to consider whether the Respondent farther is in a financial position to pay maintenance.
40. The above discussed failure by the applicant would have resulted to reject any variations sought by her. But for the interest of justice and for the best interest of the child, I perused the proceedings of this matter carefully and noted that the respondent has not been appearing before the court since 6 July 2011. The court also granted the maintenance order in 2012 on formal proof and AN ATTACHMENT OF EARNING ORDER was also granted with effect from 30 August 2011 to FIJI Police Department. I also perused the maintenance record cards and noted that the direct deduction is taking place since the order was granted and the last payment date was on 14 April 2015 and obviously the next payment would be on the next government pay date which is yet to come.
41. There is no any correspondence from the Accountant, Fiji Police Force in the file which indicates that the respondent is not employs after 14 April 2015 and given this circumstances', I am of the view that the respondent still works in the Fiji Police Department. (In the light of the Attachment of earning order.) It is also prudent to note that other than his earning capacity as stated above, I do not have any other evidence as to his financial commitments. On the same token, I also wish to note that the respondent himself deems elected to absent and unrepresented for the maintenance variation application.
42. In this backdrop, I hold the Respondent has legal duty to maintain the children. The court also of the view that the respondent is capable of paying and is in a financial position to pay the below ordered (varied) maintenance and has means to pay and capacity to pay.
43. The court also of the view s above explained d that the employed mother also has a liability to shoulder for the maintenance of child. Therefore, it is not fair, if the court orders the farther to cater for the total sum the mother spending for the maintenance of the child. In the light of above paragraphs, I make following orders;

**IT IS HEREBY ORDERED THAT:**

44. The Respondent to pay increased maintenance of \$100.00 per fortnight for the child with effecting from 12 May 2015 until the children attain 18 years of age or complete (local) education.
  45. However, either party is at liberty to apply for variation pursuant to Section 97 of the Family Law Act 2003.
  46. If the child attains the age of 18 and still needs financial support if the child is unable to maintain herself because of a mental or physical disability then the Applicant is at liberty to apply for the maintenance to continue.
  47. Pursuant to sec. 98 of FLA the maintenance for the child stops being in force:
    - i. on the death of the child;
    - ii. on the death of the Respondent;
    - iii. on the death of the person entitled to receive payments under this order;
    - iv. 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.
  48. Copy of this order to be served to the respondent within 14 days of this order by the applicant and affidavit of service and acknowledgment to be filed in the registry.
  49. Parties to bear their own costs.
- 30 days to appeal.

**LAKSHIKA FERNANDO**

**RESIDENT MAGISTRATE**

**On this 28<sup>th</sup> day of April 2015**