

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA  
APPELLATE JURISDICTION

13/Suv/ 0003

*(Original Case Number: 10/Suv/0400)*

BETWEEN:

LIVAI

APPELLAN  
T

ASENACA

RESPOND  
ENT

<i>Appearances:</i>	<i>Mr. Waqanibete for the Appellant.</i>  <i>No Appearance of Respondent.</i>
<i>Date/Place of Judgment:</i>	<i>Friday 30 October 2015 at Suva.</i>
<i>Coram:</i>	<i>Hon. Madam Justice Anjala Wati.</i>
<i>Category:</i>	All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental
<i>Anonymised Case Citation:</i>	<i>LIVAI v. ASENACA - Fiji Family High Court Appeal Case Number: 13/SUV/ 0003.</i>

**JUDGMENT**

*Catchwords:*

*FAMILY LAW - PROPERTY LAW - Allegation that orders are not capable of being enforced because the wife cannot be found- procedure to pay a person his share of money when that person cannot be located - Appellate Court cannot interfere with orders if merits not challenged.*

**Cause**

1. In the Magistrates' Court, the appellant filed an application that the property of the parties to the marriage be transferred in his name solely.
2. The matter was heard on an undefended basis. The respondent lives abroad with the only child of the marriage who is over 18 years now. The child has been living with the mother since being 12 years old.
3. The original applications have been served on the respondent by substituted service as her actual address was not known. Even the appeal proceedings were advertised.
4. After hearing the evidence of the appellant, the Court came to a finding that the appellant and the respondent had contributed 70: 30 respectively to the property. The Court then, having analysed the “**future needs**” factors, adjusted the parties’ entitlements to 85 % to the appellant and 15 % to the respondent.
5. The specific orders to reflect the contribution were as follows:
  - (i) The **appellant to retain the residential property.**

- (ii) The appellant to pay the respondent her share in the residential property being the sum of \$11,910. Payments can be made in lump sum or by way of periodic payments within 6 months of delivery of the judgment.**
- (Hi) Upon payment of the sum of \$11,910, the respondent shall execute the documents transferring her share in the residential property to the appellant;**
- (iv) The appellant is at liberty to sell his shares in the property to the respondent. In that case the respondent shall pay the appellant his share of \$67,490 and upon receipt of the said sum the appellant shall execute the documents transferring his share in the residential property to the respondent.**
- (v) In the event the said sum is not paid to the respondent or the respondent does not wish to buy the appellant's share, the property can be sold at a price not less than \$110,000. From the sale of the property payments are to be made for all security registered on the property as at the date of the judgment, thereafter the appellant to receive 85% of the balance proceeds and the respondent 15%.**
- (vi) Realization cost relating to the sale of the property to be paid from the proceeds of the sale including the solicitor's fees to prepare the transfer documents.**

***(vii) Unless the parties agree to the contrary, they shall further do all acts and things to sign all documents necessary to sell the property.***

***(viii) Either party is at liberty to apply to the court for appointment of an officer of the court to execute the transfer documents if the other party refuses to execute the transfer document.***

6. The appellant appealed against the orders. His grounds of appeal cannot be comprehended. He says in his grounds that the respondent should pay him \$48,000 because he gave the same for her father's property.

#### ***Submissions***

7. In his oral argument, Mr. Waqanibete stated that their only concern was where to pay the money for the respondent's share as she is residing offshore and cannot be located. He also argued that there is no one to sign the transfer and therefore the order is not in a form that can be enforced.
8. I then questioned Mr. Waqanibete why the monies cannot be paid in someone's trust account for example the Chief Registrar's interest bearing account and the transfer signed by the Registrar of the Family Division. To that he responded that that was an available option.
9. Apart from that he also argued that because the matter was undefended the property should have been transferred to the appellant solely.

### ***Analysis and Orders***

10. I find the appeal to have been brought without any thought. The orders in the form are not challenged on merits. What is said is that if a matter is undefended, the orders should be in favour of the applicant. That submission is very naive in law.
  
11. The evidence established that the respondent had made contributions to the property. Whether her contribution was properly assessed by the Court is not being challenged. It is therefore improper to impeach the orders of the Court without proper reasons and I refuse to interfere with the said orders.
  
12. The question of enforcement is a matter for the appellant to decide. He can make enquiries from his family and friends and ascertain where he can pay the money being the respondent's share. The respondent can be contacted and be asked to provide some account details to deposit the money in. The monies must be paid in her name. If that fails than the appellant can always make an application to the Court that the same be paid in the Chief Registrar's interest bearing account for the respondent. Once the money is paid, an application can be made for the Registrar of the Court to sign the transfer papers.
  
13. I order the appellant to comply with the orders and choose a mode that is convenient to him for enforcement.
  
14. If the appellant wishes to deposit the monies in the Chief Registrar's account for safe keep then an application can be made to the lower court

to extend the orders to that effect.

15. I find that the orders have given the appellant liberty to apply to the Court to appoint an officer of the Court to execute the transfer documents if there is refusal to sign.
16. The appellant must go back to the lower court and establish that attempts have been made to pay the monies and that there is no positive response to comply with the order from the respondent. On that basis the appellant can ask for the orders for enforcement to be modified. Any such application has to be however served on the respondent.
17. Bringing an appeal is not going to rescue the situation. The appeal in any event is baseless and shall be dismissed which I so order.
18. Each party is ordered to pay their own costs of the proceedings.

Anjala Wati

Judge

30.10.2015

To:

1. *LAC for the Appellant.*
2. *Respondent.*
3. *File: 13/SUV/0003.*