

**IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA**

**APPELLATE JURISDICTION**

**ACTION NUMBER:** 13/SUV/ 0015

**BETWEEN:** ASHISH

**APPELLANT**

**AND:** -SHILA

**RESPONDENT**

*Appearances:* Mr. Amrit Chand for the Appellant.

Mr. Sunil Sharma (DLAC) and Mr. Anil Chand for the Respondent.

*Date/Place of Judgment:* Friday 20 February 2015 at Suva.

*Coram:* Hon. Madam Justice Anjala Wati.

*Category:* 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 person is purely coincidental.

*Anonymised Case Citation:* Ashish v. Shila Family Appeal Case 0015 Suv 2013

## **JUDGMENT**

**Catchwords:**

**FAMILY LAW – APPEAL – Child Maintenance – Paternity Disputed in respect of one child – statutory presumption – rebuttal of statutory presumption- inferences to be drawn when a person unreasonably refuses to undergo paternity test- Spousal Maintenance – Spousal Maintenance is not granted as of right – the factors required by the statute must be established - Parenting Orders –Parenting orders must be in the best interest of the children – Default orders on maintenance: how made? Property Distribution procedure in Fiji.**

#### Cases/Texts Referred To:

1. **AK v. RC [unreported] Fiji Family High Court Case Number: 08/Ltk/ 0498.**
2. **FNPF v. RV and JB [unreported] Fiji Family High Court Appeal Case Number: 12/Suv/0017.**
3. **KN v. MYH [unreported] Fiji Family High Court Case Number: 08/Ba/0043.**
4. **Re L [1968] 1 All ER 20.**

#### Legislation:

1. **The Constitution of the Republic of Fiji Islands: s. 9 (2).**
2. **Family Law Act No. 18 of 2003 ("FLA"): ss. 41(2) (a); 41(2) (b); 66(1); 66(4); 121; 133; 135; 136(1); 137; 140; 154; 155; 162.**
3. **The Fiji National Provident Fund Decree 2011 ("FNPF DECREE"): ss. 141(2).**

#### Cause

1. The father appeals against the decision of the Resident Magistrate ("**RM**") of 6 June 2013.
2. Pursuant to the mother's application for maintenance for 2 children and their residence; spousal maintenance; and distribution of property, the Court had ordered that:
  - **The father must pay \$40.00 per week per child in maintenance for the two children, that is, a total sum of \$80.00 per week for the two children.**
  - **In addition, the father must pay 50% costs for all school fees, books and stationeries, and school clothes.**
  - **The father must pay \$20.00 per week as spousal maintenance until the mother finds a permanent job.**
  - **The mother was to calculate the arrears of maintenance which was to be backdated and if upon issuance and service of the Judgment Debtor Summons ("**JDS**"), there was failure to pay the maintenance, the father was to be imprisoned for 10 days on every \$100 default.**
  - **The residence of the two children was to be with the mother.**
  - **The father to have contact of the children if the children wanted to see him. The contact must**

*be exercised with prior arrangement and notification by the parties.*

- *The father was not to exercise contact without the children's wish and the supervision of the mother.*
- *If it was necessary, the children and the parties were to be counseled together.*
- *The mother to have 50% of the father's FNPF, CTCS and insurance dividends.*
- *The household items were not subject to distribution.*

### **Parties Background**

3. The mother was initially married to her first husband. Their marriage was dissolved -in 2005. The decree nisi became absolute -in 2005. I am discussing this marriage for a purpose which would become apparent later in my judgment.
4. The mother then married the appellant father in 2006.
5. Before the parties were married, a child of previous marriage was born in 2003.
6. After the parties were married, a child of marriage was born in 2007.
7. In the elder child's birth certificate, the mother's first husband -is registered as the father. In the younger child's birth certificate, -Ashish is registered as the father.
8. Since the mother had always alleged the appellant to be the biological father of the two children, a DNA test of the elder child, the first husband and the mother was conducted. The DNA test was done - in Sri Lanka. A report was presented by the Lab -in 2012 which excluded the first husband as the father of the child. The material parts of the report reads:  
  
*" ... It can be concluded with 100% certainty that -the first husband is not the biological father of the child -child of previous marriage".*
9. The lower Court made findings that the appellant was the father of the elder child.

### **Grounds of Appeal**

10. For ease, I will summarise the grounds of appeal because if I present it in the form that it was filed, it is cumbersome and very difficult to comprehend. In the grounds of appeal, the appellant's counsel has attempted to present the submissions too.

11. There must be specificity in the grounds of appeal which is seriously lacking in this case: a clear case of poor drafting without proper attention.

12. The appellant says that:

- *The quantum of maintenance in the sum of \$40.00 per week per child is excessive in light of his commitments.*
- *He should not be ordered to pay maintenance and 50% costs for school fees, books and stationeries, and school clothes for the elder child as he is not the biological father of the child.*
- *He should not be ordered to pay 50% costs for school fees, books and stationeries and school clothes for the younger child too as the parents must bear equal responsibility so the mother should be entirely responsible for this expense.*
- *The Court erred in law and in fact in ordering spousal maintenance against him since the mother is permanently employed at Ministry of Information.*
- *The Court erred in law and in fact in making an order for imprisonment against him as he is not in default of arrears of maintenance.*
- *The Court erred in law and in fact in granting residence of the younger child to the mother and supervised contact to him.*
- *The Court erred in law and in fact in ordering 50% distribution from his FNPF, CTCS and insurance.*

#### ***Appellant's Submissions***

13. In respect of maintenance of the children, the counsel for the appellant stated that the mother's first husband is registered as the father of the child and so he is the legal father and he must take responsibility for his welfare.

14. It was argued that the legal father could take away the child one day and supporting the child without being a legal parent is not proper.

15. The counsel argued that the appellant is not the father of the elder child. He only cared for the

elder child out of the goodness of his heart.

16. On the question of quantum, it was argued that the appellant is a -civil servant who earns about \$370 per week in gross. He had given to the Court the breakdown of his expenses which amounted to \$245.75. He further stated that the \$370.00 per week is his gross income. From that amount he has to pay compulsory deductions like “*Pay As you Earn Tax (P.A.Y.E)*” and “*Fiji National Fund Contributions (F.N.P.F)*”. Apart from that he has mortgage, hire purchase and insurance payments to make which he does by instalments. All these deductions amount to \$65.00 per week leaving him with a balance of \$304.00 per week.
17. It was contended that the appellant’s expenses fluctuates by an increase or decrease. After paying all his expenses, he is left with \$60.00. By that calculation the maintenance ordered is exorbitant.
18. A sum of \$30.00 for the younger child is reasonable and not \$40.00. He also needs to save money for emergency purposes.
19. The salary for the civil servants has increased in 2014 but together with that his expenses have increased too and he finds it difficult to pay that amount of maintenance.
20. The counsel for the appellant further argued that the mother had stated her weekly wages as \$249.00 and expenses as \$286.00. This shows that her expenses are more than her income. She is either lying about her expenses or she has more income from other sources which she has failed to disclose to the Court.
21. The Court should not have accepted the mother’s version of the evidence and enquired how her expenses have exceeded her income. The Court ought to have ordered the mother to amend her application to reflect the correct expenses and not relied on the expenses enlisted.
22. The appellant had always disputed paternity for the elder child and the order for him to pay 50% of all school fees, books and stationaries and school clothes is not proper.
23. The appellant did not undergo the DNA test because he did not wish for it. There was no evidence to prove that he was the father of the child. The evidence was that since he looked after and supported the child, he was the father of the child.
24. It was argued that there is no provision in the Family Law Act to declare a person putative father of the child. This was contended on the basis that the word “*putative*” does not appear in the Family Law legislation. That term, it was averred, existed in the old law but not the new law.

25. Mr. Chand directed the Courts attention to the new policy of the government by saying that now the government is paying the full school fees for the children. So the order to pay school fees should be cancelled as no parent has that burden anymore.
26. The appellant submitted that he is only prepared to pay 50% costs for the younger child's school books and stationeries and school clothes. This submission was contradictory to the ground of appeal that the mother should share the responsibility too and thus she should be entirely responsible for this expense of the younger child.
27. On the issue of spousal maintenance, it was argued that the mother is a qualified degree holder and she was already earning \$280.00 per week. The mother said in her evidence that she was not on a permanent employment. However the mother was earning and she did not qualify under s.155 and 157 of the FLA to be awarded maintenance.
28. It was argued that with the kind of wages that the mother was earning, it could be deduced that she was on a permanent cadre of employment. Temporary employments do not fetch that kind of wages.
29. The appellant's counsel also argued that the default orders made against him is improper. It should have been first ascertained whether he was in arrears. The mother had complained of arrears and the appellant had told the Court that he was paying maintenance directly in the mother's bank account. At least the mother should have been asked to produce her bank account before any default orders were made.
30. The way the orders are made is prejudicial. The mother can just take out the JDS and the appellant would be imprisoned. There would not be any opportunity for the appellant to verify any payments not accounted for.
31. If the JDS is issued, the appellant should be called to the Court and if the amount owed as shown on the JDs is found to be correct then the appellant can be examined on how the payment is to be made and orders for payment issued with default orders. If the payment is defaulted then a committal warrant would follow.
32. On the question of parenting orders, the appellant argued that the Court failed to determine the best interest of the children by determining the various factors outlined in s. 121 of the FLA.
33. The appellant is not a violent parent and to deprive him of residence without any proper basis is not correct in law and fact. The appellant was given supervised contact. That supervised

contact, it was argued, would hinder the appellant from spending quality time with his child who needs both parents love and affection.

34. It was also argued that there was danger that the mother could take the children away from Fiji and the appellant be deprived of even seeing his child which would affect his child's rights and welfare.
35. If the supervised contact continues then the mother will have to accompany the child wherever the appellant wishes to take the child and that would not be very conducive given the parties relationship.
36. The appellant was not ordered to have contact unless the children wished. This order has a lot of flaws in that the mother has already brainwashed the children with negative things. They are of tender age and they cannot make decisions for themselves. If they do want to meet the appellant, the children will have to tell their mother and the mother could hinder the contact by brainwashing them again.
37. In regards property distribution, the first property that was dealt with was FNPF. The appellant's counsel argued that s. 154 of the FLA which previously included FNPF as property of the parties to the marriage had been amended by s. 141(2) of the FNPF Decree. The Court therefore was incorrect in taking FNPF in the pool of assets to be distributed.
38. The Court should have also taken into account that the mother had her own FNPF which was not divided and that he had used monies from his FNPF for the mother's education in the University of the South Pacific and therefore her entitlement should decrease if any. If the mother has any entitlement then the amount that should be affected should be from the date of the marriage to the date of separation.
39. In regards the CTCS, shares the appellant's counsel says that no proper evidence was obtained on its current value. The appellant has already terminated the contract with CTCS and the benefits that he had received under that was used to pay for the mother's education. The account is closed and inactive.
40. He has -an insurance policy which is a money back policy. The life of the policy is for another twenty years. He received some dividends under this insurance policy which were also used for paying off the mother's education. All that should have been taken into account and if any further distribution was to occur, the mother's entitlement was for the proceeds that accumulated during the period of marriage.

### ***Respondent's Submissions***

41. Mr. Sharma appearing for the respondent argued that the first husband of the respondent has been medically excluded as the putative father of the child so he is no longer the legal father. His name may be mentioned in the birth certificate but the Court has clarified that issue.
42. The next question that the Court had to consider was whether the appellant was the father of the elder child. The mother's evidence was not challenged that the parties were in a relationship when the child was conceived and born. The father took responsibility for the child since he was born. The father also refused to undergo the DNA which strengthened the mother's evidence on him being the biological father.
43. There were enough reasons why the Court held the appellant to be the father and this Court cannot interfere with the findings of fact made by the Court.
44. On parenting and property distribution orders, Mr. Sharma argued that the Court had to determine the best interest of the children and follow the distribution procedure outlined in the legislation and those identified by the earlier case authorities of the Family Division of the High Court. He particularly relied on the case of ***KN v. MYH [unreported] Fiji Family High Court Case Number: 08/Ba/0043.***
45. Mr. Sharma argued that the above case authority should have been followed as that is the current law justifying division under the Fiji Legislation.
46. Mr. Sharma did however state that perhaps the supervised contact was because the mother had in her evidence stated that the father was a violent man and that was not contradicted by the father and so supervised contact was issued on some basis.

### ***The Law and Analysis***

47. Let me first deal with the issue of who is the putative father of the -child of previous marriage. The person who is registered as his father is -the first husband. The child was born when the mother and -the first husband were still married.
48. The father says that since -first husband is registered as the father, he is the legal father and should support the child as one day he can take the child and his supporting this child will be



meaningless.

49. Under s. 133 of the FLA, a person whose name is entered as a parent of the child in a register of births or parentage information kept under a law of the Fiji Islands is presumed to be the parent of the child. This is not an absolute presumption and is rebuttable by proof on a balance of probability pursuant to s. 136 (1) of the FLA.
50. In this case, the presumption that -the first husband is the father of the child was successfully rebutted by the - DNA - report from Sri Lanka. The DNA report was not challenged by the appellant. There cannot be any other stronger evidence than this to rebut the statutory presumption. The lower Court was therefore correct in holding that -the first husband was not the father of the child.
51. The next issue is whether there was evidence that the appellant was the father of the child. There were several basis upon which the lower Court made a finding of paternity. The first was although the mother was married to -the first husband, she testified that when she conceived this elder child, the parties were dating each other as boyfriend and girlfriend. She used to stay with her parents. The Court accepted the mother's evidence on this issue.
52. Further, the Court found that the allegations of extramarital affairs was levied against the mother but those allegations were made in 2011 and 2012. There were no allegations that she was having sexual intercourse with someone else in year 2003 when she conceived and gave birth to the subject child.
53. The second basis for finding the appellant to be the father of the child was that he took responsibility for the child from a tender age and supported him.
54. The third basis was that the appellant had signed the school report of the child as the father of the child.
55. The fourth basis was that the appellant unreasonably refused to undergo the DNA test and an adverse inference was drawn against him.
56. I will go through each basis and assess the weight it has in determining the paternity. The mother gave evidence that she conceived the elder child from the parties union as boyfriend and girlfriend. When she conceived the child, the father had asked her to abort the child. She tendered in as exhibits ten photos and testified that when the child was born, the father accepted him as his son. She was not living with him but with her parents when she conceived the child.

57. The father did not in his cross examination contradict any of the evidence that the mother gave. In his evidence in chief he stated that he is not the father but he was willing to take responsibility of the child and that he wanted residence of the child.
58. The mother's evidence that the child was born out of the union of the parties was not discredited by the father and I find that that was undisputed credible evidence for the Court to rely on to make a finding of paternity against the father.
59. The second and third basis was that the father has taken full care and responsibility of the child from his tender age and that he signed the child's school report as the father of the child. This evidence was in fact accepted by the father. All this indicates that the father had acknowledged the child as his own child and substantiates the mother's version of the evidence that he is the biological father of the child.
60. s. 135 of the FLA states that ***“ If under the law of the Fiji Islands or of a prescribed overseas jurisdiction, a man has executed an instrument acknowledging that he is the father of a specified child; and that instrument has not been annulled or otherwise set aside, the man is presumed to be the father of the child”***.
61. None of the parties have addressed me on whether the signing of school report could attract such presumption. I nevertheless find that the father had acknowledged that the elder child is his biological child.
62. The final basis to find paternity was the adverse inference from the father's refusal to undergo the DNA test. -In 2012, the mother wanted the father to undergo DNA test. She was even willing to pay for the costs of the test but the father denied without giving any valid reasons or any reasons at all for that matter.
63. In absence of any valid reason, I am inclined to find that the refusal was unreasonable and that the refusal can be treated as evidence against him. S. 140 of the FLA states that ***“ if a person is aged 18 or over fails to comply with a parentage testing order or an order under section 139, the person is not liable to any penalty in relation to the contravention, but the court may draw such inferences from the failure as appear just in the circumstances”***.
64. The above provision of the law gives the Court sufficient basis to draw negative inferences from the father's refusal to undergo the DNA test. The lower Court was correct in law in following ***Lord Denning MR in Re L [1968] 1 All ER 20:***

***“Both counsel for the husband and counsel for the wife felt bound to concede that, under these sections, the court could not order an adult to submit to a blood test. A blood test which involves the insertion of a needle is an assault, unless consented to. It would need express statutory authority to require an adult to submit to it; see W. v. W. (No. 4) [1963] 2 All E. R. 841. If these sections do not authorize the court to order an adult to have his blood tested, I do not see that they authorize the court to make such an order in the case of an infant. A test of the child’s blood will be useless unless there were tests of the adults also. But I would say this. If an adult unreasonably refuses to have a blood test, or allow a child to have one, I think that it is open to the court in any civil proceedings (no matter whether it be a paternity issue or an affiliation summons, or a custody proceeding) to treat his refusal as evidence against him, and may draw an inference therefrom adverse to him. This is simply common sense. It is in keeping with the rule in a nullity case, if a party refuses to be medically examined, the court may infer that some impediment exists pointing to incapacity...”***

65. I therefore find that on the various basis, it was open for the lower Court, on the balance of probability, to make a finding that the appellant was the putative father of the child and that he was liable to maintain the child. There is no basis for me to interfere with that finding of the Court.

66. I do not understand why the appellant is concerned that the first husband would take away the child. If he does when he has no legal right as he has been declared that he is not biological father of the child, he would have to face the brunt of the law and since the appellant is found to be the father of the child he can legally assert his rights against any potential removal of the child.

67. Mr. Chand also said that under the new Family Law Act the term “putative father” is not mentioned so the Court cannot make a finding of paternity. This is submission is nothing short of trash. s. 137 of the FLA very clearly states that if parentage of a child is in question, the court may hear evidence to determine the issue. The FLA need not use the term “putative father” but by using the word “parentage in question” it means the same thing that if a person disputes being the father of a child, a hearing can be conducted to find who the father is.

68. On the question of quantum, the father argues that the wife’s expenses are either exaggerated or that she has other source of income because her expenses outweigh her income. He argued that the Court should have found this against the mother and asked her to resubmit her expenses.

69. It was for the father to cross-examine the mother on all these matters but he failed to which leaves the mother's evidence not contradicted. The Court was therefore bound to accept the evidence of the mother on her income and expenses.
70. The father also argued that he has other expenses apart from the ones he listed in his response like P.A.Y. E and F.N.P.F contributions, mortgage, hire purchase and insurance deductions. There is no provision in the form to indicate what the father paid in tax and FNPF but there is provision to include all other expenses. The onus was therefore on him to clearly state his expenses and he failed to do so. He thus cannot bring that evidence at appellate level. Firstly, He has not made an application for leave to adduce further evidence and secondly the mother will be prejudiced as she will not be able to clarify these expenses (if I were to allow these expenses).
71. It was stated in the appellant's submission that he pays about 36.00 for P.A.Y.E and FNPF. If I give him credit for his full expenses of \$245.75 and additional \$36.00 per week for P.A. Y. E and FNPF, he would be left with a sum of \$88.00 per week. If he pays maintenance in the sum of \$80.00 per week for the children then his savings would be only \$8.00 per week from which he is asked to pay 50% of all school fees, school books and stationaries and school clothes.
72. The father's expenses were not disputed in Court so it is deemed to be correct as well. Even the Court did not raise any questions regarding his expenses at the time of the trial for him to clarify the issues.
73. I therefore find that from his \$8.00 saving per week, it will be basically impossible for him to pay for two children's books and stationeries and school clothes.
74. Further, the order for payment of school expenses is factually erroneous as the mother had in her expenses already included for the school expenses. Having done that the total expenses for both the children came to \$158.00 per week out of which the father is ordered to pay at least half of the expenses. The balance half will then be the mother's responsibility.
75. The mother's income is \$249.00 before tax. She may be getting at least \$200.00 after tax. If the father is paying full expenses for the children, she is only left to pay her expenses of \$128.00 per

week, leaving her with a balance of \$72.00 per week. With that \$72.00 per week she has to cater for half of the children's expenses. At the end of the day she too is left with no savings at all.

76. If the maintenance to be paid by the father is further reduced from \$80.00, the financial burden on the mother will be more than the father. She then will not be able to cater for herself. In that way again the reduction of the maintenance of \$80.00 to be paid by the father is not justified.
77. The therefore find that an order for the payment of maintenance for the two children in the sum of \$80.00 per week to be fair to the children in that all their expenses would be catered for by both parents and fair to the parties as well as both have equal financial responsibility for maintaining the children.
78. On the question of spousal maintenance, I find that the Court erred in ordering spousal maintenance as the mother was earning a decent salary and capable of meeting her expenses in full. She had resigned from her job but is now working again. The only basis to order spousal maintenance was that the mother does not have a permanent job but that is not the requirement that a party must have a permanent job. The mother has a decent job and she earns a decent salary. She is also qualified to continue in her job and to find many more if she cannot secure this current job.
79. If the father is left with only \$8.00 per week in savings, there is no financial ability for him to pay for his spouse who on the facts of the case can maintain herself. The mother is a qualified degree holder and has been working in the past as well. She does not suffer from any incapacity for gainful employment. The ordering of the spousal maintenance was therefore not justified under s. 155 of the FLA.
80. I therefore find that the order for maintenance of \$40.00 per week for a child, that is, \$80.00 per week for the two children justified on the commitments of the children and each party. However I find that the order for the father to pay school expenses is duplicated and shall be set aside needless to say that now there are no more school fees that need to be paid by any parent in Fiji as the Government has shouldered that responsibility.
81. The Court also issued default orders by ordering that if the father is in arrears, a JDS ought to be issued and he was to be sent to prison for 10 days for every \$100 in default. This order is procedurally wrong.
82. If a party to the maintenance order asserts that there are arrears of maintenance then he or she

may issue a Judgment Debtor Summons. The other party has a right to challenge the issuance of the JDS and the amount therein on various basis. The most common basis for the opposition is that the amount of the JDS is incorrect and that there is inability to pay the debt. The Court is always faced with this argument. It then becomes the duty of the Court to ascertain the correct amount paid by reference to receipts and to ascertain the means of the party liable to pay the maintenance.

83. If the defaulter does not have the means to pay, default orders for imprisonment cannot be issued because it is unconstitutional to deprive a person of his liberty if from no fault of his own he is not able to meet the orders. S. 9(2) of the **Constitution of the Republic of Fiji Islands 2013** is very clear:

***“ Subsection (1) c) does not permit a court to make an order depriving a person of personal liberty on the grounds of failure to pay maintenance or a debt, fine or tax, unless the court considers that the person has willfully refused to pay despite having the means to do so”.***

84. By issuing default orders the father has been deprived of due process of challenging any arrears of maintenance and putting forward his case for non-payment. The orders are therefore unconstitutional and procedurally wrong and ought to be set aside.

85. The next issue is of parenting orders. The only basis on which residence was ordered to the mother was that the father has found a partner and the children will have to stay with the step mother. The Court also stated that the father had denied paternity for the elder child and it would be traumatic for the child to be sent to the father. The father had an ulterior motive in applying for residence in that he does not want to pay maintenance.

86. There were no reasons given as to why the supervised contact was given or contact was to be only exercised if the children so wished and upon consultation and notification by the parties.

87. In Court, Mr. Chand, counsel for the appellant informed the Court that they will not press for residence but some decent defined contact for the father would be appropriate.

88. Under s. 66(1) of the FLA, the court may make any parenting orders it thinks fit. In deciding whether to make a parenting order in relation to a child, a Court must regard the best interests of the child as the paramount consideration: **s. 66(4) of the FLA.**

89. S. 121 of the FLA identifies the best interest factors. There are various factors on which evidence needs to be given or taken and analysed. In this case the Court overlooked to call for evidence

under s. 121 of the FLA and to analyse what is in the best interests of the children. The orders were made because of the emotional feelings of the bench and its ideologies of a perfect parent. The orders were not properly founded in law and fact and needs to be set aside.

90. On the aspect of contact, the law is that, it is the right of the children, to know and to be cared for by both the parents, regardless of whether their parents are married, separated, have never married or have never lived together. The children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development: **s. 41(2) (a), (b) of the FLA.**

91. There was no reason why the father was not given meaningful defined contact. The supervised contact by the mother is not justified as there are no allegations against the father for any abuse or violence on the children. By giving conditional contact, the children are deprived of their right to be meaningfully cared for by their father and to spend quality time with them.

92. Conditions on contact are normally levied for the protection of the children and in this case the exercise of discretion was improperly founded. The mother had alleged violence and the Court did not find whether the allegations were correct or not. The judgment says nothing about why supervised contact was given. It is not for me to presume that the conditional contact was because of the alleged violence. The Court must have given cogent reasons for arriving at an answer.

93. The parties want some defined contact. This is a matter for the lower Court which can be done either by agreement of the parties or after hearing the evidence on what is in the best interests of the children. The parties will have to go to the lower Court for appropriate orders to be made.

94. The final issue is that of property distribution. The only paragraph relating to such an important application was paragraph 33 of the judgment of the lower Court:

***“I now turned (should be turn) to property settlement. During the pre trial stages the respondent did not come before the deputy registrar. The Applicant states 50% value of all personal possessions, FNPF funds, Insurance policy and CTCS shares. The respondent said that his FNPF education benefit was used to finance the applicant’s studies at USP. The court cannot deduct these education expenses as they have been used with affection as gifts. The respondent has not given a loan to that effect and all funds used for education such as CTCS funds and Insurance dividends. I therefore hold that the application has right to have 50% of the property settlement.*”**

95. I will make a general finding in respect of all the property that was ordered to be distributed.

There is a process identified under the FLA in s. 162 which the Court has to go through before distributing the property. Notably that process was not even identified by the Court nor followed to any extent to justify the division. I have in my various judgments before identified how property is to be distributed. In those judgments I have outlined in detail what the Court must consider at which stage to be able to divide the property of the parties to the marriage justly and equitably. Two such cases are: **KN v. MYH [unreported] Fiji Family High Court Case Number: 08/Ba/0043** and **AK v. RC [unreported] Fiji Family High Court Case Number: 08/Ltk/ 0498**. There was failure to follow the legislated process and those identified by the earlier authorities.

96. S. 141(2) of the FNPF Decree has now amended s. 154 of the FLA. The effect of the amendment is that the FNPF is now not a property of the parties to the marriage. How the funds can be used for other purposes has been discussed in my judgment of **FNPF v. RV and JB [unreported] Fiji Family High Court Appeal Case Number: 12/Suv/0017**.

97. I have no idea whether the above judgment is on appeal as yet. The parties must clarify that issue before relying on **FNPF v. RV and JB (supra)**. However I am certain that the judgments in which I have stated the steps that has to be followed in distribution of the property has not been appealed and has been applied by many Courts in the Magistrates' Division.

98. The appellant also states that he used his dividends from the insurance and CTCS for the mother's education. He further stated that he has terminated his account in CTCS. However in his expenses list he shows that he still makes contribution to CTCS. The lower Court should have called for all the policies, examined its status, the time of maturity, the current and future value and then determined the mother's share and ordered the time for distribution. All this was not done. The property matter was dealt with in a haphazard manner and needs to be set aside and re-tried for a fair, just and equitable distribution.

### **Final Orders**

99. Based on my findings above I make the following orders on appeal:

- a. The appellant as declared by the lower Court is the putative father of the –of previous marriage**
- b. The father is to pay maintenance of the two children in the sum of \$40.00 per week per child, that is, a total of \$80.00 per week for the two children. The father is now to pay up the arrears of the maintenance which has accumulated due to the stay of the orders granted by the lower Court.**



- c. The order of the lower Court for the father to pay 50% of all costs for school fees, school books and stationeries and school clothes is set aside. The father has now no liability for this expense. Any arrears accumulated due to this order is not be levied on the father.*
- d. The order for the father to pay spousal maintenance is set aside and the father is not liable for any arrears accumulating under this order.*
- e. The default orders for imprisonment is set aside and substituted with a new order that if the father is in arrears of any maintenance (considering the appellate Court orders) then a JDS may issue and listed in Court to be dealt with.*
- f. The application for parenting orders must be re-heard by the lower Court. The parenting orders application can be resolved by an agreement of the parties in the lower Court but until the application is dealt with there must be some meaningful interim orders so that the children are not deprived of being loved and cared for by both the parents.*
- g. The application for property distribution is set aside and sent to the lower Court for re-hearing under the process prescribed by the legislation.*
- h. The file must be sent back to the Family Division of the Magistrates' Court Nasinu for rehearing of the matter on parenting orders and distribution of property.*
- i. The Registrar must advise the parties of the date on which the matter shall be called in the Magistrates' Court.*

**ANJALA WATI**

**JUDGE**

**20.02.2015**