IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER:	**12/Suv/0011** **(Original Case Number: 11/Suv/0650)**
BETWEEN:	**SAACK** **APPELLANT**
AND:	**VARANISESE** **RESPONDENT**
Appearances:	*Ms. Nunume for the Appellant.* *No Appearance of the Respondent.*
Date/Place of Judgment:	*Wednesday 13 January 2016 at Suva*
Coram:	*Hon. Madam Justice Anjala Wati.*
Category:	*All identifying information and contents in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons are consequential.*
Anonymised Case Citation:	Saack v Varanisese - FIJI FAMILY HIGH COURT APPEAL CASE NUMBER: 12/Suv/0011

JUDGMENT

Catchwords:

FAMILY LAW - Parentage Testing - is it mandatory to order parentage testing in all cases where paternity is disputed - Is Court in error if it does not make an order for parentage testing on its own initiative - powers of court where one party chooses a particular type of procedure- on the other evidence available before the Court, could a finding of paternity be made: the effect of not challenging the finding made from oral evidence in Court.

Legislation:

1. The Family Law Act No. 18 of 2003 ("FLA"): s. 137; 138.

2. The Family Law Regulations 2005: Regulation 18.

Cause

1. In 2012, after a defended hearing, the Resident Magistrate ("RM") made a finding that the appellant was the putative father of the child and ordered that he pays child maintenance in the sum of $60.00 per week until the child attains the age of 18 or until further orders of the

Court.

2. The appellant appeals the said decision only on the grounds that the Court erred in not giving the parties an opportunity for a DNA test and that it failed to indicate to the appellant his right to produce witnesses which is a denial of natural justice.

Appellant's Submissions

3. The counsel for the appellant argued that the appellant had at all times disputed that he is the father of the child. To have the best available evidence before it, the Court ought to have explained to the appellant the parentage testing procedure available to him under the Family Law Act and Regulation.

4. It was argued that under. s. 138 of the FLA the Court could have made an order on its own initiative.

5. The 5 medical procedures that are included as parentage testing procedure are red cell antigen blood grouping, red cell enzyme blood grouping, HLA tissue typing, testing for serum markers; and DNA typing. This is provided for by Regulation 18 of the Family Law Regulations.

6. Since the appellant was appearing in person, the RM should have put to the appellant the 5 procedures that he could undergo and secured the best evidence. The appellant could have then chosen what he wanted to undergo. It is the duty of the court to get the most reliable evidence and not one which is not reliable like the one which was conducted in this case.

7. If the DNA typing test was ordered, all issues of paternity would be put to rest and there would not be any reservations about paternity.

8. It was further argued that in 2012, an order for blood test was made by the Court. The hospital opted for "red cell antigen blood grouping". This was undertaken without an order of the court as the Court had only ordered "blood test".

9. The report from the hospital thus is without an order of the Court and should not be acceptable as evidence in the proceedings.

Law and Analysis

10. S. 137 of FLA gives the Court powers to make an order requiring a person to give such evidence as is material to determine the parentage of a child if it is in question.

11. S. 138 of the FLA states that the Court has powers to order parentage testing and that it can so order on its own initiative, or on the application of a party to the proceedings or a child representative.

12. When the matter was called in Court in 2012, it is the appellant who made an application for blood test. Since the request was specifically for a blood test, the Court had before it no valid reason why it should decline the request.

13. I do not find that the Court erred in accepting the request of the appellant and in making directives according to his request that the parties undergo a blood test.

14. The appellant having chosen one procedure cannot now say that he ought to have been advised of other procedures as well. By choosing a particular procedure, he insinuated to the

Court that he is aware of other procedures as well and that out of all he preferred the blood test. If he did not know about the other procedures he could have required the Court for information on the same. He failed to ask the Court for other available procedures and immediately asked for a blood test. By his own conduct he precluded the Court from providing any further information on other available and reliable procedures.

15. Further, it was the duty of the appellant to have asked for legal advice on a matter like this. He cannot expect the Court to provide advice and guidance as to what should be chosen.

16. I do not find that there is a statutory duty for the Court to inform the parties of the available procedures although the Court has discretion to make an order on its own initiative.

17. The type of blood testing that was carried out was "blood test antigen grouping" which in short form is normally called "blood test". That antigen grouping is also a parentage test for parentage testing procedure that is provided for by Regulation 18 of the Family Law Regulations .

18. There was nothing erroneous on the part of the medical profession to have carried out blood test antigen grouping as that is what was ordered in short as a "blood test".

19. It is not mandatory that in every case, parentage testing will be ordered or that DNA typing test be ordered in all cases. Once a party chooses a procedure, the Court will be very slow to decline an order on its own initiative.

20. Apart from the blood test, oral evidence was adduced as well. The appellant also gave evidence in Court. He was asked whether he wanted to present any witnesses in Court and he said he did not want to. Now to complain that he was not given an opportunity to present a witness is a manifest distortion of the state of proceedings.

21. On the evidence, the appellant does not challenge the Court's findings. He does not at all assert that the Court did not analyse the evidence properly. So even if he is not accorded a DNA typing test, on the other evidence available to the Court, it was open to the Court to make a finding that he was the putative father of the child.

22. The appellant does not say that the Court erred in finding that he is the father of the child so than there is no prejudice to him even if he did not undergo DNA typing test. The appeal has no basis and ought to be dismissed.

Final Orders

23. The appeal is dismissed and each party is to bear their own cost of the appeal proceeding.

Anjala Wati

Judge

13.01.2016

1. Messrs M.A. Khan Esquire for the Appellant.

2. Respondent.

3. File: 12/Suv/0011.