

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

**ACTION NUMBER:** 13/Suv/0021  
(Original Case Number: 06/Nau/0132)

**BETWEEN:** Jonas  
**APPELLANT**

**AND:** Elaine  
**RESPONDENT**

*Appearances:* Mr. Kean for the Appellant.

No Appearance of the Respondent.

*Date/Place of Written Judgment:* Wednesday 13 January 2016 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 persons is purely coincidental

*Anonymised Case Citation:* 2016.01.13 Family Appeal 0021 of 2013 Jonas v Elaine

## JUDGMENT

Catchwords:

FAMILY LAW - Maintenance Arrears - Proper Amount Due and Owing- Examination of Means to pay the Debt.

Legislation:

1. The Constitution of the Republic of Fiji Islands: s. 9(2).

## Cause

1. The husband appeals against the decision of the Resident Magistrate ("RM") of 29 May 2013 where, after hearing the parties on oath, she made a finding that the correct amount of arrears to be paid by the husband was \$9,600 instead of \$11,471.50.
2. The husband was ordered to pay \$50 per week towards arrears of maintenance with effect from 7 days after the delivery of the decision and in default of any one payment, the balance was to become due and owing forthwith and he was to be committed to prison for 7 days.
3. The hearing was conducted on the Judgment Debtor Summons ("JDS") when the husband claimed that he had paid the maintenance. The purpose of the hearing was to ascertain the correct amount owing on the JDS and to examine the husband on his means to pay the same.
4. The amount of arrears was reduced by the Court as stated in paragraph 1 above because it was found that since the making of the order the 1<sup>st</sup> child, a female, born in January 1992 had been residing with the husband's family.
5. The husband's ground of appeal is that the court erred in law and in fact in not taking into account the evidence presented in totality before arriving at the conclusion that it was proper for him to pay the arrears of \$9,600 plus JDS cost of \$11.50.

## Appellant's Submissions

6. It was first submitted that when the order was made for the husband to pay \$10 per week per child, a total of \$60 per week for all the children, the mother only had three children with her 2<sup>nd</sup> child, a male, born in 1993 was with one relative from 1993 and 3<sup>rd</sup> child, a female, born in 1994 and 4<sup>th</sup> child, also a female, born in 1997 were raised by another relative since 1996. The mother only had three children with her in 2007 so the entire JDS should have been recalculated on that basis.
7. The RM made a finding that the husband was last employed in the year 2011. She did not take into account that he was unemployed so he could not pay maintenance on certain periods in 2007 to 2011.
8. The Court made a finding that the husband was employed in the years 2007, 2008, 2010 image

and 2011 as the FNPF showed that there were contributions for these years. The amount left in the husband's FNPF was not properly taken into account. The appellant should have been given an opportunity to offer to clear the JDS through his FNPF.

9. Another piece of evidence that was not properly analysed was that the husband was relying on his partner to support himself and that showed that he was not able to even take care of himself.

10. The Court should have properly analysed what the husband's commitments are which was not done. A person's duty to maintain himself or herself is of higher priority than maintaining the children. On that basis the husband's income and expenses were to be worked out to ascertain whether there was enough left to pay the amount ordered.

11. The RM had also made a finding that 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> children had turned 18 in 2010, 2011 and 2012 respectively. However, only the 1st child's maintenance was excluded and not the other two who had turned as well. On that basis, the JDS should be re-calculated.

#### Law and Analysis

12. The first aspect that was raised was that when the interim order for maintenance was made, the mother had only three children with her. In his evidence in Court on the JDS, the husband had stated that the three children were with the wife's relatives.

13. The only child he said he looked after was the 1<sup>st</sup> child.

14. Even if the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> children were with the wife's relatives, the husband has a duty to maintain them. He cannot say that since the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> children did not stay with the mother, he will not pay the maintenance. His obligation to pay the maintenance remains. The issue may have been who is the proper person to collect the maintenance but that was never raised in Court. If it was, it could be shown that although the mother was not physically looking after the children, she did provide to them through her relatives.

15. The responsibility of a parent to maintain the child is not affected by the fact that 3 children were living with the wife's relatives.

16. What concerns me is that the other two children (excluding 1<sup>st</sup> child as she had already been excluded) had reached age 18 on the following dates:

(i) 2<sup>nd</sup> child attained 18 in 2011.

(ii) 3<sup>rd</sup> child attained 18 in 2012.

17. There was no application by the mother that their interim maintenance continues. In absence of any application, their maintenance should cease when they attained the age of 18.

18. The judgment of the RM of 29 May 2013 which is the subject of appeal does not indicate whether the maintenance for the above two children was excluded from the JDS from the date they attained 18 years. If it was not, then it should be as there was no application for the maintenance to continue.

19. The husband has also raised that he does not have the means to pay the money. The Court made a finding that the husband was employed in the years 2007, 2008, 2010 and 2011 and that he took no effort to pay the maintenance. The Court found that there was no evidence that he was medically unfit to find gainful employment.

20. Indeed it is correct that the husband did not say why he did not pay maintenance when he was employed and that he cannot find any employment due to some physical or mental condition. His evidence was that his last employment fetched him \$150 net per week which shows that he has the earning capacity to pay at least \$50 per week.

21. I do not find that an order to pay \$50.00 per week was based on an incorrect principle of law or fact. However the Courts findings that in default of anyone payment all the arrears becomes due forthwith and the husband be committed to prison for 7 days is unconstitutional.

22. S. 9(2) of the Constitution of the Republic of Fiji Islands states that a person must not be deprived of personal liberty on the ground 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.

23. Before any order of commitment is made, the husband will again have to have his means examined. It has to be examined whether he has the means to pay the entire amount on the JDS or even the \$50.00 as ordered and if he has the means, whether there is a wilful default on his part.

24. In the interest of justice I find that once a fresh JDS is issued, it is important that the husband be again examined as to his means and a fresh order be made. A long time has lapsed between

the last order and circumstances of the husband may have changed to justify a fresh examination as to his means.

25 . If the husband wishes to pay any monies from his FNPF or bank account, he can inform the Court of the same on the day he is being examined.

#### Final Orders

26. In the final analysis I direct the Registry to issue a correct amount of the monies to be paid by the husband via a fresh JDS.

27. From the \$9,600 which was accepted by the RM as the correct amount of maintenance due and owing, the maintenance for 2<sup>nd</sup> child and 3<sup>rd</sup> child be excluded from the date that their turn 18 respectively. If the amount has already been excluded for these two children, then there is no need to deduct the sums again.

28. The order for payment of any monies on the previous JDS is set aside.

29 . Once a fresh JDS is served, the husband is to be re-examined on his means to pay the monies. This is only ordered due to the intervening period of two years since the making of the last order for payment of the monies.

30. The orders of the RM of 29 May 2013 are set aside.

31. I direct this file to the Registrar of the Family Division of the High Court to monitor the progress and to seek clarification if necessary.

**Anjala Wati**

**Judge**

**13.01.2016**

To:

1. Mr. Kean for the Appellant.
2. The Respondent.
3. File: 13/Suv/0021.

