

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

<b>APPEAL ACTION NUMBER:</b>	<b>07/13</b> <b>(Original Case Number: 11/Stk/0163)</b>
<b>BETWEEN:</b>	<b>RITA</b> <b>APPELLANT</b>
<b>AND:</b>	<b>BUNTY</b> <b>RESPONDENT</b>
<i>Appearances:</i>	<i>Ms. M. Tara for the Appellant.</i> <i>No Appearance of the Respondent.</i>
<i>Date/Place of Judgment:</i>	<i>Thursday 8 December 2016 at Lautoka.</i>
<i>Coram:</i>	<i>Hon. Madam Justice Anjala Wati.</i>
<i>Category:</i>	<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>
<i>Anonymised Case Citation:</i>	<i>Rita v. Bunty - Family Appeal number 7 of 2013</i>

JUDGMENT

A. Catchwords:

FAMILY LAW - APPEAL – CHILD AND SPOUSAL MAINTENANCE - Determining application without evidence when parties' positions differ is improper. A parentage testing report which is not ordered by the Court is not admissible in evidence - Where a party raises issues surrounding the report, depending on the nature of the query raised by the party, the Court must allow the sample or the tester to be examined in Court regarding the authenticity of the process and the report - where parties admit de-facto relationship, the period of the duration of the relationship is not necessary to make a finding on whether the relationship existed but affects the issue of quantum - Court's powers to order step-parent to maintain a step-child discussed - for spousal maintenance to be ordered, a party claiming has to satisfy one of the

tests outlined ins. 155 of the FLA.

## B. References

### (i). Legislation:

1. The Family Law Act No. 18 of 2003 ("FLA"): ss. 93 138, 143 (a ), 144(2), 155.
2. The Family Law Regulations 2005 ("FLR"): Part III Divisions 1 to 3.

### (ii). Cases:

1. McK and K v. O [2001) FamCA 990.

## Cause and Background

1. The mother appeals against the decision of the Family Division of the Magistrates' Court ("MC") of 02 April 2013 wherein it dismissed her application for spousal and child maintenance.

2. The parties have never been married. It is agreed by the parties that they have been living in a de-facto relationship. The duration of the relationship is disputed. Whilst the mother of the child asserts that the parties had been living in a de-facto relationship for the past 21 years preceding the filing of the application on 12 December 2011, the respondent says that the relationship had been only for 1 ½ years.

3. The child in respect of whom maintenance is sought was born in 1995. At the time of the making of the application, the child was 16 years 6 months old. At the time of the delivery of the MC decision on the application, the child was 17 years 10 months old. The child is now 21 years 6 months old.

4. In the child's birth certificate, the respondent was registered as the father of the child.

## Magistrates' Courts Findings and Orders

5. In respect of child maintenance, the Court found that the DNA report which was obtained by the respondent's daughter in Australia was conclusive on the issue of paternity. Since the DNA report excluded the respondent as the father of the child, it was found and ordered that he was not liable to pay any maintenance for the child.

6. On the question of spousal maintenance, the Court found that living together for 1 ½ years

cannot constitute de-facto relationship and that the mother could not make an application.

7. Upon its findings, the applications for child and spousal maintenance were dismissed. It was further ordered that the Registrar of Births remove the respondent's name from the child's birth certificate.

#### Issues/Law and Determination

8. Arising from the appeal, there are several issues that needs to be determined:

1. Was the procedure invoked in hearing the application for child and spousal maintenance proper in the circumstances of this case?

2. Whether the DNA report is admissible in the proceedings? If No,

3. Whether the evidence otherwise of the parties establishes that the respondent is the putative father of the child?

4. If the DNA report is inadmissible in the proceedings, could the respondent alternatively be liable for maintenance as a step-parent?

5. In light of the admission of the respondent that he lived in a de-facto relationship, albeit for 1 ½ years, did the mother establish affirmatively one of the tests outlined in s. 155 of the FLA to qualify for spousal maintenance.

9. I will deal with each issue in turn. Some issues which overlap can be conveniently dealt with together.

#### A. The Procedure in Hearing the Matter/ Admissibility of the DNA Report.

10. The application for child and spousal maintenance was not heard on evidence but on written submissions. I am surprised that this procedure was undertaken and a determination made when controversial facts were apparent from the submissions of the parties. I do not know how the Court conveniently made findings of fact from the submissions of the parties.

11. There was only one affidavit from the respondent. The mother was not ordered to file any affidavit. There was therefore lack of complete sworn evidence on which the Court could rely on to make findings of fact. If there was complete affidavit evidence, and the parties did not raise any challenge to the same and wanted the Court to deliver a ruling based on the evidence, I would have had not frowned upon the procedure. Further, if there were questions of law and uncontroverted facts, I would have again endorsed the procedure.

12. Apparent from the parties' position, the major discernible contested issues were the authenticity of the DNA report, the duration for which the parties stayed together, the extent of the financial and other forms of support provided by the respondent voluntarily to the child and the mother, and the ability of the respondent to provide for the mother and the child.

13. On 1 September 2012 both parties had agreed that there be written submissions on the issue of maintenance for the mother and the child. It was agreed that the matter be fixed for ruling on 20 December 2012.

14. On 01 February 2013, the mother appeared in Court and challenged the DNA report by saying that her blood was not taken for analysis and that only the daughter's blood was taken. The DNA report was prepared on 13 January 1997, some 15 years prior to the hearing. The report says that samples of the blood were collected on 18 November 1996.

15. This report was obtained without an order of the Court and not under s. 138 of the FLA which empowers the Court to make a parentage testing order. The FLA and the FLR did not come into force at the time the report was prepared.

16. It is not in dispute that the parentage testing was conducted on the initiative of the respondent's daughter who lives in Australia. She is the person who is accused of not approving the relationship of the parties and constantly tried to keep them apart. She is also accused of not wanting the subject child to be with the respondent. If the allegations are true, there are obvious reasons why the respondent's daughter is doing that and one such reason is the issue of inheritance.

17. I will deal later on the authenticity of the report but before that a legal arises as to the admissibility of a report which is obtained without an order of the Court.

18. S. 143 (a) of the FLA authorizes parentage testing procedures to be carried out under parentage testing orders. Any parentage testing that is carried out without an order of the Court is not admissible in proceedings. I further find that because the reports are not sworn documents, it could not have been relied on evidence without the consent of the parties or without an order of the Court to carry out the parentage testing.

19. In *McK and K v. O* [2001] FamCA 990 it was held that the parentage testing certificate was inadmissible in evidence as it was prepared without an order of the Court. It was further held that the certificate was an unsworn document and could not be relied on in evidence.

20. What the Court could have done was to ask the parties on whether they consented to the report being tendered in as evidence. If there was no challenge raised, then it would have

been safe to admit the report. However, it was very clear that the mother was challenging the report as she said very clearly that her blood was not extracted.

21. If the Court still wanted to rely on the report, the mother ought to have been given an opportunity to challenge the authenticity of the same: s. 144(2) of the FLA.

22. The submission by the mother also stated that the respondent's daughter had been interfering in their relationship. Given that information and the fact that the report was initiated and directed to the respondent's daughter, coupled with the allegation that the mother's blood was never taken, the likelihood of tampering with the samples was before the Court.

23. The reason why a parentage testing should be carried out under the order of the court is to ensure compliance with the step by step procedure stated in Part III Divisions 1 to 3 of the FLR. There was no evidence before the Court in this case that the regulated procedure was fully complied with.

24. It was therefore improper to make findings of fact based on the report which was neither admissible in evidence nor free of doubts on its authenticity.

25. The Courts finding that the respondent was not the putative father of the child was based on an inadmissible document and ought to be set aside.

B. Liability to Support the Child: As Putative Parent or Step Parent?

26. It was an error on the part of the MC to have admitted the DNA report which was inadmissible in evidence. Given that situation, the Court had to either order a fresh DNA test or heard the issue of paternity on other evidence and made a finding on paternity. There was no sworn evidence before the Court to make such findings. The child was deprived of her rights when a proper finding on paternity was not made.

27. Even if the Court made a finding that the respondent was not the father of the child, the issue whether he ought to support the child as a step-parent needed to be resolved. S.93 of the FLA gives the Court powers to determine whether it is proper for a step-parent to have a duty to maintain a step-child.

28. In determining whether a step-parent must maintain the step-child, the court must have regard to the matters referred to in ss. 90 and 91 of the FLA, the length and circumstances of the relationship with the relevant parent of the child; the relationship that had existed between the relevant step-parent and the child; the arrangements that have existed for the maintenance of the child; and any special circumstances which, if not taken into account in

particular case , would result in injustice or undue hardship to any person: s. 93 (2) of FLA.

29. The Court had to take sworn evidence on the above factors to decide whether or not the respondent is liable to maintain the child. There was prima facie evidence from the respondent that he looked after the child and treated her as his own. He had his name registered as the father of the child. When the results of DNA were out and he knew that he was not the father of the child, he continued to maintain the child since 1997 till the date of hearing. He in his own submissions said that he gave \$15,000 to the mother for the treatment of the child in 2007. This is despite knowing that he was not the father of the child. He admitted that he maintained the child. These are all prima facie evidence of him providing support for the child.

30. The question of quantum of course was a matter that the court had to decide on the evidence of the parties.

31. The Court erred when it dismissed the application for child maintenance only on the basis that the respondent is not the putative father of the child when the submissions of the mother undoubtedly raised the question that even though the respondent is not the father, he treated the child as his own for the past 16 years and provided for her. A submission of this nature immediately gives rise to the question of the respondent's liability as a step-parent to maintain the child. That was never dealt with by the court to the prejudice of the child.

### C. Spousal Maintenance

32. The application for spousal maintenance was dismissed on the basis that the relationship for 1 ½ years cannot be categorized as de -facto relationship. I am surprised that the duration here was used to make a finding on whether the de-facto relationship existed or not when the respondent himself admitted that he was in a de-facto relationship.

33. Once an admission is made, the duty of the Court is to then consider whether an order for spousal maintenance should be made and if an order is to be made, a party seeking spousal maintenance must affirmatively satisfy one of the requirements in s. 155 of the FLA.

34. The matters arising in s. 155 of the FLA can only be established through evidence. In this case there was lack of complete evidence to make a finding. It appears that the Court accepted the respondent's version that the relationship was for only 1 ½ years when the respondent in his evidence contradicted the same. He presumably agreed to his name being registered in the birth certificate in 1995 otherwise his name would not have been registered. Then in 1996, he underwent paternity test because he wanted to be certain whether the subject child was his child. Then again in 2007, he gave about \$15,000 from the child's

treatment. The evidence indicates that the relationship was for more than 10 years. There was contradiction by the respondent for his evidence to be accepted.

35. If the evidence was to be tested, parties ought to have been given an opportunity to challenge each other's evidence.

36. It was therefore improper to decline spousal maintenance on the finding that 1 ½ years relationship does not amount to de-facto relationship.

#### Final Orders

37. In the final analysis, I find that in light of the disputed facts, the Court ought to have heard the matter orally before refusing the application for child and spousal maintenance. I find that the parties have been deprived of a fair trial.

38. I further find that the DNA report obtained without an order of the Court is inadmissible in evidence in the proceedings.

39. I therefore allow the appeal and order that there be a trial proper on the issue of child and spousal maintenance. I note that the child is now 21 years old. It is a matter for the mother to decide whether she will still pursue with child maintenance application which she is at liberty to do so if the child is still attaining education.

40. I further set aside the order of the MC that the respondent's name be removed from the child's birth certificate. There shall be no changes in the birth certificate until any further orders of the Court. The trial court is also to investigate on its jurisdiction to be able to make an order of such a kind.

41. A copy of this judgment shall be furnished to the Registrar of the respective division for her to inform the Registrar of Births of the terms of the orders of this Court particularly affecting the child's birth certificate.

42. Each party is to bear their own costs of the appeal proceedings.

**Anjala Wati**



**Judge**

**08.12.2016**

*To:*

*1. Legal Aid Commission for the Appellant.*

*2. Respondent.*

*3. File: 07/13 (11/Stk/0163).*