IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER:	**17/Suv/ 0001**
BETWEEN:	**CHARLIE**
	APPELLANT
AND:	**MAGDALENE**
	RESPONDENT

Appearances:	*Mr. C. Yee for the Appellant.*
	Mr. A. Chand and Mr. Waqanivavalagi for the Respondent.
Date/Place of Judgment:	*Monday 20 January 2020 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.*

JUDGMENT

A. Catchwords:

FAMILY LAW – De Facto Relationship– Disputed Relationship – Court needs to make a finding upon a holistic examination of the factors identified in s. 154A of the FLA – when a court makes a finding of fact based on the credibility of the parties and evidence that is largely uncontroverted, the appellate court cannot arrive at a different conclusion and substitute its own views of what the finding should – it has to be demonstrated that the court below made wrong inferences or findings of facts from the evidence that was tendered and that a finding of a particular nature could not be arrived at.

B. Legislation:

1. Family Law Act 2003 ("FLA"): ss. 154 and 154A.

Cause and Background.

1. The appellant has appealed against the decision of the Family Division of the Magistrates' Court of 30 December 2016. In its decision, the Court made a finding that the parties were in a de-facto relationship.

2. The issue became triable on the respondent's application for spousal maintenance. The appellant denied the existence of a de-facto relationship.

Findings of Magistrates Court/ Ground of Appeal Arising and Analysis

3. The Court had correctly cited the law to be given regard to in making a finding of whether or not a de-facto relationship existed.

4. The Court relied on s. 154 and s. 154 A of the FLA. These sections read:

s. 154 – ""de facto relationship means" the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other;…

"party to marriage" includes a party to a de facto relationship;…"

s. 154A – " In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including but not limited to the following as may be relevant in a particular case –

(a) the duration of the relationship;
(b) the nature and extent of common residence;
(c) whether or not sexual relationship exists;
(d) the degree of financial dependence or interdependence and arrangements for financial support between the parties;
(e) the ownership, use and acquisition of property;

(f) the degree of mutual commitment to shared life;

(g) the care and support of children, if any;

(h) the performance of household duties; and

(i) the reputation and public aspects of the relationship".

5. Following the guideline factors, the Court assessed the evidence and made findings in respect of each factor. The appeal lies in respect of the findings in regards 5 factors above, that is, *the duration of the relationship; the nature and extent of common residence; the degree of financial dependence or interdependence and arrangements for financial support between the parties; the degree of mutual commitment to shared life; and the reputation and public aspects of the relationship.*

6. I will deal with each factor in turn and reflect upon the Court's finding and the grievance the appellant has put forward in respect of that finding. Before I do that, I must say that certain findings have not been disputed and as such I will not take the trouble of re-examining them.

7. The Court had found that there existed sexual relationship between the parties. It was also found that there was no evidence of any ownership, use or acquisition of property by the parties. On the question of care and support to the children, the Court found that although the appellant assisted the respondent twice in paying one of her child's fees for the foundation course, it was not satisfied that the appellant provided care and support to the children to give it any weight in making a finding that the de facto relationship existed. The Court also found that the parties shared the household chores together.

8. I repeat that the findings identified in paragraph 7 above has not been challenged or appealed and I will not interfere with those findings and arrive at a different conclusion. I will concentrate on the findings that are subject to the appeal.

A. Duration of the Relationship.

9. The Court had arrived at a finding that the parties' relationship started towards the end of 2007 and ended in 2014, and discounting the 3 months period during which the parties dated, the duration of the relationship was 7 years.

10. The appellant's evidence was that he first met the respondent at the end of 2007 and the relationship ended in July 2014. The evidence of the respondent was that the relationship started in 2007 and ended in 2015 which indicated that the relationship lasted for 7 years, discounting the 3 months period of dating.

11. The appellant says that the finding that the relationship existed for 7 years in wrong in fact. It is submitted that the appellant's uncontroverted evidence was that he worked and lived in Island from 2007 to 2009 and would come to Viti Levu once in every 6 to 8 weeks. It is argued that if he was away for work purposes for 2 years, the duration of the relationship cannot equate to 7 years.

12. In my finding, the evidence was clear that the parties started courting from 2007. The appellant does not deny that. Although the appellant was living and working in Island, it was because of his work requirement that he had to be away. For that reason, there was no permanent cohabitation during that period.

13. Permanent cohabitation is not a mandatory factor that needs to be established in assessing whether a de facto relationship exists. There may be various reasons why parties in an alleged de facto relationship do no stay together on a permanent basis. There may be genuine reasons such as work commitments, travel commitments and commitments in respect to other family members and matters. This situation arises even where the parties are married. That should not mean that since the parties are living separately for some genuine reason, one must come to a conclusion that the marriage has broken down irretrievably. Similarly, it would be a very dangerous precedent to look for permanent cohabitation in determining whether the de facto relationship exists.

14. The appellant never stopped his contacts with the respondent even though he was away for work purposes. He used to call her every day and talk to her. This evidence was not challenged in cross-examination. I therefore find that in calculating the duration of the relationship, the Court was correct in taking into account the 2 years being 2007 to 2009, irrespective of the fact that the appellant lived in Island.

15. The Magistrates' Court had not made a finding of the existence of the de facto relationship on this factor alone. There were other factors which were examined holistically to arrive at the finding. I will therefore look at the next finding under challenge.

B. Nature and Extent of Common Residence

16. Under this head the Court stated that the issue was not whether the parties lived together on a permanent basis. The Court concluded that it was the nature and extent of common residence that mattered. It accepted the evidence of the respondent that the parties resided together initially at X Street, Suva then at Y Street, Suva and that that was the common residence of the parties.

17. The appellant submits that the Court's findings that he shared the common residence with the respondent at initially X Street then Y Street is an error in fact. The appellant says that the court had placed considerable weight on the testimony of the respondent when the appellant had continuously maintained that his principal place of address was at Suva where he lived with his mother and his brother. His evidence was that he did not permanently stay with the respondent but visited her occasionally when he spent nights with her.

18. I have re-examined the evidence of the parties in this case. The wife had testified that initially there were times when the appellant would visit her and return to live with his mother since she was sick. When he stayed with his mother, he would come home during lunch hours and spent time with her. She further testified that from 2010 to 2013 he stayed full time with her. That is a period of 2 ½ years of co-habitation.

19. According to her, he had his clothes, shoes and computer in the place where she rents. He would bring home crabs and prawns when he returned from Islands and share household chores when they lived together.

20. The appellant's testimony was that he visited the respondent occasionally. He only stayed with her for 2 ½ weeks when he had injured his legs. He admitted to sharing the household chores together whenever he was with her.

21. Since the parties' evidence was at variance, it was for the Court which examined the evidence being tendered to accept or reject any evidence. The acceptance or rejection of the evidence depended on the credibility of the parties, the contradictions in their evidence and whether the evidence remained uncontroverted and substantiated.

22. When a Court accepts or rejects the evidence of a party on the question of credibility and makes findings of facts, it is very difficult for the appellate court to impeach that finding unless it is shown that there was no basis upon which such a finding could be made. The appellant has failed to convince me that I should arrive at a finding different from that of what the Magistrates' Court did. There is no material upon which I could exercise such a discretion.

23. I of course lack the advantage of having seen the nature in which the evidence was tendered and the conviction of the parties position. Being bereft of that advantage, I am not in a position to accept the appellant's version over the respondent's.

24. The appellant had a counsel during the trial. He could have been advised to call witnesses to assist him in establishing matters which indicated that he did not share common residence with the respondent except for days when he visited her occasionally. He could have called his mother and other family members to state that he lived with them on a full time basis and only paid occasional visits to the respondent. In absence of the appellant having substantiated his evidence, the Court placed the weight it deemed fit on the evidence tendered by the parties. I cannot reassess whether a different weight should be placed on the evidence of the parties.

C. The degree of financial dependence or interdependence and arrangements for financial support between the parties.

25. In this regard the Court identified that the appellants' evidence was that he did give money to the respondent but that was occasional assistance. He would give the respondent money when she asked for it saying that she required it for medical bills, for her children or for sustenance. He denied paying her rent.

26. On the other hand, the respondent's evidence was that the appellant paid for the rent and bills for the place they lived in. They used to live in X Street, Toorak and when the landlord wanted to increase the rent, the appellant asked her to move out and look for a cheaper flat which she did in Y, Toorak. The appellant also paid for rent for this new flat.

27. The Court further identified the respondent's evidence that he paid for her medical bills. She was unemployed and whenever she notified the appellant about the payments, he would assist her.

28. Since the parties had given two different versions of the financial assistance provided to the respondent, the Court accepted the evidence of the respondent and came to a conclusion that such degree of support throughout the relationship cannot be termed as occasional assistance and that the respondent was financially dependent on the appellant.

29. In his grounds of appeal, the appellant asserts that the Court had placed too much weight on the evidence of the respondent. The appellant had only conceded to occasional payments to assist the respondent and that there was never any agreement for payments or the schedule for the payments.

30. I find that it is was open for the lower Court to accept or reject the evidence of one party either totally or partially. Having accepted the evidence of the respondent, it was open for the court to come to the conclusion that the respondent was financially dependent on the appellant and that there was financial arrangement between the parties. I cannot interfere in such a finding of the Court in absence of any other evidence. There was enough evidence of the appellant providing financial assistance to the respondent in terms of medical bills, for the benefit of the children and for other matters too. I am also of the view that support of this nature cannot be termed as occasional assistance.

D. The degree of mutual commitment to shared life.

31. The Court found that there was enough evidence to reveal that there was a degree of mutual commitment to shared life.

32. The appellant in his appeal argued that the Court has not identified the evidence which would indicate that there was mutual commitment to shared life. He argued that there was absence of any evidence from an independent third party to demonstrate a willingness, desire and/or intent to commit to a shared life.

33. It is the position of the appellant that he never demonstrated any behavior or conducted himself in a manner that could constitute a commitment to a shared life. Moreover, there was no shared finances, no joint bank accounts, no joint investments, no joint property and no acquisition of assets together. The sexual relationship was not exclusive in nature as well since the appellant contends that he was dating and having sexual relationship with at least 3 other women.

34. According to the appellant, his relationship could be described as friendly and sexual in nature only and no undertakings or commitments to a shared life was made by him.

35. It may be correct that the Court did not identify the evidence which indicated that the parties had a mutual commitment to shared life. Irrespective of that, there is abundance of evidence that the parties stood by each other during good and bad times including the times of their ill health. The appellant provided the respondent with financial assistance since he was the breadwinner and the respondent provided him with nursing care and comfort and stood by her in times of his need.

36. The appellant undeniably provided her financial assistance and used to send money from Australia too. If he did not have such commitment with her for a shared life, he would not bother sending money from Australia. He would rather wait to come back to Fiji and give her a small amount.

37. Both the parties undeniably did household chores together and also made decisions in respect of shifting to a new rental premises. The appellant also had his personal belongings at the respondent's place.

38. There may not be joint accounts, investments or property together. It is not necessary that all people in a de facto relationship must have joint properties or investments to qualify as de facto partners. Each party's circumstances may vary and in this case given the parties' circumstances, it was open for the Court to arrive at a finding that both parties had committed themselves to a shared life.

E. The reputation and public aspects of the relationship

39. The Court accepted the uncontroverted evidence of the respondent that although she never attended any one of the appellant's family functions, it was known to the appellant's family who she was. Her children were aware of who the appellant was. Even the respondent's former husband came to know about the relationship between them.

40. The Court also accepted that the parties had travelled to Labasa twice. They also travelled to Savusavu together twice. During their visit they stayed with the appellant's friends Sala and William. The appellant had introduced the respondent as his partner.

41. The Court concluded that the relationship had its own reputation and was public.

42. The appellant's position on appeal is that such visits and trips to Vanua Levu should not mean that there was sufficient public exposure to the relationship. One has to satisfy that both of them spent sufficient and quality time together in the public forum. In this case, the appellant argued that the respondent never attended any of the appellant's family function.

43. I have perused the Court records and the respondent's evidence does not only say that the trips to Vanua Levu was all to it when it came to public exposure of the relationship. She also testified that they would go to movies together. They would also go to clubs and dinners together. She had also been to a few of his cocktails and functions. He also, according to her, took her to his friend's place where she cooked puri and curry for them. He also made a deposit of $2900 in September 2014 for her illness and for her to join him in Australia.

44. She also was the one who took him to the hospital at 2am in the morning in a taxi when he broke his leg. She was there physically in the hospital until he recovered. The hospital is a

public place where she remained with the appellant full time. She would go to Nadi with him in the same vehicle or subsequently in a bus whenever he was required to travel for work purposes.

45. The respondent's evidence was largely uncontroverted although he refuted that the money he sent from Australia was for her to join him in Australia but for her medical check-up. In that regard I do not find that the Court had erred in holding that there was sufficient degree of public exposure of the parties' relationship. It was open to the Court to come to such a finding and there is no basis upon which I could interfere with the finding.

Final Orders

46. In the final analysis, I do not find that the appellant has shown to me any basis upon which I could interfere with the findings of the Magistrates' Court that there was de-facto relationship between the parties.

47. I therefore dismiss the appeal and uphold the decision of the Magistrates' Court.

48. I note that the application for spousal maintenance is on hold pending the decision of this appeal. I direct the Registrar to inform the Magistrates' Court of the decision so that the respondent's application for spousal maintenance is heard as soon as possible.

49. I order each party to bear their own costs of the appeal proceedings.

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Hon. Madam Justice Anjala Wati

Judge

20.01.2020

<u>To:</u>

1. ***Haniff Tuitoga Lawyers for the Appellant.***
2. ***Legal Aid Commission for the Respondent.***

3. ***File: Appeal Case Number: 17/Suv/0001.***