

IN THE FAMILY DIVISION OF THE HIGH COURT

APPELLATE JURISDICTION)

CASE NUMBER: 19/LAB/0008

BETWEEN: PATRICK

AND: SAMANTHA

Appearances: Ms. M. Tuiloma for the Appellant.
Respondent in Person.

Date/Place of judgment: Tuesday 9 June 2020 at Labasa

Judgment of: Hon. Mr. Justice Vishwa Datt Sharma

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: PATRICK v. SAMANTHA - Fiji Family High Court Appeal Case Number: 19/Lab/0008

JUDGMENT OF THE COURT

Legislation

Family Law: Spousal and Child Maintenance

Legislation: ss85, 86, 89, 90, 155 and 157 of Family Law Act (FLA)

INTRODUCTION

- [1] Before Court is the Husband's amended Appeal against the decision of the Resident Magistrate of 11th July 2019.
- [2] The Husband herein was Ordered that he was liable to pay his wife Spousal Maintenance in the sum of \$15 per week [\$60 monthly] commencing 31st July 2019 and Child Maintenance of \$42.50 each month commencing 31st July 2019 and concluding on 31st July 2020 for the period 2nd February 2019 to 2nd June 2019.
- [3] It is noted that the final maintenance orders made hereinabove are somewhat ambiguous in nature and/or two-fold. The orders made should have been clear and specific, either a weekly or monthly maintenance orders to eradicate any confusion.

GROUND(S) of APPEAL

- [4] The Husband was aggrieved by the Court's decision of 11th July 2019 and accordingly filed the amended Appeal on the following grounds:-
- i. That the Learned Magistrate erred in law and in fact in incorrectly holding that the Appellant is obligated to support the Respondent financially.
 - ii. That the Learned Magistrate erred in law and in fact in incorrectly holding that the Appellant is obligated to support the child despite the child being 18 years of age and not pursuing secondary or tertiary education.
 - iii. That the Learned Magistrate erred in law and in fact in making a retrospective order for child maintenance.
- [5] The orders now sought by the Husband are as follows-
- (a) That the Magistrates Court Order for child maintenance be set aside;
 - (b) That the Magistrates Court Order for spousal maintenance be set aside; and
 - (c) Any other orders this Honourable Court deems fit and just.
- [6] Before the commencement of the Appeal Hearing, the counsel representing the Husband informed Court that she was not proceeding with ground at paragraph 4(ii) as set out hereinabove. It is important to note that the child herein has attained the age of 18 years in June 2019. Section 92(1) of FLA refers.

GROUND (i)

- [7] That the Learned Magistrate erred in law and in fact in incorrectly holding that the Appellant is obligated to support the Respondent financially.
- [8] s.155(a) to (c) inclusive of the FLA stipulates that a person can be found to be incapable of adequately supporting himself or herself if he or she is:

- (a) having care and control of a child of the marriage who has not attained the age of 18 years;
- (b) by reason of age or physical or mental incapacity not able to be gainfully employed; or
- (c) any other adequate reason.

- [9] In determining the question of liability, the Trial Court must read s.155 of the FLA and take into consideration matters reflected in s.157 of FLA.
- [10] I find that the Trial Court had correctly applied the principles of law and assessed the facts when determining the issue of liability in this matter.
- [11] At paragraph 18 of the Judgment, the Court was satisfied and found that the Wife was unable to work as a result of pre-existing medical conditions and when cleaning the house when she had sinus and asthma which can be very uncomfortable and potentially an unsafe exercise.
- [12] Further, at paragraph 19 the Court also found that the husband was obligated to support the Wife.
- [13] However, in cases of such nature, the Court requires the Wife to prove that she has ailments or suffering from sickness and/or medical condition of the nature as such that she is not capable of and obstructs her from finding gainful employment.
- [14] The Wife in her evidence stated that she was a house girl after separation and worked 2 days a week after separation and was always sick, she cannot work since she was suffering from sinus and asthma and has difficulty in breathing. She added that she does not have any other difficulties that would stop her from working. She worked but stopped because of her sickness. She cannot do vegetable farming and cannot sew either.
- [15] Although there is no medical evidence tendered by the Wife into evidence, however, taking into consideration the nature of the ailments the Wife suffered from; the conclusion (not an assumption) that can only be drawn is that the Wife is not capable of finding a gainful employment rather resorts to the finance provided by her elder child who is in employment.
- [16] S.157 of the FLA requires Court to examine the income, property and financial resources of each of the parties to the current proceedings.
- [17] The Wife resides in her own house. Every week the elder son sends \$50 to \$60 per week to her for groceries and utility bills.

On the other hand, the Husband in his evidence stated that he works in his capacity as a fisherman and earns \$60 to \$70 per week. He stated that he can pay \$30 per month and not \$60 per week. As per the Husband's Form 6 response, he categorically confirms that he can afford to pay a sum of \$30 per week to the Wife. He also gave evidence that he lived in a De Facto relationship and maintains her. If the Husband is able to maintain the De Facto relationship, then I do not see any reason why the Husband cannot pay maintenance of \$30 per week to the Wife as confirmed by him.

[18] Therefore, in light of above, the Wife has established that she qualifies for spousal maintenance of \$30 per week by reason of her physical incapacity and medical conditions in lieu of finding an appropriate gainful employment.

[19] Above prompts me to set aside the Learned Magistrate's spousal maintenance order of \$15 per week made on 11th July 2019 and substitute the same with a spousal maintenance order of \$30 per week with effect from 9th June 2020.

GROUND (ii)

[20] That the Learned Magistrate erred in law and in fact in incorrectly holding that the Appellant is obligated to support the child despite the child being 18 years of age and not pursuing secondary or tertiary education.

[21] This ground of Appeal was abandoned by the Husband for the reasons best known to him.

[22] In fact grounds (i) and (ii) at paragraph 4 hereinabove were interrelated in terms of the Husband's obligations and liability to pay spousal maintenance.

[23] However, the decision to abandon ground (ii) is the liberty of the Husband and therefore I now accordingly abandon ground (ii).

GROUND (iii)

[24] That the Learned Magistrate erred in law and in fact in making a retrospective order for child maintenance.

[25] Reference is made to the orders of the Court of 11th July 2019 to make the maintenance liability retrospective. It can be ascertained from the Court records that the Form 5 Application seeking maintenance and/or contribution for spousal and child maintenance was filed on 6th March 2019. No interim spousal and/or child maintenance orders were ever considered by the Court for a period of 9 months until the substantive matter seeking for maintenance came up for hearing on 4th December 2019.

[26] The child in question attained the age of 18 years in June 2019. The decision of the Learned Magistrate was delivered on 11th July 2019 after the said child in fact had attained 18 years of age.

[27] A child maintenance order in relation to a child if made, stops being in force when the child turns 18 years of age unless the order is expressed to continue in force after the age of 18 years. s.92(3) of FLA refers.

[28] During the substantive hearing of Form 5 Application for child maintenance, the Court failed to examine the Husband on his means to pay backdated child maintenance in order to consider making the child maintenance liability retrospective.

[29] Upon the Court's failure to do so, such liability of child maintenance is unconstitutional and unfair in the circumstances.

[30] Therefore, I find that the Learned Magistrate had in fact erred in law and in fact in making a retrospective order for child maintenance at the rate of \$42.50 monthly commencing 31st July 2019 and concluding on 31st July 2020 for the period 2nd February 2019 to 2nd June 2019.

[31] Accordingly, I allow the Appeal on the question of child maintenance liability made retrospective and have no alternative but to set aside the Learned Magistrate's Judgment of the Court in this respect.

[32] Following are the final orders-

- (a) The Appeal is partly allowed. The spousal maintenance order of 11th July 2019 is set aside and substituted with a spousal maintenance order of \$30 per week with effect from 09th June 2020.
- (b) The Appeal in terms of amended ground (ii) at paragraph 4 hereinabove holding the Husband (Father) liable to support the said child after the child attained 18 years of age is abandoned by both parties.
- (c) The Appeal in terms of amended ground (iii) at paragraph 4 hereinabove dealing with retrospective child maintenance order is allowed accordingly.
- (d) Each party shall bear their own costs of the Appeal proceedings.

VISHWA DATT SHARMA
JUDGE
SUVA
09th Day of June, 2020

cc: Legal Aid Commission, Savusavu.
Sashi, Labasa.