

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER:	<i>Family Appeal Case Number 0006 of 2018 Action Number 13/Nas/0494</i>	<i>Original</i>
BETWEEN:	<i>MAHFUZ</i>	<i>APPELLANT</i>
AND:	<i>RENJINI</i>	<i>RESPONDENT</i>
APPEARANCES:	<i>Ms. A. Prakash for the Appellant. Mr. R. Goundar for the Respondent.</i>	
DATE/PLACE OF JUDGMENT:	<i>Friday 3 November 2023 at Suva.</i>	
CORAM:	<i>Hon. Madam Justice Anjala Wati</i>	
CATEGORY:	<i>All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.</i>	

JUDGMENT

A. Catchwords:

FAMILY LAW – PROPERTY DISTRIBUTION – DE-FACTO RELATIONSHIP – relationship denied by one party-court should examine the evidence holistically and in light of the factors set out by the law to determine whether there is existence of de-facto relationship- the evidence of the parties not analyzed properly as most of the evidence by one party disregarded by court without any analysis.

B. Legislation:

- 1. Family Law Act 2003 (“FLA”): s. 154.***

.....

Cause

- 1. The appellant claimed that he was in a de-facto relationship with the respondent from 2008-2012 and therefore applied for 50 percent of all monies sitting in her bank**

account at the Bank of the South Pacific. The respondent denied any de-facto relationship and sought that the application be struck out.

2. On the question of whether a de-facto relationship existed or not, the court found that there was no de-facto relationship as the appellant could not establish that they were living together as husband and wife or that he was financially supporting the child of the respondent. The court stated that according to the respondent lady's child, the appellant was a tenant in their house and that he never considered him as his mother's husband or his father. Based on this evidence, the court found that the de-facto relationship could not be established.
3. Aggrieved at the decision, the appellant appealed the decision of the court below. The appellant appealed on the grounds that the court did not consider s.154A and the evidence in respect of each consideration under s.154A to determine if a de-facto relationship existed between the parties.

The Law and Analysis

4. Section 154 of the Family Law Act defines what a de-facto relationship is. It states that it is a relationship between a man and a woman who live with each other as spouse on a genuine domestic basis although not legally married to each other.
5. S.154A states that *"in determining whether 2 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 a 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 a 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.”*

6. The appellant complains that in dealing with the issue, the court did not at any time analyse the evidence in respect of the considerations under s.154A. His counsel argued that there was no reference made to s.154A and the court only analyzed the evidence of the respondent and her witnesses.
7. It is clear from the judgment of the court that it did not draw its mind to s.154A of the Family Law Act and analyse the evidence pursuant to the factors outlined therein. It's consideration was limited to only: one that the appellant showed no evidence to confirm that the parties were living together as husband and wife or that he was supporting her and the child and two that the respondent's child had stated that the appellant was a tenant in their house and that he never considered him as his father or his mother's husband.
8. The very first consideration that the appellant did not provide any evidence that the parties lived as husband and wife is totally incorrect. He gave evidence that he lived with her as her husband since 2008-2012 and supported her and the child. He said that she stayed home and cooked, washed and looked after the house. He asserted that she also went with him to Savusavu twice to attend the weddings. He testified that she treated him like her husband.
9. The appellant's sister also gave evidence that she knows the respondent since 2008. She testified that the appellant went to stay with the respondent and his small son. She also testified that everyone knew about their relationship.
10. The court did not analyze the above evidence. It did not state why the above evidence was not regarded as evidence and why it rejected that evidence. It just stated that there was no evidence of the parties living as husband and wife. That is incorrect. There was evidence of the appellant's claim of a de-facto relationship but the court did not address or analyse the same.

11. I also see lack of analysis of the uncontroverted evidence that the respondent had also travelled to Savusavu with the appellant twice to his family. The court ought to have analyzed that evidence and gauge whether it affected any factors outlined in s.154A of the Family Law Act which states that the court needs to examine the degree of mutual commitment to a shared life and the reputation and public aspect of the relationship. Whether the travelling together indicated any mutual commitment to the relationship of the parties and whether this amounted to demonstrating that they are a couple should have been reflected upon by the court. Unfortunately this was totally disregarded by the court.
12. The court also appears to have accepted the evidence of the respondent's son who was 14 years of age at the time he gave evidence in 2018. It is very unsafe to rely on his evidence as the time period in which the de-facto relationship was alleged was from 2008 to 2012. The child would have been 4 years old in 2008 and 8 years old in 2012. He would not know and comprehend the nature of the parties' relationship at that age. He would mostly believe what he is told. 6 years after, he will reflect on either what he believes was the relationship or what he is told to believe. There is also a danger of the child not having complete reflection of what he saw and understood when he was of an age where his understanding was not developed.
13. The court ought to have carefully reasoned out why it accepted the evidence of a child over the appellant and his sister.
14. Together with the above observation there are no other findings on any other factors. This has affected a proper finding on the issue of the existence of a de-facto relationship.
15. I cannot step in the shoes of the trial court as I would have required evidence on matters relating to the factors in s.154A of the Family Law Act. I would also need to see the demeanour and deportment of the witnesses to come to a proper finding.

16. I do not find that the court had analyzed the evidence properly to come to a finding of whether the de-facto relationship between the parties existed. That has affected the property distribution proceedings between the parties.

Final Orders

17. I allow the appeal and order that the question of whether a de-facto relationship existed between the parties be properly determined upon analysis of all the evidence in reference to s.154A of the Family Law Act by a different magistrate.

18. It may be perhaps suitable to hear the matter on an expedited basis.

19. I require the Registrar to call this matter in Nasinu Court and fix a date before another Resident Magistrate.

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

.....

Hon. Madam Justice Anjala Wati

3.11.2023

To:

1. Legal Aid Commissions for the Appellant.
2. Ravinesh Goundar Lawyers for the Respondent.
3. File: Family Appeal Case Number: 0006 of 2018.