

asserts that the respondent has assaulted the petitioner "socially, mentally, verbally and physically". This is followed by a mishmash of allegations that the respondent has chased the petitioner from his home and not sought to reconcile with him, that she made false allegations about him to the Police, that she gossiped about their relationship to friends and employees, that she reported him to his employer (the Ministry of Education) and recommended that he be dismissed, that she attacked and violently hit him with a hammer, that she withdrew her name as a co-borrower on a loan and yet used the money for her own parent's obligations and, finally, that she underwent a medical procedure (which was referred to as having her 'tubes tied') to prevent her from having further children without the petitioner's consent.

- [2] It is understood that the petitioner relies on section 3(1)(g) of the Divorce Act which provides that the Court may dissolve a marriage where the Court is satisfied that:

..the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

- [3] In *Fe'ao v Fe'ao* [2001] TLR 243, 246, Ford J said:

The legal test for the type of behaviour that would make it unreasonable for the petitioner to live with the respondent is stated in *Halsbury*, 4th edition, vol 13, para 574, as follows:

"The matter has been approached by considering whether any right-thinking person would come to the conclusion that the (respondent) had behaved in such a way that (the petitioner) could not reasonably be expected to live with the (respondent) taking into account the whole of the circumstances and the characters and personalities of the parties."

In *Stevens v Stevens* [1979] 1 WLR 885, 887, Sheldon J adopted the following passage from *Rayden on Divorce* (12th Ed, vol 1. Page 219):

"In all these cases the totality of the evidence of the matrimonial history must be considered, and the conclusion will depend on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view, after a consideration of any excuse or explanation which this respondent might have in the circumstances, the conduct is such that this petitioner ought not to be called upon to endure it."

An overview of the marriage

- [4] On 27 June 2006 the parties were married at Nuku'alofa. There are four female children of the marriage now aged between 3 and 9 years. One of the children has been adopted by a relative. The petitioner is a teacher and the respondent is a nurse. Following their marriage the parties lived for a time at Niutoua but after the birth of their first child the respondent moved to Nukunuku while the petitioner remained at Niutoua as he then taught at the GPS Ha'amonga. For a period between 2010 and 2012 the parties lived together at the residential

home attached to the local hospital at Nukunuku but in 2012 the petitioner returned to Niutoua as he was transferred back to the GPS Niutoua. The parties separated in May 2014 but spent some time together as a family in October 2014 (during which time the respondent says sexual intercourse occurred). The petition for divorce was filed in April 2016 following the lodging by the respondent of maintenance proceedings in the Magistrates' Court.

Credibility

- [5] The petitioner gave evidence. I did not find the petitioner to be a credible witness. It is quite obvious that the problems that the petitioner and the respondent have had in their marriage have been caused, or at least contributed to in large measure, by his dependence on alcohol and kava. Some of the events of which he complains occurred during periods of his extreme intoxication. He appears to have no appreciation that he does have a dependency problem. He apparently accepts absolutely no responsibility for his conduct or the problems in his marriage. Many of the matters that are relied upon in the petition occurred years before the parties separated. They have been raised now, in my view, in retaliation for the respondent having sought maintenance orders from the Magistrates' Court.
- [6] The petitioner called his father as a witness. Sione Vi Snr gave some brief evidence of a general nature concerning the parties' marriage relations. His evidence did not advance the petitioner's case and I do not need to say more about it.
- [7] The petitioner also called as a witness Kisione Hafoka Mafua. He gave evidence of one incident that occurred during the marriage when the

respondent was said to have yelled at the petitioner while he attended a kava drinking party at Nukunuku. Kisione Mafua was an honest witness but the principal relevance of his evidence was that it confirmed that the petitioner was not forthright as to the frequency of his attendances at kava drinking sessions.

[8] The respondent gave evidence. I found her to be a credible witness. She answered honestly to the allegations made against her. She provided plausible and convincing explanations for the events of the marriage. She was genuinely perplexed by some of the allegations which related to events of which she had no recall or which were, in her view, simply untrue. She had no recall of ever having attacked the petitioner with a hammer (and it is apparent that she never did) and was certain that she had discussed having her 'tubes tied' with the petitioner as the hospital required his consent before undertaking the procedure. In any instances where there was a conflict in the evidence of the petitioner and the respondent I have no hesitation in preferring the evidence of the respondent.

[9] The respondent also called as a witness Malia Fanua, who is a Police Officer of 18 years experience. Ms. Fanua's evidence concerned two complaints made by the respondent to the Police concerning the conduct of the petitioner. Her evidence confirms the respondent's evidence that on both occasions the Police were called because the petitioner was extremely intoxicated.

The allegations in the petition

[10] The petitioner has the burden of proving to the civil standard that the respondent's conduct was so unreasonable that he cannot be expected to endure it. I find that the evidence fails to establish this by a

considerable margin. The respondent did not, in my view, conduct herself in an unreasonable manner in any of the ways alleged in the petition. I find that none of the allegations made against the respondent in the petition are made out. I deal with the allegations in the order they appear in the petition.

- [11] The first allegation is that the respondent chased the petitioner out of his house a couple of times and made no attempts at reconciliation. The petitioner gave evidence that he would argue with the respondent and that she made him sleep outside at night and he also slept for a period in his classroom. The longest period he said he spent away was 2 weeks. How exactly it is that the petitioner could be physically chased from his home by his much smaller wife was not explained. Having seen the parties I do not think she would be capable of that. What is clear is that he returned to the house whenever he wanted to because, as he said, "I missed our kids". It was also apparent from the evidence and attitudes of the parties that it is the respondent, and not the petitioner, who seeks reconciliation.
- [12] The next allegation is that the respondent made false complaints to the Police about the petitioner. The respondent accepted that she had made complaints but not that they were false. The context is everything. The respondent explained that the petitioner drunk large amounts of alcohol and kava, became extremely intoxicated and when this occurred she was afraid of him and what he might do. She said that on one occasion she had called the Police when she had found the petitioner extremely drunk on Government property and he refused to leave when asked and on the other occasion when he was drunk and he had broken into the hospital. In neither instance can she be said to have acted unreasonably. Her evidence was corroborated by Malia

Fanua who had taken her complaints. The respondent denied that she had ever suggested to the Police that there was inappropriate conduct by the petitioner towards a daughter and I believe her about that. The respondent's complaints to the Police were not false and were reasonably made.

[13] The petitioner then said that the respondent had complained about him to the Ministry of Education and sought his dismissal. He had no direct knowledge of the content of her complaint and he called no one to give evidence about that. He did accept that complaints had been made about him by parents of his students. The respondent said that she had never sought the petitioner's dismissal and I believe her.

[14] The allegations that the respondent gossiped about the parties' relationship was based solely on what the petitioner had been told by others and they were not called to give evidence. There is therefore no direct evidence of this allegation or of the content of the alleged gossip.

[15] I have previously said that I do not believe the respondent ever attacked the petitioner with a hammer and contrary to what is in the petition (which alleges that the respondent "attacked [the petitioner] with an iron hammer violently to hit him and then drove him from the house"), the petitioner's evidence was only that the respondent threatened to hit him with a hammer and that he recorded her doing so on his cell phone. He did not however produce that recording into evidence. The respondent has no recollection of the incident and I find that it did not occur.

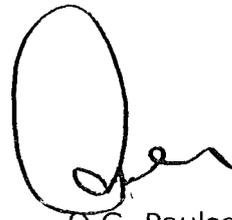
[16] The petitioner says that the respondent had withdrawn her name from a 'co-loan'. No documents from the bank were produced to confirm

that. No bank officer was called to give evidence either. The respondent said that all she had done was talk to the bank because of concerns that the petitioner was not using the money for its intended purpose, which was to pay for house renovations, but instead to buy alcohol. I accept her evidence. The petition also alleges the loan was used for payment of the respondent's parents' obligations. This is incorrect. The petitioner acknowledged that he had used the money for his own purposes and that included purchasing alcohol; albeit for workers who I understand did work for him. Only a small portion of the loan advance was given to the respondent.

- [17] The petitioner's final allegation was that the respondent had had her 'tubes tied' without discussing that with him. The respondent says she did discuss the matter with the petitioner and had to do so before the hospital would perform the procedure. I believe that the respondent did discuss the procedure with the petitioner before it was undertaken.

Result

- [18] For the reasons given the petition for divorce is dismissed.
- [19] This petition was ill-advised. It appears to me that had the petitioner waited a short time until May 2016 he might have petitioned for divorce following two years separation, in which case he may well have faced no opposition from the respondent. It was reasonable for the respondent to defend the allegations made against her and she is entitled to her costs, which are to be fixed by the Registrar if not agreed.



O.G. Paulsen



NUKU'ALOFA: 16 August 2016.

LORD CHIEF JUSTICE