IN THE FAMILY DIVISION OF THE HIGH COURT	
CASE NUMBER:	08/BA/0043
BETWEEN:	KESAIA
AND:	MUKHTAR
Appearances:	Mr. S. Sharma of LAC for Appellant Respondent in person.
Date/Place of judgment:	Thursday, 20th January, 2011 at Lautoka.
Judgment of:	The Hon. 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.*
Anonymised Case Citation:	KESAIA V. MUKHTAR - Fiji Family High Court Case Number: 08/BA/0043.

JUDGMENT OF THE COURT

Catchwords

APPEAL -ALTERATION OF PROPERTY INTERESTS -Applicant wife made an application in the lower court for alteration of property interests namely monies standing to the credit of the husbands account in Fiji National Provident Fund- Court refused distribution mainly on the ground that the property was acquired before marriage-this court held that lower court erred in refusing distribution on that ground and not considering the legal definition of properly and by not taking the alteration of interests factors into account ns prescribed by the statute before determining the issue-gross failure on part of the court and error of law and fact has both occurred-appeal allowed with no order as to costs-fresh trial ordered before new magistrate.

Legislation

Family Law Act No. 18 of2003.

Cases/Texts

Pastrikos (1980) FLC 90-897

Clauson (1995) FLC 92-595

Dickey, A, "Family Law" 4th Edition (2002) Lawbook Co. Sydney.

The Appeal

1. On the 2nd day of October, 2009, the appellant filed a notice of appeal against the orders of the Magistrate made on the 22nd day of September, 2009.

The Grounds of Appeal

Mr. Appellant raised 3 grounds of Appeal and they are as follows:-

Ground 1

The Appellant is entitled to some shares in the husbands Funds held in Fiji National Provident Fund since she was staying with him since 1987.

Ground 2

The Learned Trial Magistrate failed to ask the Respondent to disclose his statements from FNPF.

Ground 3

The Learned Trial Magistrate erred in law and in fact when he failed to analyse the application for property distribution.

The Orders Sought in Appeal

2. The Appellant has sought an order that she be given some shares from the husbands FNPF.

The Parties/Case Background

3. The parties lived together in a de-facto relationship for some time until they got married in 2002.

4. They separated in 2008 and their marriage was conditionally dissolved in 2009. The order for

dissolution of marriage became final on the 05th day of August, 2009.

5. On the 07th day of May, 2009 the wife filed an application for final orders for half share in the husbands FNPF monies and also for a double bed and drawer in the house to be given to her. The application was heard on the 1st day of September, 2009.

6. On the 29th day of September, his worship through a very brief judgment consisting 9 sentences dismissed the wife's claim for shares in the FNPF of her husband.

7. I shall set out the entire ruling of his worship:-

"I have heard the evidence provided by the Applicant. I have also heard the evidence provided by the Respondent. The Respondent is objecting to the Applicant getting any share of his FNPF. He is however willing to assist her from time to time with any difficulties that she has. The Applicant is saying that she is entitled to a share of his Fiji National Provident Fund as she has stayed with him and looked after him since they started living back in 1987. The Applicant is currently working as a house girl.

After hearing evidence from both parties, I note that the Applicant is not entitled to any share of the Respondent's FNPF. He was working before he married her, he filled in his applications himself and the FNPF was deducted for his work. The properties have been related to her, the marriage has been terminated. Both parties deserve to have a clean break from the marriage.

The Application is refused and struck out".

8. It is against the above orders that the appellant has appealed.

The Appellants Submissions

9. Mr. Sharma on behalf of the appellant submitted that whether the property was acquired in the marriage or within the marriage, it is subject to distribution. He also said that FNPF is specifically included as property by virtue of s. 154 of the Act. He further submitted that his worship failed to consider that the wife had a presumption of equal contribution in her favour which was never displaced and that she should then be entitled to distribution of monies from the FNPF. He further submitted that his worship has failed to act in accordance with the guidelines stipulated in s. 162 of the Act which states the appropriate factors that the court must take into account when dividing property.

The Respondents Submission

10. The Respondent submitted that whatever is the outcome of the proceedings is not his fault. He submitted his evidence and presented his case. It is for the court to decide on the merits of the same.

The Law and Determination

11. I will deal with all the grounds together as it is impossible to deal with each in isolation.

12. It is very apparent that his worship declined to make any orders for distribution because he had made a finding that the property was acquired before marriage and so not liable for distribution.

13. This indicates that his worship is purely unaware of the definition of property that is liable for distribution or alteration of interests under s. 161 of the Family Law Act.

14. There is in fact, under the new Fiji law, no such distinction between matrimonial property and non-matrimonial property. Section 162(1) speaks of the *"property of the parties to the marriage or either of them"*. Accordingly, when the Court is making its judgment, the Court must include in the pool of assets each and every item of property - and of course every liability.

15. One must also look at the definition of property in s. 2(1) of the Act. It defines property to be property within or outside marriage. This includes property acquired outside marriage and retained after the

marriage is dissolved.

16. S. 154 of the Act also states that property includes the money standing to the credit of a party in the Fiji National Provident Fund.

17. Our Parliament obviously had a number of models of property division available to it when it passed the new law. One has to run with the system our Parliament has chosen - and this system does not recognize the concept of the non-matrimonial asset.

18. His worship grossly erred in law when he held that the FNPF monies were not subject to distribution.

19. Having excluded the FNPF monies from the pool of assets his worship then could not consider the factors to be taken into account when altering interests in property.

20. If his worship had properly considered the FNPF monies as an asset in the pool, then he would have realised that there is a presumption that contribution of the parties to marriage in respect of every asset is equal. The husband had not discharged that onus that was necessary. If this onus is not discharged, then definitely like the appellant contends, the appellant would be entitled to her share in the FNPF monies. There is no evidence on record that could have rebutted the presumption of equal contribution.

21. The appellant is also correct in saying that his worship did not analyse the application for property distribution. He could not because he had made the first gross error by taking FNPF out of the pool of assets. There was no asset left to analyse.

22. His worship also did not take into account the value of the asset; again he could not because he had excluded the asset as one that was liable for distribution.

23. This appeal is allowed on all grounds. It is only fair if a proper trial is held in respect of the same application and the proper processes are invoked.

24. It is my duty as an appellate court to state the processes involved in altering interests in property. This may be of assistance to the new Magistrate who will be hying the matter.

25. Under the old law in Fiji, the Court was directed to make such settlement of property as it considered "equitable" - the Act provided no guidance at all to assist the Court to identify what factors might be important in making a settlement of property. The outcomes must only have been able to be predicted by reference to case law. The new Act provides much more guidance - in particular this can be found in section 162 of the Act.

26. In Australia, the Courts have identified a four-step process in working through every property case. Although this four-step process is not mandated by the words of the Act, the process is entirely consistent with the scheme of the Act and it provides a very useful structure for the Magistrate hearing the case.

27. I will begin by very briefly running through these four steps. I will then discuss them in a little more detail.

1. identify and value the assets and liabilities of the parties;
2. assess the parties' contributions to the assets;
3. assess a range of factors set out mainly in s 162(3) of the Act; and
4. consider whether the order proposed after consideration of all those factors is - to use the word employed in the Act - "appropriate".

28. Although the four-step process provides a framework in which to work through a disputed property case - the four steps do not actually provide an entirely predictable answer to the way in which the

property is to be divided.

29. Each step is not done as a separate little Court hearing and the Magistrate does not announce his or her decision at the end of each of the four steps along the way. The four steps are all happening together in the one trial - and it is only when the Magistrate makes the final decision that you will see the four steps laid out and findings made in relation to each step.

Step One: Identify and value the assets and liabilities of the parties:

30. The first step of the four-step process is to identify all the assets. This information about the assets and liabilities is then included in the statement of financial circumstances - which is the Form 19 in the Fiji Family Law Rules. Each party includes in the Form 19 the assets they own or in which they have an interest - not the assets of the other party.

31. There are two other very important things to note about property in our country.

32. The first is that the definition in section 154 indicates that property includes a party's interest in the Fiji National Provident Fund.

33. The second thing to note is that section 154 expressly indicates that the interest of a party in real or leasehold property that is inalienable shall not be considered as property for the purposes of the *Family Law Act*. Section 166 goes on to state expressly that the Family Law Act does not authorize a Court to make an order alienating native land or any interest in it.

34. So at Step One of the four-step process, the Court would not include inalienable property in the pool of assets available for division or transfer. This does not mean, however, that an interest in property that is

inalienable is irrelevant. On the contrary it is highly relevant, for reasons I will mention in a moment.

35. Because inalienable property is relevant, the lawyer preparing an application for property settlement would ascertain from the client whether either party to the marriage has any interest in such property. In fact, the client must disclose such interests in their statement of financial circumstances.

36. Interestingly, the client who has an interest in an item of property that is inalienable must give an estimate of the value of such an interest. This is a difficult concept. If the interest in the property is inalienable, how do you put a value on it?

Step Two: Assess the parties' contributions to the assets:

37. The second step is to identify the contributions each party made during the marriage.

38. For convenience, I will refer to contributions to the acquisition of assets. However, it is important to note that the Act says the Court must not only assess contributions towards the acquisition of assets but also contributions made towards the conservation and improvement of the assets.

39. It is also important to keep in mind that the Act says the Court has to consider contributions not only to the property the couple own at the time of the hearing, but also any property they previously owned. Thus contributions made to property owned earlier in the marriage, but since sold, are just as important as contributions to the assets they have now.

40. S. 162 gives a good idea of the evidence that is needed to be adduced. The court must ask the lawyers to break the evidence into the categories identified in s 162 - not only does that help the Court, but it makes sure lawyers do not overlook important contributions. Subparagraph (a) of s 162(1)

41. The first category of contributions is financial contributions - this is clearly a very important type of contribution, but by no means the most important.

42. Often especially in a short marriage, the most important financial contribution is the contribution of assets one party makes at the commencement of the relationship.

43. These assets should all be identified carefully and some estimate placed on their value at the time of the marriage.

44. Another type of financial contribution is income earned during the marriage. Some of this income will have been used to acquire, maintain or improve assets.

45. One will note from the words of s 162(1) itself that the financial contribution can either be direct or indirect:-

- a direct contribution would be paying for the asset in question;
- an indirect financial contribution could, for example, be paying for day-to-day living expenses, thereby freeing up the income of the other party to pay for the asset.

46. Another category of financial contribution would be financial assistance provided by relatives, which is usually considered as having been a contribution made by the party to the marriage whose relative provided the help.

Subparagraph (b) of s 162(1)

47. The second category of contribution identified by the Act is direct or indirect contributions other than financial contributions. This could include building the house with one's own hands, making a garden, painting walls, making curtains and likewise Subparagraph (c) of s 162(1)

48. The third category of contributions is a very important one and that is the contribution made to the welfare of the family, which includes contributions as homemaker and parent. These contributions are not directed towards any specific item of property. These contributions are referred to in the Act to

ensure the Court places appropriate weight on domestic work, so that the focus of the exercise is not just on financial contributions.

49. So just to recap, there are three sorts of contributions that must be assessed at Step Two of the Four Step process:-

- financial contributions to property;
- non financial contributions to property; and
- contributions to the welfare of the family.

50. The Act does not suggest that one of these types of contributions is any more important than any other contribution. It is up to the Court to assess the respective value of each type of contribution. For what it is worth, Australian courts usually treat domestic contributions as being of similar value to contributions of income - so a wife who stays home and looks after the family is considered to be making an equivalent contribution to the husband who is earning the wages.

51. This brings me to one section of our Act which is of immense significance for our Court and for lawyers as well in the way they prepare their cases. This is s 162(2) and it is a provision on presumption. It reads as follows:-

"For the purposes of subsection (1) the contribution of the parties to a marriage is presumed to be equal, but the presumption may be rebutted if a court considers a finding of equal contribution is on the facts of the case repugnant to justice, (for example as a marriage of short duration)."

52. What does this mean? What it clearly means is that in Fiji one is going to be able to avoid most of the time consuming and costly legal arguments about the value of domestic work compared with the value of income earning activity. I doubt that anyone could reasonably suggest it is "repugnant to justice" to treat the contributions of the woman who stays at home and looks after the house and children

as being of equal value to the contributions of the husband who works.

53. Not only does section 162(2) help avoid such arguments, but it will also avoid arguments about the assessment of contributions in cases where one party might think they have made slightly greater contribution than the other party, but the difference is not worth litigating about. So, for example, it might not be seen as "repugnant to justice" to say that after a marriage of some years, contributions should be assessed as equal, even if one party brought in say $5,000 or $10,000 more than the other party many years ago.

54. However, a finding of equality of contribution would almost certainly be "repugnant to justice" if, say, the wife brought into the marriage a house worth $250,000 and two weeks, or even two years later the marriage collapsed. It would not in any way be just to suggest the value of the husband's contribution was equivalent to the value of the wife's.

55. Where is the Court going to draw the line on the "repugnant to justice" issue. The only guidance in the Act is the one specific example mentioned in the section itself - i.e. the short marriage. But this is only an example - there will probably be other circumstances in which a presumption of equality of contribution could be repugnant to justice.

56. As an example, in one case a Magistrate decided a finding of equality of contributions would be repugnant to justice and instead found the contributions should have been assessed as made 80% by the wife and 20% by the husband. This might have been warranted, for example, because the wife brought in the house worth $250,000 at the start of what ended up being a 2-year marriage.

57. If the property settlement process stopped there, the assets would be divided 80% to the wife and 20% to the husband.

Step 3: Assess a range of factors set out mainly in s 162(3) of the Act:

58. Under the Fiji *Family Law Act* the process does not stop after the assessment of contributions. The reason for this is the Act says there are other things that need to be taken into account as well as contributions. These factors are all to be found in s 162.

59. The first place to look is in subparagraph 162(1) (d). This relates to pensions and superannuation. I am not altogether sure why this was put in subsection 161(1), which otherwise is totally devoted to contribution issues - but I am sure there was a good reason and that is where it is.

60. The rest of the matters to be taken into account at this Third Step of the process are set out in s 162(3), which provides that the Court must also take into account:-

"(a) the age and state of health of the parties;

(b) the income, property and financial resources, including any interest in inalienable property, of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;

(c) whether either party has the care and control of a child of the marriage who has not attained the age of 18 years;

(d) the commitments of each of the parties that are necessary enable the party to support-

(i) himself or herself; and

(ii) a child or another person that the party has a legal or customary duty to support.

(e) a standard of living that in all the circumstances is reasonable;

(f) the financial resources available to a person if cohabiting with another person;

(g) the duration of the marriage;

(h) the terms of any order for spousal or child maintenance made in favour of or against a

party;

(i) any other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account."

61. S. 162(3) factors are not looking at things that have happened in the past in the way we do when assessing contributions. Instead we are looking to the future. I like referring these factors as "future needs" factors.

62. Once again, although the Act lays down in section 162(3) the matters the Court has to take into account, it does not say how the Court is to take them into account.

63. Perhaps to explain how these things could be taken into account, I can go back to the example of the two-year marriage with the $250,000 home owned by the wife at the start of the marriage. Say that the wife was a very successful lawyer in Nadi - earning $100,000 a year and the husband had worked in a flourmill and was earning $5,000 a year. Also say that the husband has had a serious accident that prevents him from going back to work for the foreseeable future. Say again for example that the couple had two young children who they have decided are going to be living with the husband for the next 16 or so years.

64. What would the Magistrate do with all these factors?

65. The Magistrate would first of all remember that the wife is going to receive 80% of the assets if some adjustment is not made. That was the outcome achieved at Step 2 of the process - the contribution assessment stage.

66. So we know if no adjustment is made to the 80:20 outcome, the wife is already going to be much better off than the husband. The Magistrate must take that into account. He or she will next take into account that the wife has a very much greater income. The Magistrate would also take into account the fact the husband needs somewhere to live with the children and that he has a very low income. The

Magistrate would then go on to consider all of the other matters in s 162(3).

67. Having looked at all these factors, the Magistrate might say that he or she considers that the need to accommodate and look after the children and the great disparity in the financial positions of the husband and wife justifies making an adjustment to the initial 80:20 split. The size of this adjustment is entirely discretionary, but the Magistrate must exercise the discretion by reference to the section 162(3) factors.

68. The adjustment would be expressed in percentage terms in the same way as the contributions were expressed. Say the Magistrate decides a 20% adjustment is appropriate. This would then mean that the result would not be 80:20 in favor of the wife - which was arrived at earlier - but 60:40 in favour of the wife. This percentage would then be applied to all of the assets, so that the husband comes out with 60% of the pool of assets and the wife comes out with 40%.

69. Now it is very important in looking at the size of the percentage adjustment to take into account the size of the pool. If the assets are very large, the magistrate must clearly recognize that a 20% adjustment is going to have a very much greater impact than if the asset pool is very modest. Generally the smaller the asset pool, the greater the percentage the Magistrate has to make at the Third Step to take into account adequately all those things I mentioned, especially the need to accommodate children.

70. There is one thing I have not mentioned in the discussion about the Third Step. I had earlier stated at the beginning that although native land or inalienable property is not counted as property for the purposes of the Act, it is nevertheless still very important. It is important in this Third Step of the property settlement process because of the provisions of s 162(2), which talks about something called "*financial resources*" and which includes any interest in inalienable property.

71. Having an interest in inalienable property such as native land might make a big difference to the outcome if that interest, for example, provides accommodation for one party to the marriage.

Step Four:	Consider whether the order proposed order is "appropriate":

72. Coming back to the Nadi lawyer and her husband, the Court has now reached the end of Step Three of the four-step process.

73. What is left to do? The Fourth Step concentrates on the overriding requirement of s 161, which says the Court can make such property settlement order as it considers *appropriate*.

74. Although there is not much meant in this Fourth Step, it is always a good thing to stand back and look at the overall result after the court has assessed the contributions at Step Two and made any adjustment called for at Step Three. Really, the Fourth Step is just a last check to make sure the court has not lost sight of the wood for the trees as it goes along the three earlier steps of the process.

75. By the nature of the exercise, the Fourth Step is something the Magistrate is going to be more concerned about than the lawyer. The lawyer's job is usually done when he or she has got all the evidence and arguments before the Court to help the Magistrate to decide the first three steps in the process.

The Result

76. If the court decided that the 60:40 outcome is the fair result, the Magistrate then goes on either to ask the parties how they want to bring about the split or makes the decision for them if they can not agree.

77. This four-step process can also provide a useful structure for negotiations to settle cases.

How does maintenance fit into this?

78. Section 162(3) makes it clear that when deciding the division of property the Court must consider what maintenance orders have been made or are going to be made. These would be considered at Step Three of the process when working out what adjustment, if any, needs to be made to the contribution-based outcome.

79. Clearly, if the rich lawyer from Nadi is going to be paying $20,000 per year spousal and child maintenance, the Third Step adjustment to the property settlement will be very different than it would have been if she had run away to somewhere from where it will be impossible to recover any maintenance for the husband and the children.

80. The inter-relationship between property and maintenance is a fairly complex one and it bears some careful study. Two Australian cases that might help explain better than I can through this judgment are:-

- *Pastrikos* (1980) FLC 90-897 - which was handed down, five years after the Act started and which set the Court on a road of a structured way of dealing with property disputes.

- *Clauson* (1995) FLC 92-595 - which tried to correct heresies that had arisen in working out the relationship between property and maintenance.

Relevance of fault and matrimonial misconduct

81. I wish to say something about the continuing relevance of fault or matrimonial misconduct under the new Act.

82. Fault can still be relevant in some limited circumstances.

- In children's cases, if the behaviour of a parent has some impact on the welfare of the children, that is clearly a relevant consideration. For example, if one partner has been violent towards the other that is a matter that the Court may well wish to take into account in working out residence and contact orders.

- In property cases, it is unusual for fault to have relevance but it can be important occasionally. The way the court formulates it is to say that the behaviour complained about must have some financial consequence before it is taken into account - for example the fact a party has been violent towards the other party on isolated occasions is unlikely to have any relevance - if however the other party was left so badly injured or traumatized that they cannot work to support themselves, then that is clearly a

relevant factor.

- In property cases the fact a party has left to live with another person is not relevant, except to the extent it may make a difference to their financial position - for example if the new partner is working, it could have an impact on the future needs of the party in question.

83. The above is a brief outline to assist the lower court.

84. On the issue of costs in this appeal, each party is to bear its own costs.

Final Orders

85. The appeal is allowed on all grounds.

86. The orders of the Magistrate are set aside.

87. The matter is sent back to the Magistrates' Court for a retrial on the same application by the wife.

88. Each party must bear their own costs.

89. Orders accordingly.

ANJALA WATI
JUDGE
20.01.2011

To:

1. *Mr. S. Shanna of LAC, Solicitor for the Appellant.*
2. *Respondent.*
3. *File Number: 0S/Ba/0043.*