IN THE FAMILY DIVISION OF THE HIGH COURT	
CASE NUMBER:	08/Ltk/0498
BETWEEN:	AKSHAY
AND:	ROMIKA
Appearances:	Mr. Degei for the Appellant. Mr S. Krishna & Ms. Latianara for the Respondent
Date/Place of judgment:	Friday, 17th February, 2012 at Lautoka
CORAM:	
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:	AKSHAY v. ROMIKA - Fiji Family High Court Case Number; 08/Ltk/0498

JUDGMENT OF THE COURT

Catchwords

FAMILY LAW - PROPERTY LAW -APPEAL- NEED FOR EXISTENCE OF PROCEEDINGS BEFORE ALTERATION OF INTEREST IS MADE- PRESCRIBED PROCEDURE TO BE FOLLOWED.

Legislation

THE FAMILY LAW ACT 2003 ("FLA")

THE FAMILY LAW RULES 2005 (FLR")

Cases/Texts

KN v. MYH - Fiji Family High Court Case Number: 08/Bt</0043.

The Appeal

The husband has filed an appeal against the order for property distribution. The lower Court had ordered equal distribution of the following properties

(a) Cash of $32,925.67 (deposited in Court);

(b) Property 1; and

(c) Property 2.

1. For the above leasehold properties, his worship had ordered that "*the parties be given one month to draw up the terms of settlement for the disposition of the same, either through sale for equal distribution of the proceeds or through one of the party buying off the other party's share of the property*".

2. The husband wants the order for distribution wholly set aside on the grounds that the learned Magistrate erred in law and in fact

(a) In making an order for property distribution when there was no application made for the same;

(b) In overlooking the rules to be followed under the Family Law Act when ordering property distribution;

(c) In making an order for distribution of Housing Authority Sublease No. ……when the parties did not have any legal and/or equitable interest in the said property at the time of making the said orders;

(d) In making the orders for distribution when there was clear evidence that the wife had not contributed anything towards the acquisition and/or repayments on the said properties;

(e) In making an award for equal share of cash deposits in Court when the wife had already been paid her share of monies from the sale of an earlier property; and By making an award in favour of the wife when the weight of the evidence did not support the making of an award.

The Submissions

4, In respect of ground 1, the appellant submitted that the wife had never applied for property distribution and so there should not have been any order distributing the property.

The wife's counsel agreed that there was no application for distribution but the Magistrate was correct in making the award because the Court may have deduced that

the wife's situation was one of those instances where it was important for the Court to alter interest as provided for by s.l61(l) of the Family Law Act.

5, In respect of ground *2,* the husband's counsel submitted that the husband had rebutted the presumption of equal contribution because the wife already had the use and benefit of $25,000 being the sale proceeds of the first property. Again to have equal share of the rest of the property was not fair, just and equitable but repugnant to justice.

The wife's counsel submitted that the learned Magistrate properly considered ss. 160,161 and 162 of the FLA when dealing with the issue of property distribution.

6, In respect of grounds 3 and 4, the husband's counsel submitted that the Housing Authority sublease No. ……was mortgaged to one of the financial institution of Fiji under. A mortgaged property cannot be distributed, as the proprietary rights are vested in the third party. The property 1 which was also distributed is not matrimonial property. The wife had no beneficial interest in the same as it belonged to the husband's father who had transferred the cane contract in the husband's name but the cane proceeds went to the brother who worked the farm. '

The wife's counsel submitted that the Housing Authority sublease No. …….in fact was sold before the order was granted for distribution and the proceeds of the sale in the sum of $32,925.67 was deposited in Court. This is the cash that the learned Magistrate had equally divided between the parties. It was further submitted that the wife had given evidence that her contributions were that of gardening, carrying out household chores, looking after the husband and two children, cooking, washing, preparing parcels for work, ironing and entertaining husband's clients at home. She did all these for past 27 years and all this contribution is not less than that of a salary earner. Although the Housing Authority sublease was sold, the Magistrate was legally correct in taking the wife's contribution to that, pursuant to s. 162(1) (b) of the Family Law Act. Equal distribution was by all means fair.

7. In respect of grounds 5 and 6, the husband's counsel submitted that there should not have been equal distribution of cash of $32,925.67 as the wife already had received and used the money from the first property in the sum of $25,000. She had therefore already taken substantial share in the property.

The wife's counsel submitted that the sale of the first house was in 2005. Hie husband had testified in Court that when the house was sold the parties continued to live together. There is no basis then for the husband to say that the sum of $25,000 was for the wife's share. The case came about in 2008, 3 years after the sale. There is no documentary evidence that $25,000 was given to the wife as her share. The wife did make contributions to the Housing Authority sublease which was later sold and converted to cash. The wife's contribution is undisputed and her share in the property was properly equated to fifty percent. The husband himself had testified that he always discussed with the wife before he made any decision. This in itself shows the important role the wife played hi the family.

The Law and Analysis

8. It is evident from the records that neither party had made any application for alteration of interest in the property of the parties to the marriage.

9. The only application made by the wife hi relation to the property was when she had sought an order for disclosure of financial statements of the husband, an order that the husband does not dispose of any assets and withdraw monies from fix deposits and bank accounts held at ABank, Bc Banking Corporation and C Bank and also for an order that these authorities do not release any funds from the husband's account to the husband.

10. The wife had also applied for interim maintenance and it was that application that went on for hearing.

11. Even at the hearing stage, the wife indicated that she wanted interim maintenance. At no time did the party's mentioned property distribution. Indeed evidence was adduced in respect of the properties of the parties as the hearing of spousal maintenance requires evidence of what property a person has and what are each parties financial resources: *s, 155 and s. 157(b) of the FLA*.

12. The husband had filed his financial statement but the wife had not, and by dealing with the property distribution on his own motion, the Magistrate erred in law as the law requires that an alteration of interest only be made upon an application by a party to the

marriage. Moreover the full facts regarding the wife's financial status was not before the learned Magistrate, as I cannot find any court records of the same.

13. It is mandatory for parties applying for property distribution to file their financial statement pursuant to *rule 8,28(1) (a) of the FLR*. The wife did testify that she had had advantage of $25,000 given to her by the husband which she used after separation. Her evidence was

"2003 *my husband gave me $25,000,00. I deposited it with ABank on a fixed deposit in 2003. I spent $8,000.00 on the car. I can't shozv the court now. I spent the rest of the money ..."*

14. It is clear from the wife's evidence that she was also not ready with the full evidence regarding her finances. These all happened because she never intended to have a battle on property distribution. The lack of evidence on this aspect also affected tire husband's case, as the monies he said he paid to the wife and which was later in part converted to the asset of a motor vehicle, had not been taken into account. The husband also was not fully prepared with the hearing as he did not have with him documents to prove that he gave $25,000 to the wife. If the husband knew or was told that the hearing date would be for property distribution, he at least would have come prepared for the hearing with all the evidence.

15. By writing a judgment on property distribution, the husband has been denied the natural justice of fairly and properly presenting Iris case for property distribution. This error of his worship is sufficient to set aside the entire orders of his worship, and, I intend to do so, but before I do that, I also wish to deal with other grounds which on the face of it shows how Iris worship had not been vigilant and serious in following the recommended steps in deciding the distribution of property.

16. I refer to my case of KN v. MY11 - Fiji Family High Court Case Number: 08/Ba/0043, in which I had said the following:-

"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 trying the matter.*

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.

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.

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".*

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. 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.

<u>Step One:</u> *Identify and value the assets and liabilities of the parties:*

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.

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

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

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.

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.

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.
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?

<u>Step Two:</u> Assess the parties' contributions to the assets:

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

For convenience, 1 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.

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.

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)

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

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.

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

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.

One will note from the words ofs 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.

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) ofs 162(1)

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) ofs 162(1)

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.

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.*

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.

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)."

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.

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.

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.

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. 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.

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

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

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 ins 162.

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.

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."

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.

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.

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.

What would the Magistrate do with all these factors?

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. 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).

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.

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%.

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.

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.
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.

<u>Step Four:</u> Consider whether the order proposed order is "appropriate":

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

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.

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.

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

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.

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

How does maintenance fit into this?

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. 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.

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

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

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...*[1]

17. Ground 2 states that his worship overlooked the rules to be followed under the Family Law Act. When I look at the recommendations I had laid down in the above case, I find that his worship had neither pooled the assets correctly nor did he consider adjustment of the parties' entitlement as the third recommended step. Serious prejudice may result as a failure to follow the above steps and prejudice would be to the party who has walked away with less than his or her entitlement. The assets that his worship overlooked to pool was the parties FNPF, the cash of $25,000, the life insurance policy of husband as disclosed in his financial statement, the vehicle bought from the sum of $25,000 and I do not know how much more as I myself am not aware of the true financial status of the parties.

18. The distribution of property was not as provided for by the law and as such the orders are erroneous.

19. Ground 3 relates to Housing Authority sublease No. ….. and property 1. There is undisputed evidence by parties that there was no such property of Housing Authority sublease No. …. at the disposal of the parties. That property was sold before the hearing and the proceeds of the sale was deposited in Court. By ordering division of the proceeds of sale and by ordering the 50% division of the Housing Authority sublease Iris worship erred in law and on the facts. The property now belongs to someone else and no division is possible. Tire facts of the case also do not support the verdict at all. The order for division of Housing Authority sublease is improper in law.

20. The Native Lease 27005 is inalienable in character by virtue of *s. 166(1)* of the FLA. His worship could not order a division but could have taken the interest of the husband in the same and analysed whether the wife's entitlement could be increased from other assets. The order alienating property 1 is also in breach of the legislation and cannot stand.

21. I think it is now improper for me to venture into the remaining grounds as they relate to the wife's contribution and order of equal distribution. I flunk it will be prejudicial for the parties if I make that comment from the little evidence before the court. It is better left to the new Magistrate to make a fresh assessment of those facts and law in question.

22. I appreciate that the wife does not wish to go for a retrial but there is no other option left.
I cannot let her interest override that of the other party as both need access to justice in its true sense. The parties may suffer delay but one cannot override the need to observe the process of the Court to get a cheap and easy resolution of matters.

Final Orders

23. The orders of his worship on distribution of property are wholly set aside.

24. The parties to file proper application and papers for distribution of property if a division is preferred.

25. The monies deposited in Court to remain in Court until further orders. Parties are at liberty to make

applications for payment out at the Magistrates Court.

26. Each party to bear their own costs.

ANJALA WATI
JUDGE
17.02.2012

To:

1. ***Mr. Degel, Counsel for the Appellant***
2. ***Mr. S. Krishna Counsel for the Respondent***
3. ***File Number - 08/Ltk/0498***