

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

APPEAL NUMBER:	17/Suv/ 0017 <i>(Original Case Number: 16/Nas/0157)</i>
BETWEEN:	RAJSHRI APPELLANT
AND:	MAHIR RESPONDENT
Appearances:	Mr. P. Niubalavu for the Appellant. No Appearance for the Respondent.
Date/Place of judgment:	Friday 31 July 2020 at Suva.
Coram:	Hon. Madam 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.

JUDGMENT

A. Catchwords:

FAMILY LAW – PROPERTY DISTRIBUTION – *Distributive process not followed by the Court – orders for distribution made not just and equitable - matter remitted for re-trial.*

B. Cases:

1. *D & D [2006] FamCA 245.*

C. Legislation:

1. *Family Law Act 2003 (“FLA”): ss. 161; and 166.*

Cause and Background

1. The wife appeals against the decision of the Family Division of the Magistrates Court, wherein, upon the wife's application, the Court made orders for property distribution.
2. The wife sought 80% shares in the property of the parties to the marriage. Her application was for 80% shares in 4 residential properties, 80% shares in 17 motor vehicles, transfer of 2 out of 3 taxi permits, 80% shares in the business known as MA and 80% of the monies and the value of the insurance policies held under the name of the husband or the business.
3. The matter was heard undefended. The Court ordered that the wife was entitled to 50% of the following properties:

Residential Properties

- a. *Housing Authority Sub-Lease No. XXXX 1*
- b. *Housing Authority Sub-Lease No. XXXX 2*
- c. *Certificate of Title No. XXXX 3*
- d. *Crown Lease No. XXXX 4*

Motor Vehicles

- e. *All 14 motor vehicles and 3 taxis*

4. A further order was made that the sale of the residential properties be subject to the consent of the Director of Lands and that the motor vehicles under the bill of sale be excluded from the distribution list.
5. The court excluded the taxi permits from being subject to distribution. In its finding, the taxi permits were inalienable properties. The insurance policies were excluded from the pool on the basis that there was lack of evidence on the number of policies, the types of policies, the date of initiation and maturity of the same and the wife's contribution on the acquisition or maintenance of these policies. The Court also stated that the policy is not transferrable.

6. There is no finding why the business MA was not dealt with by the Court.
7. Aggrieved at the decision, the mother appealed. The complaint on the grounds of appeal are that the Court did not follow the proper law on the distributive process to arrive at a just and equitable result for the wife.
8. In form of brief background, the parties were married in 2000. They have a child of the marriage born in 2002. After the parties' separation in 2016, the child has been living with the mother.

Law and Analysis

9. In regards the law on the distributive process, it is sufficient if I say that in my previous guideline judgment, I have identified the four- step process that ought to be followed by the Court. In the guideline judgment, I have accepted that 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. It provides a very structured and consistent approach in determining the rights of the parties.
10. The four step process is:
 1. *Identify the value of 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 appropriate.*
11. *D & D [2006] FamCA 245*, an Australian case, also identifies the need for the four-step process as follows:

“4. The orthodox approach in exercising the adjustive jurisdiction...involves four interrelated steps.

5. The first is to identify and value the parties’ net property and financial resources at the date of hearing.

6. The second is to assess the entitlements of each party based on the...contributions.

7. ...

8. ...

9. The third is to decide whether there should be any adjustment to those entitlements by virtue of any other relevant factor...

10. The second and the third steps do not involve an audit type process in the same way as the preparation of a balance sheet does. It is more a matter of judgment than computation.

11. The fourth and final step requires the Court to consider the provisional outcome of the first three steps and to make orders which in both structure and substance achieves a just and equitable overall result. Whether they do or not depends on the real impact in actual money terms not the percentage assessment.

12. The goal is to finally and fairly terminate financial relations between former spouses.”

12. If all the grounds of appeal were to be crystalized, it would require me to determine whether the Court properly followed each step to finally arrive at a just and equitable finding. The first step was for the Court to value the parties’ property(s) and financial resources at the date of hearing.

13. In this instance the Court did not accurately reflect the net value of the pool of assets. It failed to make a proper finding as to the actual value of each asset after considering the liabilities on each asset. It is clear from the pleadings papers and the documentary evidence that one of the properties has a charge levied on it by the Fiji Revenue and Customs Service, there is some indication of mortgage on one property, and one property has been sold and

converted to cash. Further, there was no clear finding on the value of the motor vehicles. If there was bill of sale on any vehicle, a clear finding had to be made.

14. The Court also did not make a finding on the value of the inalienable assets. Although there are inalienable assets, the value of the same should be worked out because in making a final distribution, the Court must have regard to the same, and if proper, make orders affecting the other property to compensate a party who does not have the benefit of the inalienable property. Even s. 166 (2), which is a provision on inalienable property, makes provision for how orders can be made affecting other property(s) to compensate a party. It reads:

“ If a court is of the opinion that an interest in native land would have influenced or varied an order that the court would have made had it not been for subsection (1), the Court may make such order affecting other property of the parties or either of them as will compensate a party for the effect of subsection (1)”.

15. In this case the assets that the Court classed as inalienable are the taxi permits. They are income earning assets, which would on the face of the process, puts the owner of the permit in an advantageous position. How much financial advantage a party would reap and whether this advantage needed to be compensated to the other party needed assessment.
16. There was also failure to make a finding on the value of the insurance policies and to what extent a party was going to be advantaged by this. An assessment was required as to whether in the whole scheme of the distribution process, a party left without the benefit of the policy needed to be compensated.
17. Further, the judgment is fatally silent on why the business MA was excluded from the pool. This definitely affects the wife’s entitlement as this major asset was not considered for distribution.
18. I find that if the net value of the pool of assets and resources is not properly identified, the process of distribution will never be justified. In this case too, there is no justification why the wife should only walk away with 50% of some of the assets.

19. The next step was for the Court to assess each party's entitlement based on their contribution. The Court failed to make any assessment on the wife's contribution to the properties. It ought to have identified specifically the different types of contributions she has made and assessed what those contributions amount to.

20. There was no specific finding on the following contributions by the wife:

(a) Financial contribution made directly or indirectly by her or on her behalf to the acquisition, conservation or improvement of the properties identified: s. 162(1) (a) of the FLA.

(b) The non-financial contribution made directly or indirectly by her or on her behalf to the acquisition, conservation or improvement of the properties: s. 162(1) (b) of the FLA.

(c) Contribution made by her to the welfare of the family and to the child of the marriage including any contribution made in the capacity of a homemaker or parent: s. 162(1) (c) of the FLA.

21. I am surprised that the court made an assessment of 50% contribution in just one paragraph of the judgment as follows:

"In my assessment of the evidence I am not persuaded that the applicant be granted a substantial share in all the above properties. The property is matrimonial property and the respondent is entitled to at least more than a minuscule serving".

22. The Court ought to have made a finding as to why her contributions did not equate to 80% but 50%. The one paragraph analysis in no way justifies the 50% split made by the Court.

23. Let me say for the sake of completeness that the factors in s. 162(1) are used to work out an initial split between the parties. The initial split is under further consideration given the factors set out in s. 162(3). If, upon considering the factors set out in the latter provision indicates that there will be future economic disparity between the parties leading to financial

distress to one party, the Court may adjust that party's entitlement to cater for that disparity. The s. 162(3) factors are normally called the "*future needs*" factors.

24. The taking into consideration the "*future needs*" factors and making adjustments to the initial split is the third step in the process of distribution. After all the 3 steps are followed, the Court will then assess whether the final outcome is just and equitable. In this case, the proper steps were not followed and the result cannot be said to be just and fair.
25. I have seen the affidavit evidence in chief and the evidence tendered in Court on the wife's application for distribution of the properties. With the nature of evidence tendered in Court, I cannot make a fresh assessment of the wife's entitlements. If I were to make a fresh assessment, I would require a lot more evidence on various aspects and explanations on the documentary evidence that has been tendered in Court. For example, there is no evidence on the value of the charge and liabilities on the properties, there is serious lack of details regarding the business, the details of the insurance is lacking, there is no evidence on the value of the encumbrances on the vehicles and so forth.
26. I am sympathetic about the delay in this matter but the counsel for the wife ought to have presented proper evidence before the Court notwithstanding that the matter was undefended. The wife needed to establish her contribution in the same way as if the matter was defended. With the flimsy evidence before the Court, a proper distribution is impossible.

Final Orders

27. In the final analysis, I allow the appeal and set aside the orders of the Court below. The matter is remitted to Magistrates' Court before another Resident Magistrate to properly hear and determine the wife's application within 3 months.
28. The Registrar of the Family Division of the High Court is to allocate a suitable date and inform the parties of the same.
29. The appellant is to bear the costs of the appeal proceedings.

.....
Hon. Madam Justice Anjala Wati

Judge

31.07.2020

To:

- 1. Oceania IP for the Appellant.***
- 2. Respondent.***
- 3. File: Appeal Case Number: 17/Suv/0017.***