

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

ORIGINAL JURISDICTION

<u>CASE NUMBER:</u>	<u>22/SUV/0009</u>
<u>BETWEEN:</u>	<u>BABITA</u>
<u>AND:</u>	<u>DHIREN</u>
<u>Appearances:</u>	<u>Ms. T. Kean for the Appellant.</u> <u>Mr. P. Kumar for the Respondent.</u>
<u>Date/Place of ruling:</u>	<u>Wednesday 07 August 2024 at Suva.</u>
<u>Ruling of:</u>	<u>The Hon. Madam Justice Anjala Wati</u>
<u>Category:</u>	<u>All identifying information in this ruling have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.</u>
<u>Anonymized Case Citation:</u>	<u>BABITA v DHIREN – Fiji Family High Court Case number: 22SUV0009</u>

JUDGMENT

A. Catchwords:

FAMILY LAW – PROPERTY DISTRIBUTION – APPEAL – Claim by wife for distribution of the property of the husband- trial court dismissed the claim for want of evidence on her contribution- at appeal it was discovered that she did not fairly disclose her property – the pool of assets must consist of all the property of both the parties to the marriage, then only will the court be able to know the full economic situation of the parties to make a just and equitable order for distribution- property of the husband inherited from his mother- the initial total contribution to the property was of the husband’s- the wife did not give evidence on the husband’s contribution and how her contribution eroded the husband’s initial greater contribution to the property-no evidence on the future needs of the parties was given- due to lack of proper evidence, no order for distribution

could have been made by the court below- appeal dismissed.

B. Cases:

1. *In the Marriage of Carter [1981] F.L.C. 91-061 at 76,491-76,482.*
2. *In the Marriage of Duff [1977] F.L.C. 90-217.*
3. *In the Marriage of Burgoyne (1978) 33 F.L.R. 42 at 50-51.*

C. Legislation:

1. *Family Law Act 2003 ("FLA"): s. 161.*

Cause

1. The wife appeals against the decision of the Family Division of the Magistrate's Court dismissing her application for distribution of the property of the husband.
2. The matter was heard undefended in the court below. The asset in question was a residential property in the Central Division.
3. The court dismissed the application on the basis that the wife did not give evidence on the specific contribution she made for the upkeep of the residential property or how she contributed towards the welfare of the family.

The Appeal

4. The grounds of appeal are that the court erred in law and in fact in:

(1) not correctly assessing and giving weight to the wife's contribution to the property of the parties of the marriage.

(2) *not considering the relevant factors that should be taken into account when making an assessment as highlighted in s.162 of the Family Law Act 2003.*

(3) *not considering the wife's support during the years of marriage and therefore this meant that the outcome of the distributive process was not just and equitable.*

Law and Analysis

5. In making a determination on the rights and interests of the parties in the property, the four step process enunciated below is followed. Although this four step process is not mandated by the words of the Act, it is entirely consistent with the scheme of the Act. The four step process provides a very structured and consistent approach in determining the rights of the parties.

6. The steps are:

- (i) *Identify and value the assets and liabilities of the parties;*
- (ii) *Assess the parties' contributions to the assets;*
- (iii) *Assess a range of factors set out mainly in s.162(3) of the Act; and*
- (iv) *Consider whether the orders proposed after consideration of all those factors is – to use the word employed in the Act – “appropriate”.*

7. In respect of the first process, the court is required to take into account all the property of both of the parties to the marriage: ***In the Marriage of Carter [1981] F.L.C. 91-061 at 76,491-76,482.***

8. ***In the Marriage of Duff [1977] F.L.C. 90-217*** the Full Court of the Family Court said:

“We are of the view that the intention ... is to enable the court to take into account and assess all the property of the parties upon being asked by either of them to make an order altering interests of the parties in the property”.

9. The court is obliged to take into account all the property of both of the parties to the marriage irrespective of an applicant's claim in only a particular property. S. 161 uses the term "*property of the parties to the marriage*". In Australia, this term has been construed as requiring the court to take into account all the property of both of the parties to the marriage.
10. S. 161(6) of the FLA states that "*the court must not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order*". In order to arrive at a just and equitable outcome, it is important that the court is aware of the totality of the property that each party owns: ***In the Marriage of Burgoyne (1978) 33 F.L.R. 42 at 50-51.***
11. Without knowing about the total of each party's property, the court cannot appreciate the general economic position of each party. How can it then make an order which is just and equitable in all the circumstances of the case?
12. In this case, the wife did not fairly and properly identify her assets. During the appeal hearing, it was raised that she has a property too. She did not dispute that. If the wife also has a property, she ought to have identified the property and had it valued. The evidence of her property and the value of it ought to have been tendered in evidence.
13. The way the matter was handled in the court below establishes that since the wife was making the claim, she believed that she need not reveal her properties. The entire process of distribution was not appreciated by the wife. The court below could not have made any orders in the husband's property in light of non-disclosure of the wife's property, the relevant evidence of its value and contribution of the parties to that property.
14. The only asset that was included in the pool was the husband's residential property which he inherited from his mother before the marriage. The husband did not deny ownership of the residential property. The wife, however, was not able to provide to the court a registered title of the property. Since there was no denial of ownership, I do not find it an error of law to have included that asset in the pool for division as contended by the husband's counsel at the

appeal hearing. However I find that it should not have been the only asset in the pool for consideration.

15. In the second step of the process, the court needs to have regard to the parties' contributions towards the acquisition of the assets and also towards the conservation and improvements of the same. The types of contributions that the court must have regard to is financial contributions and non-financial contributions. The court must also have regard to contributions made by the parties for the welfare of the family.
16. The wife gave evidence of her contribution to the husband's property. She very briefly said that she looked after the family including the husband and his mother. She used to cook for them. She helped the husband. She cared for him and helped him at home. She cleaned the house. She also said that she contributed financially for the upkeep of the house.
17. Since the property was inherited by the husband, it appears that the entire contribution to the acquisition of the property was made by the husband. The wife's evidence then ought to have addressed how her contributions over the period of marriage eroded the husband's initial contribution to the acquisition of the property.
18. The fact that the matter was heard undefended does not mean that the wife should not diligently address the aspect of the parties' contribution to the husband's property.
19. In respect of the third step where the initial contribution is re-adjusted due to the future needs of the parties, the court below was bereft of completing this process as the wife did not give any evidence on the future needs factors.
20. Even if the presumption of equal contribution applied, there was a problem in the evidence from the beginning. The wife did not give proper evidence on the pool of assets. She deliberately did not disclose her property. The court did not have the correct pool of assets to start with.

21. There was also no proper evidence on contribution of the parties to all the properties and the future needs of the parties. The evidence on all aspects was given in a haphazard manner leaving the court with no option but to dismiss the claim.

Final Orders

22. In the final analysis, I dismiss the appeal and order each party to bear their own costs of the appeal proceedings.

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Hon. Madam Justice Anjala Wati

07.08.2024

To:

- 1. Legal Aid Commission for the Appellant.***
- 2. Kumar Legal for the Respondent.***
- 3. File: Family Appeal Case Number: 0009 of 2022.***