

**IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA**

**ORIGINAL JURISDICTION**

**ACTION NUMBER:** 17/Suv/ 0416

**BETWEEN:** Manisha

**APPLICANT**

**AND:** Dharma

**RESPONDENT**

Appearances: Mr. A. Sen for the Applicant.

Ms. I. Lutu for the Respondent.

Date/Place of Judgment: Wednesday 11 September 2019 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 are purely coincidental.

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**JUDGMENT**

**Catchwords:**

**FAMILY LAW – PROPERTY DISTRIBUTION** under Family Law Act 2003 (“FLA”) – Application by wife for distribution of property of the parties to the marriage – presumption of equal contribution not rebutted through the evidence – finding of equal contribution made- wife’s contribution both financial and non-financial - distribution just and equitable.

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***Cause and Background***

1. The wife has brought an application for an order for distribution of the property of the parties to the marriage. She seeks an equal distribution in the following properties:
  - i. *Matrimonial home.*
  - ii. *A Motor Vehicle.*
  - iii. *Household Items.*
  - iv. *Rental Proceeds at the rate of 600 per month from 2009 till 2018.*
  - v. *\$15,000 being cash lent to both the parties by her father.*
2. The husband refutes the wife's entitlement and seeks a declaration that the wife holds the property in trust for her or alternatively if there is to be a distribution then she be granted 25 per cent share in the residential home. He denies the wife's right in any other properties claimed.
3. In form of brief background, the parties were married in 1987. In 2009, the wife left for overseas to work. She came to Fiji in 2016. She came back to Fiji again in 2017. In her second visit, she asserts that she found out that the husband had started living with another woman. The marriage broke down then.
4. It is not disputed that the parties have had a long marriage running to three decades. When the parties were married, they did not have any valuable assets which could be included in the pool for distribution. All they acquired was after their marriage.
5. Their acquisition of the property started in 1993 when the husband bought a land in his name. The husband and the wife both paid for the property bought in 1993. In 1995, they both decided to build on the property. They had to borrow further loan which they did. The property was then transferred in their names as joint tenants. They both paid for the loan and also made repayments from monies in their account in Fiji National Provident Fund (*"FNPF"*).

6. By the year 2000, they had built extra three flats. They both had made financial contributions to the acquisition of the same. The wife's father also assisted in repaying for the house by contributing cash and by paying rent for one of the flats he occupied. The wife's father had also used materials from his existing house in Nausori to assist in building of the flats.
7. The only dispute that this court has to determine is the respective percentage contribution of the parties and their entitlements. There is no denial in the evidence that the wife contributed to the properties financially and non-financially.

***Evidence/Law/Determination***

8. In making a determination of the rights and interests of the parties in the property, I will approach the matter using the four step process enunciated below. I have in my guideline judgment issued before, identified the four step process and 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.
9. 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”.*
10. I will deal with each step in turn.

***A. Pool of Assets/Value***

11. The first asset is the residential home which is owned by both the parties as joint tenants. The property was valued by a professional valuer in 2017. The value has been fixed at \$195,000. The valuation is made up of the value of the land and the house.
12. The value of the land is \$95,000 and the value of the house is \$100,000. There are no other valuations provided by the parties. The wife testified in her evidence that the value would be more now. She has said that the market for the property has increased.
13. The hearing of the matter took place within a year of the valuation. The wife has not stated the basis on which she says that the value of the property has increased and by how much it has. She is the person who has provided to the court the valuation of the property by a professional valuer. If she does not agree with the evidence that she has tendered then she was supposed to have provided evidence to discredit her earlier valuation. This is possible. One of the circumstances would be where substantial time has lapsed between the date of the valuation and the date of the hearing.
14. Since there is no evidence to contradict the valuation by the experts and given the fact that the time period between the date of valuation and the hearing is not substantial and that there is no other information before the court which is likely to affect the value of the property from 2017, I find that the value of the property with which the court ought to work at is \$195,000.
15. There is no existing liability on the property. Neither party has provided evidence of secured charges(s) although the memorial of the title shows secured charges. The bank loan has been paid off and the contributions by the parties from their FNPF account no longer is required to be repaid in the parties respective accounts after the sale of the property. The procedure on securing charges on borrowings from the FNPF for the purposes of buying residential homes has changed now.
16. The second property is a motor vehicle. No one has provided a valuation of the motor vehicle. The wife stated in her evidence that the husband told her that he bought the vehicle at FJD6, 500. The husband says that he bought the same in FJD6, 000.

17. No one can assert a true value of the vehicle. Any estimated valuation, considered fit by the court, after taking into account the model, make, the wear and tear and the date of manufacturing, has to be accepted by the parties.
18. This vehicle, as per the certificate of the Land Transport Authority was manufactured in 1998. It is a Nissan Sunny vehicle. If the parties had bought it in either \$6,000 or \$6,500, the value of it after 4 years of driving would not be the same.
19. The value of the vehicle, as it is commonly said, depreciates according to its use and mileage. This vehicle was used by the parties for 4 years since the purchase. She is 21 years old since the date of manufacturing. It will be very difficult for anyone intending to buy this vehicle to ask the bank to finance it due to her age.
20. Having looked at the relevant factors, I do not find that the value of the vehicle would be any more than FJD3, 000 to \$4,000. I will fix a value at \$3,000.
21. The third property is the household items. The wife, in her evidence, fixed different values on each item. The items she identified in the house were a television set, dining table with chairs, 2 double beds, 2 wardrobes, a coffee table, a washing machine, a sofa set, electrical appliances (blender, microwave electric jug), stainless steel utensils, and pots and pans.
22. I do not think that the parties should expect the court to be able to pick up the value of the household items from thin air. If the parties want a fair distribution of the properties, valuation of the same must be provided. The value of the properties depend a lot on the condition it is in, the date it was purchased and how much it has been used. The court is bereft of that evidence.
23. Mr. Sen, in his opening statement had said that the household items are worth \$10,000. Where is any evidence of this? There are so many distributors in Fiji selling household items. At least one of them could have been asked to identify the value of the items. I cannot just accept that the figure that the wife has given is the correct valuation of the properties.

24. In absence of any evidence which will assist me in fixing the value of the household items, I find that it is reasonable to fix the value at \$7,000 given the number of items that are there. This again may not be the correct value but one cannot say that the items in the house would not be worth anything at all. Although these are second hand items and may not fetch a lot of price, they are still valuable and useful for the parties' day to day affairs.
25. If the parties were to buy these items second hand, I do not think that an amount less than \$7,000 would be enough to acquire it. I therefore will work on the value of \$7,000.
26. The fourth item that the wife claims a share in is the rental proceeds from the 3 flats on the matrimonial home. She says that the 3 flats collectively derived \$600 per month. She claims her share from 2009, that is, when she left for overseas.
27. The parties' marriage lasted till July 2017. It was their obligation jointly to decide how the rental proceeds were to be used during the pendency of the marriage. It is inequitable for any one of them to ask the court to interfere in the decisions they made during the pendency of the marriage regarding the income derived and spent. The court will not interfere in how they used or managed the proceeds till they separated.
28. The husband, nevertheless, has to give to this court an accounting of what happened to the monies for the past two years, that is, from the date of separation until the date of the judgment.
29. The husband says that the property is not on rent. He has not proved this to me with any degree of satisfaction. He ought to have brought evidence that the flats were vacant for the past two years and the reasons why it was so. He ought to provide to this court evidence of what happened to the monies. The minimum that this property was earning was \$600 a month. For two years the amount of the rental proceeds equates to \$14,400.
30. From the rental proceeds for two years, I have to discount for the fact that the husband would have had to pay for the mail box and the ground rent. I do not know the exact amount for these two expenses. Since the wife has given evidence that she used to pay for these

expenses, it is only proper that allowances be made from the rental monies for these expenses.

31. I will have to make some allowances for the two identified expenses. I find that the sum of \$1,400 should be taken away from the rental income for the past two years. The sum is to be applied towards mail box payment, ground rent payment and for the general cleaning and upkeep of the house. The pool of assets should therefore include the rental income in the sum of \$13,000.
32. The wife also claims that her father had lent to the parties a sum of \$15,000, which amount she asserts, should be included in the pool of assets. I have no reason to doubt the evidence of the wife and her half -brother that the father had lent to the parties this amount which was to be returned to him. The parties are now indebted to the father's estate.
33. Debts of this nature can be recoverable in civil suits. In distribution cases, under the Family Law Act, the debt cannot be classed as an asset in the pool. It is a liability against the property which will have the effect of reducing the value of the existing pool of assets and thus impacting on the parties' entitlements.
34. In absence of any claim by the father or his estate, the most that can be done is that these monies be regarded as contribution by the father on behalf of his daughter. The amount should not be included in the pool to be divided.

#### ***B. Parties' contribution to the assets***

35. Under this head, I will 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.
36. The wife worked before her marriage, during the marriage, and after the separation of the parties. I accept her evidence that she used her income for the benefit of the family.

37. The husband had initially bought the residential lease in his name in 1993. At that time the property did not have a house on it. The husband had used his monies from the Fiji National Provident Fund to pay for the deposit.
38. The property was bought on a loan from Housing Authority which was paid by the wife. I accept the evidence that she continued payments for the land until 1995 when the property was transferred in her name as well.
39. The property had to be transferred in the name of the wife too as both of them had to secure a mortgage to build on the property. One person's income could not have secured the loan.
40. Further, unless the property was transferred in the name of the wife too, she could not use monies from her FNPF for repayment of the debt. She in fact used her monies from the FNPF thrice for payment of the loan. I will give details of this later.
41. The husband's evidence that the house was transferred for natural love and affection is rejected in light of the uncontroverted evidence that the wife contributed to the residential property financially and that her financial assistance ensured that the property remained in their names and could sustain the borrowings and the loan repayments.
42. The transfer document does show that the property was transferred for natural love and affection but that in my finding was to avoid the statutory liability of the stamp duty which was applicable on transfer. I repeat that there is enough evidence that if the property was not transferred in the wife's name, she would not have been able to assist in the borrowing of further loan and the repayment of the same from monies standing to her credit in the FNPF.
43. I accept the evidence of the wife that she used monies from her FNPF 3 times in the vicinity of \$10,000 for the benefit of the property. The documentary evidence from the FNPF being a statement produced by FNPF shows that the wife withdrew the monies. The husband also admits that the wife used her funds from the FNPF towards payment of the mortgage of the property.



44. The statement from the FNPF shows that she used the monies first in 1998 in the sum of \$1,300, the second sum in 2000 in the sum of \$1,792 and the third in 2012 in the sum of \$5,072.
45. Apart from making payments from her FNPF account, the wife paid the debt for the property as well. As identified earlier, before the house was built, she paid the debt alone. Since 1995, when the house was built for the parties' occupation, both contributed to the mortgage equally.
46. In 1999, the parties borrowed from the bank again to build three extra flats for rent which was completed and rented out in 2000. The 3 flats derived an income of about \$600 in total per month. The mortgage repayment for the property was in the sum \$250 per month which was made from the rental monies.
47. Until the property was rented out, the wife paid equally for the mortgage since 1995. Before that she alone paid for the mortgage although the payment for the land was initially made by the husband.
48. I do not accept the husband's evidence that he paid more for the property than the wife. It was their joint effort in managing their finance and building the home that they ensured such a substantial property being erected on the matrimonial home. The husband admitted in his evidence that the wife was paying \$75 per month in mortgage since 1995 to 1997. From 1997 until 2000, when the flats were being rented, she paid equally for the mortgage.
49. I find that had it not been for the joint income of the parties, neither the land nor the substantial building would have come about.
50. The husband said that he did renovations to the house in 2017 as the property was deteriorating but he has not shown the receipts of the renovation to the wife or the court. This evidence was refuted by the wife and her half-brother who said that no renovations were carried in the house until 2016 when the wife came from overseas and did the same.

51. The husband says that he withdrew the money twice from FNPF in 2016 and used the same in renovating the house. His FNPF statement shows that he withdrew \$2,100 twice in 2016. I find that he may have withdrawn the money but there is no evidence of any repairs done to the property by him. His claim is strongly refuted. It is also refuted that he paid \$500 for repairing of the gate.
52. The wife's evidence that she did repairs to the gate and did general cleaning of the house is not denied by the husband. In light of that background I find that it is the wife who had done repairs to the house and not the husband.
53. When the wife left Fiji in 2009, the debt was about \$10,000. I find that the rental monies were used to pay the debt as it was sufficient to cover the loan repayments. It was the wife's equal effort and contribution towards the acquisition and maintenance of the property that resulted in the flats being rented out and the monies used for the payment of the loan. It would be inequitable to find that she did not contribute after 2009 when she left for overseas to work. Her contribution right throughout was equal in my finding.
54. From overseas, she continuously sent monies to her husband. I accept that she had sent to him monies in the vicinity of overseas currencies of 20,000. There is documentary evidence of some monies that she sent from overseas for the benefit of the husband. The documentary evidence substantiates the wife's evidence that she did send monies as claimed. There may not be evidence of all the monies she has sent. This is only because she could not retrieve the documents pertaining to some transactions.
55. The documentary evidence from a financial services institution shows that the wife had sent monies to the husband in the sum of overseas currencies of 6,674.53 between 2011 to 2016. Further, the documentary evidence from another financial services institution shows that the wife had sent to her husband monies from overseas in the sum of overseas currencies of 2,400 between 2011 to 2012. The documentary evidence from yet another financial services institution shows that the wife had sent monies to the husband in the sum of overseas currencies of 1,560.56 in 2015. In total the documentary evidence shows that the wife sent

about overseas currencies of 10,635.09 for the husband. This, if converted to Fijian Dollars, would be close to \$15,000.

56. I find from the wife's evidence that she continued to contribute to the family financially despite leaving the shores. Her contributed cannot be discredited. I reject the husband's evidence that the monies were sent as debt repayment to him. This material information was never put to the wife when she gave evidence to address the same.

57. In 2016, when the wife came to Fiji, I accept her evidence that she brought overseas currencies of 8,000. She used about overseas currencies of 3,000 to repair the fence, install a sliding gate, and clean the house. There was a balance of overseas currencies of 5, 000 which I find she left in the hands of her husband.

58. The husband had to spend the money is renovating the flats as it did not have any maintenance to it for long. If he has done any repairs after the wife had left, it would be from these monies that were left with him. There is, however, no evidence of him repairing the property.

59. The wife testified that she used to send monies from overseas for the payment of the ground rent for the residential property and for the postal box fee as well. Her evidence in this regard remains uncontroverted, which I accept. I find that she did send monies for this purpose which I find is financial contributions by her.

60. Apart from the wife's direct contribution to the house, I find that her father, as per the evidence of the wife and her half-brother, contributed in cash in the sum of \$15,000. This was given for the payment of the loan. For reasons identified earlier, I regard this to have been given on the account of the relationship with his daughter and thus should properly be counted as the wife's contribution.

61. The wife's father also used materials from his home in Nausori to build one flat in the matrimonial home which the family occupied till 2017. The father and his family paid rent at the rate of \$150 per month despite the contribution vide cash and materials. The half-brother

gave evidence that they paid rent because the house was in debt and the mortgage needed to be cleared. The monies given by the father was to be returned to him once the mortgage was paid.

62. The father had to find a place to build since his property in Nausori had its lease expired. He therefore built at his daughters place. Now since no one is living in that flat, that is and should be available for rent for joint use by the parties until the distribution.
63. I find that the wife's contribution to the acquisition and improvement of the residential property to be equal.
64. In respect of the vehicle, the wife says that she had sent overseas currencies of 3, 000 for the purchase of the motor vehicle. The vehicle was bought in FJD 6,500 as per the wife's evidence. She says that she was given that information by the husband. I find that the wife did send monies to the husband in the sum overseas currencies of 3, 000 to purchase the vehicle. Her contribution cannot be equated to less than a half in the acquisition of this property.
65. The husband's evidence is rejected on the grounds of inconsistency. He initially said that he used his own monies to buy the vehicle. Then he said that he used the rental income to do so. How can he say that when he does not have records for the rental collected? His evidence was that for most years the house was vacant and that he has no records of what he received as rent.
66. I find that the wife had contributed towards the purchase of the vehicle and I find that she is entitled to an equal distribution of the same. Even if the vehicle was bought from the rental monies, the wife's effort ensured that the flats were being rented. In that regard, her indirect financial contribution should be equated as equal. Otherwise her evidence of showing monies being sent to the husband is enough to hold that these were applied towards acquisition of the motor vehicle.

67. The wife said that she had household items in the house when she left. She says that these were new items. She bought them when she was in Fiji. For the washing machine and the television set, she sent monies from overseas in the sum of overseas currencies of 1600.
68. I accept the evidence of the wife that she contributed to the acquisition of the household items when she was married and even when she left for overseas. Her contribution for acquisition of the same cannot be ignored and I regard it as equal.
69. I also find that the wife is entitled to an equal split in the rental income derived for the past two years in the sum of \$13,000. Had it not been for the wife and her contribution, I find that the husband would not have been able to acquire and conserve the property.
70. Apart from the wife's contribution financially, she also contributed non-financially by cooking, cleaning, maintaining the house and doing her duties as a wife.
71. I therefore find that in respect of all the pool of assets, the wife has contributed equally and that she is entitled to a 50 percent split on the value of the assets. On the evidence before me, the husband has not been able to rebut the presumption of equal contribution.

### *C. Future needs factors and adjustments of contributions*

72. Under the requirements of FLA, I need to now look at the factors set out in s 162(3) to make an assessment as to whether there needs to be an adjustment of the initial assessment of 50 percent split.
73. Neither party has with any diligence addressed these factors at the trial. What I will say under this head therefore will be based on evidence of the parties tendered mainly in establishing their contributions.
74. The wife is 51 years old and the husband is 56 years old. No one has spoken about their health condition which can be an impediment to them working in future and earning. Both of them have been earning for their living so far.

75. In absence of any contrary evidence, it would be an error of fact to assess that one party's capacity to earn for their living is more or less than the other. No one has to look after any children under 18 years. No evidence to my satisfaction has been tendered in this regard.
76. This is a long marriage and the person who will pay the other party's share as per the distribution orders will definitely have to take the loan to do so. This would mean that one party will have to seek loan to pay the other's share. There is existence of rental income but that will in future be used to pay the loan by the party who is paying the other party his or her share in the house.
77. Having analysed the future needs factors, I do not find any significant economic disparity between the parties to make any adjustments in their initial split of 50 % that I have worked out for the parties.

***D. Are the orders appropriate?***

78. For me to make a finding on whether the proposed orders are just and equitable, I have to identify generally the orders that are proposed to be made in the matter. I find that since the wife had gone away and earning a living in overseas, it is best for her to get her shares in terms of monetary value from the properties. It is convenient that she be given her share then be asked to buy out the husband's share in the properties.
79. It would be draconian at this stage to order sale of the residential property since the wife's shares can be adequately compensated for by an order for payment of the monies. If her share is not paid, then only it is appropriate to order sale of the residential property.
80. Since the property is worth \$195,000, I find that the wife's share in the same amounts to \$97,500. I will discount this to \$97,000. The \$500 is to be used as her share for raising loan for the property. There will be documentation costs involved in raising the loan for the house.
81. I find that the vehicle too should be retained by the husband and that he ought to pay the wife her share in the sum of \$1500.

82. In respect of the household items, I have found that it would cost about \$7,000 in this era to collect these items that have been identified as the household items. The husband ought to pay the wife \$3,500 in lieu of him retaining all the household items and using it.
83. The husband should also compensate her for the two years rental income that he has collected post separation of the parties and enjoyed exclusively for his benefit with reasonable deductions for the fixed charges/disbursements on the property.
84. I will be using an asset to asset approach in ordering the distribution. I will not be ordering the wife's share in the vehicle, the household items and the rental income to be paid from the husband's from the residential home. This can cause difficulty in raising loan on the property. The ability to repay the amount can also be hindered given that the rental income is not so much from the three flats. The husband will also be retiring from employment and he will need constant income to pay the loan. His fallback resource and income will be the rental proceeds.
85. In my finding, the proposed orders serves the interest of both parties, I find the orders "appropriate" in terms of the Act to make.

### ***Final Orders***

86. In the final analysis I find that the wife has contributed equally to the pool of assets and that it is just and equitable to make, and I so do, the following orders:
- (a). *That the husband shall pay to the wife her share in the residential home in the sum of \$97,000 within 3 months of the date of the order. Upon payment of these sums, the wife shall transfer the property in the husband's name exclusively.*
- (b). *If any extension of time is needed for payment of the monies in paragraph (a) above, then the husband is entitled to one extension of one month upon a satisfactory application to the Court. No such extension shall be granted unless the Court is satisfied that proper financial arrangements are being made by the husband.*

- (c). *If no such payments are made within the time limits prescribed by para. (a) above or any extension granted under para. (b) above, the wife is at liberty to sell the property to a purchaser at a price not below \$195,000.*
- (d). *If the property is to be sold, then the costs of the sale not exceeding the sum of \$3,000 is to be deducted from the sale price. Any further sums incurred for selling of the house is to be borne by the parties equally and not to be deducted from the sale price. In this regard, I have already taken account of the fact that a sum of \$500 has been discounted from the wife's share in the residential home as realization costs.*
- (e). *If the sale is on foot and the husband refuses to sign any documents including transfer of the property and any statutory requirements like consent then the same should be signed by the Registrar or the Assistant Registrar of the Family Court.*
- (f). *Any statutory liability arising from the sale of the property which falls under the responsibility of the vendors is to be paid from the proceeds of the sale.*
- (g). *The husband is to pay to the wife \$1,500 as her share in the vehicle. If the same is not paid within a month then the husband is to sell the same within 14 days after the time for payment of \$1,500 has lapsed, at a price not less than \$3,000, and divide the proceeds equally between the parties.*
- (h). *If the husband does not pay to the wife her share of \$1,500 within a month of the order or the proceeds of the sale within 14 days of the expiration of a month from the date of this order, the wife is at liberty to have the vehicle transferred in her name in order to be able to sell the same at the market value and divide the same equally between the parties. The Registrar of the Court is to sign the order for transfer of the vehicle in the wife's name.*



- (i). *The husband is ordered to pay to the wife \$3,500 for her share in the household items. These monies are to be paid within 3 months of the date of the order. If the monies are not paid then the wife is at liberty to enforce the same through the standard enforcement procedures.*
- (j). *The husband is to pay to the wife a further sum of \$6,500 being her share of the rental proceeds for the two years post separation. These sums are to be paid within 3 months. Standard enforcement procedures may apply for recovery of any such monies.*

87. Each party shall bear their own costs of the proceedings.

**AnjalaWati**

Judge

11.09.2019

**To:**

1. *Maqbool& Company for the Applicant.*
2. *Shelvin Singh Lawyers for the Respondent.*
3. *File: 17/Suv/0416.*