

**IN THE FAMILY DIVISION OF THE HIGH COURT  
APPELLATE JURISDICTION**

<b>CASE NUMBER:</b>	15/Suv/ 0015
<b>BETWEEN:</b>	SHELVIN VINCENT CHETTY
<b>AND:</b>	ZABEEN NILUFA DESLEY
<b>Appearances:</b>	Mr. S. Singh for the Appellant. Mr. D. Sharma for the Respondent
<b>Date/Place of judgment:</b>	Tuesday 19 May 2020 at Suva
<b>Judgment of:</b>	Hon. Madam Justice Anjala Wati
<b>Category:</b>	<i>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.</i>

**JUDGMENT OF THE COURT**

*Catchwords*

A. Catchwords:

**FAMILY LAW – PROPERTY DISTRIBUTION** – property brought in the marriage will be included in the pool of assets for distribution – the parties can show their relevant contributions to the same– both the parties property as at the date of the hearing should be taken into account and not the property of one party only – the initial distribution and the later adjustment in favour of the wife not justified on the facts of the case – wife not entitled to any distribution – the orders for distribution set aside.

B. Cases:

1. D & D [2006] FamCA 245.

**Legislation**

1. *Family Law Act 2003 ("FLA"); s. 2(1); 162*

***Cause and Background***

1. The husband appeals against the decision of the Family Division of the Magistrates Court of November 2015, wherein, upon the wife's application, the Court made orders for property distribution.
2. The orders were that the wife was entitled to 40% of the property of the parties to the marriage and the husband was entitled to 60%. The parties were ordered to determine amongst themselves and their respective counsel how they wished to realize their shares, in absence of which, a formal application was to be filed for the Court to determine the manner of distribution.
3. The parties entered into a civil union in December 2009. Their traditional marriage took place in January 2010. After 2 years and 3 months of their marriage they separated in 2012. Their marriage was dissolved in 2013. They have no children of the marriage.

***Magistrates' Findings***

4. The properties that were considered for distribution belonged to the husband. The subject properties were a motor vehicle and a residential home. The residential home was acquired 9 months before the marriage and the motor vehicle was acquired 2 years after the marriage.
5. The two issues that the Court considered were whether the properties registered under the name of the husband can be classified as property of the parties to the marriage which can be subject to distribution and if it was, whether any orders for distribution should be made.
6. In determining whether the properties are subject to the distribution, the Court relied on the definition of property, the husband's evidence on why the property was bought, the material

non- disclosure in his financial statement that he owned a motor vehicle of substantial value and disposing the same to his sister after separation for \$5,000.

7. Relying on s. 2(1) of the FLA, which defines property to include property of any party acquired within or outside the marriage, the Court found that although the residential property was acquired before the marriage, it cannot be excluded from the pool of assets to be distributed. The motor vehicle was bought after the marriage, so the argument that property acquired before the marriage could not be subject to distribution did not apply.
8. Referring to the husband's evidence that he bought the residential property for his family being his parents and siblings, the Court found that the husband had contradicted his evidence when he testified that his family lives in , Lautoka . The husband's mother's evidence was referred to. The Court found that the mother had conceded to the truth that they never lived in the residential property owned by the husband. She had always lived in Lautoka and that she does all the household chores contrary to the husband's claim that she is sickly.
9. Using the contradiction, the Court found that it was obvious that the husband intended to mislead the Court and that there was no truth in his claim that the residential property that he bought was for his family.
10. In respect of the motor vehicle, the Court found that this was not disclosed by the husband as a property that he owned. It was discovered in the evidence that during the pendency of the claim by the wife, the husband had transferred the property to his sister. His claim was that his sister had given him the money when he needed the same for his studies. The Court found that this transaction revealed the intention of the husband not to meet the wife's claim but it was pursuant to the law that her claim was going to be determined.
11. In determining the actual distribution, the Court followed the four step process that I had identified in my guideline judgment before. The four step processes were to:
  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.*

12. The Court identified that the wife had monies in her bank to the value of \$850, had a motor vehicle worth \$46,000 and household contents worth \$12,500. Her properties added up to \$59,350. Her personal liabilities were \$429.00.
13. The husband's assets added up to \$214,400 including a residential property worth \$209,000, monies in bank account in the sum of \$400 and household contents valued at \$12,000. His personal liabilities were calculated to be in the sum of \$719.00.
14. The Court found that it will only include the residential home and the motor vehicle owned by the husband in the pool for distribution. The Court did not provide any clear reasons or shall I say no reasons at all why the wife's property was not included in the pool. This shortfall is subject to the appeal and I will deal with it at an appropriate time.
15. In determining the parties' contribution to the properties, the Court dealt with each property in turn. In respect of the residential property, the Court found that the husband had contributed financially towards its acquisition. He had paid a cash deposit of \$50,000. The Court found that the deposit was a point of contention in that the wife wanted clarification on where the deposit had come from. The Court then found that there was no powers vested in the Court presiding on a distribution application to determine the source of the contribution particularly whether the funds for the deposit were lawfully acquired or not.
16. The Court found that the wife had truthfully conceded that she did not play a strong part in the purchase of the property. She did not contribute towards any deposit for the property which was bought in \$185,000. The property was collecting income from two flats in the sum of \$500 per flat making a total of \$1000 in rental income.
17. The property was under mortgage with a repayment of \$1200 per month. The rental was collected by the husband and he was also responsible for making the payments to the bank.

18. The wife's evidence on her contribution was that when she moved into the property, she kept it clean, did the household work, cut the grass and bought groceries. In respect of the vehicle, the wife's evidence was that she did not contribute towards the same financially but fuelled it because she was using the same and kept it with her most of the times.
19. Considering that the marriage was of a short duration and that the wife contributed non-financially by keeping the house clean, doing the household chores and cutting the grass, it was found that her contribution if held to be equal would be repugnant to justice. The Court assessed the wife's contribution at 20 percent.
20. After having worked out the initial contribution the Court then properly went to assess the future needs factors as required by the Act and assess whether any adjustment was necessary. It is at this stage that the Court readjusted the wife's entitlement by another 20 percent making her entitlement to 40%. There were no reasons advanced why the adjustment was made in favour of the wife.

### ***Appeal***

21. Aggrieved at the decision, the husband filed an appeal. His complaint is as follows:
1. *The Court erred in fact in its assessment that the husband intended to mislead the Court when he gave evidence that the residential property was intended for his family and failed to consider his evidence in totality.*
  2. *The Court erred in fact in his assessment that the husband did not intend to give any share of his property to the wife when his evidence was that she made no contribution to the purchase of the motor vehicle and that he had disposed off the same prior to the hearing.*
  3. *The Court erred in law in his assessment that the only property to be dealt with are the assets of the husband and completely disregarded the assets owned by the wife.*

4. *The Court erred in law and in fact in not considering s. 162 of the FLA of the following facts and circumstances which the justice of the case required to be taken into account:*
- a. *The wife was never a home maker.*
  - b. *She did not make any financial contribution towards acquisition of the husband's assets.*
  - c. *She did not make any non-financial contribution towards the acquisition of the husband's assets.*
  - d. *She did not make any financial or non-financial contribution towards the upkeep or maintenance of the residential property.*
  - e. *She did not make any financial or non-financial contribution towards the upkeep or maintenance of the motor vehicle.*
  - f. *If there was any contribution by the wife, then it was in the form of a negative contribution which prevented the husband from acquiring or making any progress in his personal wealth during the lifetime of their marriage.*
5. *The Court erred in law and in fact in granting the property distribution in the percentage of 60: 40 between the husband and the wife respectively and upon relying on irrelevant facts, matters and circumstances and in failing to take into proper consideration of matters set out in s. 162 (3) of the FLA.*
6. *The distribution ordered by the Court is repugnant to justice.*

### ***Issues/Law/Analysis***

22. 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.

23. *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.”*

24. I will be referring to other legal provisions of the distributive process as and when the need arises. If all the grounds were to be crystalized, it would require me to determine whether the distribution order of the Court below was made upon proper consideration of the matters set

out in s. 162 of the FLA and whether the final result is just and equitable. 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 loss. The s. 162(3) factors are normally called the "*future needs*" factors.

25. Since the husband is challenging the final orders in terms of 40% distribution to the wife, it is necessary that I examine how the orders were arrived at. The Court initially found that the wife's contribution to the property of the parties to the marriage was 20% which was increased by another 20% by way of an adjustment. I reiterate, there were no reasons advanced why the 20% adjustment was made and which future needs factors identified in s. 162(3) warranted an increase.

26. I will first of all deal with the initial 20% distribution. For the Court to have arrived at this, it ought to have been established that the wife made contributions to the property of the parties to the marriage or as a homemaker or a parent. The law recognizes three different types of contributions by a party to the marriage:

*(a) Financial contribution made directly or indirectly by or on behalf of a party to the marriage to the acquisition, conservation or improvement of any property of the parties to the marriage: s. 162(1) (a) of the FLA.*

*(b) The non-financial contribution made directly or indirectly by or on behalf of a party to the marriage to the acquisition, conservation or improvement of a property of the parties to the marriage: s. 162(1) (b) of the FLA.*

*(c) Contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of a homemaker or parent: s. 162(1) (c) of the FLA.*



27. The first two types of contributions relates directly to the property and the last type of contribution concerns contribution of a party to the marriage for the welfare of the family as a homemaker or a parent.
28. Let me examine the evidence of the wife to ascertain what contributions she said she made which resulted in the Court arriving at a finding that her contribution was 20%. If she has made the contributions recognized by the law, then whether the 20% initial split was proper in the circumstances needs examination as well.
29. The wife's testimony in chief on her contribution appears from the records. The gist of her evidence can be summarized. She said that the parties were courting from 2004. In 2007, they wanted to buy a property but she was not very keen to do so. She was involved in searching for a property for them.
30. She did not play a very strong part in acquiring the property. She did not contribute the deposit for the property. The house has two flats apart from the one they lived in and each flat brings rental income of \$500 per month. The mortgage repayment is about \$1, 200 and is the husband's responsibility.
31. Her contribution was as a spouse. She exactly said that she contributed by doing the household chores such as cooking, doing the laundry, cleaning the house, ironing and cutting the grass. She also did shopping. She said that she should be entitled to the property because she has lost 10 years of her life in this marriage.
32. In respect of the vehicle, the wife said that her contribution was paying for the fuel as she was driving it most of the times and kept the same with her most of the times. She does not know where the deposit for the vehicle came from. She is of the view that the deposit would be from a vehicle that was traded in.
33. In cross-examination, the wife stated that she did not contribute financially towards the house and the vehicle. She contributed by cutting the grass. The husband's credit card was used for whatever he wanted to buy and that the husband also contributed towards paying for the

food. They hardly had breakfast and lunch at home. They had a house girl who did the laundry for them. The money for her jewelry was paid by her husband. The cost of the jewelry was \$8,000 to \$9,000.

34. It is clear from the entire evidence of the wife that she did not make any direct or indirect financial contributions to the acquisition, conservation or improvement of either the residential property or the motor vehicle. All she said she did was to search for the property in order to purchase the same, doing household work such as cooking, cleaning the house, cutting the grass, buying food and doing laundry. How her cooking, cleaning, cutting the grass, doing the laundry and buying the food contributed as the non-financial contribution towards the conservation or improvement of the property was not identified by her at all.
35. Her evidence is seriously short of any link between her doing the household work to the conservation and improvement of the property. I can understand if she had used her money to maintain the other aspects of the parties living which freed the husband's income to maintain the house and improve the same. That however is not evident from the records and it will be an error on my part to presume any such contribution as linking to the conservation and improvement of the property.
36. Even the Court below did not find how her working in the house and buying groceries can be regarded as indirect financial contribution towards the conservation and improvement of the property. The husband was still in a position to sustain the outgoings on the property without any form of assistance from the wife. He used his credit card for his expenses and did not rely on the wife for sustenance.
37. The wife also goes further to contradict her evidence when she says that the husband's credit card was used to buy what he wanted and that he also bought food. They hardly had breakfast and lunch at home and the maid was there to assist in the laundry work.
38. If that is the case, then it clearly appears from the evidence of the wife that she spent her money for the purposes of either bringing or buying food for the parties which responsibility

the husband also shared. Her income was used towards maintaining the day to day living of the parties which was also shared by the husband.

39. If the wife used her income to maintain herself and her day to day costs then that cannot be classed as contribution as a homemaker or contribution towards the property. That is contribution for the day to day living which she in any event would have had to cater for even if she was not married, unless, like I have said before, a link could be shown to have assisted the husband financially to maintain or conserve the property.
40. This is not a case where the wife was asked to live her work or employment and manage the house as a homemaker. She cannot say that she became financially disadvantaged as a result of the marriage and since the marriage has been dissolved she needs to be put back in the same place she was before the marriage. If anything, the wife appears to have had some financial advantage out of the marriage. She had been provided with a house and transport. She acquired from her husband jewelries worth of \$8,000 to \$9,000. She also managed to buy a vehicle after the parties had separated. Her financial position was much better than what she had before marriage.
41. In respect of the motor vehicle, the wife said that she used to fuel the same and that was her contribution. I do not find that it is just or equitable to class this as direct or indirect financial or non-financial contribution for the conservation or upkeep of the motor vehicle. The wife had to fuel the vehicle so that she could use the same. Her fuelling the vehicle in no way via her evidence suggests that it conserved or improved the vehicle.
42. This was a very short marriage and in the little over two years, I do not find that the wife had made recognized contributions as required under s. 162(1) of the FLA which would entitle the Court to give it a value. At this stage it is proper to deal with the wife's concern that she was courting since 2003 and that she should be considered as having lived in a de-facto relationship from 2003. This would bring the term of the marriage to 9 years instead of little over 2 years.

43. I do not agree that the duration of the parties' relationship should be worked out from the time they were courting. Firstly, there was no application before the trial Court to determine whether the parties were in a de-facto relationship from 2003. There was a dispute between the parties as to when their relationship started. The Court worked the period of duration from the time of the marriage. If one party wanted the period of duration to be considered before the marriage, the issue should have been put before the Court to be tried. If it was and not dealt with, then the omission by the Court or any error in the finding in regards that issue ought to be appealed.
44. There is no appeal before me on the issue that the Court made an incorrect finding on the duration of the marriage. It is not for me now to hear that issue. It is common knowledge that when de-facto relationship is disputed, the Court ought to make finding of facts upon hearing the parties. These findings of facts are in reference to the statutory factors outlined in the FLA. I am not in a position at the appellate level to make such findings as there is obvious shortfall of evidence in respect of each factor.
45. For now, I find that there was no error when the Court worked the duration of the marriage from the date of the marriage and not from the date when the parties started courting. Courting is not the same as having de-facto relationship.
46. I also need to address two concerns raised by the wife's counsel. The first is that the husband ought to disclose where he got the money to pay the deposit for the house and the car and that if the residential property was self-paying then the Court cannot attach greater financial contribution on the part of the husband.
47. In regards the deposit for the house, I find that the Court was correct in identifying that the purpose of the distribution exercise is not to investigate the source of the funds for the deposit. I will qualify that statement by saying that it is not for the Court to investigate where the husband found the money for the deposit unless there is a dispute that the wife contributed the same. In this case, the wife did not make any deposit either for the residential property or the motor vehicle. Since the properties are registered in the name of the husband, it is taken that the contributions for its acquisition was made by him or on his behalf. Had it

not been for that, he will not be able to acquire the said properties. There is no triable issue on the aspect of deposit for the Court to investigate where the money came from. I would have undertaken that exercise if the wife gave evidence or insinuated that she should be given the benefit for the payment of the deposits for the house and the car.

48. The counsel for the wife also says that the residential property was largely self- paying and as a result the husband cannot show greater financial contributions on his behalf. I must re-iterate that the residential property was bought before the marriage. If the wife asserts that she is entitled to a share in the same, she has to show that she made direct or indirect financial contributions to the same or contributed during the marriage as a homemaker. If she can show to the Court that she made the contributions as a result of which the property was put to a state where it could derive income, then her contributions would be given relevance and weight. In absence of such evidence, the law does not permit that if a party buys a property before marriage from his income and the property derives rental income (*which can be used to pay the mortgage debt or used for the upkeep of the same*), than that party cannot claim greater financial contribution. Had it not been for the effort of that party, the property will not exist at all to even derive the income.

49. The rental income from the property was \$1,000 and the repayment as per the bank statement dated 2<sup>nd</sup> September 2013 and tendered in evidence as *Exhibit R3* was \$1320. This indicates that the husband had to make some mortgage repayments from his earnings and that the property was not totally self-paying. This is a safe assumption because the wife did not give any evidence that she paid the mortgage for the property. How else was the mortgage debt to be repaid on the property? The husband could not totally rely on the rental income to pay the same.

50. To add to the requirement to sustain the debt on the property, the husband had to spend substantial amount of money since June 2012 for the maintenance and upkeep of the property. *Exhibit R 4* is relevant at this stage. A sum of more than \$15,000 was spent by the husband for the general upkeep of all the flats and maintenance of the house. Although this work started immediately after the parties had separated, it is indication that the property was in need of conservation and maintenance. If it was maintained during the marriage, there

would not be a need for the husband to spend such large amount of money after the separation. This once again fortifies my finding that the wife's evidence does not show that her income or work of household chores or buying groceries in any way assisted towards the maintenance or conservation of the property.

51. She cannot claim that she is entitled to a share because she was married to him. Marriage itself is not a ground for alteration of interest. It has to be shown that on the account of the marriage, she made contributions as required by the law and that her contribution be now recognized by a split in the assets. I do not find that the wife was entitled to the initial distribution of 20% as allocated by the Magistrate and any such finding is not supported by her evidence.
52. The next issue is that of the adjustment of 20% made in favour of the wife. The Court unfortunately was sympathetic when it made an adjustment without identifying the reason or the basis upon which such a finding was made.
53. The Court makes no finding of why an adjustment in favour of the wife was essential and whether she was in a weaker economic position when compared to the husband. They both are largely the same in terms of their age, income and ability to cater for their living. The adjustment cannot be justified on any basis.
54. The next aspect of the appeal is to consider whether, as complained, all the property of the parties to the marriage was pooled for a consideration. Whilst the husband's properties were pooled using the definition of the term "*property*", the wife's property being the motor vehicle and her household contents were left out for reasons not identified by the Court. Although the motor vehicle was bought after the parties had separated, it ought to have been pooled. The fact of the same being acquired after the separation was a matter that ought to have been considered when the question of contribution was being assessed.
55. The wife's counsel argues that there was no counter-claim made by the husband for distribution of the assets owned by the wife and as a result the Court was correct in not bringing the assets to the pool. If the law on distributive process is to result in a just and

equitable outcome, then by no means it is proper to exclude the wife's assets from the pool. It does not matter that there was no counter-claim made. There need not be a counter-claim. In any distributive process, the Court ought to know what each party will end up with after the split and whether there is any economic disparity that needs to be catered for. All this is only possible if all the assets are pooled and a fair percentage is worked out given the parties entitlements.

56. In this matter the husband has asserted that it was due to the wife saving up her money as a result of the marriage that she managed to buy the vehicle for herself after the separation. What he in fact asserted equated to the fact that the marriage did not hinder the wife's economic situation but rather improved the same.
57. The Court ought to have investigated whether the wife saved up her money during the course of the marriage to be able to buy an expensive vehicle after the separation. If that was done, it would have an impact on the outcome of the decision.
58. The Court did not take into account that the wife already has jewelries of about \$9,000 bought by the husband. She now has a vehicle and there was no distribution undertaken on that. She has a very good paid employment, younger than her husband, no health issues, and FNPF monies standing to her credit.
59. I find that when the wife's assets were not pooled, the result of the distribution became unfair and inequitable as it does not truly reflect the wife's future economic position or weakness based on which she received an adjustment of 20%.
60. It is also at this stage that I must raise that when the distribution was ordered, the Court did not make any orders that the liabilities on the property shall be taken into account. The liabilities would be as at the date of the hearing. It is understood from the evidence that the house is under mortgage, the exact amount is not reflected in the evidence. However *Exhibit R3* shows that as at August 2013 the debt on the property was in the vicinity of \$123,975.74. The hearing of the matter took place in 2015 which indicates that the amount may be lowered

by further payments. In absence of any proper accounting, an order for distribution in the percentage form should be properly made subject to the liabilities.

61. The Court had not taken the liability into account. This is apparent when the Court was making findings under the first stage of the process. There is no mention of any liability on the property.
62. I also wish to raise the husband's concern that the Court had stated that the husband's intention was to mislead the Court and not to give any share in his property to the wife when he stated that he bought the property for his family and his parents and that he had not disclosed that he had owned a motor vehicle and disposed the same during the pendency of the hearing.
63. The comments by the Court were made when the Court was determining whether the two properties of the husband could be brought in the pool for distribution. However, the finding that the husband wanted to mislead the Court and did not wish to give the wife any share is an unfair comment. The husband's evidence merely reflected his legal position that there should not be any distribution on the basis that the wife did not make any contributions as required by law.
64. There are concerns why the husband transferred the vehicle to his sister in the sum of \$5,000 when the vehicle was worth far more than that. It could be a genuine transaction or a one in sham. That issue is not before me on appeal. However, since the husband kept the vehicle with him all along, it indicates that he did not wish to dispose the same with the intention to deprive the wife of her share. He could have sold the same to a third party which would have made it more difficult to bring the asset to the pool and left the Court to target the cash received upon the sale.
65. The findings by the Court that the husband wanted to deprive the wife of her share was perhaps confused with his legal position. These remarks may have influenced the Court to have a sympathetic approach towards the wife in ordering the distribution rather than



following the requirements of the law, which, I find, if followed properly would not result in the findings that the Court arrived at.

***Final Orders***

66. In the final analysis, I find that the Court erred in law and in fact when it initially found that the wife was entitled to a 20% split when it could not be established through her evidence that she had made any contributions towards the acquisition, conservation or improvement of the subject properties or contributed as a homemaker or a parent as required by s. 162(1) of the FLA and when it readjusted the wife's share by increasing the same by another 20% without any proper reasons.
67. The Court also erred in law and in fact in not pooling the wife's assets to ensure that the final outcome of the distributive process was just and equitable.
68. I allow the appeal and set aside the orders of the Court below granting the wife her share in the properties registered in the husband's name to the extent of 40%.
69. I reiterate that the wife is not entitled to any distribution claimed by her and that her claim is dismissed.
70. I order each party to bear their own costs of the appeal proceedings.

.....  
***Hon. Madam Justice Anjala Wati***

***Judge***

***19.05.2020***

**To:**

- 1. Shelvin Singh Lawyers for the Appellant.***
- 2. R Patel Lawyers for the Respondent.***
- 3. File: Appeal Case Number: 15/Suv/0015.***