

## **1. Brief Overview of Aspects of the Family Law Act 2003**

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Divorce reform in Fiji is now at the crossroads with the introduction of the landmark Family Law Act 2003. Throughout history, there has been a cycle of reform in other jurisdictions as thoughts and new ideas develop on lifetime commitments. The institution of marriage has seen changes, with the new focus on the domestic roles of males and females as more women enter the workforce and with greater opportunities for higher education. The preservation of the institution of marriage was seen to be protected by the emphasis on fault-based divorce with waiting periods prior to divorce. Over time, law reformers were convinced that the stringent and adversarial approach to divorce was harmful to both spouse and children thus a variety of reforms were introduced to liberalise the laws on divorce. Today, a number of countries including Fiji have adopted the “no fault” ground, establishing “*irretrievable breakdown*” as the sole ground for divorce. Despite the wide acceptance of the “no fault” ground in other jurisdictions, this law is considered in some sectors of our community as revolutionary.

The Family Law Act (FLA) repeals the following laws:

Matrimonial Causes Act (Cap.51)

Maintenance and Affiliation Act (Cap.52)

Maintenance(Prevention of Desertion and Miscellaneous Provisions) Act (Cap.53)

Maintenance Orders (Facilities for Enforcement) Act (Cap.54)

Maintenance Orders (Reciprocal Enforcement) Act (Cap.55)

The FLA creates a Family Court which is a new and separate Division of the High Court and Magistrates’ Courts. It is a specialist court which has the power to deal with divorce, maintenance, property, children’s issues such as residence and contact, parenting responsibilities and parenting plans, children’s right to separate representation and also enforces its own orders.

The FLA emphasis the obligations of parents to their children and the principle of the best interest of the child. It encourages parents to make decisions and to come to agreement on the care and welfare of their children. Preventive measures in the form of counselling is a core feature of this law. The court counselling service can provide the opportunity for reconciliation or where this is not possible, to encourage the parties to plan realistically for the welfare and maintenance of their children.

## **2. Parental Responsibility**

The FLA therefore introduces the concept of “parental responsibility.” Section 45 defines “parental responsibility” in relation to a child to mean all the duties, powers, responsibilities and authority which parents by law have in relation to their children. Each

parent has parental responsibility for any children under the age of 18 years despite changes that may occur in the parents relationship (s. 46). Parental authority would therefore cover all those authorities, duties and responsibilities that parents have in relation to their children and which cover the duties and the rights to make daily, short term and long term decisions regarding their children.

Parental responsibility does not apply to children 18 years and over (s.46(1)). In other words, parental responsibility ceases when the child reaches 18 years of age. This concept of parental responsibility will raise questions about parental authority, control and responsibility with respect to children over 18 years of age in relation to education, conduct, medical treatment and other issues that affect the parent child relationship. Lord Denning's view in *Hewer v. Bryant (1970) 1 QB 357* on parental rights of custody in respect of her or his child is that the right is a "dwindling right" which the courts will hesitate to enforce against the wishes of a child and the more so the older he/she is. It starts with the right of control and ends with little more than advice.

### **3. Property**

There are specific provisions in the FLA which deals with property. Only parties who are married can apply at anytime before being divorced for a property settlement. Once divorce has become final, an application for property orders cannot be filed within 2 years after the date of making of the Order except by leave of the court (s.27(3). The court will not grant leave, unless it is satisfied that hardship would be caused to a party or child of the marriage if leave were not granted (s.27(4). It is difficult to assess the policy behind section 27(3) as it is expected that applications for property orders must be filed within two years after final orders, rather than after two years. There seems to be some contradiction here.

Property is defined in section 2 of the FLA to mean "*property within or outside, to which those parties are, or that party is, entitled, whether in possession or reversion.*" Under s. 154 "*property*" is defined to include *money standing to the credit of a party in the Fiji National Provident Fund but does not include the interest of any party in real or leasehold property which is inalienable.*

A court therefore cannot make an order alienating native land (s.166(1)). A property settlement may therefore involve the family home, any other real estate, cash, investments, insurance policies, superannuation and any other assets. Although insurances and superannuation is not strictly property, they are financial resources which can be included in a property settlement.

In any property proceedings between the parties, the general focus of the FLA is to encourage the parties to reach binding agreements in relation to their property without going to court. Once agreement is reached, the parties can apply to the court for a Consent Order, and this agreement becomes legally binding and is enforceable by the court. To help the parties reach agreement, the court counselling service or the Registrar who has conciliation skills, can assist the parties to reach their own agreement that is considered fair to both sides.

**(a) How does the court make property orders?**

The court may make declarations on the titles or rights, if any, that a party has in the property (ies) (s.160 (1)). Once a declaration is made, the court may make consequential orders to give effect to the declaration, including orders for the sale or partition of the property or interim or permanent orders as to possession (s.160(2)).

There are a number of factors the court must take into account when making a property order and to this end, the court will take into account what financial and non-financial contributions the parties have made during their relationship. These factors are set out in **section 162** of the FLA and include:

- (a) any direct or indirect financial contribution made to the conservation or improvement of the property individually or jointly owned;
- (b) the contribution (other than financial) made by either party directly or indirectly;
- (c) the contribution made by a party to the welfare of the marriage including any contribution made in the capacity of home-maker or parent; and
- (d) the eligibility of either party to a pension, allowance or benefit.

The contribution of either party is presumed to be equal, but this presumption may be rebutted if the facts of the case is repugnant to justice.

In making a property order, the court is obliged to take other factors into account such as:

- (a) the age and state of health of the parties;
- (b) the income, property and financial resources and the physical and mental capacity of each of them for appropriate gainful employment;
- (c) the party who has the care and control of children to the marriage who are under the age of 18 years;
- (d) the commitments of each party that are necessary to support himself or herself or 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 if cohabiting with another person;
- (g) the duration of the marriage;
- (h) the terms or any orders for spousal or child maintenance;
- (i) any other factor or circumstance of the case which the court requires to be taken into account.

**(b) What can the Court order?**

The court has power under s.164(1) of the FLA to make the following orders:

- (a) a lump sum whether in one amount or by installment;
- (b) weekly, monthly, yearly or other periodic sum;
- (c) specific transfer or settlement of property;

- (d) security of sum ordered in a manner the court directs;
- (e) deed or instrument to be executed to enable an order to be carried out effectively
- (f) appointment and removal of trustees;
- (g) payments to be made direct to a party to a marriage, to a trustee to be appointed or into court or to a public authority;
- (h) a permanent order, an order pending the disposal of proceedings, a fixed term or for a life or during joint lives or until further order;
- (i) imposing terms and conditions;
- (j) making an order by consent;
- (k) making any other necessary order.

#### **4. Spousal Maintenance**

The FLA provides for spousal maintenance in Part VII. The liability of one spouse in a marriage to maintain the other is provided for in *section 155* as follows:

“A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately, whether-

- (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
- (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
- (c) for any other adequate reason,

having regard to any relevant matter referred to in *section 157*.

*Section 155* stipulates two conditions for maintenance:

- (a) where one spouse is unable to support herself or himself adequately;
- (b) the extent to which one spouse is reasonably able to maintain the other.

There are 5 general features to spousal maintenance:

- The potential liability for spousal maintenance immediately arises upon marriage;
- The section makes no differentiation between husband and wife;
- The potential liability for maintenance lasts for the joint lives of the parties (see the term used ‘parties to a marriage’).
- Spousal maintenance rests on economic considerations and not on fault;
- Each spouse should maintain himself or herself if this is reasonable in the circumstances.

*Section 157* sets out the factors which must be taken into account in determining spousal maintenance. There are several thematic headings which encompass the provisions in *section 157* – namely: personal circumstances of the parties; future obligations to others; past circumstances of the marriage.

**(a) Personal circumstances**

*The age and state of health of each of the parties* (s.157(a)). This factor requires no explanation. Under s.157(b) *the income, property and financial resources (including any interesting leasehold or real estate which is inalienable) of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment.* This provision compares the financial circumstances of each of the parties which is important in both maintenance proceedings and property adjustments.

Section 157 (i) provides for maintenance to be paid that would increase the earning capacity of the party by enabling that party to undertake a course of education or training or to establish a business or some other venture in order to obtain an adequate income.

**(b) Future Obligations to others**

*Section 157(c)* where either party has the care or control of a child of the marriage who is under the age of 18 years.

*Section 157(d)* commitments of each of the parties that are necessary to enable a party to support himself or herself, a child or another person that party has a duty to maintain. This section raises issues of obligations where a party has to support 2 families – the former family and the new family. Similarly, *section 159(1)* refers to parental maintenance where a person is liable to maintain his or her parent to the extent that he or she is reasonably able and only if the parent has no means of support due to age or physical and mental incapacity or for any other reason.

**(c) Past circumstances of the marriage**

*Section 157(j)* gives recognition to the contributions made by the applicant to the marriage. This is the only provision which looks to past contributions. Such contributions could include financial contributions made by one spouse to the earning capacity perhaps through higher education, income, financial resources and property of the other spouse.

**(d) Urgent Maintenance Orders**

The Court has powers under *section 158* to issue urgent maintenance orders. Where it appears to the court that a party is in immediate need of financial assistance, but it is not practical in the circumstances what order, if any, should be made, the court may order maintenance pending the disposal of the proceedings.

**(e) Cessation of maintenance**

The obligation to pay maintenance ceases upon the death of the party and upon the death of the party liable to pay maintenance (*s.165(1)*). Maintenance also ceases upon re-marriage of the party to whom the maintenance is being paid or where a party cohabits with another in a domestic relationship unless special circumstances exist.

## **5. Concluding comments**

This paper covers only those topics identified by the conference organizers. The Family Law Act has detailed provisions, particularly under the property and spousal maintenance provisions, which cannot be covered in this paper. Issues of spousal maintenance are problematic and experience has taught us that such maintenance is difficult to enforce particularly where income and resources within a family are very limited. Where there is insufficient cash to maintain families, contributions in kind can make some difference to the sustenance of families but it does not pay school fees, clothing and footwear. One of the enlightening features of the Family Law Act is for parties, as far as possible, to decide for themselves and agree upon the amount of maintenance that can be paid or the nature of any contributions that can be made in kind. Once an agreement has been entered into by the parties, the court could issue a Consent Order. Once a Consent Order has been issued, it is difficult to change or end the Order without the agreement of the other party. Consent Orders can be viewed as final, thus avoiding the need for further court proceedings by the parties. Consent Orders can be set aside for fraud, or that the order is impractical to carry out or that there are exceptional circumstances requiring the setting aside of the Order. Similar considerations will also apply to other financial agreements.

It is too early to comment on what impact the new Family Law Act will have but it is clear that the “no fault divorce” has been constructed to allow parties to exit from the marriage without airing the faults and failures of the marriage. Once the Family Law Act is in force a more comprehensive study of the effect of this law will be necessary. It is possible that questions may arise in the future on the role of fault factors and their relevance when determination is being made on spousal maintenance and marital property division.