

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER: 16/Suv/ 0002
(Original Case Number: 08/Suv/0324)

BETWEEN: Gordon
APPELLANT

AND: Manjula
RESPONDENT

Appearances: Ms. R. Naidu the Appellant.

Ms. Choy for the Respondent.

Date/Place of Judgment: Thursday 05 October 2017 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 person referred to. Any similarities to any persons is purely coincidental.

Anonymised Case Citation: Gordon v. Manjula– Fiji Family High Court Appeal Case Number: 16/Suv/0002.

JUDGMENT

A. Catchwords:

FAMILY LAW – APPEAL – PROPERTY DISTRIBUTION – Taking into account the liability on the property - orders for sale of residential property must be justified on the facts of the case – Business in partnership should be given consideration as the entire proceeds of sale does not belong to one person – Gifts to children should not form part of distribution as the parents have already decided on a course of action and they cannot change their minds afterwards and affect the rights of the children unfairly.

B. Cases:

1. *In the Marriage of Wardman and Hudson (formerly Wardman) (1978)* 33 F.L.R. 196.
 2. *In the Marriage of Geyl (1978)* 7 Fam. L.R. 219.
 3. *In the Marriage of Crawford (1979)* 35 F.L.R. 489.
 4. *In the Marriage of Quinn (1979)* 37 F.L.R. 168.
 5. *In the Marriage of Warne [1982]* F.L.C. 91-247.
 6. *In the Marriage of Hauff [1986]* F.L.C. 91-747.
 7. *In the Marriage of Gamer [1988]* F.L.C. 91-932.
 8. *In the Marriage of Cozantis (1979)* 34 F.L.R. 523.
 9. *In the Marriage of P. [1985]* F.L.C. 91-605.
 10. *In the Marriage of Faraone and Shabadalah [1988]* F.L.C. 91-956.
 11. *In the Marriage of Hauff [1986]* F.L.C. 91-747.
 12. *In the Marriage of Af Petersens [1981]* F.L.C. 91-095.
 13. *In the Marriage of Prince [1984]* F.L.C. 91-501.
 14. *In the Marriage of Rowell; Deputy Commissioner of Taxation (intervener) (1989)* F.L.C. 92-026.
 15. *In the Marriage of Bailey and Bailey's Executrix (1989)* 98 F.L.R. 1.
 16. *In the Marriage of Biltoft [1995]* F.L.C. 92-614.
 17. *In Ascot Investments Pty. Ltd. v. Harper (1981)* 148 C.L.R. 337.
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Cause

1. The husband appeals against the property distribution orders made by the Family Division of the Magistrates' Court on 11 December 2015. The distribution was on percentage basis granting 40% shares to the wife and 60% to the husband.
2. The specific orders were as follows:
 - a. *The husband to sell the residential freehold property in Sydney Australia at the present market price and share the proceeds of the sale on a 40:60 percentage split.*
 - b. *The husband to sell the business and share the proceeds on a 40:60 basis.*
 - c. *The husband to make immediate arrangements to sell the shares and divide the proceeds on 40:60 basis.*

d. The husband to sell the motor vehicles and share the proceeds on 40:60 basis.

3. The Notice of Appeal had raised seven grounds of appeal. However at the hearing Ms. Naidu, on behalf of her client, submitted that the 40:60 percentage is agreed to. The husband's concern is regarding the liability in the residential property which was not taken into account and the order for sale of the house.
4. It was raised that the order for the sale of the house was never requested for. Only a distribution was sought and for an order for sale to be made, a more draconian distribution affecting the rights of the husband to occupy the property was made when the distribution orders could be made more effective by ordering the husband to pay the wife's share in lump sum. Ms. Naidu argued that the husband was in a position to pay off the shares.
5. The husband's further concern was that the tax liability on the business which did not exist anymore as it was closed down due to re-zoning was never taken into account.
6. Ms. Choy agreed to a 40: 60 split. Her client had further agreed to forgeo her shares in the company and her shares in the vehicle. This was the most sensible consent her client could make. I would elaborate on this later.
7. In terms of the background of the parties, they were married in 1980. Their marriage was dissolved in July 2008. They have three children of the marriage. All of them are above the age of 18.
8. The wife now lives in Fiji and the husband lives in Australia with his three children. The husband and the children occupy the residential property in respect of which distribution is sought.

Issues and Determination

9. I will not deal with the grounds of appeal in its original form as the position of the husband has changed since the date of filing the appeal. It is therefore prudent that I deal with each asset separately and the concerns raised on appeal.

A. Residential Property

10. The two issues that arise out of the order on this asset are:

- (i) *Whether the order for sale of the home was necessary, and*
- (ii) *Whether the mortgage liability should have been taken into account.*

11. The above issues can be dealt with collectively. The Court had accepted the valuation of the residential property to be between AUD 850,000 and \$900,000. This was based on the latest valuation submitted by the husband. The Court had also remarked that current market value would also matter.

12. The wife's contention is that the current valuation as at the date of sale should be taken into account.

13. The court had taken into account the latest valuation of the property provided by the husband. It is the duty of the parties to submit the valuation to the Court. The wife had submitted a valuation which was dated 18 June 2003. The husband had produced from the real estate agents the selling price of the property. Two agents had given the letter in August 2008. Both had basically said that the selling price was AUD900,000. Since the valuation provided by the husband was the latest, the Court accepted that valuation. That was the best evidence that was available to the Court.

14. The wife's contention that the current valuation should be taken into account is improper. Orders for distribution are not made in mind taking into account the future

valuation. When the final orders for alteration of interest in the property is contemplated, the parties must be ready with the valuation of the pool of assets otherwise the distribution proceedings become meaningless.

15. If the wife was of the view that the property was valued more than AUD 900,000 then it was her duty to submit a valuation. The court had noted that she was advised of this but she did not submit any valuation contradicting the latest valuation.
16. Given the evidence of the parties, the only valuation the court could work at was \$900,000 at a higher end. I would accept this is as the proper valuation as the date of hearing.
17. Case laws can be found to support various times as being the proper time at which to value property for the purposes of distribution proceedings. The two principal times which have variously been regarded as the most appropriate are the time of separation of the parties and the time of hearing of the proceedings, though other times, such as the time of the severance of a joint tenancy, have been considered appropriate in particular cases.
18. The preponderance of cases, especially from the Full Court of the Family Court in Australia, have held that normally the proper time to value property is the time of the hearing: *In the Marriage of Wardman and Hudson (formerly Wardman) (1978) 33 F.L.R. 196 at 200*; *In the Marriage of Geyl (1978) 7 Fam. L.R. 219 at 223, 224*; *In the Marriage of Crawford (1979) 35 F.L.R. 489 at 497-498*; *In the Marriage of Quinn (1979) 37 F.L.R. 168 at 173*; *in the Marriage of Warne [1982] F.L.C. 91-247 esp at 77,369, 77,370*; *In the Marriage of Hauff [1986] F.L.C. 91-747 at 75,441*; *In the Marriage of Gamer [1988] F.L.C. 91-932 at 76,752*.
19. Some cases, however have held that in light of the particular circumstances involved, the more appropriate time is the time of separation. This has especially been the case

where a substantial period of time has elapsed between the date of separation and the time of hearing, or where certain intervening events appear to make the time of separation the more appropriate time to value the property. *In the Marriage of Cozanitis (1979) 34 F.L.R. 523*, for example, a husband and wife purchased a run-down milk bar in 1972. They then separated in 1973. The hearing of the wife's application for alteration of property interests did not, however, take place until 1978. In the meantime, the husband had built up the milk bar through his own personal efforts without the assistance of the wife. The Full Court of the Family Court held that in these circumstances the proper time to value the property was at the time of separation.

20. In the subsequent case of *In the Marriage of Warner [1982] F.L.C. 91-247*, however, the Full Court of the Family Court held that because of the practical difficulty in determining the value of the property at a time in the past, and particularly in the distant past, property should normally be valued at the time of the hearing rather than at the time of separation, with an appropriate adjustment being made in the final order to cover any significant intervening events. Although no member of the Full Court held that property should never now be valued at the time of separation, this is the clear implication of the case.
21. There are subsequent cases in which the Family Court has nonetheless regarded the time of separation to be the appropriate time to value the properties, for example, *In the Marriage of P. [1985] F.L.C. 91-605 at 79,916*; *In the Marriage of Faraone and Shabadalah [1988] F.L.C. 91-956 at 76,915*; and *In the Marriage of Hauff [1986] F.L.C. 91-747 at 75,441*.
22. None of the above cases indicate that the time to value the property is at the date of enforcement of the orders which is the position of the wife. Her contention has no basis to be upheld.

23. Then comes the issue of the true value of the house. In order to work that and the proper shares of the parties, the court ought to have taken into account the liability on the house: *In the Marriage of Af Petersens* [1981] F.L.C. 91-095 at 76,669; *In the Marriage of Prince* [1984] F.L.C. 91-501 at 79,076; *In the Marriage of Rowell; Deputy Commissioner of Taxation (intervener)* (1989) F.L.C. 92-026 at 77, 392; *In the Marriage of Bailey and Bailey's Executrix* (1989) 98 F.L.R. 1 at 5; *In the Marriage of Biltoft* [1995] F.L.C. 92-614 at 82,124-82-127.
24. The position may be different if there is an unsecured liability on the property. In this case there was secured mortgage on the property. Both parties even agreed that the mortgage is in the sum of \$450,000. In that regard the sum of \$450,000 ought to have been considered as the proper liability to be deducted from the value of the property to arrive at a net value on which the distribution was to be worked out.
25. The Court did not make any findings as to the deduction of liability from the value of the residential property. This was an error of law. The liability must be taken into account from the value of the house. The true value of the property therefore is AUD450,000.
26. *In Ascot Investments Pty. Ltd. v. Harper* (1981) 148 C.L.R. 337 at 355, the High Court has laid down a basic rule that “*the Family Court must take into account the property of a party to the marriage as it finds it*”. The Family Court must accordingly take the property of a party to a marriage subject to any mortgage, charge, restrictive covenant or other incumbrance that has been placed upon it. There are certain exceptions to this rule which I will not deal with in this case as the exceptions do not apply here.
27. The wife’s share at 40 % calculates to \$180,000. The question now arises is that if her shares equate to \$180,000 is the husband capable of paying lump sum to her. That is an aspect that ought to have been explored by alternative orders being granted in

that the husband ought to have been ordered to pay the lump sum within a certain period and if he could not that the next option of selling the house would be considered.

28. I must say that the purpose of the distribution orders are not to punish any parties but to grant them a just and equitable relief. The husband and the children of the marriage, albeit over 18 years, have been occupying this house. They do not wish to leave this house. The husband has confirmed that he will pay the wife his shares in the house. In that regard any orders for sale of the house is not justified and equitable.

29. I find that the court erred firstly in not taking into account the mortgage liability in the house and further erred when it ordered the sale of the house without allowing the husband to pay the wife her shares at 40%.

B. Company

30. In respect of this property the Court ordered that the shares in the same be sold and the wife be given 40% of the shares.

31. The wife had indicated that she does not want any shares in this property. The reason is clear because on the evidence available before the Court, this business is not worth much. There is uncontradicted evidence that this business was in partnership. The couple only owned 50% of the shares. The wife's share is 40% of half the shares.

32. There was also uncontradicted evidence that this business had to be shut down due to rezoning. The evidence of the wife was that the business sold scrap metals worth of \$100,000. The husband's evidence was that the business did not earn any money after shut down. The Court accepted the evidence of the wife. It made a finding of fact that if scrap metal was sold on weight, it would have fetched AUD 100,000. I have no reason to interfere with that finding because the business having assets and

scrap metal would have fetched some money. The husband's evidence was not believed.

33. Having said that I must say that out of the AUD 100,000, the couple were only entitled to AUD 50,000 as the business was in partnership. There was also a debt of \$77,000 in the form of tax. There is no dispute regarding that. If the debt is to be shared between the two partners, each partner is responsible for payment of tax in the sum of \$38,500. The amount remaining from AUD 50,000 to be divided between the parties is \$11,500. The wife's share would be 40% of \$11,500 which would amount to \$4,600. The wife has decided to forego this share. Since the amount is not substantial, I do not find that it would be inequitable if her shares in the property are ordered to be forfeited as per her consent.

C. Shares There is no appeal by any party regarding distribution orders on this property. I therefore will not interfere with the finding of the court for distribution of 40% of the shares in these companies. The shares are to be sold.

D. Motor Vehicles

34. The wife does not want any shares in the vehicles. She confirmed that on appeal. Indeed the evidence revealed that the vehicles were bought for the benefit of the children. The children are using the vehicle as it was a gift to them. It is therefore improper for the parties to renege on the arrangement and ask for distribution of the property that has been gifted to the children.
35. The wife's consent is noted and any orders for division in this property is set aside.

Final Orders

36. In the final analysis, I make the following orders:

- (i). *The order for sale of the residential property is set aside. The order is substituted with an order that the husband is to pay the wife a sum of AUD 180,000 or the FJD equivalent of the same within 3 months. If the monies are paid in Fijian dollars, the exchange rate to apply should be the rate applicable at the date of the payments.*
- (ii). *If the husband does not pay the monies as ordered in (i) above, the residential property must then be sold by either party after the proper enforcement procedures are observed in the jurisdiction the property is located in. After the sale of the property the wife must be paid her share of AUD 180,000 or the Fijian equivalent of the same.*
- (iii). *By consent of the wife, there shall be no orders for distribution in Sted Pty. Ltd. and the Motor vehicles.*
- (iv). *The orders of the Magistrates' Court in respect of the sale of shares is affirmed. The wife is to be paid 40 % of the sale value of the shares.*
38. *I would order each party to bear their own costs of the appeal proceedings irrespective of the fact that there was always willingness on the part of the husband to settle the dispute.*

Anjala Wati

Judge

09.03.2018

To:

1. *Sherani & Co. for the Appellant.*
2. *LAC for the Respondent.*
3. *File: 16/Suv/0002.*