

NO. 24025

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

DONALD ROBERT KENNEDY, JR., Plaintiff-Appellant, v.
SHERYL MARIE CHING, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-D NO. 97-185K)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

Plaintiff-Appellant Donald Robert Kennedy, Jr.

(Kennedy), appeals the division and distribution of the property and debts part of the Divorce Decree¹ entered on December 15, 2000, by District Family Judge Aley K. Auna, Jr. We vacate the division and distribution of the property and debts part of the Divorce Decree and remand that issue for further proceedings consistent with this opinion.

BACKGROUND

Kennedy was born on December 18, 1948. Defendant-Appellee Sheryl Marie Ching (Ching) was born on January 23, 1951. Kennedy and Ching were married on February 27, 1993 (DOM). They separated in January 1997. Kennedy filed a complaint for divorce on July 24, 1997. The trial occurred on April 6 and 7, 2000.

¹ Hawaii divorce cases involve a maximum of four discrete parts: (1) dissolution of marriage; (2) (a) child custody (legal and physical) and visitation, and (b) child support and education; (3) spousal support; and (4) division and distribution of property and debts. Eaton v. Eaton, 7 Haw. App. 111, 748 P.2d 801 (1987).

The family court filed its written decision and order on September 13, 2000. Kennedy filed a motion for reconsideration on September 25, 2000. The court filed its decision and order granting in part and denying in part Kennedy's motion for reconsideration on December 1, 2000. The Divorce Decree was entered on December 15, 2000.

In its September 13, 2000 decision and order, the court presented a comprehensive chart (September 13, 2000 Chart) that valued each item of marital partnership property (MPP), allocated each item in accordance with the Marital Partnership Division, and stated the distribution of each item. Property valued at \$1,846,948 was distributed to Kennedy and property valued at \$1,011,006 was distributed to Ching.

Although the court noted that Kennedy's Category 1²

² Despite the inapplicability of the [Uniform Starting Points (USPs)], the family court is not without any direction in determining the equitable division and distribution of marital estates in that the family court can still utilize the construct of five categories of net market values (NMVs) in divorce cases:

Category 1. The net market value (NMV), plus or minus, of all property separately owned by one spouse on the date of marriage (DOM) but excluding the NMV attributable to property that is subsequently legally gifted by the owner to the other spouse, to both spouses, or to a third party.

Category 2. The increase in the NMV of all property whose NMV on the DOM is included in category 1 and that the owner separately owns continuously from the DOM to the DOCOEPOT [date of the conclusion of the evidentiary part of the trial].

Category 3. The date-of-acquisition NMV, plus or minus, of property separately acquired by gift or inheritance during the marriage but excluding the NMV attributable to property that is subsequently legally gifted by the owner to the other spouse, to both spouses, or to a third party.

(continued...)

East Ohina Place property had been sold in October 1995 for \$206,000, it included that property in the property distributed to Kennedy.

Although the court noted that Kennedy's Category 1 \$210,000 Purchase Money Mortgage (PMM) from Stephen Doyle had been satisfied in December 1993, it included that value in the values distributed to Kennedy.

The court decided, in relevant part, as follows:

"Wasting of Assets Claim: The Court has reviewed the extensive evidence presented, including trying to follow the trail of the proceeds of [Kennedy's] MPP Category 1 assets (East Ohina and Doyle PMM) that were sold or received after DOM. The evidence does not show wasting of marital assets."

²(...continued)

Category 4. The increase in the NMV of all property whose NMV on the date of acquisition during the marriage is included in category 3 and that the owner separately owns continuously from the date of acquisition to the DOCOEPOT.

Category 5. The difference between the NMVs, plus or minus, of all property owned by one or both of the spouses on the DOCOEPOT minus the NMVs, plus or minus, includable in categories 1, 2, 3, and 4.

Malek v. Malek, 7 Haw. App. 377, 380-81 n.1, 768 P.2d 243, 246-47 n.1 (1989).

The NMVs in Categories 1 and 3 are the parties' capital contributions to the marital partnership. The NMVs in Categories 2 and 4 are the during-the-marriage increase in the NMVs of the Categories 1 and 3 properties owned at DOCOEPOT. Category 5 is the DOCOEPOT NMV in excess of the Categories 1, 2, 3, and 4 NMVs. In other words, Category 5 is the net profit or loss of the marital partnership after deducting the partners' capital contributions and the during-the-marriage increase in the NMV of property that was a capital contribution to the partnership and is still owned at DOCOEPOT. Gardner v. Gardner, 8 Haw. App. 461, 467, 810 P.2d 239, 240 (1991).

Tougas v. Tougas, 76 Hawai'i 19, 27, 868 P.2d 437, 445 (1994).

The court noted that Kennedy had \$15,212 cash at DOM and that Ching had \$3,500 cash at DOM. Notwithstanding the nonexistence of that cash at the date of the conclusion of the evidentiary part of the trial (DOCOEPOT), the court included the Category 1 \$15,212 in the property distributed to Kennedy and the Category 1 \$3,500 in the property distributed to Ching.

The court noted that in November 1996, Ching received a personal injury settlement of \$20,665 and used it for marriage expenses. The court categorized this settlement as Category 5 property and, notwithstanding its nonexistence at DOCOEPOT, distributed this amount one-half to each party.

The court noted that in or about March 1993, Ching received about \$18,000 in settlement of an employment claim. The court categorized this settlement as a Category 1 value and, notwithstanding its nonexistence at DOCOEPOT, included it in the property distributed to Ching.

In sum, the court awarded more property and a greater value than actually existed. In its December 1, 2000 Order Granting in Part and Denying in Part Plaintiff's Motion for Reconsideration, Filed on September 25, 2000, the court recognized its errors and ordered an Amended Distribution/Allocation Summary Chart (AD/ASC).

The court's AD/ASC deleted Ching's \$20,665 personal injury settlement Category 5 value.

This appeal challenges the fact that the court's AD/ASC also deleted Kennedy's Category 1 \$431,212 (East Ohina, Doyle PMM, and \$15,212 cash) and Ching's Category 1 \$21,500 (\$18,000 employment settlement and \$3,500 cash) from consideration. As a result of the deletions, the court awarded property valued at \$1,469,452 to Kennedy and property valued at \$915,125 to Ching, and Ching was awarded property valued at \$140,807 more than the amount calculated pursuant to the Partnership Model Division formula.

On this subject, the court stated in its December 1, 2000 Order, in relevant part, as follows:

2. Having reconsidered that aspect of [Kennedy's] Motion for Reconsideration as set forth in Paragraph No. 1 above, are the above-named assets still considered MPP Category 1 properties subject to a capital contribution credit?

[Kennedy] argues that the parties should be awarded a capital contribution credit for their respective properties that are no longer in existence; citing Jackson v. Jackson, 84 Haw. 319 (1997), as follows: "If a party does not own the Category 1 property at the DOCOEPOT, that Category 1 NMV is a part of the total of the DOCOEPOT NMVs and is subtracted from the Category 5 NMVs." 84 Haw. at 336.

In this case, however, it would be patently unjust, unfair, and inequitable to provide the parties a capital contribution credit for an asset no longer in existence.

Of particular concern is the proceeds from the sale of [Kennedy's] East Olina [sic] Place property and the receipt of payment of the Doyle Purchase Money Mortgage, where the evidence shows that [Kennedy] benefitted from this sale and receipt and used the majority of the proceeds for his own use rather than for the marital partnership.

As for the cash brought into the marriage and [Ching's] Employment Settlement proceeds, it appears that they were absorbed into the marital partnership. Thus, both parties benefitted from these assets.

Although the Court concluded on Page 17 of its Order on Trial that there was no evidence of wasting of marital assets, the Court now also concludes that providing a capital contribution credit of assets no longer in existence would be inequitable under the circumstances of this case.

Accordingly, that portion of the Court's Order on Trial concluding that these assets are MPP Category 1 properties subject to a capital contribution credit is hereby set aside.

In this appeal, Kennedy challenges the family court's "failure to give either party a capital contribution credit for the Category 1 property he or she brought into the marriage even though that property no longer existed at DOCOEPO." Kennedy complains that the family court "didn't deduct [Kennedy's] or [Ching's] capital contribution of Category 1 assets which no longer existed at DOCOEPO from the Category 5 assets of the marital estate[.]"

PARTNERSHIP MODEL DIVISION RULES

Under the Partnership Model, assuming all valid and relevant considerations are equal,

1. The Category 1 and 3 NMVs are the "partner's contributions" to the Marital Partnership Property that, assuming all valid and relevant considerations are equal, are repaid to the contributing spouse; and

2. The Category 2, 4, and 5 NMVs are Marital Partnership Property that, assuming all valid and relevant considerations are equal, are awarded one-half to each spouse.

Hussey v. Hussey, 77 Hawai'i 202, 207-08, 881 P.2d 1270, 1275-76 (App. 1994). We label this Hussey division the Partnership Model Division.

Thus, under the Partnership Model Division, Category 2, 4, and 5 NMVs are divided 50% to the owner and 50% to the nonowner. Id.

The Partnership Model requires the family court, when deciding the division and distribution of the Marital Partnership Property [FN8] of the parties part of divorce cases, to proceed as follows: (1) find the relevant facts; start at the Partnership Model Division and (2) (a) decide whether or not the facts present any valid and relevant considerations authorizing a deviation from the Partnership Model Division and, if so, (b) itemize those considerations; if the answer to question (2) (a) is "yes," exercise its discretion and (3) decide whether or not there will be a deviation; and, if the answer to question (3) is "yes," exercise its discretion and (4) decide the extent of the deviation.

FN8. In Hussey v. Hussey, 77 Hawai'i 202, 206-07, 881 P.2d 1270, 1274-75 (App.1994), we distinguished between Premarital Separate Property, Marital Separate Property, and Marital Partnership Property.

Question (2) (a) is a question of law. The family court's answer to it is reviewed under the right/wrong standard of appellate review. Questions (3) and (4) are discretionary matters. The family court's answers to them are reviewed under the abuse of discretion standard of appellate review.

Jackson v. Jackson, 84 Hawai'i 319, 332-33, 933 P.2d 1353, 1366-67 (1997).

DISCUSSION

The family court decided that

[i]n this case, however, it would be patently unjust, unfair, and inequitable to provide the parties a capital contribution credit for an asset no longer in existence.

. . . .

Although the Court concluded on Page 17 of its Order on Trial that there was no evidence of wasting of marital assets, the Court now also concludes that providing a capital contribution credit of assets no longer in existence would be inequitable under the circumstances of this case.

The family court's decision that adherence to the Partnership Model Division rules would be inequitable under the circumstances of the case does not answer the question of what facts, if any, present any valid considerations authorizing a deviation from the Partnership Model Division.

With respect to the noncash Category 1 values relating to property no longer owned by the parties, the following is the only factual basis stated by the family court for its deviation from the Partnership Model Division:

Of particular concern is the proceeds from the sale of [Kennedy's] East Olina [sic] Place property and the receipt of payment of the Doyle Purchase Money Mortgage, where the evidence shows that [Kennedy] benefitted from this sale and receipt and used the majority of the proceeds for his own use rather than for the marital partnership.

We conclude that this factual basis is insufficiently specific to be a valid and relevant consideration authorizing a deviation from the Partnership Model Division.³ Kennedy is a partner of the marital partnership. The mere fact that he used marital partnership funds "for his own use" is not substantial evidence that he did not use them "for the marital partnership." The family court must identify the use of marital partnership funds, state why the use was not a marital partnership use, and state why it should be charged solely to the spending partner.

The answering brief argues that "the evidence at trial revealed that during the marriage [Kennedy] supported his two adult sons generously with marital assets, and that after the parties' 1998 separation, he spent lavishly on them using marital assets, and otherwise depleted marital assets for his benefit."

³ We note that with respect to the noncash Category 1 values of property no longer owned by the parties, the family court deleted them from its calculations because they were not used for marital partnership purposes. In contrast, with respect to the cash Category 1 values of property, the family court deleted them from its calculations because they were used for marital partnership purposes.

This, however, is not the reason given by the family court for the deviation. Had this been the reason, the family court would have had to identify the expenditures upon which this generalized finding is based, state why the expenditures were not marital partnership expenditures, and state why they should be charged solely to Kennedy.

With respect to the Category 1 cash, the following is the only factual basis stated by the family court for its deviation from the Partnership Model Division: "As for the cash brought into the marriage and [Ching's] Employment Settlement proceeds, it appears that they were absorbed into the marital partnership. Thus, both parties benefitted from these assets."⁴ This fact is not a valid basis for deviating from the Partnership Model. Under the Partnership Model, the fact that "both parties benefitted" from one party's Categories 1 and 3 values is not a valid and relevant consideration authorizing a deviation from the Partnership Model Division. A party's Categories 1 and 3 values are that party's capital investment into the marital partnership. Under the Partnership Model Division, when the marital partnership is terminated by divorce, each party is reimbursed his or her capital investment into the marital partnership. Epp v. Epp, 80 Hawai'i 79, 905 P.2d 54 (App. 1995). The remaining balance is divided equally.

⁴ See footnote 3 above.

CONCLUSION

Accordingly, we vacate the division and distribution of the property and debts part of the December 15, 2000 Divorce Decree and remand that issue for further proceedings consistent with this opinion. More specifically, we vacate parts (8), (9), and (10) of the December 15, 2000 Divorce Decree.

DATED: Honolulu, Hawai'i, May 17, 2002.

On the briefs:

Charles T. Kleintop and Dyan M. Medeiros (Stirling & Kleintop, of counsel) and Michael S. Zola for Plaintiff-Appellant.	Chief Judge
	Associate Judge
Ira Leitel for Defendant-Appellee.	
	Associate Judge