NO. 24114

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

SHARON S. LLEWELLYN, Plaintiff-Appellant, v.
FRED WARDE LLEWELLYN, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D No. 99-2925)

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim, and Foley, JJ.)

This appeal challenges the division and distribution of the marital partnership property portion of a decree entered by the Family Court of the First Circuit (the family court),[1] granting Plaintiff-Appellant Sharon S. Llewellyn (Sharon) a divorce from Defendant-Appellee Fred Warde Llewellyn (Fred). We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

BACKGROUND

Sharon and Fred married on May 23, 1976 (DOM). At the time, Sharon had a daughter from a prior marriage, Christine D. Woods (Daughter).

When Sharon divorced her former husband, she was awarded cash and real estate as part of the division and distribution of their marital estate. About a month before her marriage to Fred, Sharon used $130,000 of her cash award to

[1/] Judge Darryl Y.C. Choy (Judge Choy) presided.

purchase a single premium annuity from the Chesapeake Life Insurance Company, naming Daughter as her beneficiary and Fred as the first trustee on the policy. At the time, Daughter was just a toddler and Sharon wanted to ensure that Daughter would be provided for if Sharon did not survive Daughter's childhood. Sharon claimed that Fred understood, prior to their marriage, that this annuity investment would be her separate property, since it was set up solely for Daughter's benefit. The annuity was initially invested through the Wells Fargo Bank and, subsequently, through the Lincoln Trust Company (Lincoln Trust). After Daughter married and had a son (Grandson), Sharon changed the policy terms so that Daughter became an owner of the policy and Grandson was designated as the beneficiary. The policy was also amended to provide that Sharon would be entitled to receive one hundred twenty installment payments "one day less one month after [her] eighty-fifth birthday" and in the event of her death, "the beneficiary for the policy would receive all payments." By the date of the conclusion of the evidentiary portion of the trial (DOCOEPOT) below, the value of the Lincoln Trust annuity had grown to $233,144, an appreciation of $103,144 from the DOM. Sharon requested that the family court award her one hundred percent of this appreciated value.

At their DOM, Fred and Sharon each owned a townhouse in Whittier, California. Fred testified that he thought that both townhouses "had about the same amount of equity" at the DOM.

"Perhaps," he said, Sharon "had a few thousand more. I had about five to six thousand. She may have had eight to nine thousand." Sharon testified that the equity in her townhouse (Sharon's townhouse) was "greater than [Fred's] equity in his at [the DOM]." However, she admitted that she had no documents to support her claim. No finding was made by the family court as to the net market value (NMV) of either townhouse on the DOM.

After the DOM, Fred added Sharon's name to the deed for his townhouse (the Whittier property). The family court found that Fred "thus gifted" one-half of his ownership equity in the Whittier property to Sharon, a finding that Fred has not appealed. At trial, Sharon testified that she "provided some funds, about seven thousand -- six, seven thousand dollars," of her premarital savings for the Whittier property. However, she provided no documentation to support her testimony. She argues on appeal that the family court should have ordered the return to her of $7,800 in premarital "partnership contributions" that she made to the Whittier property.

In November 1977, Sharon's townhouse was sold and realized a net profit of $28,000. In 1980, Sharon and Fred purchased a house in Camarillo, California (the Camarillo property or the Camarillo house). Sharon testified, and Fred concedes, that the $28,000 net profit from the sale of Sharon's townhouse went towards the $35,000 down payment on the Camarillo house. According to Sharon, she added "approximately six

thousand dollars from [her premarital] savings account" to make the down payment. On appeal, however, Sharon claims that she should have been reimbursed $35,000 in "partnership contributions" towards the Camarillo house.

In 1991, Fred, Sharon, and Daughter relocated to Hawai‘i. While Fred was temporarily stationed overseas in Saudi Arabia, Fred and Sharon purchased a two-bedroom condominium unit in Waipahu (the Waipahu condominium). Sharon claims, without any supporting documentation, that she used monetary gifts received in 1991 and possibly 1990 from her mother, Mildred Starkey (Starkey), to make the down payment on the Waipahu condominium. Fred disputed that Sharon received gifts from Starkey for the down payment. He recalled a long-distance telephone call with Sharon, in which she had mentioned wanting to get a loan from Starkey to make the down payment and he had questioned the necessity of a loan "[b]ecause I was -- had been making plenty of money and so had she and we had ample assets to be able to afford the downpayment [sic] ourselves." Indeed, according to the residential loan application dated September 16, 1991, which Sharon completed for the Waipahu condominium, Fred and Sharon had liquid assets worth $257,664 and total assets worth $861,414.

In 1992, Fred and Sharon sold the Waipahu condominium and realized a profit of about $56,000. In December 1992, they purchased a house in Waikele (the Waikele house or the Waikele project). The down payment on the Waikele house was $109,000,

and Sharon testified that it was paid for with part of the proceeds from the sale of the Waipahu condominium, as well as additional monetary gifts from Starkey to Sharon and Daughter, totaling $58,466.18.[2] Sharon claims that she should be reimbursed a total of $90,000 for the portion of the Waikele house down payment that was gifted to her by Starkey.

During the marriage, Fred received inheritances of stock from his mother and grandmother, some of which were sold and reinvested in other securities. On August 17, 2000, Fred sold the stocks he held in a Van Kampen Investment Trust, netting approximately $42,000 after taxes. Pursuant to an agreement with Sharon that removed the proceeds of the sale from any further consideration in the divorce settlement, Fred and Sharon split the net proceeds. Fred forwarded a check of $21,198 to Sharon as her share.

[2/] In support of the claim of Plaintiff-Appellant Sharon S. Llewellyn (Sharon) that the down payment on the Waikele house was paid partly with gifts from her mother, Mildred Starkey, Sharon produced four checks, three made out to Sharon and one made out to Sharon's daughter from a prior marriage, Christine D. Woods (Daughter), as follows:

DATE	PAYEE	AMOUNT
10/21/91	Sharon	$23,466.18
6/3/92	Sharon	10,000.00
6/5/92	Sharon	15,000.00
6/23/92	Daughter	10,000.00
		$58,466.18

PROCEDURAL HISTORY

On September 16, 1999, Sharon filed a Complaint for Divorce against Fred in FC-D No. 99-2925. Shortly thereafter, Fred filed a Complaint for Divorce against Sharon in FC-D No. 99-3084. On September 13, 2000, Sharon moved for an order to consolidate both divorce actions. Although it appears from the record that the family court orally granted the consolidation motion, the record does not include a written order granting the motion.

On December 22, 2000, following a divorce trial held on November 27 and 28, 2000, the family court, Judge Darryl Y.C. Choy (Judge Choy) presiding, entered a Decree Granting Absolute Divorce (the divorce decree). On February 16, 2001, following a partially successful Motion for Reconsideration filed by Sharon, the family court entered an Order Amending Decree Granting Absolute Divorce. (The divorce decree, as amended, will hereafter be referred to as the Divorce Decree.)

The Divorce Decree divided and distributed Fred and Sharon's marital property and debts and ordered Sharon to make an "equalization payment" of $11,404 to Fred so that both would receive fifty percent of the NMV of the marriage's Category 2, 4, and 5 assets.[3]

[3/] In Tougas v. Tougas, 76 Hawai‘i 19, 27, 868 P.2d 437, 445 (1994), the Hawai‘i Supreme Court described the five "categories" of net market values (NMVs) that Hawai‘i courts use to divide marital assets as follows:

> Category 1. The [NMV], plus or minus, of all property separately owned by one spouse on the date of marriage (DOM)

(continued...)

On February 28, 2001, Sharon timely appealed. On August 1, 2001, pursuant to Rule 52 of the Hawai‘i Family Court Rules, Judge Choy filed his Findings of Fact (FsOF) and Conclusions of Law (CsOL), which stated, in relevant part, as follows:

> II. [FsOF].
>
> After carefully considering all of the evidence and credible testimony, and considering the arguments made, the [c]ourt finds the following facts to have been proven by a preponderance of the evidence.
>
> 1. [Fred] was born in Seattle, Washington, on September 28, 1935 and is presently 65 years of age.
>
> 2. [Sharon] was born in Pasadena, California on June 17, 1948 and is presently 52 years of age.
>
> 3. The parties have resided in the state of Hawaii continuously from mid-December 1991 until October 1999 when [Sharon] moved to Virginia.
>
> 4. The parties were married on May 23, 1976 in Los Angeles, California.

[3/](...continued)

> 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 [date of the conclusion of the evidentiary part of the trial (DOCOEPOT)].
>
> 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.
>
> 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.

5. The parties physically and permanently separated on March 5, 1992.

6. There were no children born of this marriage and none are expected.

7. [Fred] graduated from the U.S. Naval Academy at Annapolis. He then graduated from U.C.L.A. Medical School followed by an internship and residency in psychiatry. He is a board-certified psychiatrist.

8. [Sharon] received a BA from California State University at Los Angeles in 1967. She then attended the University of Southern California, receiving a Masters in Social Work (MSW) in 1969.

9. [Sharon] has worked for the United States Army continuously since January 1982. She began as a "dependent hire" in Germany, but quickly moved to regular civil service and is presently a GS 12, working at Department of the Army Command and Family Support Center, 4700 King Street, ATTN: USACFSC-SF, Alexandria, Virginia 22302.

10. [Fred], upon graduating from the U.S. Naval Academy in June 1957 served a regular four-year officer's tour and was honorably discharged on June 8, 1961. He attended medical school from September 10, 1962 until June 8, 1966.

11. [Fred] worked as a staff psychiatrist for the state medical system of the state of California from January 1969 until September 1981. On September 9, 1981 he reentered active duty as a medical officer (Major) in the U.S. Army and served continuously in that capacity until his retirement on August 31, 1994.

12. [Fred] began working for Hina Mauka Drug and Alcohol Treatment Facility in June 1997, as a staff psychiatrist and has since been promoted to Associate Medical Director of that facility. He continues to serve in that capacity.

13. Prior to the marriage [Fred] owned a house located at 1861 Via Bandera, Whittier, California ("Whittier property"). After the marriage he deeded the property into the names of both [Fred] and [Sharon], thus gifting [Sharon] of one-half of his Category 1 ownership equity, and placing all equitable value in the property into Category 5. In 1980 the parties purchased a house located at 853 Rowland Avenue, Camarillo, California ("Camarillo property"), and on December 4, 1992 the parties purchased a house located at 94-1004 Kaeele Street, Waipahu, Hawaii [("Waikele house")]. These three houses were owned by the parties at the time of the divorce, and constitute the real property portion of the marital estate. The [c]ourt finds that all three properties constitute Category 5 marital property.

14. By stipulation between the parties the value of the Whittier property is deemed to be one hundred twenty-eight thousand dollars ($128,000); the value of the Camarillo property is deemed to be two hundred and seventy

thousand dollars ($270,000); and the value of the [Waikele house] is deemed to be three hundred and eight thousand dollars ($308,000). Also, by stipulation between the parties, it was agreed that the Whittier property is free of debt, the outstanding mortgage owed on the Camarillo property is forty-nine thousand dollars ($49,000), and the outstanding mortgage owed on the [Waikele house] is two hundred thirty-four thousand dollars ($234,000).

15. Again by stipulation between the parties it was agreed that [Sharon] would keep the Camarillo property and the [Waikele house], and [Fred] would keep the Whittier property, with a credit to [Fred] to offset the additional equity awarded to [Sharon]. The [c]ourt finds [Sharon] would retain an equitable interest in real property in the amount of two hundred and ninety-five thousand dollars ($295,000) and [Fred] would retain an equitable interest in the amount of one hundred and twenty-eight thousand dollars ($128,000), requiring a credit to [Fred] of eighty-three thousand five hundred dollars ($83,500).

16. The only Category 1 and/or 2 property owned by either party is an account owned by [Sharon] and managed by [Lincoln Trust]. [Sharon] received a divorce settlement from her former husband and, prior to the marriage, invested the funds with [Lincoln Trust]. The value of the original investment was one hundred and thirty thousand dollars ($130,000) (Exhibit J, p.23). That sum represents her Category 1 property. As of June 30, 2000, the account held three assets: (1) [a]n insured money market account valued at $854.00; (2) [a] Life Insurance Policy (#CA034517) having a cash value of $140,981.92; and (3) [a] Life Insurance Policy (#CA034518) having a cash value of $91,308.51. Thus, the total present value of the account is found by the [c]ourt to be two hundred and thirty-three thousand one hundred and forty-four dollars ($233,144) (Exhibit I). The difference of $103,144 is Category 2 property of the marital estate.

17. The [c]ourt finds no credible evidence that [the Lincoln Trust] investment was the subject of any premarital or post-marital agreement; neither does the [c]ourt find that [Sharon] has divested herself of the beneficial ownership of the asset. In fact she testified that the policies, "will be payable to me after I reach eighty-five years of age."

18. The [c]ourt has repeatedly commented upon the lack of credibility of [Sharon] throughout the trial of this divorce. [Sharon] did not provide a signed, file-stamped copy of an Asset and Debt Statement until the Court *sua sponte* insisted upon the filing of one during the trial. Both parties made use of the Asset and Debt Statement form in their requests for interrogatories; however, when both parties submitted [Sharon's] answers to interrogatories (dated December 6, 1999) [Sharon's] submission (Exhibit 34) was only fourteen pages long, while [Fred's] submission *of what purports to be exactly the same document* is thirty pages long (Exhibit J). The difference is that [Fred's] exhibit contains the asset and debt statements completed by

[Sharon], while [Sharon's] exhibit omits the asset and debt statements.

19. [Sharon] contends that she was gifted money by [Starkey] during the marriage. [Fred] disputes the same and contends that any money received by [Sharon] from [Starkey] was a loan that was repaid. Looking to the content of [Sharon's] answers to interrogatories, on page 6 (both Exhibit 34 and Exhibit J) she says that in 1991 she received $50,000 from [Starkey] to be used as a down payment on a house, and that in 1992 she received an additional $40,000 from [Starkey] for another down payment on another house (having sold the house purchased in 1991 and carrying over the fifty thousand dollars invested there into the new house). [Sharon] never produced an escrow sheet for either purchase. Instead, she produced copies of four checks from [Starkey] (Exhibit 37) in amounts of $23,466.18, $10,000, $10,000 and $15,000. One of these checks was made payable to [Daughter].

20. The [c]ourt has several unanswered questions about the use to which the above referenced checks were put. If the first check was the 1991 contribution to the purchase of the first house then why in such a strange amount (down to 18 cents)? Why is the amount less than half that claimed on page 6 of her interrogatories, and most important why is the date of the check *five weeks* after the purchase of the house on September 16, 1991? As for the remaining three checks, again there are serious unanswered questions. Why is one to [Daughter]? Why is the amount in disagreement with that claimed on the interrogatories, and -- once again -- why is there no agreement with the date? The [Waikele house] was purchased on December 4, 1992 (Exhibit Y, p.3). The checks are all dated in June 1992.

21. This [c]ourt finds it credible that [Starkey] wrote checks to [Sharon] and [Daughter]. Based upon all of the testimony received by the [c]ourt covering financial matters during the period 1991 to 1994 the [c]ourt finds it most likely that [Starkey] *loaned* certain sums to [Sharon] (and possibly [Daughter]) during this period. It is possible some or all of these loans were used to make the down payments on the two houses purchased during this period of time. The [c]ourt is particularly persuaded by the testimony of [Sharon] when asked about Exhibit BB. Exhibit BB is a Ft. Bliss Federal Credit Union Account that in June of 1993 held $63,827, and was closed by the end of 1993. According to [Sharon], "This is I believe the account into which the checks were deposited and then used to purchase[] no, I don't know." Given [Fred's] testimony about what [Sharon] told him (that the funds were used to repay a loan from [Starkey]) and the testimony quoted above it seems clear to the [c]ourt that [Starkey's] checks were loans that were repaid from the proceeds of the Ft. Bliss account. That is the only conclusion that adequately explains the facts presented to the [c]ourt.

. . . .

24. Except for the annuity retirement (ERISA enabled "qualified defined benefit retirement") plans of each party

discussed below, the [c]ourt finds all of the remaining property of the parties to be Category 5 marital property:

. . . .

g. At the [DOCOEPOT Sharon] had three bank accounts and a CD:

. . . .

3. Pentagon FCU Regular Share	[$]9,826 (Exhibit 36)
4. Pentagon FCU Pencheck	[$]1,455 (Exhibit 36)

. . . .

26. The [c]ourt heard the testimony of . . . [Sharon], whose credibility the [c]ourt doubts. . . . Because of the nature and date of the expenditures for which a debt was incurred, the [c]ourt find [sic] that the $26,115 in credit card debt owed by [Fred] should not be considered marital debt. The only marital debts the [c]ourt recognizes are the two mortgages (see paragraph 14 above) on the two houses [Sharon] is keeping, and the debt owed on [Fred's] life insurance. By stipulation [Sharon] will assume the mortgages, and [Fred] has agreed to assume the debt on the life insurance.

27. To summarize paragraph 20 above, the five marital assets held by [Fred] (valued at $275,701, $26,592, $76,221, $51,554 and $22,318) total $452,386, and the [c]ourt finds the said $452,386 to be all of the Category 5 personalty held by [Fred] at the [DOCOEPOT]. Similarly, the three totals from paragraph 20 held by [Sharon] (valued at $103,709, $14,356, and $33,073) totaling $151,138, the [c]ourt finds to be all of the Category 5 personalty held by [Sharon] at the [DOCOEPOT].

28. Considering now the entire marital estate (exclusive of Category 1 and 3 assets) the [c]ourt finds that there is $706,000 in real property, $103,144 in Category 2 marital assets (see paragraph 16 above), $14,450 in Category 4 marital assets (see paragraph 18 above showing [Fred] having $2,586 in Category 4 property, and paragraph 19 showing [Sharon] having $11,864 in Category 4 property) and $603,524 in total Category 5 personalty (see paragraph 23 above and add [Sharon's] $151,138 Category 5 holdings to [Fred's] $452,386 in Category 5 holdings). Adding these amounts ($706,000, $103,144, $14,450 and $603,524) the [c]ourt finds the Gross Divisible Marital Estate to be valued at $1,427,118. This does not include [Sharon's] $130,000 Category 1 property and $23,800 Category 3 property, nor [Fred's] $12,234 Category 3 property. If these sums are included then the Gross Marital Estate is $1,593,152.

29. The total marital debt is $327,633 ($283,000 in mortgage debt, and $44,633 borrowed against [Fred's] life insurance policies).

30. The [c]ourt finds the Net Marital Estate to be valued at $1,265,519 ($1,427,118 [sic][4] - $327,633). This sum includes $166,034 in Category 1 and 3 property mentioned in paragraph 24 above. Subtracting the Category 1 and 3 property leaves $1,099,485 ($1,265,519 - $166,034) as the Net Divisible Marital Estate.

. . . .

32. [Sharon's] net holdings of the divisible marital estate exceed [Fred's] net holdings by the sum of $22,807 ($561,146 - $538,339). Accordingly, [Sharon] owes [Fred] an equalization payment in the amount of $11,404.

. . . .

34. The following [CsOL], insofar as they may be considered [FsOF], are so found by this [c]ourt to be true in all respects.

III. [CsOL].

Based upon the foregoing [FsOF], the [c]ourt enters the following [CsOL].

1. The material allegations of the Complaint for Divorce are true. The [c]ourt has subject matter jurisdiction to grant the divorce and make all orders necessarily incident thereto. The [c]ourt has personal jurisdiction over the parties. Hawaii Revised Statutes (HRS) § 580-1. [Fred] and [Sharon] are each entitled to a divorce from the bonds of matrimony on the grounds that the marriage is irretrievably broken. HRS §§ 580-41(1) and 580-42(a).

2. Upon the granting of the divorce, the [c]ourt may make whatever orders as shall appear just and equitable. HRS § 580-47(a).

. . . .

5. It is just and equitable that [Sharon] be awarded all of her interest in the accounts being managed by [Lincoln Trust]. It is just and equitable that $130,000 in equity be awarded to her as Category 1 property that she brought into the marriage. It is just and equitable that the remaining $103,144 be and the same is determined to be Category 2 marital property.

. . . .

11. It is just and equitable that [Sharon] pay to [Fred] an equalization payment in the amount of $11,404.

. . . .

[4/] It appears that the gross marital estate total of $1,593,152 should have been used instead of the $1,427,118 gross divisible marital estate total.

> 29. Equalization Payment. In addition to the awards mentioned above, and in further equalization of the property division between the parties, [Sharon] shall pay to [Fred] the sum of $11,404.00.

(Emphases in original.)

ISSUES ON APPEAL

Sharon contends that the family court committed the following errors in dividing the estate of the parties:

(1) The family court failed to reimburse her for her "partnership contributions" to the three houses (the Whittier property, the Camarillo property, and the Waikele house) that were part of the marital estate at the termination of the marriage;

(2) The family court did not consider the factors listed in Cassiday v. Cassiday, 68 Haw. 383, 716 P.2d 1133 (1986) (Cassiday factors) to determine whether it was just and equitable to award her more than fifty percent of the Category 2 earnings on the Lincoln Trust annuity;

(3) The family court abused its discretion when it disregarded a post-nuptial agreement and awarded Fred half of the proceeds Sharon received from the Van Kampen stock sale that Sharon claims was deposited in the Pentagon FCU account; and

(4) The family court ruled that Fred's credit card debts were not marital property but inconsistently included the debts in the marital estate when computing Sharon's equalization payment.

STANDARD OF REVIEW

A family court's final division and distribution of a marital estate is reviewed on appeal for abuse of discretion, in view of the factors set forth in HRS § 580-47 (Supp. 2002)[5] and partnership principles. Tougas v. Tougas, 76 Hawai'i 19, 26, 868 P.2d 437, 444 (1994) (footnote omitted). The supreme court explained in Tougas that

> [u]nder the abuse of discretion standard of review, the appellate court is not authorized to disturb the family court's decision unless (1) the family court disregarded rules or principles of law or practice to the substantial detriment of a party litigant; (2) the family court failed to exercise its equitable discretion; or (3) the family court's decision clearly exceeds the bounds of reason. Except in those rare situations where the appellate court can conclude, as a matter of law, that the family court had only one choice, its only authorized courses of action are to affirm or to vacate and remand.

Id. at 26 n.6, 868 P.2d at 444 n.6.

DISCUSSION

In Tougas, the supreme court held that a family court dividing and distributing marital estates in divorce cases can

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[5/] Hawaii Revised Statutes (HRS) § 580-47 (Supp. 2002) provides, in relevant part:

> **Support orders; division of property.** (a) Upon granting a divorce, or thereafter if, in addition to the powers granted in subsections (c) and (d), jurisdiction of those matters is reserved under the decree by agreement of both parties or by order of court after finding that good cause exists, the court may make any further orders as shall appear just and equitable . . . (3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether community, joint, or separate; and (4) allocating, as between the parties, the responsibility for the payment of the debts of the parties whether community, joint, or separate, and the attorney's fees, costs, and expenses incurred by each party by reason of the divorce. In making these further orders, the court shall take into consideration: the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left by the divorce, . . . and all other circumstances of the case.

utilize the construct of five categories of NMVs. See footnote 3, *supra*, for a description of the five categories. The supreme court also explained:

> 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).

Armed with these general classifications, the family court is further guided in divorce proceedings by partnership principles in governing division and distribution:

> Under general partnership law, "each partner is entitled to be repaid his contributions to the partnership property, whether made by way of capital or advances." 59A Am. Jur. 2d *Partnership* § 476 (1987) (footnotes omitted). Absent a legally permissible and binding partnership agreement to the contrary, "partners share equally in the profits of their partnership, even though they may have contributed unequally to capital or services." *Id.* § 469 (footnotes omitted). Hawaii partnership law provides in relevant part as follows:
>
> > **Rules determining rights and duties of partners**. The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:
> >
> > (a) Each partner shall be repaid the partner's contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to the partner's share in the profits.

Gardner v. Gardner, 8 Haw. App. 461, 464-65, 810 P.2d 239, 242 (1991) (quoting HRS § 425-118(a) (1985)). Therefore, if there is no agreement between the husband and wife defining the respective property interests, partnership principles dictate an equal division of the marital estate "where the

> only facts proved are the marriage itself and the existence of jointly owned property." *Gussin [v. Gussin]*, 73 Haw. [470,] 484, 836 P.2d [484,] 491 (quoting *Hashimoto [v. Hashimoto]*, 6 Haw. App. [424,] 427 n.4, 725 P.2d 522 n.4 (1986)).
>
> Accordingly, while the family court judges are accorded wide discretion pursuant to HRS § 580-47 in adjudicating the rights of parties to a divorce, the family court strives for "a certain degree of 'uniformity, stability, clarity or predictability' [in its decision-making and thus] are compelled to apply the appropriate law to the facts of each case and be guided by reason and conscience to attain a just result." *Gussin*, 73 Haw. at 486, 836 P.2d at 492. The partnership model is the appropriate law for the family courts to apply when exercising their discretion in the adjudication of property division in divorce proceedings.

Tougas, 76 Hawai‘i at 27-28, 868 P.2d at 445-46.

Stated otherwise, the relevant date for calculating the NMV for Category 1 property is the DOM. Generally, a family court must determine the NMV of each divorcing party's separately owned Category 1 property as of the DOM because: (1) assuming all valid and relevant considerations are equal, the Category 1 NMVs are repaid to the spouse contributing the Category 1 property to the marital partnership, Wong v. Wong, 87 Hawai‘i 475, 483, 960 P.2d 145, 153 (App. 1998); and (2) any increase (or decrease) in the NMV of Category 1 property after the DOM becomes either Category 2 property (if the property is still owned at the DOCOEPOT) or Category 5 property (if the property is no longer owned at the DOCOEPOT), to presumably be split between the two spouses. Jackson v. Jackson, 84 Hawai‘i 319, 336, 933 P.2d 1353, 1370 (App. 1997).

Similarly, a family court must generally determine the NMV of each divorcing party's Category 3 property as of the date of its acquisition during the marriage because: (1) assuming all

valid and relevant considerations are equal, Category 3 NMVs are repaid to the spouse contributing the Category 3 property to the marital partnership, Wong v. Wong, 87 Hawai‘i at 483, 960 P.2d at 153; and (2) any increase (or decrease) in the NMV of Category 3 property after the date of acquisition becomes either Category 4 property (if the property is still owned at the DOCOEPOT) or Category 5 property (if the property is no longer owned at the DOCOEPOT), to presumably be split between the spouses.

The Hawai‘i Supreme Court has held, however, that a family court may disregard undisputed evidence of the existence of Category 1 property at the DOM if the family court determines that there is insufficient evidence to establish the net equity of such property at the DOM. Booth v. Booth, 90 Hawai‘i 413, 978 P.2d 851 (1999). In Booth, it was uncontested that prior to the marriage of Richard and Evelyn, Richard owned two properties, one in ‘Aiea and one in Mililani. At trial, Richard personally testified that on the DOM, the ‘Aiea property had a net equity of $6,400 and the Mililani property had a Category 1 value of $28,000. Richard did not offer an actual appraisal of either property as of the DOM. Instead, he offered into evidence

> his affidavit filed in his 1985 divorce proceedings from Catherine Booth[, Richard's previous wife,] to establish the net equity of the Mililani and 'Aiea properties as of 1987[, when Richard married Evelyn]. The affidavit stated that, in September 1985, Rummel Mortgage had appraised the Mililani property for purposes of a loan at approximately $126,000.00, with a net equity of $44,300.00. The affidavit also stated that an appraisal made by Alexander & Alexander before his divorce from Catherine Booth for purposes of property settlement valued the Mililani property at $147,000.00, with a net equity of "approximately $23,500.00."

Id. at 414 n.1, 978 P.2d at 852 n.1. Additionally, Richard estimated that by the time he married Evelyn on October 31, 1987, the value of the Mililani property would have gone up so that the equity in the Mililani property was $28,000.00. He also estimated that the ʻAiea property would have gone up by "four or five thousand dollars." Id. Notwithstanding Richard's testimony, the family court entered the following FsOF and CsOL:

> *[FsOF]*
>
> . . . .
>
> 14. [Richard] did not present any evidence of the value of the Mililani Property at the time of his marriage to [Evelyn].
>
> . . . .
>
> 20. [Richard] did not present any evidence of the value of the Aiea [ʻAiea] Property at the time of his marriage to [Evelyn].
>
> . . . .
>
> 43. According to the joint appraisal agreed to by both parties, the current value of the Mililani property is $216,000.00. See [Richard's] EXHIBIT 2.
>
> . . . .
>
> *[CsOL]*
>
> . . . .
>
> 9. The [c]ourt finds and concludes that there was insufficient competent evidence presented by [Richard] of any equity in the Mililani Property or the Aiea ['Aiea] Property at the time of his marriage to [Evelyn]. Thus [Richard] failed to establish any Category I property with respect to the Mililani and Aiea [ʻAiea] properties.
>
> . . . .
>
> 12. The [c]ourt finds and concludes that at the time of the trial, the Mililani Property had a net equity of $50,500.00 and that pursuant to the partnership model each party is entitled to one-half of the equity.
>
> 13. The [c]ourt awards the Mililani Property to [Richard] subject to [Evelyn] being allocated $25,500.00 [sic] of the net equity.

Booth, 90 Hawai‘i at 414-15, 978 P.2d at 852-53 (ellipses and some brackets in original). Richard appealed this determination, and the Intermediate Court of Appeals (the ICA) vacated in part, holding that

> [FsOF] nos. 14 and 20 are wrong and COL no. 9 is clearly erroneous and wrong and we vacate them. In this case, the undisputed evidence that the October 1985 NMV of the Mililani property was $23,000 and October 1985 NMV of the 'Aiea apartment was $6,400 is substantial evidence that the DOM-Category 1 NMVs of those properties were no less than those amounts. Thus, those amounts are Richard's Category 1 NMVs of those two properties.

Booth, 90 Hawai‘i at 415, 978 P.2d at 853 (brackets omitted).

On *certiorari*, the Hawai‘i Supreme Court reversed the ICA's decision, in part, stating:

> [Evelyn] contends that, because a determination of the weight of the evidence properly lay within the province of the family court, the ICA erred in holding that [Richard] adduced sufficient evidence of the net equity of the Mililani and 'Aiea properties. We agree.
>
> . . . .
>
> Here, the record indicates that the only evidence [Richard] offered to establish the net equity in the Mililani and ‘Aiea properties on the date of marriage was his own testimony as to various appraisals of the properties, his own estimates of the properties' values, and pleadings filed in his prior divorce proceedings. No actual appraisals of the properties on the [DOM] were presented to the court.
>
> [FsOF] 14 and 20 reflect that the family court considered the evidence presented and determined that respondent's testimony was not a reliable representation of the net equity of the properties on the [DOM]. Accepting this implicit finding, and in light of the fact that no actual appraisals were presented to the family court, the court's conclusion that [Richard] did not present sufficient evidence of the amount of equity on the [DOM] in the Mililani or ‘Aiea properties cannot be said to be clearly erroneous. *See In re Marriage of Aud,* 142 Ill. App. 3d 320, 96 Ill. Dec. 615, 491 N.E.2d 894, 898 (1986) ("there must be competent evidence of value to support the court's division of property"); *In re Marriage of Tyrrell,* 132 Ill. App. 3d 348, 87 Ill. Dec. 546, 477 N.E.2d 523, 524 (1985) ("Where a party does not offer evidence of an asset's value, the party cannot complain as to the disposition of that asset by the court.").

> Because the assessment of the weight of [Richard's] evidence properly lay within the sound discretion of the family court, the ICA lacked a basis for setting aside the family court's findings on appeal. Accordingly, we reverse the ICA's holding that [Richard] adduced sufficient evidence of the net equity of the parties' Mililani and 'Aiea properties on the [DOM].

Booth, 90 Hawai'i at 416, 978 P.2d at 854.

We address the issues on appeal with the foregoing guidelines in mind.

A. Whether Sharon Should be Reimbursed for Her Alleged Category 1 or 3 Contributions to the Whittier Property, the Camarillo Property, and the Waikele House

1. *The Whittier Property*

Sharon alleges that the family court should have accepted her claim that she invested $7,800 in premarital Category 1 funds in the Whittier property, since Fred did not object to her claim at trial or provide contrary evidence. In light of Booth, we disagree.

The primary evidence regarding Sharon's contribution to the Whittier property was Sharon's own testimony, unsupported by documentation.[6] Although Sharon testified at trial that she invested "six, seven thousand dollars" of her own premarital funds in the Whittier property,[7] she never provided any other evidence to back up her claim for $7,800. She also never explained what the money was used for and precisely where it came

[6] As will be discussed below, the Family Court of the First Circuit made clear in its Findings of Fact and Conclusions of Law that it found Sharon to "lack . . . credibility[.]"

[7] In her Opening Brief, Sharon states that she invested $7,800.

from. Moreover, the family court expressly found that Sharon lacked credibility throughout the trial.

In light of the record, we cannot conclude that the family court abused its discretion when it did not reimburse Sharon for the $7,800 she allegedly contributed to the Whittier property out of her Category 1 property.

2. *The Camarillo Property*

It is uncontested that in 1977, shortly after the DOM, Sharon's townhouse was sold for a net profit of approximately $28,000. Both parties agree that in 1980, this money was used to fund the down payment on the Camarillo property. At trial, Sharon testified that she invested an additional "six thousand dollars from [her premarital] savings account" towards the $35,000 down payment on the Camarillo property. Sharon accordingly argues that the family court erred when it failed to return to her the $35,000, which was her Category 1 contribution to the marital partnership. We disagree.

The record reveals that Sharon offered no evidence regarding the net equity of her townhouse as of the DOM, rendering it impossible for the family court to determine what portion of the $28,000 net profit from the sale of the townhouse amounted to post-DOM appreciation of the NMV of Sharon's townhouse. Sharon also provided no evidence at trial to support her claim that her premarital Category 1 savings account was used

to make part of the down payment on the Camarillo property.[8] It is also apparent from the record that the family court had serious questions about Sharon's credibility.[9]

[8/] At trial, Sharon claimed that she did have documentation on the down payment on the Camarillo property but had not produced it during discovery because Defendant-Appellee Fred Warde Llewellyn had not requested the documentation.

[9/] At the January 31, 2001 hearing on Sharon's Motion for Reconsideration, Judge Choy had this to say, apparently referring to the credibility of Sharon and her attorney:

> Court has heard the position of the parties regarding this Motion [f]or Reconsideration. Court will grant in part, deny in part said [m]otion.
>
> Court will require that the property division chart shall be amended to reflect the proper amount in the value of the Waikele project and that the equalization payment shall be adjusted in reflection of the correct amount entered therein.
>
> As to the other requests, they're denied.
>
> Court has made on occasion statements regarding credibility of witnesses. Court has not done so for many years. I think it's important that we begin to do so.
>
> I'm beginning to be somewhat amazed within the last couple of years the parties believe that the oath of -- the oath of telling the truth has very little meaning and the amount of deception in this [c]ourt has reached epic proportion.
>
> Perhaps it's important the [c]ourt in certain case a word [sic] deem proper made comments regarding credibility and deception and disingenuousness perhaps with the hope the parties take a little more seriousness the oath they are taking.
>
> Court will not make those findings or those statements merely upon an occasional showing that there was perhaps something untrue or there was an inconsistency.
>
> The [c]ourt will make those comments when the [c]ourt is of the belief that taking the testimony in its entirety if there are questions of deception, there are questions of dishonesty, there are questions of credibility the [c]ourt has done so in approximately four cases so far and the [c]ourt will continue to do so when it falls into those categories and I will promote these among all the Judge [sic]. We've remained silent far too long allowing the parties to tell us anything they feel like when they're under oath with the (indiscernible) impunity that Mr. Carlisle's office is so inundated they will not

(continued...)

In Booth, the supreme court quoted with approval from an Illinois case which held, "Where a party does not offer evidence of an asset's value, the party cannot complain as to the disposition of that asset by the court." Booth, 90 Hawai‘i at 416, 978 P.2d at 854 (internal quotation marks omitted). The supreme court has also stated that the assessment of the weight of evidence properly lies within the discretion of the family court and should be respected on appeal. Id. Applying the foregoing principles to the evidence adduced in this case, we affirm the family court's denial of Category 1 status to the $35,000 Sharon alleges she contributed to the Camarillo property.

3. *The Waikele House*

Sharon claimed, both at trial and in her Motion for Reconsideration, that the money used to make the down payment on the Waipahu condominium, which was subsequently sold to purchase the Waikele house, was a Category 3 "gift" from Starkey and should therefore be reimbursed to Sharon. Sharon also claimed that she and Daughter received additional Category 3 monetary gifts from Starkey that were used towards the down payment on the Waikele house.

The family court disbelieved Sharon's claim and entered extensive FsOF that any funds provided by Starkey were in the

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[9/](...continued)
prosecute a single perjury case.

As Judge Wong would say, "We're tired of being light."

(Ellipsis omitted.)

nature of a loan. The family court's FsOF are reviewed on appeal under the clearly erroneous standard. In re Doe, 84 Hawai‘i 41, 46, 928 P.2d 883, 888 (1996).

> Under this standard, we will not disturb a FOF unless we are left, after examining the record, with a definite and firm conviction that a mistake has been committed. The test on appeal is whether there was substantial evidence to support the conclusion of the trier of fact. Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

Id. (brackets, citation, ellipses, and quotation marks omitted).

Based on our review of the record, we cannot conclude that the family court's FsOF regarding the categorization of the moneys used for the down payment on the Waikele house were clearly erroneous.

B. Whether the Family Court Abused Its Discretion by Awarding Half of the Earnings on the Lincoln Trust Account to Fred

The family court awarded half of the after-DOM earnings on Sharon's Lincoln Trust account to Fred. Sharon correctly concedes that these earnings are Category 2 funds and that, assuming "all valid and relevant considerations are equal," Category 2 funds are awarded one-half to each spouse. See Hussey v. Hussey, 77 Hawai‘i 202, 207, 881 P.2d 1270, 1275 (App. 1994). Her argument on appeal is that the family court erred by not considering the Cassiday factors regarding equitable distribution of marital assets which, Sharon claims, would have resulted in

Sharon being awarded more than fifty percent of the Lincoln Trust earnings.[10]

This court recently explained what the Partnership Model requires of family court judges who are dividing Category 2, 4, and 5 Marital Partnership Property, such as the Lincoln Trust post-DOM NMV appreciation:

> The Partnership Model requires the family court, when deciding the division and distribution of the Marital Partnership Property 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.

Jackson v. Jackson, 84 Hawai‘i at 332, 933 P.2d at 1366 (footnote omitted). This court also held in Jackson that

> [q]uestion 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.

Id. at 332-33, 933 P.2d at 1366-67.

The family court in this case did not explicitly find whether the "facts present[ed] any valid and relevant considerations authorizing a deviation from the Partnership Model Division[.]" Id. at 332, 933 P.2d at 1366. It did find, however, that there was no credible evidence of a premarital or postmarital agreement between Sharon and Fred regarding the

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[10/] These Cassiday factors are simply the factors that HRS § 580-47 (Supp. 2002) states that family courts must take into account when dividing marital property (or making other related orders). See footnote 5 for relevant text of HRS § 580-47.

Lincoln Trust asset. The family court also found that Sharon had not divested herself of the beneficial ownership of the Lincoln Trust asset and "[i]n fact she testified that the policies, 'will be payable to me after I reach eighty-five years of age.'" The family court also concluded that

> [i]t is just and equitable that [Sharon] be awarded all of her interest in the accounts being managed by [Lincoln Trust]. It is just and equitable that $130,000 in equity be awarded to her as Category 1 property that she brought into the marriage. It is just and equitable that the remaining $103,144 be and the same is determined to be Category 2 marital property.

There are three ways to interpret the family court's ruling:

(1) The family court felt that the facts did not "present any valid and relevant considerations authorizing a deviation from the Partnership Model Division";

(2) The family court found that such factors did exist but departure from the Partnership Model Division was not warranted; or

(3) Sharon is correct, and the family court, having found the property to be Category 2, did not examine whether there should be a deviation from the Partnership Model Division.

While we suspect that the family court adequately considered the relevant factors and found that no departure from the Partnership Model Division was called for, we cannot be certain. On remand, we advise the family court to make an explicit ruling on this issue, following the procedures outlined in the Jackson decision, quoted above.

C. Whether the Family Court Erred by Counting Sharon's Pentagon FCU Accounts as Category 5 Marital Property

Sharon argued, for the first time in her Motion for Reconsideration, that the family court erred by counting her Pentagon FCU accounts as Category 5 marital property. According to Sharon, those Pentagon FCU accounts contained funds that came from a sale of Van Kampen stock, pursuant to a marital agreement between Fred and Sharon, and were effectively removed by the agreement from further consideration in the divorce hearing. Sharon's only evidence in support of her allegation that the funds in the Pentagon FCU accounts came from the Van Kampen transaction was an affidavit from her lawyer.

Fred does not contest that the marital agreement existed or that the money Sharon received from the Van Kampen stock is no longer marital partnership property. He argues that the family court did not err by classifying the Pentagon FCU accounts as Category 5 assets of the marital estate because Sharon never provided any credible evidence that these accounts contained the Van Kampen stock proceeds.

The family court did not explicitly rule on this issue in its findings but apparently did not believe that Sharon's allegations were credible. Determinations of credibility by the family court are entitled to considerable deference by the appellate courts. Booth, 90 Hawai‘i at 416, 978 P.2d at 854. The family court's decision is particularly binding here since, "[t]he party who alleges that an item of property of one or both

of the parties is not partnership property has the burden of proof." Kuroda v. Kuroda, 87 Hawai'i 419, 429, 958 P.2d 541, 551 (App. 1998).

We therefore affirm the family court's decision to count the Pentagon FCU accounts as Category 5 marital assets.

D. Whether the Family Court Erred by Counting Fred's Credit Card Debts as Marital Property for the Purposes of the Equalization Payment

After Fred and Sharon had separated in contemplation of divorce, Fred incurred three credit card debts totaling $21,536. Fred included these debts as marital debts on the proposed property division chart that he submitted to the family court, which the family court apparently used as a basis for entering the divorce decree. At trial, Fred testified that he would take responsibility for all the debts currently on the USAA Visa charge card account. The Decree Granting Absolute Divorce entered on December 22, 2000 provided, in part, that Sharon shall pay Fred a property division equalization payment of $26,904.

Sharon, thereafter, filed a Motion for Relief from Judgment or Order, Motion for Reconsideration and Stay Pending Reconsideration and/or Further Hearing (Sharon's Reconsideration Motion), arguing, in relevant part, as follows:

> At trial, [Fred] testified that he did not intend to hold [Sharon] responsible for his debts, which he accumulated during the parties' separation. [Fred] further testified that if his debts were indeed included in his property division chart which was submitted to the [c]ourt, the chart should be corrected. However, despite [Fred's] testimony at trial, [Fred's] property division chart includes his debts, namely: USAA VISA ($10,608.00); Citibank VISA ($9,245); and Homeworld [F]urniture ($1,683). Accordingly, [Fred] has

> erroneously understated the value of the marital estate by $21,536.00.

On January 31, 2001, the family court entered its order granting Sharon's Reconsideration Motion (Reconsideration Order), in part, but denying that portion that sought a modification of Sharon's equalization payment, to the extent it was calculated based on the three credit card debts incurred by Fred after the parties had separated in contemplation of divorce. However, when the family court subsequently entered its FsOF and CsOL, it inconsistently found, in FOF No. 26, in part, as follows:

> Because of the nature and date of the expenditures for which a debt was incurred, the [c]ourt find [(sic)] that the $26,115 in credit card debt owed by [Fred] should not be considered marital debt. The only marital debts the [c]ourt recognizes are the two mortgages . . . on the two houses [Sharon] is keeping, and the debt owned on [Fred's] life insurance. By stipulation, [Sharon] will assume the mortgages, and [Fred] has agreed to assume the debt on the life insurance.

Fred concedes that the foregoing finding is inconsistent with the Divorce Decree and the Reconsideration Order. The family court is directed to address this seeming inconsistency on remand.

CONCLUSION

In light of the foregoing discussion, we vacate: (1) section M of the Decree Granting Absolute Divorce entered on December 22, 2000, as amended by the Order Amending Decree Granting Absolute Divorce entered on February 16, 2001; and (2) the following portions of the FsOF and CsOL entered on August 1, 2001 that relate to Fred's credit card debts, the Category 2 Lincoln Trust earnings, and the calculations deriving from these assets: FsOF Nos. 16, 28, 29, 30, and 32 and CsOL

Nos. 5, 11, and 29. We also remand this case to the family court, with instructions that it: (1) reconcile any inconsistencies in the FsOF and CsOL regarding Fred's credit card debts; and (2) enter findings as to whether, under Cassiday, it is just and equitable for Sharon to be awarded more than fifty percent of the Category 2 Lincoln Trust earnings.

In all other respects, we affirm.

DATED: Honolulu, Hawai‘i, July 17, 2003.

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