

**IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA**

**APPELLATE JURISDICTION**

<b>CASE NUMBER:</b>	22/SUV/0006
<b>[ORIGINAL CASE NUMBER]:</b>	16/SUV/0237
<b>BETWEEN:</b>	BHARAT
<b>AND:</b>	MALA
<b>Appearances:</b>	<i>Mr. E. Narayan and Mr. P. Kumar for the Appellant. Mr. A. Pal and Ms. M. Veikoso for the Respondent.</i>
<b>Date/Place of Judgment:</b>	<i>Wednesday 18 September 2024 at Suva.</i>
<b>Judgment of:</b>	<i>Hon. Madam Justice Anjala Wati</i>
<b>Category:</b>	<i>All identifying information in this ruling have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.</i>
<b>Anonymized Case Citation:</b>	BHARAT v MALA – Fiji Family High Court Case number: 22SUV0006

**JUDGMENT**

A. Catchwords:

**FAMILY LAW – PROPERTY DISTRIBUTION- APPEAL** - *could a different Magistrate deliver judgment in a matter heard by another Magistrate- was the application for trial de novo properly denied – whether property bought before marriage could be included in the pool of assets – whether jewelry of substantial value ought to have been included in the pool of assets- whether rental proceeds from a property under mortgage should have been included in the pool- working out the contributions of the parties – whether any party was entitled to an adjustment in their share given their economic disadvantage in the future – working out final percentage distribution on the principles of “just and equitable”.*

**B. Cases:**

1. *Lee Steeve [1985] F.L.C. 91-626.*
2. *Dougherty v. Dougherty (1987) 163 C. L. R. 278.*

**C. Legislation:**

1. *Family Law Act 2003 ("FLA"): ss. 161, 162 and 185.*
2. *Magistrates Court Act 1944 ("MCA"): s. 47.*

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***Cause***

1. The husband appeals against the property distribution orders made by the trial Court. The wife had applied for distribution of the property of the parties to the marriage. Her application in particular was for:
  - (a) 50% share in the residential home;
  - (b) 50% proceeds of sale from a property sold by the husband after separation; and
  - (c) 50% of rental proceeds from the date of separation till the date of sale of the property.
2. The husband had opposed the orders. His position was that the properties purchased before the marriage should not be included in the pool of assets. In respect of rental income, his position was that the rental from the property sold was used on the property for mortgage and other outgoings.
3. The husband required that the jewelries of the wife to the value of \$200,000 be included in the pool of assets as he had contributed towards acquisition of most of it.
4. After the trial, the court ordered the husband to pay to the wife a sum of \$653,346.32 within 6 months from the date of the judgment. This reflected 50% of her shares in the residential home valued at \$525,000, 50% of the net sale proceeds received from the sale of the property being a sum of \$777,892.64, and 50% of the net rental proceeds (*some outgoings deducted*) collected from the date of separation until the date of sale of the property.

***Background***

5. The parties were married in 1992. They separated in June 2014. The marriage lasted for almost 22 years. A Final order for dissolution of marriage was granted in late 2016.
6. There is one child of the marriage. She is over 18 years and living with the father in the residential home.

7. When the parties to the marriage entered into the civil union, the husband brought his two children from the previous marriage to live with them. Altogether he had three children under 18 from the previous marriage. 2 sons came to live with the father.

### ***The Court's Findings***

8. Since there was dispute as to the pool of assets and the parties' contribution to the acquisition, improvement and conservation of the properties, the court proceeded to determine the same.
9. The husband had argued that the residential property had been purchased before the marriage and as such it cannot be included in the pool. He also argued that the property which was sold, its proceeds could not be included in the pool, as that property was also bought before the marriage.
10. In determining whether the assets purchased before the marriage should form part of the pool of assets, the court referred to the definition of property. It reflected that the property included property within or outside the marriage. It also cited *Aruf v Nazrin (2017-2020), Family LR 123 at 125 paragraph 14* where I had said;

*"I must first identify that property of the parties to the marriage includes property brought or acquired in the marriage. The parties are at liberty to show their respective contribution to the same if they are of the view that they have brought in the marriage property of greater value and that the distributions should reflect the same."*

11. Using the definition of property and the binding legal precedent, the court found that both the properties formed part of the pool of assets. It stated that the question of contribution would be material in determining the distribution.
12. The husband had also raised that the gold jewelries which he gave to the wife to the value of \$200,000 should be included in the pool of assets.
13. The court stated that the wife, in her evidence, had stated that she received a mangalsutra and a 3 piece of ring from the husband during the wedding. The wife also acknowledged that the husband also gave her 2 gold earrings, 2 gold bracelets, 2 chains, necklaces and 5 gold coins during the marriage. She herself bought a Kundan Set. Another thick gold bangle was bought which was paid for equally by both of them.

14. The court noted the wife's evidence that she refuted that the value of the jewelries equated to \$200,000.
15. In determining whether the jewelries should be included in the pool, the court stated that it was common knowledge that the weight of the gold is a determinative factor in the value of the items apart from its make and design. The court found that there was not enough evidence before it to make a determination of what jewelries are being held by the wife, what has been sold and what is the current valuation of the same. It stated that it was incumbent upon parties to provide the relevant details of this to the court, in absence of which the court could not make an informed decision. Consequently, the jewelries was not be included in the pool of assets.
16. On the question of the rental proceeds from one of the properties which was sold after separation, the court referred to one of my decisions in *Manisha v Dharma [2019] FJH CFD2; Family Case 0416 Suv of 2017 (11 September) 20* where at paragraph 27, I had said;  
  
*"The parties' marriage lasted till July 2017. It was their obligation jointly to decide how the rental proceeds were to be used during the pendency of the marriage. It is inequitable for any one of them to ask the court to interfere in the decision they made during the pendency of the marriage regarding the income derived and spent. The court will not interfere in how they used or managed the proceeds till they separated."*
17. Using that legal precedent, the court stated that the wife's evidence was that when the parties were married, the rental income was deposited in the husband's account. The husband's evidence was that they shared the balance of the rental income once all the expenses had been catered for.
18. The court found that rental income derived until the marriage subsisted, did not form part of the pool of assets as the parties had amicably decided how the proceeds were to be utilized. However, the husband had to account for any rentals received after the parties separated. It said that the parties had separated in June 2014. The property had rental income of \$1200 per month.
19. The business got closed and the property sold in November 2015, so the proceeds of rental income calculated to \$6,800. The court stated that some allowance must be made for the upkeep of the rental property and the cost associated with any rates payable by the husband. Insurance payable also needed to be discounted. The court found that no evidence of these costs for the upkeep of the property was provided by the husband. However it discounted a sum of \$3,000 from the rental income derived. It brought in the pool a sum of \$3,800 to be considered for distribution.

20. The final pool of assets was therefore found to be:

(a) *Residential property valued at \$525,000.*

(b) *Net Proceeds of sale of property being \$777,892.64.*

(c) *Rental proceeds being a sum \$3,800.*

21. The court then proceeded to work out the parties contributions under s.162 of the FLA.

22. It referred to the evidence of the wife that she gave \$1,000 from her FNPF to the husband to fence the residential property. She also had been gifted \$8,000 from her mother out of which she gave \$5,000 to be used in the business and \$3,000 to the husband's brother-in-law on the husband's request. The \$3,000 was later returned to the wife. In the court's analysis of the evidence, this was not disputed by the husband. The court found that the above sums were direct financial contribution by the wife to the properties.

23. In respect of non-financial contribution, the court referred to the wife's evidence that she was living with the husband in the residential property prior to the marriage and just before the marriage the husband purchased the property.

24. Her evidence was that she used to wake up at 5am and cook breakfast and lunch for the family. She looked after the two children of the husband from the previous marriage as well as the daughter from the parties. She had to prepare the children for school. The two sons from the previous marriage lived in the house from the time of the marriage. The elder son lived until 2004 and the younger son still resides on the property.

25. In the afternoon, she cooked dinner for the family and at times helped the children with the homework. She also attended to the flowers after work. She worked in the business since 1989 to 2013 except for a period of 4 years when she gave birth to the daughter. She managed the office and was paid for her work. She did not get paid any compulsory contribution to her Fiji National Provident Fund ("*FNPF*") and she did not raise any issue as it was a family business and she felt that she was contributing to the growth of the business.

26. The court also reflected on the husband's evidence on his contribution. He said that he had sold his house and bought the residential property. He made all the payments on the property. He paid for the groceries, the outgoing and the bills. He catered for everyone's expenses. He also paid for the house help and the gardener. He ran his business.

27. The wife looked after the office for him and he had to hire another office girl after marriage. He did the field work. He paid his wife to do the work in the office. He said that the wife had house help and a gardener during the course of the marriage. His two sons had to do the house work before they were given meals by the wife.
28. The court found that even if a house help is available, there are a myriad of things a person has to do to manage a home and family, small part of which is keeping the house and compound clean. She therefore contributed as a homemaker and was a vital support to the husband in his business by running his office with the help of another staff.
29. The court found that the wife had also contributed financially to the residential home and business. She also forfeited her FNPf entitlement for the benefit of the business.
30. The court found that during the 23 years of marriage, the husband's direct financial contribution was greater but the wife's direct and indirect financial contribution in both the home and office made her contribution equal. The court did not find that the presumption of equal contribution was rebutted by the evidence.
31. After working out that the parties' contribution was equal, the court went on to determining the future needs of the parties.
32. It reflected from the evidence that the wife was 50 years old at the trial. She was working and earning a sum of \$230 per week. She had no liabilities. She was paying rent of \$600 per month. She spent about \$40 to \$50 per week in groceries. She had no other responsibilities. She was dependent on her weekly wages and her retirement funds. She had no property or dependents. She also retained the jewelries given to her during the course of the marriage. There was no evidence of any mental or physical incapacity.
33. The husband was 67 years old at the time of the trial. He lived with his son and daughter-in-law and 2 grandchildren. For his aunt and uncle, he spent around \$170 per month on groceries and \$200 for medication. He spent \$400 to \$500 on his groceries. He paid the bills with his son and spent \$50.00 on fuel. He also paid for house insurance. His son was about 37 years old and employed in the IT profession. The daughter-in-law was about 36 years old and a Manager in an Admin section. The parties' daughter was 25 years old and pursuing post graduate studies. He had high blood pressure and sinus for 40 years.

34. The court found that the son and daughter-in-law could look after their own children. The daughter was also an adult and could look after herself. The wife had agreed that the husband had high blood pressure. The court said that there was also evidence that the husband had purchased an industrial lease which is designated for commercial purposes.
35. In determining the future economic needs of the parties, the court found that the wife is in good health to continue to support herself. The husband looked after his two elderly relatives and had medical conditions. He did not have to pay rent and had the support of his son and daughter-in-law. He has an industrial lease available to him for future income prospects.
36. The court found there was no need to adjust the parties' entitlement given the evidence on their future economic needs.
37. In its final findings the court concluded that the wife was entitled to 50% shares from the residential property being a sum of \$262,500 and 50% from the sale proceeds of the business property in the sum of \$388,946.32 totaling to \$651,446.32. A sum of \$1,900 was also ordered as 50% of the wife's share from the rental proceeds from the date of separation until the property was sold.
38. The husband was ordered to pay the wife \$653,346.32 within 6 months from the date of the judgment.

### ***The Appeal***

39. There are several grounds of appeal. The issues that arise from the appeal are as follows:
  - (1) *Did the court have jurisdiction to proceed to rule on the matter when the trial was heard by a different Magistrate? [Ground 1].*
  - (2) *Was a trial de novo necessary in light of the submission of the husband's counsel that there were serious issues of conflict of evidence in the parties testimonies which necessitated findings of fact based on disputed evidence and credibility and demeanour of witnesses and that the giving of a judgment without trial de novo would be prejudicial to his client? [Grounds 1, 2, and 3].*
  - (3) *Should the property (s) purchased before the marriage have been included in the pool of assets? [Ground 4].*
  - (4) *Did the court correctly find that the parties had contribution equally to the acquisition, conservation and improvement of the properties of the parties to the marriage? [Grounds 5 and 6].*
  - (5) *Should the rental income from the business property from the date of separation until the date of sale of property have been in the pool of assets? (Ground 8).*

- (6) *Should the jewelries have been included in the pool of assets? [Ground 9].*
- (7) *Did the husband properly gift significant portion of the proceeds of sale of the property to his children and grandchildren? [Ground 10].*
- (8) *Was the court correct in not readjusting the entitlements of the parties based on their future economic needs by finding that the husband had purchased an industrial lease which is designated for commercial use and by failing to account for the capacity of each party for appropriate gainful employment? [Grounds 7 and 11].*

### **Law and Analysis**

40. I will deal with each issue under a different head.

#### **(A) Jurisdiction to deliver Judgment on a matter heard by a different Magistrate**

41. The husband's counsel submitted that the trial was heard and completed by one Magistrate. It was for that Magistrate to deliver the judgment. It was argued that another Magistrate did not have jurisdiction to deliver the judgment and the matter should have been heard *de novo*.

42. S.47 of the Magistrates Court Act deals with the above issue. It reads:

*“Where a Magistrate has...otherwise taken or commenced any proceeding or matter whether civil or criminal ..., and subsequently ceases to act as such Magistrate,...any successor of such Magistrate, or any person acting for such Magistrate, may hear, determine, execute, enforce and carry to completion any proceeding or matter so commenced as aforesaid save that, except where otherwise provided by the Criminal Procedure Act 2009, such Magistrate shall commence the trial of any such cause or matter ab initio.”*

43. S.47 of the MCA clearly gives the court the discretion to either complete the proceedings or to order a trial *de novo*. It is therefore not correct to assert that the court did not have the jurisdiction to complete the proceedings by delivering the judgment.

44. There are many factors that needs consideration in making a determination on whether a different Magistrate can deliver judgment on the existing trial notes. This then brings me to the next issue.



**(B) Was a trial de-novo necessary in the interest of justice and the parties?**

45. Whether a trial *de novo* was necessary was a contentious issue before the Magistrate. The parties had different views on whether and why the matter should be heard *de novo*. Obviously, it was only the husband's counsel that contended that the matter needed hearing afresh.
46. The court had to examine some important factors to arrive at the decision. One is whether the trial notes and records were properly and comprehensively taken to proceed to make a determination on the matter. The court also had to examine the reasons advanced for a trial *de novo*. With all that, the court had to have regard to the case management principles. It also needed to consider the prejudicial effect on the parties if the application for trial *de novo* was granted or refused.
47. In respect of the first factor, the court below found that the trial evidence was recorded verbatim. There was also audio recording. It noted that both counsel had confirmed to the court that they did not have any issues with the evidence recorded. The court therefore found the records comprehensive to be able to determine the application for property distribution.
48. On why a trial *de novo* was required, the husband's counsel had raised the following:
- (a) *That there was serious conflict of evidence and the court need to observe the demeanour of the witnesses and draw the necessary inferences on credibility.*
  - (b) *That in the best interest of justice and fairness the matter needed to be remitted for trial de novo so that the husband can have the chance to show his defence and arguments to clarify the issues that he raised in cross-examination.*
49. The court below stated that it appeared that an application for trial *de novo* had been made in an attempt to re-run the case of the husband. It remarked that if there were issues raised in cross-examination which needed clarification, the husband or his counsel could have clarified the same in re-examination.
50. On the issue of prejudice, the court was concerned about the delay. It stated that there was no strong basis to order trial *de novo*. If a trial *de novo* was ordered, it would cause more delay in the proceedings.
51. I agree with the trial court that the manner in which the evidence was recorded was comprehensive. It was complete to be able to determine the credibility of witnesses where and if needed. How a witness

answered a question, how much time he took and his or her general reflection on the issues were all available to the court. The only thing that the court was bereft of was that it did not see the witnesses giving evidence which I find was not fatal and prejudicial to any party as the court below did not accept or reject any evidence based on the credibility of the parties' given their demeanour.

52. The court stated that in his affidavit, the husband had given the reasons for a trial *de novo* and one of the reasons was that he wanted a chance to show his defence and arguments and clarify the issues that he had raised in cross-examination.
53. I agree with the trial court that trial *de novo* is not granted for parties to cover up or clarify what they did/did not do at the trial. The husband's counsel stated that he needed a chance to show his defence and arguments. This could be done in the closing submissions. He also said that he needed to clarify his evidence. It was for him to do this at the re-examination evidence.
54. It must also be borne in mind that it is the responsibility of every judicial officer to observe the principles of case management in every proceeding. A party is entitled to have his or her case determined within a reasonable time. The court must endeavor to ensure that the proceedings are not protracted: *s.185 (4) of the FLA*.
55. This was a case that was filed in 2016. By 2020, the matter was not determined. The matter was heard in October 2019. A property distribution matter should not be in the system for over 2 years. There was already sufficient delay in the case. The new Magistrate attempted her very best to eradicate any further delay in the case. I agree with her approach.
56. I find no basis to disturb the decision of the court below that a trial *de novo* was not warranted in light of the factors that needed consideration in this case. I now turn to the next ground.

**(C) Property Purchased Before Marriage**

57. The husband's contention is that property purchased before marriage does not and should not form part of the pool of assets. This dilemma only arises because the appellant's counsel is still stuck on the term "*matrimonial property*", which formerly, before the FLA came in force, meant property gained during the marriage. The term "*matrimonial*" means connected with marriage or with being married.

58. Under the FLA, the term that is used is “*property of the parties to the marriage*” and the court below was correct in finding that the definition includes property acquired in the marriage. The proper stage at which the issue of acquisition of a property before the marriage comes in is when parties are giving evidence on contribution.

59. It was emphasized by the Full Court of the Family Court in *In the Marriage of Lee Steeve [1985] F.L.C. 91-626*, that property of a party acquired before marriage is not exempted from consideration in a property distribution application. I therefore do not find that the court erred in pooling the assets bought by the husband before the marriage.

**(D) Determining Contribution of the Parties**

60. The court below had found that the parties had contributed equally to the properties of the parties to the marriage. Under this head, I will concentrate on two properties which is the residential property and the proceeds of the sale of the other property.

61. In respect of direct and indirect financial contribution towards the residential property and the property that was sold, the wife’s evidence was that she paid \$1,000 from her FNPF for fencing works at the residential property. She said she did not contribute financially towards the property which was sold except that she gave \$5,000 to be used in the business. This \$5,000 was given to her by her mother.

62. She relied largely on her contribution as a homemaker parent for 22 years of marriage. She said that she managed cooking, the children, the home and the flower gardens.

63. The husband denied that she contributed any money towards the residential property and that the major renovation works were done by loan from the bank.

64. Since the evidence on the wife’s \$1,000 contribution from her FNPF was disputed, one of the ways of establishing it was to give evidence that she in fact withdrew monies from her FNPF at a particular time. She tendered her FNPF statement but failed to produce the relevant statement to show any withdrawals. I do not agree with the court below that the husband had not disputed this evidence.

65. It is not any difficult to get statements from FNPF online or physically showing withdrawals made from the account, no matter how old a transaction is. That institution keeps all records. The wife chose not to produce relevant evidence when she could have. Given her shortfall, she failed to establish her contention that she contributed financially towards the maintenance or conservation of

the residential property. I find that she did not make any direct or indirect financial contributions towards the acquisition, improvement and conservation of the residential property.

66. She agreed that she did not contribute financially towards the property sold except for the \$5,000 that she used in the business. The husband refuted this position too. The wife should have provided documentary evidence of withdrawal of funds. That would have supported her evidence. There was no reliable documentary evidence to give her evidence any weight. Even if there no documentary evidence, she could have even subpoenaed the husband's brother-in-law to give evidence that she gave him \$3,000. This would have supported her contention that she used the money on the business and his family member.
67. The wife agreed that the husband contributed financially towards purchase of both the properties, towards its improvements and conservation. He paid all the mortgages, rates, bills, insurance and expenses needed on the property. He also catered for all the expenses.
68. The wife was also earning weekly wages but she did not spend her money for the maintenance of the property or for any expenses. She did not even pay for any household or anyone's expenses. All the expenses was catered for by the husband. Even the husband provided for her. He also provided for her expenses. The wife used her money on herself. This is supported by her evidence of how she bought and paid for her gold jewelry through her income.
69. Her contribution was to the welfare of the family but she did not do this exclusively. She was not a homemaker exclusively. She did not stay home full time and managed the home, allowing the husband to go and work. She did not contribute as a homemaker alone. She and the husband both contributed as homemakers.
70. Whilst the wife did the cooking for children and looked after them, the husband provided support by finding her hired help. He paid for hired help. That is his contribution.
71. Together with a house help, he provided help through engaging a gardener. He paid for that as well. After 2008, when one of the sons from the previous marriage got married, his wife also assisted in managing the house. The daughter-in-law also contributed as a homemaker too.
72. Then in 2014, the wife separated from the husband. She left her own daughter behind with the husband. The daughter was still attaining education although she was 20 years old. The husband provided this child with all the support. He provided her with home, love, care, mental and physical

support and the financial support to educate her and make her independent. With that assistance she was able to obtain her tertiary education. She is now financially independent and pursuing her post graduate studies. The husband therefore contributed directly as a homemaker and a parent post separation. He contributed by supporting his child. It is not proper to disregard his post separation contribution as a parent and a homemaker.

73. It was the mother's duty too to provide the child with financial support especially he was not there to provide the child with the day to day care and guidance. If a child is over 18 years and still attaining education, it is the duty of the parents to provide for the child in all forms. The mother said in her evidence that she paid the child's tuition fees from her FNPF. She has not produced any statement from FNPF to establish that. She could have easily established this. She failed to, and her contention cannot be given weight.
74. It is therefore clear from the evidence that the wife only contributed as a homemaker but she did not do this exclusively. Everyone in the house played their role. In that regard, it is repugnant to justice to regard her contribution as a homemaker equal to that of the husband who contributed both financially to the acquisition, improvement and conservation of the properties and as a homemaker and parent too. His contribution is significant and substantially outweighs the contribution of the wife. The distribution should reflect this.
75. The court below found that the wife did not have her FNPF contribution deducted from the husband's business and that should count as her contribution. I do not equate that to her contribution. She was the person who was in charge of the office work. She decided not to pay herself. There is no evidence that the husband directed her not to pay her FNPF. She decided that she would not deduct this amount as it was good for the business.
76. At \$80.00 a week, the business would have only had to pay her \$6.40 extra per week which calculates to \$332.80 per year. That is an insignificant amount for growth of any business. In her 18 years of not collecting the monies, the business had only gained close to \$6,000. I am saying 18 years as she did not work for about 4 years when the daughter was born. Even if this is accepted as her financial contribution, it does not in any way erode the husband's greater contribution.
77. The court below also found that the wife contributed to the business by working in the office. I find that she did not contribute to the business as a wife. She was a worker and she was paid for her work. There is no evidence of her having worked beyond her expected and paid duties for her additional work to be given recognition.

78. I find that the wife's contribution could not have been calculated to 50%. It is just and equitable that the husband's greater contribution is recognized. I find that a percentage of 70% for the husband is more justified to reflect his greater contribution.

79. The wife's contribution in the residential property at 30% equates to:

- $30/100 \times 525,000 = \underline{157,500}$ .

80. The next is to work out the amount of the sale proceeds on which the 30% should be levied. The property was sold in \$1,000,000. From that the following necessary payments were made:

\$81,099.60 - *Outstanding Loan to ANZ Bank*

90,300.00 - *FRCS - CGT*

\$21,066.02 - *FRCS*

\$50,000 - *Real Estate*

\$707.76 - *SCC Rates*

**Total:** **\$243,173.38**

**Balance**  $\$756,826.62 + \$20,000$  (*Kept in Sharan Law*) =  $\$776,826.62$ .

81. The next pertinent issue is whether the large sums of money to the extent of \$75,000 each could be given to the son from the previous marriage, his wife and their 2 children. A sum of \$25,000 was also given to the daughter of the parties to the marriage.

82. I am of the finding that there was no unfulfilled parental obligation on the part of any or both parents towards the married and working child for any parent to attribute any shares from the property of the parties to the marriage.

83. However for the daughter who was still attaining education, both parents had a duty to provide for her for 3 to 4 years until she finished her basic education. On the evidence, it was the father who provided for her alone.

84. This child was a student. She would need a minimum amount of \$50 a week for her pocket expenses. Apart from that she needed to be paid for her food, clothing, fees and other sundry expenses.

85. It is therefore not improper for the father to set aside the sum of \$25,000 from the sale proceeds for her. This should be treated as the mother's unfulfilled parental obligation in maintaining this child. The total amount of proceeds left on which the wife's 30% needs to be worked on is \$751,826.62 (776,826.62 - \$25,000). The wife's share at 30% amounts to **\$225,547.99**.
86. I will very quickly address a question that arises out of the above paragraph which is whether the FLA empowers the court to order a settlement or transfer of property for the benefit of a child of the marriage.
87. S. 161 (1) states that:
- "161. (1). In proceedings with respect to the property of the parties to a marriage or either of them, the court may make such order as it considers appropriate altering the interest of the parties in the property, including –*
- (a) An order for settlement of property in substitution for any interest in the property; and*
- (b) An order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage, such settlement or transfer of property as the court determines".*
88. The law therefore provides that property could be given to children. It is therefore not unjustified that a sum of \$25,000 from the proceeds of sale that has been given to the daughter who was attaining education be left in her name and that amount be reduced from the proceeds of sale.
89. The same issue was considered by the High Court in *Dougherty v. Dougherty (1987) 163 C. L. R. 278* where two points were made clear. The first is that the term "child" included an adult child and is not restricted to an infant. The second is that if there is some unfulfilled parental obligation, for example, an unfulfilled maintenance obligation, an order for transfer of the property can be made in favour of the child for that unfulfilled obligation.
90. The total of the wife's share from the two properties thus amounts **\$383,047.99** (157,500 + 225,547.99). This is not the final settlement sum. It would be finally worked out once I have attended to other grounds of appeal.

(E) **Rental Income**

91. The court below found that a sum of \$6,800 was received in rental income from the property sold. The rental income was from the time of separation until sale of the property. From that it excluded

the outgoings on the property such as insurance, rates and maintenance. A sum of \$3,000 was discounted.

92. What the court did not assess was that this property was under mortgage. The husband was solely contributing towards the mortgage. He did this post separation too. There would also be a need to pay substantial insurance premium and city/garbage rates on the property. The property would also need to be maintained. All this costs money which would be used from the rental income.
93. If the property was free from all charges then the rental income could have been included in the pool, otherwise, it was not justified.

(F)     *The Jewelleries*

94. The issue for consideration under this head is whether the jewelries should have been included in the pool of assets. The court below did not include it for lack of sufficient evidence on the type and valuation of the jewelries.
95. I have perused the PTC minutes. Under the head “*issues to be determined*”, the parties had required the court to determine whether the jewelries amounting to about \$200,000 in value should form part of the property and what percentage distribution should attach to it?
96. The parties’ had therefore accepted that the jewelries were worth \$200,000. The issue in the PTC minutes was not about what is the value of the jewelries? The issue was whether the jewelries to the value of about \$200,000 should be included in the pool for distribution.
97. I do not think that the court ought to have therefore very shortly dismissed the issue on the basis of lack of information on the nature of the jewelries and the valuation. Even if the PTC issues means that the value is disputed, then the onus was on the wife to value the same. She is the custodian of the jewelries. She has in her possession all the jewelries. She knows where she has kept it. The husband could not have had it valued.
98. Jewelries are kept like personal possessions. It is not available like land to get a Valuer to value it. It requires production to the goldsmith to get a valuation done.
99. Even if the husband applied for an order for valuation, the practical aspect of getting the valuation done would not be easy. I find that given the PTC minutes and the nature of the property and



possession, if the wife was disputing the valuation, it was incumbent on her to provide the valuation. If there were financial difficulties, she could have asked for an order for costs to be split between the parties or she could have asked the court to require the husband to value it.

100. To allow the wife to seek advantage of her own omission is detrimental and inequitable. It provides and promotes the idea that parties who are in a position to provide valuation of properties can easily and at their whim refuse to do so and make the proceedings expensive and protracted by making it onerous on the other party to make applications in court and get an order for interrogatories or valuation. This practice can be very expensive for a party. It also does not promote the modern day case management principles. It is also against the requirements of the FLA which mandates that proceedings must not be made expensive and long drawn.
101. When the agreed facts and issues were identified, the wife knew that the jewelries were contentious property. She should have then had it valued. I do not find it proper that the jewelries were excluded from the pool. Gold is of economic value and it is an asset. There is no reason why it should be excluded from the pool.
102. Let me now go to the evidence. The wife said in her evidence in chief that the jewelries were not worth \$200,000. She said that when she got married, the husband gifted her a mangalsutra and a 3 piece ring. During the course of the marriage, she bought a Kundan Set. She also bought a thick bangle for \$1,800 for which the parties paid equally. She also testified that she bought one set of necklace and earrings on hire purchase. She paid it from her wages.
103. She also testified that the husband gave her two gold earrings, two gold bracelets and two chain necklace and 5 gold coins.
104. In cross examination evidence she was asked and she answered as follows:

*“Q: In terms of jewelry, you told court lot of jewelry at time of wedding and gifts?*

*A: Yes.*

*Q: 2 gold earrings, necklaces, bracelets?*

*A: Yes.*

*Q: This was during course of marriage?*

*A: Yes.*

*Q: He is entitled to that?*

*A: Not sure.*

*Q: How much do you think it is worth? \$150,000*

*A: Not sure.*

*Objection raised and upheld.*

Q: *Where is it?*  
A: *At bank (bank named). Some of it was sold.*  
Q: *Still wearing some?*  
A: *Yes.*  
Q: *How much you sold them for?*  
A: *Around \$1,500”.*

105. The husband’s evidence in chief was that the jewelries were worth \$200,000. He bought the Kundan Set for \$3,700. Now it is about \$35,000.
106. The husband’s assessment of the value of the jewelries was not challenged in evidence. His evidence was not disturbed. The wife should have given her valuation to contradict this evidence. She very conveniently avoided giving a valuation to the jewelries with the hope that it would benefit her given the lack of evidence. When she was asked whether the jewelries were worth \$150,000, she said that she was not sure. If it was not worth so much, she would have denied it. She did not. She could have at least given a value she thought the jewelries were worth. She again did not.
107. In the circumstances, I find that the court had not properly analyzed the evidence on the valuation of the jewelries. If it did, it would have come to an inescapable conclusion that neither there was a challenge to the value of the jewelries in the PTC Minutes nor was there sufficient evidence by the wife to dispute the husband’s assessment.
108. The nature of the jewelries that the wife identified are expensive jewelries. It is also kept in a bank. Some were even sold for \$1,500. If the jewelries were not expensive, the wife would not be keeping it in the bank. She would not be paying rentals for the bank to keep the jewelries.
109. I find that the jewelries should form part of the pool. The majority of the jewelries were bought by the husband and so his contribution at 70% is still justifiable in this asset. The wife did not make any contributions from her income to any one of the properties. As a result she paid for some of her jewelries. Had it not been the husband’s effort and contribution to other properties and expenses, the wife would have had to use her income for her daily expenses and her utilities. This would not save up her money to buy jewelries.
110. I find that the value of the jewelries should be accepted as \$200,000. The husband’s share would be  $70/100 \times 200,000 = \$140,000$ . This amount needs to be reduced from the wife’s entitlement worked out at \$383,047.99. The wife’s share amounts to \$243,047.99.

**(G)     Gifts Made to Children and Grandchildren**

111. I have dealt with this issue earlier when assessing the actual net value of the proceeds of sale that ought to be divided. I need not repeat my findings.

**(H)     Future Needs Factors**

112. The evidence had very clearly established that the husband was 70 years old when the judgment was delivered and the wife was 54 years old. The age difference between the parties was 16 years. The husband was not working.

113. He was basically retired and it is understandable that at that age, he will not be able to find employment.

114. The wife is working and earning weekly income of \$230. She is also contributing to FNPF which is for her retirement. If she works for another 10 years, which she can, she will get at an income of \$230 per week and have an amount of about \$20,000 in her FNPF. On that she will be earning yearly interest. She may have an increase in salary. That would be an added benefit for her. I have however not factored that in.

115. The wife will have a constant income in future. The husband does not. In future there is economic disparity between the parties.

116. The court said that the husband has an industrial lease which could bring him an income. There was no evidence during the trial that the husband had any such lease. Even the wife's counsel accepts in his submissions that the issue was settled before the trial that there is not such property held by the husband.

117. Given the economic disparity between the parties, it is only justifiable that the husband's entitlement be adjusted upwards to 10 %. The final distribution in favor of the wife is 20% and in favor of the husband is 80%. The husband was and is entitled to an adjustment upwards in his share of distribution.

118. After 10% adjustment, the wife's share calculates to:

**•   Residential Property   -       20/100 × \$525,000               =       \$105,000**

- *Proceeds of Sale* -  $20/100 \times \$751,826.62$  = *\$150,365*

**Total** **\$255,365**

- *Minus Husband's 80% Share from Jewelry* = *-\$160,000*

**Total Share** **\$95,365**

119. Before the adjustment, the wife's share calculated to \$243,047.99. After the adjustment, her share calculates to \$95,365. The actual monetary benefit that the husband has after the adjustment at 10% is \$147,682.99. This money would be for his future expense for the next 10 years. That is almost the amount of money that the wife will earn as income and savings for her retirement in the next 10 years. I find that the adjustment at 10% in monetary terms is justified.

***Final Orders***

120. For the reasons above, I allow the appeal. I set aside the judgment of the court below.

121. I order that the final distribution of the property shall be as follows:

- *80% to the husband and 20% to the wife.*

122. The wife's share calculates to \$95,365. This amount shall be satisfied within 90 working days.

123. Each party shall bear their own costs of the legal proceedings.

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

***18.09.2024***

**To:**

1. *Patel Sharma Lawyers, Suva for the Appellant.*
2. *A. P. Legal, Suva for the Respondent.*
3. *File: Family Appeal Case Number: 06 of 2022.*