

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

<u>ACTION NUMBER:</u>	APPEAL CASE NUMBER 2016/SUV/0006
<u>BETWEEN:</u>	RAMESH APPELLANT
<u>AND:</u>	BIMLA RESPONDENT
<u>Appearances:</u>	<i>MR. J. Reddy for the Appellant</i> <i>Mr. A. Chand (Legal Aid Commission) for the Respondent.</i>
<u>Date/Place of Judgment:</u>	<i>Wednesday 04 September 2024 at Suva</i>
<u>Coram:</u>	<i>Hon. Madam Justice Anjala Wati.</i>
<u>Category:</u>	<i>All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.</i>

JUDGMENT

A. *Catchwords: FAMILY LAW – PROPERTY DISTRIBUTION – wife given 7/12 hares in the property, whether the distribution is just and equitable in light of the children of the marriage having contributed extensively to the property by developing the land and building substantial residential structures on the property with the consent of the parties to the marriage- the agreement of all the parties to the marriage, although not formalized in writing, had permitted the elderly children to build on the land and live on the same for life- the distribution not being just and equitable – the proper orders for the elderly wife seeking distribution is an order for her use and occupation of the house she had been occupying until her lifetime- any other arrangement will disturb about 7 families living on the property with the consent and arrangement of the parties.*

B. *Legislation:*

1. **Family Law Act 2003 (“FLA”):** *ss. 161.*

Cause

1. The respondent wife had applied for distribution of the property of the parties to the marriage. The property involved was a freehold land with 7 residential homes and a temple.
2. After the trial, the court awarded the respondent wife 7/12 shares in the property and the husband 5/12 shares. It was also **ordered that the respondent wife's name be registered** as the joint owner of the property.
3. The husband appealed against those orders. When the appeal proceedings were pending, the husband died. The counsel for the wife made an application to the Family Court for issuance of the Probate which I refused as the application should have been made in the Probate Jurisdiction. The Family Court does not have jurisdiction to issue Letters of Administration or the Probate.
4. I had directed that the appeal will be heard irrespective. I had indicated that after the appeal hearing, I will deliver the judgment. The enforcement of the appeal orders will be done by or against the estate whenever the probate is issued.
5. It was not prudent for me to wait for the probate to be issued as the issues on appeal could be heard and determined without the substitution of parties. Waiting for the probate would have caused delay in the hearing of the case. It would have been different if the trial was pending and one of the parties to the proceedings died.

The Husband's Position

6. The husband had agreed to give to the wife the portion of the land on which she had her house and was living in. He wanted her to have the land sub-divided and transferred in her name.

Background

7. The parties were married in 1960. They were divorced in 2014. They have seven children out of the marriage. All are now adults. They are married and have children.
8. Whilst the parties were still married, the husband started living in a de-facto relationship with another person. He married her after getting his first marriage dissolved in 2014. He has five

children living from that relationship. They are also adults, married, and have children of their own.

9. The respondent wife continued to live with the husband and the second wife. In the beginning, all the children from both the relationships lived in one big house. Later when the children from both the relationships grew up and started getting married, some moved out of the property to live on their own. Others remained on the property.
10. From the first marriage, three sons lived on the property from the beginning. Two out of the three sons have built their own houses on the property. They have developed their portion of the land.
11. The respondent wife lived in another house built by the husband. She lived in that house with one of her sons and a daughter who was married but separated. That daughter has her own children. She lived in that same house for 15 years until she was given notice to vacate by her father due to some family dispute.
12. The daughter left the property and lives somewhere else since 2015. The respondent wife left the property in 2015 too, to live with her daughter who was evicted.
13. From the second relationship, four elder sons are living on the property. A son in law also lives on that property. The second wife lives in one of the houses with a son. There are four dwellings for them.
14. Altogether, there are seven dwellings on the property. The seventh one is only 60% complete (as at February 2015). There is also a temple built on the property for both private and public use.
15. The evidence had clearly established that the property has seven dwellings. They are substantial structures and were built with the consent of the parties to the marriage including the second wife. It was agreed that all the children who have built on the property could remain on the land and that they will be given their shares by the father. In light of that arrangement, the husband asserts that the orders granting the wife 7/12 shares in the property is not justified.

The Appeal

16. The grounds of appeal collectively requires me to determine whether the distribution orders are just and equitable.

Law and Analysis

17. When the deceased appellant gave evidence, he clearly indicated that he had made arrangements for all his children living on the property to have those portions of the land on which they have built their houses.

18. He also reflected that the respondent wife could also have her portion. Whoever wants a title in their name could subdivide the land and have a title issued in their names.

19. The wife also wanted all her children and the children from the second relationship to have equal shares in the property. She acknowledged that they have developed the land and built their own houses except for the one in which she lived in with her son and daughter which was built by the appellant.

20. However the wife wants to be registered as the owner of half the land so that she can divide her share equally amongst all her children.

21. In light of the evidence given in court, it is quite clear that there is a family arrangement in place that all three children from the first relationship and the four children from the second relationship, who have been living on the property, will continue to live on it in their respective houses. They have contributed to the property. Those who have left have and have not contributed to this property will not be given any shares from the property.

22. Only the sons remaining on the land have developed the land and looked after the parents. They have contributed by building their own houses and increasing the valuation of the land. It is not just and equitable to disturb that arrangement and deprive them of their shares to live on the property. That arrangement was agreed to and acknowledged by the parties to the marriage although there was no formal deed.

23. **The wife's application that she be the registered owner of half the property** for her to distribute her share equally to all her children is not just and equitable. She may end up distributing her share to the children who have not contributed. This will affect the other children who have developed the land and built their houses.

-
24. The respondent wife should be entitled to the use and occupation of the house and the land. She can stay there all her life. She is now very elderly. An order granting her shares in the property will disturb the accepted family arrangement and displace most of the families currently living on the property.
25. The property also has a temple for public use. This was built for religious purposes. It would upset the religious sentiments of all the family members if this portion is to be divided and given to one of the parties.
26. **The wife's contribution to the property as a homemaker parent is recognized. She has by her** conduct and evidence accepted that she and all other children from both the relationships will live and stay on that property. She has accepted that arrangement for so many years. There is no reason why that arrangement should be disturbed.
27. This is a case where an order for division in her favour will be unjust. This is a case where I **recognize the children's' contribution in terms of s. 162(1) (a) and (b) of the FLA.** S.162 (1) (a) and (b) states that the court must take into account direct or indirect financial or non-financial contribution made by a child of the marriage.
28. S. 161(6) of the FLA states that a court must not make an order in respect of property of the parties to the marriage unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.
29. In the circumstances, I find that a permanent order for the respondent wife to live and occupy the house for her lifetime without any interference from any one on the property is a just and equitable order. The son who used to occupy the same house can also continue to live and occupy the same.

Final Orders

30. In the final analysis, I allow the appeal. I set aside the orders of the court below.
31. I make an order that the respondent wife has a permanent right to live and occupy the house on the property she has always lived in with her son currently occupying the same. The order remains until her lifetime. The son living with her can also continue to live and occupy the property.

32. No one shall interfere with **the respondent wife's** right to live and occupy her house.

33. The personal representative is to put the orders into effect. The personal representative can now proceed to act in accordance of the will of the deceased appellant.

34. Each party is to bear their own costs of the appeal proceedings.

.....
Hon. Madam Justice Anjala Wati

04.09.2024

To:

1. *Jiten Reddy Lawyers for the Appellant.*
2. *Legal Aid Commission for the Respondent.*
3. *File: Family Appeal Case Number: 0006/2016*