

NO. 22550

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

RUSSELL K. NAKAMURA, Plaintiff-Appellant, v.  
JUNE H. K. NAKAMURA, now known as  
June H. K. Shin, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
(FC-D NO. 98-0023)

MEMORANDUM OPINION

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

Plaintiff-Appellant Russell K. Nakamura (Russell) appeals the family court's<sup>1</sup> May 10, 1999 Decree Granting Divorce and Awarding Child Custody (Divorce Decree). We affirm.

BACKGROUND

Russell was born August 24, 1927; Defendant-Appellee June H. K. Nakamura, now known as June H. K. Shin (June), was born November 2, 1947. Russell and June were married on June 26, 1977. A son (Son) was born on November 19, 1979, and, at the time of the divorce, was not dependent on the parties for support. A daughter (Daughter) was born on June 16, 1981, and, at the time of the divorce, was dependent on the parties for support.

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<sup>1</sup>

Family Court Judge Christine E. Kuriyama presided in this case.

Russell and June were separated in May 1997. On January 6, 1998, Russell filed a Complaint for Divorce.

The family court's<sup>2</sup> March 17, 1998 Order For Pre-Decree Relief ordered Russell to pay, commencing March 5, 1998, temporary child support of \$620 per month and temporary alimony of \$800 per month. It also ordered, in relevant part, as follows:

4. PAYMENT OF DEBTS: . . . [U]ntil further order of the court, [Russell] shall pay as much as he can of the all [sic] sums due and payable on the parties' joint debts, including the maintenance fees on the former marital residence at 2637 Kuilei Street, A-112, Honolulu, Hawaii.

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7. RESTRAINING ORDER: Until further order of the court, both [Russell] and [June] are enjoined and restrained from transferring, encumbering, wasting or otherwise disposing any real or personal property, except as necessary, over and above current income, in the ordinary course of business or for usual living expenses.<sup>3</sup>

(Footnote added.)

The family court's March 31, 1998 order terminated temporary alimony effective March 31, 1998, and increased child support to \$690 per month.

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<sup>2</sup> Family Court Judge R. Mark Browning presided at the hearing on the Motion and Affidavit for Pre-Decree Relief.

<sup>3</sup> In other words, the parties were permitted to transfer, encumber, or otherwise dispose of real or personal property "as necessary, over and above current income . . . for usual living expenses[.]"

The family court's October 12, 1998 stipulated order authorized the payment of the following debts from the proceeds of the sale of the apartment:

IRS	\$2,826.00
State Tax Collector	\$ 491.00
Bank of Hawaii VISA	\$6,106.59
Citibank Preferred MC	\$8,832.61

The family court's October 23, 1998 Order for Pre Decree Relief ordered Russell to pay \$800 alimony commencing November 5, 1998, and ordered the following debts paid from the proceeds of the sale of the apartment:

Navy Federal Credit Union (Russell's Van)	\$7,796.18
City Bank (June's Hyundai)	\$9,800.77

The November 10, 1998 Stipulation Re Temporary Child Support reducing child support to \$400 per month commencing November 5, 1998, was approved and ordered by the family court.

Russell's November 25, 1998 Settlement Conference Statement states, in relevant part, as follows:

J. Credit union/bank accounts:

. . . Agreed that each party should retain any accounts in their sole names that were opened after the parties' separation and subsequent filing of the Complaint for Divorce.

Russell's November 25, 1998 Asset and Debt Statement

lists the following outstanding debts:

<u>Creditor</u>	<u>Debtor (H,W,J or Other)</u>	<u>Security</u>	<u>Mo./Yr. Debt Incurred</u>	<u>Total Balance Owed</u>	<u>Minimum Monthly Payment</u>
First Hawn	J			\$ 3899	\$142
First Hawn (MC)	H			\$ 350	\$ 15
Liberty House	H			\$ 300	\$ 54
Liberty House	J			\$ 81	
Bank of Hi (Flex)	H			\$ 2617	\$ 71
Citibank (MC)	J			\$ 8915	\$185
Bank of Hi (VISA)	H			\$ 6042	\$123
American Ex	J			\$ 6042	\$120
Patricia Bourke	W			\$ 3000	
IRS	J			\$ 2826	
State of Hawaii	J			\$ 491	
Citibank	J			\$12000	\$350
Patricia Bourke	H			\$14100	
Yonemitsu & Co.	H			\$ 773	
Yonemitsu & Co.	W			\$ 584	
Bank of Hawaii	W	Savings		\$ 6000	
Total Debt in [June's] Name Alone:				\$ 9,584.00	
Total Debt in [Russell's] Name Alone:				\$24,182.00	
Total Debt in Joint Names:				\$30,274.00	

June's December 4, 1998 Asset and Debt Statement lists the following outstanding debts:

<u>Creditor</u>	<u>Debtor (H,W,J or Other)</u>	<u>Security</u>	<u>Mo./Yr. Debt Incurred</u>	<u>Total Balance Owed</u>	<u>Minimum Monthly Payment</u>
Bank of HI.	W	savings		\$5,495.44	\$233.07
Yonemitsu Co.	W			\$ 614.00	DUE
Liberty Hse	J			\$ 70.00	\$ 20.00
Oknan Shin	W			\$ 500.00	DUE
Kim Nakamura	W			\$ 205.71	DUE
Hsb's Debts	H	Unknown	Unknown	Unknown	Unknown

June's December 8, 1998 Settlement Conference Statement states, in relevant part, that

[a]ll of the parties' joint debts, . . . have been paid from the sales proceeds of the former marital condominium. It is [June's] position that each party should be solely responsible for and pay all remaining debts in his or her individual name, and that each party should indemnify and hold the other party harmless for payment of any of the same.

The trial was held on December 29 and 30, 1998. In his written closing argument filed on January 11, 1999, Russell stated, in relevant part, as follows:

It is [Russell's] contention that [June] due to the financial circumstances of their relationship was allowed to save a substantial sum of money during the parties' marriage. It is his estimation that she was able to save more than \$80,000.00 during the marriage. Though he has been unable to discover any fund or account, the basis for this belief is that he had paid for everything throughout the marriage. He testified that he paid for the mortgage, maintenance, utilities, transportation costs, food, clothing and other essentials necessary to run the household.

The Divorce Decree was entered on May 10, 1999. The Findings of Fact and Conclusions of Law (FsOF and CsOL) were entered on August 19, 1999.

The Divorce Decree awarded custody of Daughter to June; ordered Russell to pay to June child support of \$340 per month; ordered Russell to continue the medical and dental insurance coverage for Daughter and ordered Russell to pay 78% and June to pay 22% of the uninsured costs; entitled Russell to claim Daughter as his dependent for tax purposes; awarded June the \$6,995.78 remaining from the sale of the marital apartment; awarded Russell the debt-free 1990 Dodge Caravan and June the debt-free 1996 Hyundai; awarded Russell his benefits from his former employer, Kentron; awarded June her Navy Federal Credit Union IRA account and "her Linson formula interest in [Russell's] Pearl Harbor retirement, pension or other benefit plan"; awarded Russell "the stereo system . . . , as well as the computer, if and when [Daughter] no longer needs to use the computer to do her work at school; ordered Russell to "name [June] as the sole and irrevocable beneficiary of his \$125,000 Pearl Harbor life insurance policy to secure his child support and alimony obligations"; permitted Russell to change the beneficiary "once he no longer has an obligation to pay child support or educational support for a child or the parties or to pay alimony to [June]"; ordered Russell to pay to June alimony of \$1,200 per month commencing on March 20, 1999, and continuing for sixty months "or until [June's] earlier remarriage or the death of either party, or until further order of the Court, provided [June] is enrolled in school or a training program to learn a skill which she can utilize to become gainfully employed in the future"; ordered Russell to "take all steps required to secure

continue[d] health care coverage for [June] beyond COBRA coverage, provided that the cost of any such coverage shall be paid in full by [June]"; and ordered, in relevant part, as follows:

**G. Payment of Debts:** Each party shall pay his or her own individually incurred debts and liabilities and shall indemnify and hold the other party harmless for payment of any of the same. Specifically, [Russell] shall assume and pay and be solely responsible for payment of all sums due and owing in his individual name, as reflected on his Asset and Debt Statement dated November 25, 1998, to First Hawaiian MasterCard, Liberty House, Bank of Hawaii (Flex), Bank of Hawaii (VISA), and Yonemitsu & Company. [Russell] shall also assume and pay and be solely responsible for payment of all sums due and owing in the joint names of the parties, as also listed on his November 25, 1998 Asset and Debt Statement, to First Hawaiian (approximately \$3,899), Citibank MC (approximately \$8,915), American Express (approximately \$6,042), and Citibank (approximately \$12,000).

[June] shall assume and pay and be solely responsible for payment of all sums due and owing in her individual name, as reflected on her Asset and Debt Statement dated December 4, 1998, to Bank of Hawaii, Yonemitsu Company, Oknan Shin, and Kim Nakamura. [June] shall also assume and pay and be solely responsible for payment of all sums due and owing in the joint names of the parties, as also listed on her December 4, 1998 Asset and Debt Statement, to Liberty House (approximately \$70 on [June's] Asset and Debt Statement and approximately \$81 on [Russell's] said Asset and Debt Statement).

The parties shall be equally responsible for and shall each pay one-half of the joint debts owing to Patricia Bourke<sup>4</sup> (\$1,500 each of the \$3,000 debt listed on [Russell's] November 25, 1998 Asset and Debt Statement), and all sums due and owing jointly by the parties to the State of Hawaii and/or to the Internal Revenue Service resulting from the parties' filing of joint income tax returns.

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<sup>4</sup> Patricia Bourke is Plaintiff-Appellant Russell K. Nakamura's half-sister.

The FsOF and CsOL state, in relevant part, as follows:

FINDINGS OF FACT

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5. [June] received an equivalent of an eighth grade education while growing up in Korea. She moved to the United States when she was approximately 24 years old when she was sponsored by an American family she had met in Korea. That family legally adopted her as an adult and supported her through her beautician training at Willow Grove Beauty School in Pennsylvania.

. . . . .

7. [Russell] became employed at Pearl Harbor Naval Shipyard in about September, 1979, and, because of prior service in the United States Navy, he at the time of trial had accrued approximately 25 years of retirement benefits with the United States government between his military service and his work at Pearl Harbor.

8. As of September, 1998, [Russell] had regular monthly income of \$4,059.47. This is exclusive of overtime pay or incentive pay.

9. When [June] moved to Hawaii from Pennsylvania in 1975, she worked full-time as a hair stylist at Honolulu Beauty Salon during the day and part time as a waitress at night. Two years later when she married [Russell] in 1977, [June] had accumulated \$10,000 in savings, \$2,000 of which she spent on the parties' wedding. In 1979 when the parties purchased their former marital condominium [sic], [June] contributed the remaining \$8,000 of her premarital monies towards the down payment.

10. [June] continued to work in various Honolulu beauty salons following the 1977 marriage until about 1986 when she and [Russell] began a beauty shop business. [June] continued to be a hair stylist and [Russell] handled the day to day operations of this business.

. . . . .

12. After [Russell] left [June] and the children in about May, 1997, he continued to handle the finances for the family and for the beauty shop business, and [June] continued to turn over every cent taken in by the business to [Russell] until October, 1997.

13. In or about October, 1997, [June] determined to learn the status of the beauty shop business in terms of its finances and management. She hired a bookkeeper to whom she turned over all of the business records that were available. The bookkeeper



informed [June] that [Russell] had not been paying all of the taxes and some of the other items that needed to be paid for the business.

14. [June] did not have the money required to bring the taxes and other business payments current. Additionally, she had already incurred thousands of dollars in loans from family members and friends over the preceding two years, primarily for schooling of the parties' son [at the Academy of the Pacific]. In view of the parties' marital situation, she wished to be able to repay those debts. For the foregoing reasons, [June] sold the business for \$25,000, paid the back taxes, business debts and repaid the personal loans.

15. From the sales proceeds of the beauty shop business, [June] paid \$680 to the CPA; \$3,600.39 directly to the IRS; \$1,321.92 to First Hawaiian Bank for withholding and FICA taxes; \$502.75 to First Hawaiian Bank for Form 941; \$797.21 to First Hawaiian Bank for IRS tax levy and other taxes; and \$354.77 to the State of Hawaii Tax Collector, for a total of \$7,277.04. She also repaid family and friends \$15,000 from moneys borrowed from June, [sic] 19, 1995, to October, 1997, paid \$1,500 to her family law attorney, and the balance of the \$25,000 was used for family expenses. There were no proceeds from the 1997 sale of the beauty shop to be divided between the parties at trial.

16. The balance owed on the parties' joint Bank of Hawaii VISA account in December of 1997, was \$6,106.59. This balance the parties agreed would be paid from the sales proceeds of the marital condominium and were in fact paid from that source.

17. After December 1997, [Russell] used the Bank of Hawaii VISA card for his personal and exclusive use and enjoyment.

18. [Russell] used the parties' joint Citibank Preferred Mastercard for his personal use and enjoyment dating back to early 1997. Notwithstanding this fact, the parties agreed during the pendency of the divorce action to pay the balance on this joint charge card account as of December, 1997, from the sales proceeds of the marital condominium.

19. Accordingly, the sum of \$8,832.61 was paid on this joint Citibank Mastercard account from the sales proceeds of the former marital condominium.

20. Any sums owing on that account at the time of trial were due to the [Russell's] personal charges.

21. [Russell] has individual debts in his individual name to the First Hawaiian mastercard, Liberty House, Bank of Hawaii (Flex), Bank of Hawaii (VISA), and Yonemitsu and Company.

22. There are sums due and owing on accounts in the joint names of the parties: First Hawaiian (approximately \$3,899), Citibank Mastercard (approximately \$8,915), American Express (\$6,042) and Citibank (approximately \$12,000).

23. The marital condominium unit owned by the parties was sold on or about July, 1998. The proceeds of sale from the marital condominium unit were used to pay the following debts after payment of the mortgage, real estate commission and closing and escrow costs:

- A. Jointly owed federal income taxes, \$2,826[;]
- B. Jointly owed state income taxes, \$4,091 [sic]<sup>5</sup>;
- C. Jointly owed Bank of Hawaii VISA balance, \$6,106.59;
- D. Jointly owed Citibank Mastercard balance, \$8,832.61;
- E. Jointly owed - FCU for the 1990 Dodge Caravan, \$7,796.18;
- F. Jointly owed Citibank for the 1996 Huyndai, \$9,800.77;

for a total of \$35,853.15.

24. There is a balance remaining in escrow from the proceeds of sale of the marital condominium unit as of the date of trial of \$6,995.78.

25. [Russell] was obligated during the pendency of the divorce to make mortgage payments monthly on the marital condominium. At the time of the closing of the sale of the marital condominium, he had not made approximately four months of mortgage payments, and these were deducted from the gross proceeds of sale. Also additionally, \$1,757.83 in foreclosure fees were incurred because of the nonpayment of the mortgage by [Russell].

26. Following the sale of the beauty shop in late 1997, [June] began to work as much as she could using a chair at a friend's beauty shop.

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<sup>5</sup> Simple mathematics and the record establish that this amount was \$491 rather than \$4,091.

28. [June] was facing a substantial monthly deficit without regard to payment or nonpayment of the mortgage and maintenance fees for the marital condominium. For that reason, in February, 1998, [June] signed the documents necessary to obtain the cash value of her then life insurance policy. She received approximately \$16,000 from cashing in this policy.

29. From the cash value received from the life insurance policy, [June] paid remaining taxes and personal loans in early 1998, paid monies still owing to Academy of the Pacific for her son's senior year, paid an additional \$1,000 to her attorney, contributed to acquisition of the son's 1984 automobile as and for transportation to attend community college and work, and used the remaining funds to live on to meet the living expenses of [June] and the parties' two children over and above the \$690 [Russell] was paying for child support and the small amount she was earning. Any remaining insurance cash value remains on deposit at the Bank of Hawaii in savings accounts in her individual name and is pledged as collateral for a loan [June] made in hopes of establishing good credit in her own name. [June] has approximately \$1,225 on deposit in her Bank of Hawaii savings account over and above the sums placed as collateral for her loan.

30. [June's] earnings from the use of the chair at her friend's beauty shop from January to October, 1998, averaged \$620 gross per month.

31. On or about June, 1994, [June] experienced widespread and painful breaking out on her hands. This condition worsened over time and became worse because of the chemicals involved in the hairdressing business.

32. [June] has been seen by Norman Goldstein, M.D., a dermatology specialist, since 1994. Dr. Goldstein testified at trial, and the Court finds that she is allergic to parathenylene diamine and nickel and that these chemicals are found in many products she has used in the past and still does.

33. Dr. Goldstein further testified that in his opinion [June] should not be working as a hairdresser and suggested that she change her occupation. The Court so finds.

34. [June] was also seen in therapy by Rosemary Adam-Terem, Ph.D., at Kapiolani Counseling Center, who in turn testified, and the Court finds, that [June] is chronically anxious, acutely stressed and depressed, and that there is limited capacity at this time for new learning. The physical problems which should disqualify her in her profession are exacerbated by just the kind of stress she is going through now. Dr. Adam-Terem testified that if [June] continued working, she would be harmed and that she ought to quit working but could not afford to.

35. Dr. Adam-Terem testified that she did not believe that [June] could be expected to support herself financially at the present time and that she needs assistance for at least three to four years.

36. Kelly Martino, M.S.C.P., performed a vocational assessment and testified that [June] is a good candidate for a Licensed Practical Nurse Program which would train her for work as a home health caregiver or nurse's assistant, and the Court so finds. This would require going back to school to develop skill in the area of English and Mathematics and complete her general education (high school) diploma. She also testified with respect to specific classes at Kapiolani Community College which she could take to obtain licensure under the licensed practical nurse program. Kelly Martino further testified that it would take approximately three years for the completion of [June's] G.E.D. and License Practice Nurse (LPN) degree, with a graduation date of December, 2001.

37. Ms. Martino testified, and the Court finds, that it would take two years of financial assistance beyond her education to allow her to establish a client base and develop some earning power.

38. Ms. Martino testified that the cost of tuition, books, fees, and uniforms should be approximately \$3,600 at 1998 published rates.

CONCLUSIONS OF LAW

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9. The court finds that [June] has presented sufficient, competent evidence to support a Category 1 claim of \$8,000 being the sum she contributed towards the down payment of the parties' former marital residence and that she is therefore entitled to receive said sum.

10. [June's] \$2,000 Category 1 claim as to moneys she testified she used for the parties' wedding in 1997, the Court finds to be a gift to the marriage and the Category 1 claim as to such an amount is denied.

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14. The approximate amount of \$6,995.78 in the remaining net proceeds of the marital residence currently held in an escrow account with Guardian Escrow is awarded [June] as partial reimbursement for her allowable Category 1 claim and to further assist her in undertaking her educational/rehabilitative efforts. [Russell] shall not receive a credit for any portion of these remaining net sale proceeds.

15. The Court finds that [June] was compelled to sell her beauty salon business following the parties' separation in order to support herself and the parties' children, as well as to pay the legitimate expenses and debts of the marriage, including business taxes owed and tuition fees and personal loans obtained to pay for private schooling for the parties' son [at the Academy of the Pacific]. The Court finds these private school expenses as having been a joint expense of the marriage, notwithstanding [Russell's] contention that he did not want his son to attend a private school. [June] is allocated the full amount of the \$25,000 in proceeds from the sale of the business, all of which had been spent prior to the trial on December 29 and 30 for the obligations above stated. For these reasons [Russell] shall not receive a credit for any portion of this amount.

16. The Court finds that [June's] use of the cash value proceeds from her Prudential life insurance policy was not waste of a marital asset inasmuch as the money was actually used to provide for herself and her children after the parties' separation and to pay for legitimate expenses and debts of the marriage. The net value remaining of \$1,225 is awarded to [June], and [Russell] shall not receive a credit for any portion of the amount which [June] received from the insurance company.

17. The Court finds, from the credible evidence that [June] is no longer able to work as a hairstylist due to health concerns and therefore must pursue a high school degree and further education and training in order to gain self-sufficiency in another field of work, to which end [Russell] shall pay [June] \$1,200/month alimony for a continuous period of 60 months commencing as of the effective date of the divorce decree, provided that [June] is enrolled in school or a training program to learn a skill which she can utilize to become gainfully employed in the future.

18. In accordance with principles of equity partnership and family law above enunciated, the Court has allocated debt to [Russell] as it has for the reason, among others, that a large portion of the debt allocated to [Russell] consists of personal loans he obtained following the parties' separation in May, 1997, as well as personal credit card charges incurred by [Russell] post-separation and subsequent to the December, 1997, payments ordered by the Court on the balances due and owing on the parties' joint Bank of Hawaii Visa and Citibank Preferred Mastercard accounts.

19. Consistent with these principles, the remaining [parties'] property shall be divided, their remaining debts shall be allocated, and their legal expenses shall be apportioned, in accordance with the provisions of the divorce decree filed on May 10, 1999.

(Emphasis in original.)

In his opening brief, Russell states, in relevant part, as follows:

**II. STATEMENT OF THE POINTS OF ERROR**

A. The Lower Court has grievously and egregiously erred in awarding [Russell] poverty, bankruptcy, lost opportunities (to provide for his two children as well as for himself) and ill health for the rest of his life, leading [Russell] to suspect bias and favoritism in this all encompassing manifest abuse of discretionary powers . . . . The court has deprived [Russell] any and all funds to "right the wrongs" done to him and is unable to pay for transcript costs (which in [sic] would have verified the obvious false statements the lower court permitted and encouraged [June] and her Attorney to make).

1. The lower court awarded [June] approximately \$95,000 in up front cash and left [Russell] with only one asset, his (\$2,485) 1990 Dodge Caravan, which he uses for working, carrying his tools, and sleeping in. . . . With this and other cash awards the lower court has . . . made it very difficult, if not impossible for [Russell] to provide evidence of the exact locations and amounts of [June's] foreign bank accounts in Korea. . . .

2. [June] and her Attorney have perjured themselves from the start of these proceedings and have continued to do so with no repercussions or consequences for their deceitful actions. . . . The court having been convinced, but yet refusing to put a stop to any of these illogical statements and perjuring, decided to "impute" \$800 as a monthly income for [June]. . . . [T]he awards for alimony, rehabilitation and child support should be vacated on the grounds that it was obtained through falsified documents and statements made by [June] and her Attorney. . . . [Russell] should be given his retirement/insurance plan as a whole and not to be divided with [June] due to [June]: 1) cashing out her more lucrative plan, 2) keeping and attempting to concealing [sic] those funds, and falsifying documents (fraud).

3. The court has awarded [June] \$95,000 up front cash with \$1,540 in alimony, rehabilitation, and child support . . . .

4. [June] has received about \$42,000 in benefits from the sale of the condominium, while [Russell] has receive [sic] only \$2,486 (for 1990 van). . . .

5. [June] was awarded \$25,000 from the sale of the family business. . . . [June] and [June's] Attorney making many cumulative statements saying that she has paid approximately \$25,000 to \$42,000 in taxes as a result of this failed business is false, records in court indicates only less than \$3,000 was due in back taxes . . . .

6. [June] was awarded 1996 Hyundai Elantra which was paid for by the proceeds of the sale of the condominium and has since not used the car and has loaned it to her boyfriend on occasions. How does a third party, a major reason for this divorce become an unlisted pecuniary beneficiary of the divorce proceeds? [Russell] should be awarded this vehicle due to: 1) non-use by [June] (who has purchased two additional cars and loans this vehicle to her boyfriend), and 2) Compensation and restitution for perjury committed [sic] by [June]. [June] will eventually state that all cash proceeds (approximately \$150,000 and possibly much more) awarded to her has been spent and/or "paid of [sic] as loans" to relatives and friends. It is suspected that some of these awards has [sic] already been funneled to her foreign bank account in Korea.

7. Alimony received by [June] and procured by [June's] Attorney was obtained by fraudulently falsifying her income through perjury and false statements . . . . [June] and her Attorney should and must be penalized according to the applicable codes to restore the integrity and confidence in the judicial system.

### **III. STANDARD OF REVIEW**

[June's] Attorney's Findings of Facts and Conclusions of Law are riddled with false and misleading statements. Of the thirty eight so called "facts" only thirteen are true and the remaining twenty five are not facts, but false statements. Of the twenty one so called "Conclusions of Law", only nine are true and the remaining twelve are false statements. . . . [W]hat is amazing, frightening, and most perturbing is the lower Court Judge sat in these hearings and should have known what was going on and been able to distinguish fact from fiction. The apparent indifference and bias of the lower court must be corrected not only for [Russell's] sake but for the sake, safety, security and confidence of the general public and for those who appear in court. The Court had the jurisdiction, the responsibility, and should have had the integrity to end the obvious false statements from [June] in the hearings.

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### **IV. STATEMENT OF THE QUESTIONS PRESENTED**

. . . [T]he Court and Defense Attorney knew that [Russell] had a very serious back injury, hearing loss problems, loss of equilibrium, carpal tunnel in both hands, high blood pressure (190/120) and other medical problems and had lost well over a years [sic] work due to these injuries and other medical problems in the last ten years and the ability for [Russell] to seek work in other areas within and outside of his normal career were not good, especially given the fact that the court had put [June's] 1997 (Living Expenses) \$30,000 debt load onto [Russell] and that

most employers now request that all prospective employees have a good credit record. [Russell] was forced, by the court, to become unemployed, now and in the future. . . .

. . . .

#### VII. CONCLUSION

. . . .

. . . [Russell] requests the following:

- 1) Vacate all cash awards to [June], current and past.
- 2) [Russell] to be reimbursed from Plaintiff [sic].
  - a) The total amount awarded to [June] through deceit (Approximately \$170,000)[.]
  - b) \$341.73 for 1997 Federal taxes (as ordered by the court, but not yet received).
- 3) One half of the (over) \$7,000 awarded to [June] from proceeds of the sale of the family residence.
- 4) Alimony and Rehabilitation be vacated.
- 5) Child Support be recalculated on [June's] realistic income of \$3,500 (more realistically, \$4,000)[.]
- 6) [June's] \$30,000 living expenses for 1997, which was awarded [sic] to [Russell] should be reimbursed to [Russell].
- 7) [June] reimburse (an estimated) \$30,000 to [Russell], the amount she had spent on her boyfriend/s within the past five years, prior to the granting of Divorce [the] amount she ("borrowed" from friends and relatives).
- 8) [June] return the remaining work programs and other related software to [Russell] as agreed upon in court.
- 9) [June], her Attorney, her employer, and therapist be reprimanded and penalized according to the applicable statutes for their perjury, concealments, misleading and false statements made to an official (public servant) in their attempt to change the outcome of the case in their favor . . . .
- 10) [June] make a formal apology to her friends for the offensive and destructive false statements made regarding [June].



## DISCUSSION

### A.

The standard for appellate review of a trial court's findings of fact is the following: "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is left with a definite and firm conviction that a mistake has been made." State v. Balberdi, 90 Hawai'i 16, 20, 21 975 P.2d 773, 777-778 (1999).

It is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact; the judge may accept or reject any witness's testimony in whole or in part. Lono v. State, 63 Haw. 470, 473, 629 P.2d 630, 633 (1981). As the trier of fact, the judge may draw all reasonable and legitimate inferences and deductions from the evidence, and the findings of the trial court will not be disturbed unless clearly erroneous. Id. at 473-74, 629 P.2d at 633. An appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge. Domingo v. State, 76 Hawai'i 237, 242, 873 P.2d 775, 780 (1994); Amfac, Inc. v. Waikiki Beachcomber Investment Co., 74 Haw. 85, 117, 839 P.2d 10, 28 (1992), *reconsideration denied*, 74 Haw. 650, 843 P.2d 144 (1992); State v. Aplaca, 74 Haw. 54, 65-66, 837 P.2d 1298, 1304-05 (1992).

State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 37, 65 (1996).

It is impossible for this court to consider most of Russell's challenge of the family court's findings of fact because Russell failed to cause the transcript(s) of the trial to be made a part of the record on appeal.

### B.

As previously noted, Russell and June separated in May 1997, Russell filed his Complaint for Divorce on January 6, 1998, and the Divorce Decree was entered on May 10, 1999. FsOF

nos. 17, 18, 20, and 21 and CsOL nos. 18 and 19 indicate that the court considered the marital partnership to have ended on the May 1997 date of separation.

In Myers v. Myers, 70 Haw. 143, 764 P.2d 1237 (1988), however, the Hawai'i Supreme Court abolished Category 6 and emphatically stated, in relevant part, as follows:

Our divorce and separation laws do "not contemplate any [final] division of property other than where the person is divorced **a vinculo [matrimonii]**." Clifford v. Clifford, 42 Haw. 279, 283 (1958)[.]

Jackson v. Jackson, 84 Hawai'i 319, 334-35, 933 P.2d 1353, 1368 (1997) (emphasis and brackets in the original).

The question is whether the family court found one or more valid reasons why the post-separation pre-divorce expenditures by Russell noted in FsOF nos. 17, 18, 20, and 21 were not valid marital partnership expenses. CsOL nos. 15 and 16 imply that it did. For example, in COL no. 16, the family court found that one of June's post-separation expenditures "was not waste of a marital asset inasmuch as the money was actually used to provide for herself and her children after the parties' separation and to pay for legitimate expenses and debts of the marriage." The absence of a similar finding regarding Russell's post-separation pre-divorce expenditures implies that these expenditures by him were a waste of a marital asset.

C.

As noted above, FOF no. 25 states as follows:

[Russell] was obligated during the pendency of the divorce to make mortgage payments monthly on the marital condominium. At the time of the closing of the sale of the marital condominium, he had not made approximately four months of mortgage payments, and these

were deducted from the gross proceeds of sale. Also additionally, \$1,757.83 in foreclosure fees were incurred because of the nonpayment of the mortgage by [Russell].

Our search of the record for an order obligating Russell during the pendency of the divorce to make monthly mortgage payments on the marital condominium revealed only the family court's March 17, 1998 Order for Pre-Decree Relief that ordered, in relevant part: "[U]ntil further order of the court, [Russell] shall pay as much as he can of the all [sic] sums due and payable on the parties' joint debts, including the maintenance fees on the former marital residence at 2637 Kuilei Street, A-112, Honolulu, Hawaii."

Assuming the mortgage debt was a joint debt, the above order did not obligate Russell to pay it absent a finding that, in light of his financial situation, he reasonably could and should have paid it. Implicitly, the court made such a finding.

D.

Although this case was hotly contested, it is not complicated. However, it was very difficult to analyze on appeal because the family court failed its duty to itemize all of the marital assets and debts and their values at the time of the divorce, categorize them, and state the reason or reasons why deviations were made from partnership principles whenever those deviations were made.

Russell implicitly challenges various findings of fact. These implicit challenges violate Rule 28 of the Hawai'i Rules of

Appellate procedure.<sup>6</sup> Assuming we would consider these implicit challenges, it is impossible for this court to consider most of them because Russell failed to cause the transcript(s) of the trial to be made a part of the record on appeal. Considering the record, Russell's admitted inability to discover proof of June's alleged savings, and the absence of a transcript, we conclude that Russell has failed his burden on appeal of showing reversible error.<sup>7</sup>

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<sup>6</sup> Rule 28 of the Hawai'i Rules of Appellate Procedure states, in relevant part, as follows:

(b) **Opening Brief.** Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

. . . .

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

. . . .

(C) when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error[.]

<sup>7</sup> We note that in this appeal, on June 13, 2000, Russell filed a Notice of (Bankruptcy Order) Discharge of Debtor from U.S. Bankruptcy Court in which he restated his allegations that had been rejected by the family court, reargued his case, and informed the appellate courts that on June 5, 2000, he was "granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code)."

CONCLUSION

Accordingly, we affirm the family court's May 10, 1999 Decree Granting Divorce and Awarding Child Custody.

DATED: Honolulu, Hawai'i, May 17, 2001.

On the briefs:

Russell K. Nakamura,  
Plaintiff-Appellant, pro se.      Chief Judge

Associate Judge

Associate Judge