

NO. 22608

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

AYAKO KATAKURA,	)	FC-D NO. 92-1128
	)	
Plaintiff-Appellant,	)	APPEAL FROM THE
	)	FAMILY COURT OF THE
vs.	)	FIRST CIRCUIT COURT
	)	
RICHARD S. KATAKURA,	)	
	)	
Defendant-Appellee.	)	
_____	)	

MEMORANDUM OPINION

Plaintiff-Appellant Ayako Katakura (Ayako) appeals the family court's May 20, 1999 "Order Denying Plaintiff's Motion for Judgment Against Defendant for Failure to Pay Alimony Filed on 4/8/99" (May 20, 1999 Order). We affirm.

BACKGROUND

Ayako was born on August 28, 1933, and Defendant-Appellee Richard S. Katakura (Richard) was born on March 8, 1933. Ayako and Richard were married on September 27, 1952. Ayako filed a Complaint for Divorce on March 19, 1992. According to the Matrimonial Action Information form, Ayako was then an employee of Shiro's in Waimalu and Richard was an employee of the KFC Group.

The Agreement Incident to Divorce was filed on July 16, 1993. It stated in relevant part as follows:

2. **Alimony.** [Richard] shall pay to [Ayako] as and for alimony, the sum of \$650.00. Said sum shall be payable directly to [Ayako] in two (2) equal installments of \$325.00 each on the 5th and 20th days of each month, commencing on August 5, 1993. Payments shall continue until [Ayako's] remarriage, or until the death of either party, or until [Richard] retires, whichever occurs first, subject to further order of the Court. . . .

. . . .

5. **Retirement, Pension, IRA, Profit-Sharing, Annuity and/or Other Deferred Compensation Benefits.** All of the parties' retirement, pension, IRA, profit-sharing and/or other deferred compensation benefits shall be divided between the parties by using the following formula:

$$\frac{\text{[Yrs] of Marriage While in the Plan}}{\text{Total Yrs in the Plan}} \times \frac{1}{2} \times \text{gross monthly benefits when and how rec'd}$$

The July 19, 1993 Divorce Decree states in relevant part as follows: "The Agreement Incident to Divorce entered into by and between the parties on July 15, 1993, is approved by the Court and incorporated herein by reference."

A Qualified Domestic Relations Order was filed on November 9, 1994. It states that Richard "has retirement benefits in California Field Ironworkers Pension Trust. . . ." It further states that Ayako's portion is calculated as follows: "32 (years of Marriage while in Plan) **divided by** Total years in the Plan by participant **multiplied by** gross monthly benefits when and how received **multiplied by** one-half." (Emphasis in original.)

On April 8, 1999, Ayako moved for a judgment against Richard "in the amount of \$23,875.00 for failure to pay alimony in the amount of \$650.00 per month" from January 1996 through March 1999.

The May 20, 1999 Order states that a hearing on Ayako's April 8, 1999 motion was held on April 28, 1999, testimony was presented, and arguments were heard. Ayako's opening brief cites to the "Transcript of the Proceedings of April 28, 1999." Those citations are improper and invalid because that transcript has not been made a part of the record on appeal in this case. Orso v. City & County of Honolulu, 55 Haw. 37, 514 P.2d 859 (1973).

On July 28, 1999, the family court entered its Findings of Fact and Conclusions of Law (FsOF and CsOL) in relevant part as follows:

To the extent that a Finding of Fact herein is a Conclusion of Law, it shall be so construed. Likewise to the extent a Conclusion of Law is a Finding of Fact it shall be so construed.

#### FINDINGS OF FACT

1. A divorce decree (hereinafter referred to as Decree) was granted on July 19, 1993.

2. Pursuant to the Decree, [Richard] was obligated to pay to [Ayako], alimony in the amount of \$650 per month commencing on August 5, 1993. The Decree specifically states "Payments shall continue until [Ayako's] remarriage, or until the death of either party, or until [Richard] retires, whichever occurs first, subject to further order of the Court."

3. [Richard] retired on or about September 15, 1995 and was current in his alimony payments.

4. Subsequent to [Richard's] retirement both [Ayako] and [Richard] received their respective share of retirement compensation monthly and continue to do so to the date of the hearing.

5. The Court finds and concludes that upon [Richard's] retirement [Richard's] obligation to [Ayako] for alimony pursuant to the Decree ceased.

6. The fact that subsequent to his retirement on or about April 1996 [Richard] became employed and worked approximately 22-32 hours per week does not alter the Court's finding that pursuant to the Decree [Richard's] obligation to pay alimony ceased upon his retirement.

7. The fact that [Richard] made some payments totaling \$1475 during the months of June through November of 1998 does not support [Ayako's] allegation that [Richard] made these partial payments because he knew he had an alimony obligation. [Richard] testified that he believed his obligation to pay [Ayako] alimony stopped when he retired and that he gave [Ayako] some money because he wanted to help her out. The Court finds [Richard] credible and that he made these payments out of good will.

8. [Ayako] in her motion requests a judgment in the amount of \$23,875 which represents past due alimony payments of \$650 per month for the entire years of 1996 and 1997 totaling \$7,800 each year, plus \$6,325 for 12 months in 1998 less payments of \$1,475, and 1,950 for 3 months in 1999. [Ayako] further requests an award of attorney fees and costs.

#### CONCLUSIONS OF LAW

. . . .

2. . . . [T]he Court denies Plaintiff's Motion for Judgment Against Defendant for Failure to Pay Alimony, and denies Plaintiff's request for attorney fees and costs.

## DISCUSSION

1.

Ayako contends that the family court erred in not categorizing FsOF nos. 5, 6, and 7 as CsOL. For two reasons, this point is a waste of time: (1) as the opening brief notes, mislabeling a conclusion of law as a finding of fact does not change the conclusion of law into a finding of fact; and (2) in Ayako's case, the FsOF and CsOL expressly state that the label is not determinative when distinguishing findings from conclusions.

2.

Ayako contends that FOF no. 5 is wrong because "[Richard's] retirement was ineffective to terminate alimony without an application to the Family Court to terminate alimony." Ayako cites the rule stated in Thielen v. Thielen, 88 Hawai'i 191, 198-99, 964 P.2d 645, 652-53 (Haw. App. 1998), that "when the parties agree to terminate court-ordered spousal support payable in the future, the agreement is invalid absent the family court's approval. Only the family court has the power to change court-ordered spousal support payable in the future."

We conclude that Thielen is not relevant precedent. In Thielen, on October 27, 1994, when David owed Susan \$16,614.72, some of which was for past-due alimony, plus \$1,600.00 per month alimony commencing on November 1994 and ending on February 1996, Susan accepted \$18,000.00 from David in satisfaction of all of David's financial obligations to Susan under the divorce decree.

This court held that the deal did not terminate Susan's eligibility to alimony in the future and expressed the rule that "when the parties agree to terminate court-ordered spousal support payable in the future, the agreement is invalid absent the family court's approval. Only the family court has the power to change court-ordered spousal support payable in the future." Id. at 198-99, 964 P.2d at 652-53.

In Ayako's case, however, there is more than the agreement of the parties. Here, the Agreement Incident to Divorce was approved by the family court and incorporated into the Divorce Decree. As noted above, it stated in relevant part as follows: "Payments shall continue until [Ayako's] remarriage, or until the death of either party, or until [Richard] retires, whichever occurs first, subject to further order of the Court."

The "subject to further order of the Court" provision operates only "until [Ayako's] remarriage,<sup>1</sup> or until the death of either party, or until [Richard] retires, whichever occurs first." Richard retired on or about September 15, 1995, long before the time-periods for which Ayako seeks continued alimony.

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<sup>1</sup> Hawai'i Revised Statutes § 580-51 (1993) states in relevant part as follows:

**Modification of alimony on remarriage.** (a) Upon the remarriage of a party in whose favor a final decree or order for support and maintenance has been made, all rights to receive and all duties to make payments for support and maintenance shall automatically terminate for all payments due after the date of the remarriage, unless the final decree or order, or an agreement of the parties approved by the final decree or order, provides specifically for the payments to continue after such remarriage.

When Richard retired, there was no "court-ordered spousal support payable in the future," and the alimony provision in the Divorce Decree was no longer "subject to further order of the Court."

3.

Ayako disagrees with FOF no. 6. In her view, "[Richard's] reemployment was a fact that established that [Ayako] was entitled to alimony."<sup>2</sup> She cites the rule of Vorfeld v. Vorfeld, 8 Haw. App. 391, 401, 804 P.2d 891, 897 (1991), that "the family court's spousal support order is always subject to the further order of the family court upon a material change in the relevant circumstances of either party[,]" and argues in her opening brief that "the Family Court should have considered the circumstances of the parties at the time of [Richard's] reemployment in deciding whether [Richard] should continue to pay alimony." Ayako's argument fails because the family court's spousal support order had previously terminated when Richard retired. The Vorfeld rule that "a spousal support order is always subject to the further order of the family court upon a material change in the relevant circumstances of either party," Thielen, supra, does not apply to a spousal support order after it has terminated. After Richard's obligation to pay spousal

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<sup>2</sup> To the extent that the use of the word "reemployment" suggests the possibility that Defendant-Appellee Richard Katakura went back to work for the company from which he retired, we note that this suggestion is not supported by anything in the record.

support had terminated, the family court lacked a valid basis for ordering spousal support.<sup>3</sup>

4.

Ayako argues that FOF no. 7 erroneously "assumes that the burden of proof was upon [Ayako] to establish that the payments made by [Richard] after his 'retirement' were made as part of his obligation to pay alimony." Ayako cites Hawai'i Rules of Evidence (HRE) Rule 303(c)(1) ("[m]oney delivered by one to another is presumed to have been due the latter"), and states that "[Richard] and not [Ayako] had the burden of proof that the payments were not based on [Richard's] obligation to pay alimony to [Ayako]" and "[t]he burden was on [Richard] to prove that said payments were some form of a gift."

We disagree. Initially, we note that HRE Rule 303(c)'s presumptions "are presumptions imposing the burden of producing evidence" rather than presumptions imposing the burden of proof. Because Richard is not seeking repayment of money he paid to Ayako, Richard had no burden to prove anything.

Ayako argues that Richard's post-retirement payments are evidence that Richard thought he had a spousal support obligation. However, Richard's "thought" is not relevant when deciding the question of law whether Richard was legally

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<sup>3</sup> Similarly, "in the absence of a power reserved by statute a court granting a final divorce decree without an alimony award does not retain jurisdiction over the parties for the ordering of a future alimony." Ingraham v. Commissioner of Internal Revenue, 119 F.2d 223, 226 (9th Cir. 1941).



obligated to pay spousal support to Ayako. It was Ayako's burden to prove the facts supporting the conclusion that Richard was legally obligated to pay spousal support to Ayako. Moreover, even if it was Richard's burden, FOF no. 7 expressly notes that "[Richard] testified . . . that he gave [Ayako] some money because he wanted to help her out. The Court finds [Richard] credible and that he made these payments out of good will." This finding is not clearly erroneous.

5.

In her point of error no "5", Ayako contends that "[t]he trial court erred in failing to make a finding of fact on whether [Richard] retired to avoid paying alimony." This point has no merit for the following reasons.

First, in the "ARGUMENT" section of her opening brief, Ayako does not discuss this point.

Second, we do not know whether Ayako asserted this point during the April 28, 1999 hearing and are unable to find out because the transcript of that hearing is not a part of the record on appeal.

Third, nothing in the Agreement Incident to Divorce and the Divorce Decree places any restrictions or limitations on the timing of, or reasons for, Richard's retirement.

Fourth, FOF no. 3 finds that Richard retired on or about September 15, 1995. FOF no. 4 finds that Richard and Ayako each have been receiving monthly payments of their share of the

retirement compensation since September 15, 1995. Ayako's actions and inactions from the time Richard retired on or about September 15, 1995, contradict her present position that Richard's retirement was improper.

CONCLUSION

Accordingly, we affirm the family court's May 20, 1999 "Order Denying Plaintiff's Motion for Judgment Against Defendant for Failure to Pay Alimony Filed on 4/8/99."

DATED: Honolulu, Hawai'i, June 26, 2000.

On the brief:

Stephen T. Hioki  
for Plaintiff-Appellant.

JAMES S. BURNS  
Chief Judge

JOHN S. W. LIM  
Associate Judge

GAIL C. NAKATANI  
Acting Associate Judge