NO. 22732

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

LEO BILLY VEGA, Plaintiff-Appellant

v.

KATHLEEN KAZUKO VEGA, Defendant-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(FC-D NO. 96-0021)

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

Plaintiff-Appellant Leo B. Vega (Leo) appeals the family court's July 13, 1999 Order Denying Alimony. In the process, he challenges parts of the family court's August 17, 1999 Findings of Fact and Conclusions of Law (August 17, 1999 FsOF and CsOL).

This is the second appeal emanating from the same contested trial. The Complaint was filed on January 3, 1996, and the trial occurred on December 19, 1996. In Vega v. Vega, No. 20531, memo. op. (Haw. App. June 22, 1998), this court (a) vacated the paragraph of the family court's January 31, 1997 Decree of Absolute Divorce denying Leo's request for spousal support and (b) remanded for reconsideration Leo's request for spousal support.

On remand, after arguments on July 13, 1999, the family court orally denied Leo's request for spousal support and then entered its Order Denying Alimony. Leo appealed. We affirm.

BACKGROUND

Leo, born on April 1, 1943, and Kathleen Kazuko Vega (Kathleen), born on November 16, 1946, were married on September 18, 1971. Their daughter (Daughter) was born on June 28, 1973. Their son (Son) was born on August 9, 1976.

According to Leo's December 4, 1996 Income and Expense Statement, he receives $1,006 a month in disability payments ($666 from social security and $340 from an insurance company). He reports that his expenses are as follows:

Rent	$ 900
Utilities	250
Vehicle insurance	147
Vehicle maintenance	100
Vehicle operation	120
Food	125
Medical and dental	150
Laundry and cleaning	50
Personal articles	50
TOTAL	$1,892

At the time of trial, Son had been employed and living with Leo for about one year. Although Leo testified that he had asked Son to contribute $100 per week toward Leo's rent expense, Son had contributed a total of only $200 towards Leo's rent expenses during that one year.

During the marriage, Leo ran businesses financed by Kathleen's father and/or mother, including a car wash and a carpet and drapery business (sales, service, cleaning,

maintenance). Kathleen testified that months before Leo got hurt, the latter business was sold for a net of about $15,000.

On December 16, 1985, outside a bar where he had been drinking, Leo slipped and fell. The slip-and-fall incident left him permanently disabled. The January 27, 1995 "Physician's Certified Report on . . . Disability for Tax Exemption Purposes," signed by Raymond M. Taniguchi, M.D., reports in relevant part as follows:

> a. Diagnosis[:] Residual left hemiparesis and cortical sensory loss left hand, partial left homonymous hemianopsia from right parietal lobe damage.
>
> * * *
>
> c. Diagnosis and pertinent symptoms or findings that preclude ability to engage in gainful work[:] Permanent weakness and sensory loss of his left extremities[.]

In a letter dated September 26, 1996, to Vega's lawyer, Stewart Y. Matsumoto, M.D., opined:

> [Leo's] major disability revolves around a closed head injury which produced a left hemiparesis and seizure disorder. . . .
>
> It is my opinion that the combination of his neurologic deficit which includes the seizure disorder and left hemiparesis compounded by his single vessel coronary artery disease makes [Leo] totally and permanently disabled and unable to work.

In a letter dated September 25, 1996, to Vega's lawyer, James S. Tsuji, M.D., opined that Leo was "totally disabled and unable to work."

In January 1990, Leo received a net of approximately $50,000 in settlement of the personal injury suit related to the slip-and-fall incident which resulted in his disability. This money was deposited in Leo and Kathleen's joint bank account. The parties stipulated that $28,000 was used to pay for Son's and

Daughter's orthodontics and to repay marital debts. Leo testified that he took the remaining $22,000 and "paid off all my debts before I spent the money." One of these debts was the $6,500 he allegedly owed to his long-time friend, Daniel Young (Daniel). Daniel testified that he subsequently loaned the $6,000 back to Leo, $3,000 on May 26, 1996, and $3,000 on August 2, 1996. Leo testified that he borrowed an additional $500 from Daniel to pay his car insurance. Leo repaid a total of $12,000 he allegedly owed to two other friends. Kathleen asserted that Leo "just gave five thousand to each of two friends and six thousand to this friend to hold for him so he'd look good when he came into court."

The Divorce Decree left Leo with the following assets and (debts):

ITEM	NET MARKET VALUE
American Savings	$ 1,300
FHCC Keeaumoku	130
1969 Mercury Cougar	1,500
1987 Nissan	2,000
Jade rings	2,000
FHB VISA	(150)
ATT Card	(700)
Danny Young	(6,500)

Almost every day, Leo provides transportation and after-school care for Daughter's three children. He picks them up at school, drives them to the residence of Kathleen, Daughter, and Kathleen's mother and stays and plays with them until Daughter comes home at "4:30, 5:00" p.m. Many times when Leo watches his grandchildren, Leo stays for dinner. Kathleen's mother testified that Leo is "always welcome to have dinner."

At the December 19, 1996 hearing, Leo testified in relevant part as follows:

Q. What do you do during your days?

A. During the days

Q. Uh-huh

A. Exercise, walk around, take care my grandchildren, pick them up from school.

Q. You take care of your grandchildren three days a week?

A. As much as I can.

Q. How many days a week?

A. Well, I've been seeing them almost every day.

Q. Okay.
So every day you take care of them?

A. I don't take care of them all day.

Q. You don't take care of them all day.

A. They go to school.

Q. Okay.
But you pick 'em up from school. How do they get to school?

A. I will drop 'em off sometimes and I guess my wife's -- my daughter's husband will drop them off or she will drop them off.

Q. But how do you get to school to pick up your children -

A. I drive.

Q. -- your grandchildren?
You drive.
And you drive 'em back again?

A. Yes.

Q. So, you can drive?

A. Yes I can drive.

Q. Do you have problems driving, are you dangerous driving?

A. No. I don't think so.

. . . .

Q. What time do you pick up the kids?

A. At 2:00 o'clock in the afternoon.

Q. Okay.
And what time does your daughter get the kids?

A. My Daughter get the kids?

Q. You drop them at her house or does she pick them up?

A. I drop them at home. I take them home to her house.

Q. At what time?

A. I normally get there about 2:15, 2:30.

Q. And you watch them where?

A. Well, I'll stay and play with them until, you know, she comes home or the daughter comes home.

Q. At what time?

A. 5:00. 4:30 -- 4:30, 5:00.

Q. Okay.
So, basically you're doing after school care for you grandchildren?

A. Yes.

Q. Could you do after school care for other children?

A. No. I don't think I'd like to take on that kind of responsibility.

. . . .

Q. Is there any reason you haven't tried to do that?

A. No.

. . . .

Q. So, you did sales work as well as installing before at carpet place?

A. Before. Uh-huh.

Q. Is there any reason you couldn't do sales work now?

A. No.

Q. Have you applied for jobs doing sales.

A. No.

Q. You were helping Danny Young trim back his trees, yeah?

A. Yes. I wasn't doing the trimming. I was helping load the rubbish.

Q. Load the rubbish?

A. Yeah. The shrubs. I was dragging it down for him.

. . . .

Q. Do you know whether your wife is going to survive after she retires?

A. If -- she asks for this, she wants her freedom, she can go.

Kathleen is the general manager of Sizzler Restaurant in Pearlridge. She testified that she had made more in prior years because:

A. I tried to work as much as possible, seven days or whenever. I mean, as much as I could. If, you know, we were shorthanded I volunteered.

Q. So, would it be fair to say that you were working six to seven days a week --

A. Yes.

Q. -- consistently from the accident until last year?

A. Yes.

Q. Prior to last year, were you ever able to take vacation?

A. No. I never did, because I always had bills to pay, something always came up. So, I always worked, I never took vacation.

Q. So, when you didn't take vacation then you'd get your vacation pay -- . . . -- is that correct?

A. Yes.

Kathleen lives in rented living quarters, together with her mother, Daughter, and Daughter's three children. Kathleen's father is deceased. Daughter is separated and works at Longs Drug Store. Kathleen testified that her mother agreed to contribute $200 a month and to help with utilities and groceries but that her mother "doesn't have any money." Kathleen further testified that Daughter is supposed to contribute $400 per month but that there are times when she cannot afford to do so.

Kathleen testified in relevant part as follows:

Q. Can you support yourself if you don't have this job?

A. No.

Q. Do you have any savings you can draw on that is set aside?

A. No.

Q. Can you meet your bills if you don't have this job?

A. No.

Q. Are you making it now?

A. Barely making it, but getting a hard time.

Q. Would it be fair to say that basically you're making it because you're going further into debt?

A. Yes.

The Divorce Decree left Kathleen with the following assets and (debts) and monthly payments:

ITEM	VALUE + OR (-)	MONTHLY PAYMENT
1991 Mercury Cougar	$ 5,000	
Discover (J)	(889)	$ 75.00
Bank of Hawaii VISA (J)	(2,677)	115.00
First Hawaiian Bank (J)	(1,398)	100.00
401K plan	19,000	
Liberty House	(400)	60.00
GM Card	(6,663)	135.00
AT&T Mastercard	(1,683)	50.00
First USA	(3,183)	75.00
City Bank VISA	(4,800)	100.00
Pearl ring	500	
Diamond wedding ring	2,000	
Kennedy half-dollar	750	

Joint debts are indicated by a "(J)". The First Hawaiian Bank joint debt was incurred by Leo after the date of final separation in contemplation of divorce.

The August 17, 1999 FsOF and CsOL, with all of the parts challenged by Leo in this appeal outlined in bold, state as follows:

[FINDINGS OF FACT]

[1.] [Kathleen's] net is Two Thousand Two Hundred Forty Seven Dollars and Eighteen Cents ($2,247.18) minus Seven Hundred Twenty Nine Dollars ($729.00) monthly marital debt payment leaving her with One Thousand Five Hundred Eighteen Dollars and Eighteen Cents ($1,518.18) to live on. Her Expenses are One Thousand Six Hundred Dollars ($1,600.00) a month leaving her with an Eighty One Dollar and Eighty Two Cents ($81.82) deficit. Although [Kathleen] testified that her mother and daughter are not always able to pay their share of the rent, and [Kathleen] must sometimes cover part of their share, this shortfall is not included in her expenses and the Court does not take this factor into consideration.

[2.] [Leo's] net is One Thousand Six Dollars ($1,006.00). He claims expenses of One Thousand Eight Hundred Ninety Two Dollars ($1,892.00) a month, but Five Hundred Seventy Five Dollars ($575.00) is his son's share of the rent and One Hundred Eighty Three Dollars and Fifty Cents ($183.50) is the cost of maintaining a second car. When these expenses are deducted [Leo's] expenses come to One Thousand One Hundred Thirty Three Dollars and Fifty Cents ($1,133.50), leaving a deficit of One Hundred Forty Three Dollars and Fifty Cents ($143.50). [Leo] is living in the former marital residence in which the entire family once resided. He could rent out a room or move to a smaller residence now that he is a single person, thereby lowering his expenditures.

[3.] **Neither party has the income to meet all of his/her current expenses, particularly if those expenses include subsidizing adult employed children and [Kathleen's] mother.**

[4.] [Kathleen] made more money in prior years because she worked six to seven days a week and took vacation pay instead of vacation. [Kathleen] is now approaching retirement age and unable to keep up the same hours. She has no ability to produce more money in order to add to [Leo's] support.

[5.] **[Leo] has done sales work in the past and could still do so. [Leo] has been doing child care and transportation for three grandchildren and has been helping a friend with yard work. These are tasks he could do for pay. He has, by his own testimony, the ability to add to his income sufficiently to provide for any additional needs he has, including, if he wishes, subsidizing his son to some extent.**

CONCLUSIONS OF LAW

1. [Leo] has no legal duty to contribute to the support of his adult employed son.

2. [Kathleen] has no legal duty to aid [Leo] in contributing to the support of his adult employed son.

3. The Court will not consider any expenses [Leo] has [as] a result of subsidizing his son.

4. [Kathleen] has no legal duty to aid in the support of her aged mother or adult employed daughter. The Court has not considered any expenses caused by their failure to pay their share of the rent.

> 5. **[Leo's] maintenance of the standard of living established during the marriage does not include maintaining the marital residence formerly occupied by the entire family for his sole use. As a single person with no duty to support anyone else, his rent and utilities should be reduced to that necessary for one person rather than a whole family. [Kathleen] cannot support [Leo's] remaining in a rented residence formerly occupied by the entire family.**
>
> 6. **[Leo] has adequate income to meet his own reasonable needs as a single person.**
>
> 7. Neither [Leo] nor [Kathleen] has adequate income to meet the needs of either of their adult employed children nor [Kathleen's] aged mother.
>
> 8. **[Kathleen] has no ability to pay spousal support.**
>
> 9. **[Leo] has the ability to earn additional income.**
>
> Therefore, [Leo's] request for spousal support is hereby and the same is denied.

STANDARD OF REVIEW

The standard of review for a family court's findings of fact is the "clearly erroneous" test. Doe VI v. Roe VI, 6 Haw. App. 629, 640, 736 P.2d 448, 456 (1987)(citing Doe III v. Roe III, 3 Haw. App. 241, 648 P.2d 199 (1982)). "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).

Conclusions of law are reviewed *de novo* under the right/wrong standard. Doe VI v. Roe VI, 6 Haw. App. 629, 640, 736 P.2d 448, 456 (1987)(citing Friedrich v. Dept. of Transportation, 60 Haw. 32, 586 P.2d 1037 (1978); Nani Koolau Co.

v. K & M Construction, Inc., 5 Haw. App. 137, 681 P.2d 580 (1984)).

RELEVANT PRECEDENT

When determining a divorcing party's request for alimony, the questions, in order of determination, are as follows:

> The first relevant circumstance is the payee's need. What amount of money does he or she need to maintain the standard of living established during the marriage? The second relevant circumstance is the payee's ability to meet his or her need without spousal support. Taking into account the payee's income, or what it should be, including the net income producing capability of his or her property, what is his or her reasonable ability to meet his or her need without spousal support? The third relevant circumstance is the payor's need. What amount of money does he or she need to maintain the standard of living established during the marriage? The fourth relevant circumstance is the payor's ability to pay spousal support. Taking into account the payor's income, or what it should be, including the income producing capability of his or her property, what is his or her reasonable ability to meet his or her need and to pay spousal support?
>
> . . . .
>
> When answering any of the above questions, the following two rules apply: Any part of the payor's current inability to pay that was unreasonably caused by the payor may not be considered and must be ignored. Any part of the payee's current need that was caused by the payee's violation of his or her duty to exert reasonable efforts to attain self-sufficiency at the standard of living established during the marriage may not be considered and must be ignored. Saromines v. Saromines, 3 Haw. App. 20, 641 P.2d 1342 (1982).

Vorfeld v. Vorfeld, 8 Haw. App. 391, 402-03, 804 P.2d 891, 897-98 (1991).

In other words, the four relevant facts are: (1) the payee's need; (2) the payee's ability to meet the payee's need without spousal support; (3) the payor's need; and (4) the payor's ability to meet the payor's need and pay for spousal support.

DISCUSSION

Leo contends the family court "committed error by refusing to award alimony to a totally disabled husband, . . . where: (A) the Court concluded that '[Leo] had the ability to earn additional income,' despite the unanimous conclusion of three physicians that [Leo] was totally disabled as a result of a brain injury; (B) the Court concluded that '[Kathleen] has no ability to pay spousal support,' despite the uncontradicted evidence that [Kathleen's] annual gross income was between $44,000 and $45,000, and the fact that [Kathleen's] Income and Expense Statement was withdrawn, thus depriving the Court of the ability to conclude that [Kathleen's] expenses exceeded her ability to pay alimony, as of the date of trial."

(A)

Two doctors opined that Leo was totally disabled and unable to work. In response to an inquiry from Leo's attorney in this case, Stewart Y. Matsumoto, M.D., F.A.C.C., wrote in relevant part as follows:

> [Leo's] major disability revolves around a closed head injury which produced a left hemiparesis and seizure disorder. I have only cared for his cardiovascular problem.
>
> [Leo] recently underwent diagnostic cardiac catheterization for a positive treadmill stress test. Total occlusion of the right coronary artery was identified. An attempt at coronary angioplasty is planned in the future.
>
> It is my opinion that the combination of his neurologic deficit which includes the seizure disorder and left hemiparesis compounded by his single vessel coronary artery disease makes [Leo] totally and permanently disabled and unable to work. For his neurologic impairement [sic], an appropriate neurologic specialist should be consulted.

Leo contends that the finding that he has the ability to earn additional income is clearly erroneous. His argument challenges the family court's Finding of Fact (FOF) No. 5 and Conclusion of Law (COL) No. 9.[1] We disagree with Leo. These challenged findings are supported by his testimony and by FOF No. 2 which is not challenged in his points on appeal.[2]

(B)

Leo's second argument is that the family court should have awarded him spousal support because without spousal support, he does not have the ability to maintain the standard of living established during the marriage and Kathleen has the ability to

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[1] Conclusion of Law No. 9 is a finding of fact.

[2] Hawai‘i Rules of Appellate Procedure Rule 28 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 on which appellant intends to rely, set forth in separate, numbered paragraphs. Each point shall refer to the alleged error committed by the court or agency upon which appellant intends to rely. The point shall show where in the record the alleged error occurred and where it was objected to and, where applicable, the following:
>
> . . . .
>
> (C) When the point involves findings or conclusions of the court below, those urged as error shall be quoted in their entirety and there shall be included a statement explaining why the findings of fact or conclusions of law are alleged to be erroneous.
>
> . . . .
>
> Points not presented in accordance with this section will be disregarded, except that the court, at its option, may notice a plain error not presented.

pay spousal support. This argument challenges the family court's FOF No. 3 and CsOL Nos. 5, 6, and 8.

We affirm COL No. 5. Moreover, even assuming that Leo does not have the ability to earn sufficient additional income to maintain the standard of living established during the marriage, FOF no. 1 is not challenged in Leo's points on appeal and it conclusively establishes that Kathleen does not have the ability to pay spousal support. Therefore, Leo's point is without merit.

CONCLUSION

Accordingly, we affirm the family court's July 13, 1999 Order Denying Alimony.

DATED: Honolulu, Hawai'i, September 13, 2000.

On the briefs:

Gary Y. Okuda (Leu & Okuda, of counsel) for Plaintiff-Appellant.

Barbara Lee Melvin for Defendant-Appellee.

Chief Judge

Associate Judge

Associate Judge