

NO. 22949

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ADA E. KUSHI, Plaintiff-Appellee, v.
AL M. KUSHI, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-D NO. 95-0289)

MEMORANDUM OPINION

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

Defendant-Appellant Al M. Kushi (Husband) appeals the property distribution part of the family court's October 11, 1999 Divorce Decree (Divorce Decree). We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

BACKGROUND

Husband and Plaintiff-Appellee Ada E. Kushi, now known as Ada E. Nagao (Wife), were married on August 29, 1973. Their first son was born on February 26, 1974. Their second son was born on May 30, 1981. Their third son was born on September 11, 1988.

The parties were separated on October 16, 1995. Wife filed a Complaint for Divorce on November 28, 1995.

Two low-income housing projects are relevant in this case, the Hilo Hale Ohana Associates (Hilo Hale) and the Lincoln

Courtside Associates (Lincoln). Hilo Hale and Lincoln are limited partnerships. The parties are the general partners of these limited partnerships.

The parties are lessees of the real properties upon which Hilo Hale and Lincoln are located. The parties subleased the real properties to the Hilo Hale and Lincoln limited partnerships.

Seawind Realty, Inc. (SRI), is a real estate brokerage and property management corporation. The parties are the sole stockholders of SRI. By contract, SRI is the property manager for both Hilo Hale and Lincoln.

On December 6, 1995, pursuant to a stipulation, the family court ordered that Wife shall run the daily business activities of SRI; that any major decision must be mutually agreed upon; that unless for ordinary course of business, any withdrawals from business savings accounts must be by mutual agreement; that Wife shall continue to collect all rental incomes and to pay family expenses; and that Husband and Wife shall continue to receive their \$1,000 monthly draw from SRI.

On February 2, 1996, the family court appointed a guardian ad litem for Husband; awarded Wife sole control and authority over SRI and all of its accounts, assets, and liabilities; ordered the 1995 Lexus LS400 automobile used by Husband to be placed under the sole possession and control of

Wife; enjoined Husband from transferring or further encumbering any real property interest; named Wife the sole manager of all the rental and lease properties of the parties; ordered Husband to provide a detailed accounting of charges and expenditures in or from various specified accounts and funds since the filing of the Complaint; and cancelled Husband's \$1,000 per month draw from SRI.

On May 20, 1996, the family court ordered, in relevant part, as follows:

ANDREW P. WILSON, Guardian Ad Litem for [Husband], is hereby authorized and ordered to execute the document entitled "Change Form - Real Estate" on behalf of [Husband]. Said document releases [Husband] as principal broker of the parties' business, Seawind Realty, and names KAZUTO TAKAYAMA to be the new principal broker of Seawind Realty.

Also on May 20, 1996, the family court ordered, in relevant part, as follows:

Visitation. [Husband's] request for visitation with his children is denied. However, the Court will reconsider its [decision] based upon the following conditions:

(a) [Husband] submits to a psychological evaluation;

(b) The Court receives a statement from the psychologist attesting to [Husband's] mental stability and that [Husband] does not pose a danger to himself or others; and

(c) [Husband] continues to get treatment, whether by medication or counseling or both.

On October 4, 1996, the family court ordered, in relevant part, "[t]hat the transaction entered into by [Husband] to purchase certain real property from [third parties] . . . is hereby cancelled and the \$10,000.00 deposit made by [Husband] to

said escrow account shall be returned" to Andrew P. Wilson, Guardian Ad Litem (GAL), to pay \$2,500 to GAL as partial payment of his fees and costs, \$2,500 as a retainer to hire a divorce attorney for Husband, and \$5,000 to be held by GAL until further order of the court.

Husband's Opening Brief concedes that

[u]ndeniably, Husband contributed to this early outcome by not showing up at hearings, by making angry statements to his staff, [Wife] and to other people. There was concern that he was taking and using his children's money

Possibly, there was enough anger and alleged bizarre behavior on Husband's part at the outset of this case to justify the initial imposition of safeguards to protect Wife from the risk of physical harm and to protect the marital assets of the parties from waste. The Family Court's major concern about Husband was whether he was mentally and emotionally stable and whether he could continue to operate his business[.]

The report of the December 10, 1996 psychological evaluation of Husband stated that Husband was of sound mind, mentally stable, and not a threat "at this time."

On March 24, 1997, the family court discharged the GAL from his duties regarding Husband's person but continued the GAL's duties regarding some of Husband's funds.

Pursuant to stipulation, the family court, on March 24, 1997, ordered Wife to turn the 1995 Lexus LS400 over to Husband and appointed Husband's counsel as manager of the 740 Waiianuenue Avenue rental property.

The two-day trial was held on April 12, 1999, and April 16, 1999.

The family court's July 22, 1999 written decision was followed by its October 11, 1999 Order Granting in Part and Denying in Part Defendant's Motion for Reconsideration and/or Clarification of Decision Filed July 22, 1999, and by its Divorce Decree.

DISCUSSION

A.

Husband contends the family court erred when, in section 10 of the Divorce Decree, it credited Wife with receipt of the 32 Aipuni Street property having a net market value (NMV) of \$25,479 and credited him with receipt of the 740 Waianuenue Avenue and Waiwai Loop properties having a NMV of \$41,000. Husband contends that this award contradicts the court-approved stipulation of the parties that the award would be made as an even exchange regardless of the NMV of the properties.

The transcript reports the following stipulation:

[COUNSEL FOR WIFE]: For the record, my understanding is [Husband] is now agreeing that [Wife] should be awarded Aipuni subject to the mortgage and that [Husband] will be awarded Waianuenue and Waiwai Loop subject to the mortgage with no equalization in values.

In other words, whatever value those two properties are will be [Husband's] value. Whatever value Aipuni is would be [Wife's] value. Neither would owe anybody any money.

THE COURT: Agreed?

[COUNSEL FOR HUSBAND]: Yes. Agreed.

THE COURT: Okay. Court will accept that stipulation.

The transcript quoted above proves that Husband is right.

B.

1.

The first paragraph of section 18 of the Divorce Decree states as follows:

Seawind Realty, Inc. Wife shall be awarded the parties' interest in and to Seawind Realty, Inc., subject to all of the indebtedness thereon and shall hold Husband harmless from any liability therefrom. Seawind Realty, Inc. has a present fair market value of \$26,000. Husband shall receive a set off or credit of \$13,000 for his share of the business in the final division of property as indicated in Appendix "A".

Husband contends that the family court erred when it awarded all of SRI's shares to Wife. He states that

under HRS, Section 572-22, the Family Court, in the exercise of its discretion to make property divisions in divorce actions pursuant to HRS, Section 580-47, has no jurisdictional power or authority to void valid contracts between spouses and contracts between a spouse and third parties. The Family Court must enforce all such contracts no matter how compelling the equities may be for the non-enforcement of these contracts.

. . . .

The Family Court has taken the very simplistic view that all it has done is award one of the assets of the parties, in this case shares of stock in SRI, to Wife. But in reality, the Court has in effect rendered invalid the parties' implicit agreement to share in the long-term benefits of these "guaranteed" contracts.

We disagree with Husband. SRI is a corporation. The parties own its stock. In a divorce action, the family court is authorized to award corporate stock owned by the parties to one party. The Divorce Decree awarded Wife all of the SRI stock owned by Wife and/or Husband. This award will cause Wife to be the sole owner of SRI. It will not "void valid contracts between spouses and contracts between a spouse and third parties."

2.

Husband further contends that the family court erred when it decided that the fair market value of SRI was \$26,000. We will discuss this point in part C that follows.

C.

The second paragraph of section 18 of the Divorce Decree states, in relevant part, as follows:

Seawind Realty shall continue to operate under the existing property management agreements that are currently in place. Husband shall be restrained and enjoined from interfering with all current and future business activities of Seawind Realty, Inc., as well as the property management agreements currently in place with Lincoln Courtside Associates, Hilo Hale Ohana Associates, and other property owners that presently contract for property management services with Seawind Realty, Inc.

Hawai'i Revised Statutes (HRS) § 572-22 (1993) states, in relevant part, as follows:

Contracts. A married person may make contracts, oral and written, sealed and unsealed, with her or his spouse, or any other person, in the same manner as if she or he were sole.

. . . .

All contracts made between spouses, whenever made, whether before or after June 6, 1987, and not otherwise invalid because of any other law, shall be valid.

Husband cites Labayoq v. Labayoq, 83 Hawai'i 412, 927 P.2d 420 (App. 1996), and Epp v. Epp, 80 Hawai'i 79, 905 P.2d 54 (App. 1995), as precedent that

under HRS, Section 572-22, the Family Court, in the exercise of its discretion to make property divisions in divorce actions pursuant to HRS, Section 580-47, has no jurisdictional power or authority to void valid contracts between spouses and contracts between a spouse and third parties. The Family Court must enforce all such contracts no matter how compelling the equities may be for the non-enforcement of these contracts.

We agree with Husband. As noted above, the parties are general partners in the Hilo Hale limited partnership and in the Lincoln limited partnership. We cannot discern from the record whether the family court could have awarded all of Husband's interests in these two limited partnership's to Wife. In any event, it did not make such an award.

Each limited partnership is a low income housing project. Each limited partnership subleases their real property from the parties. Each has a property management agreement with SRI. It is easy to understand why the family court wants to prevent Husband from using his position as general partner of Lincoln and of Hilo Hale to disturb Lincoln's and/or Hilo Hale's relationships with SRI. However, the family court lacks the authority to remove Husband as a general partner or to limit or interfere with his exercise and performance of his rights, privileges, and duties as a general partner. The second paragraph of section 18 of the Divorce Decree is beyond the court's powers and must be deleted from the Divorce Decree.

If Husband, in his capacity as general partner of Hilo Hale and Lincoln, cannot or will not disturb the subleases and/or property management agreements between Hilo Hale and SRI and/or Lincoln and SRI, the family court's finding that the NMV of SRI is \$26,000 is not clearly erroneous. However, the extent to

which Husband can and may disturb those agreements may have a negative impact on the NMV of SRI. This may be an issue on remand.

D.

The Divorce Decree states, in relevant part, as follows: "Court Denies Reimbursement to Husband. The Court finds that because the marital estate has diminished during the period January 1, 1996 through March 9, 1999, despite careful and prudent management, Husband will not be awarded any reimbursement for the funds collected and expended by Wife."

Husband contends that the family court erred when it refused to award him a share of the marital funds collected and expended by Wife during the lengthy divorce proceedings.

We recognize that section 23 of the Divorce Decree is a bit simplistic in its explanation of the reason why Husband is not being awarded any reimbursement. The relevant questions are: How much of that reduction of the marital estate was reasonable? How much of that reduction of the marital estate should be imposed on Husband? How much of that reduction of the marital estate should be imposed on Wife? If there is a difference, why? Nevertheless, upon a review of the record, we decide that the family court did not abuse its discretion.

CONCLUSION

Accordingly, we affirm in part and vacate in part as follows:

1. We vacate the following bold-lettered parts of section 10 of the Divorce Decree:

10. Real Property.

a. 32 Aipuni Street, Hilo, Hawaii. The parties have stipulated and agreed, and the Court shall order that the marital residence located at 32 Aipuni Street, Hilo, Hawaii, shall be awarded to Wife as her sole and separate property, subject to the existing mortgage with Bank United of Texas in the approximate amount of \$118,521. **The Aipuni Street house and lot has a present fair market value of \$144,000. Husband shall receive a set off or credit of \$12,739.50 for one-half of the net value of this property less the mortgage (\$144,000 - \$118,521 divided by 2) in the final division of property as indicated in Appendix "A".**

. . . .

b. 740 Waianuenue Avenue, Hilo, Hawaii, and Waiwai Loop (vacant lot), Hilo, Hawaii. The parties have stipulated and agreed, and the Court shall order that the properties located at 740 Waianuenue Avenue, Hilo, Hawaii, and Waiwai Loop (vacant lot), Hilo, Hawaii, shall be awarded to Husband as his sole and separate property, subject to the existing commercial loan with First Hawaiian Bank in the approximate amount of \$133,000. **The Waianuenue Avenue property has a present fair market value of \$117,000 and the Waiwai Loop property has a fair market value of \$57,000. Wife shall receive a set off or credit of \$20,500 for one-half of the value of these parcels less the mortgage (\$117,000 + \$57,000 = \$174,000 - \$133,000 divided by 2) in the final division of property as indicated in Appendix "A".**

2. We vacate the following bold-lettered parts of section 18 of the Divorce Decree:

18. Seawind Realty, Inc. Wife shall be awarded the parties' interest in and to Seawind Realty, Inc., subject to all of the indebtedness thereon and shall hold Husband harmless from any liability therefrom. **Seawind Realty, Inc. has a present fair market value of \$26,000. Husband shall receive a set off or credit of \$13,000 for his share of the business in the final division of property as indicated in Appendix "A".**

Seawind Realty shall continue to operate under the existing property management agreements that are currently in place. Husband shall be restrained and enjoined from interfering with all

current and future business activities of Seawind Realty, Inc., as well as the property management agreements currently in place with Lincoln Courtside Associates, Hilo Hale Ohana Associates, and other property owners that presently contract for property management services with Seawind Realty, Inc.

3. We vacate Appendix "A" of the Divorce Decree.

We remand for further proceedings consistent with this opinion. The family court is reminded of the time limit specified in HRS § 580-56(d) (1993) and as interpreted in Todd v. Todd, 9 Haw. App 214, 832 P.2d 280 (1992).

DATED: Honolulu, Hawai'i, May 9, 2001.

On the briefs:

Burton T. Kato
for Defendant-Appellant.

Ada E. Nagao, formerly known
as Ada E. Kushi,
Plaintiff-Appellee, pro se.