

NO. 24121

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

MARJORIE ANN MINAKAMI, Plaintiff-Appellee/Cross-Appellant, v.
MELVIN TOORU MINAKAMI, Defendant-Appellant/Cross-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 99-1044)

MEMORANDUM OPINION

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

Defendant-Appellant/Cross-Appellee Melvin Tooru Minakami (Melvin) appeals from the following actions by the Family Court of the First Circuit Court entered on February 20, 2001: (1) "Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Award of Costs and Attorneys' Fees Pursuant to Rule 68, Hawaii Family Court Rules and Judgment" and (2) "Decree Granting Absolute Divorce and Awarding Property Division" (Divorce Decree).

Plaintiff-Appellee/Cross-Appellant Marjorie Ann Minakami (Marjorie) cross-appeals from the Divorce Decree.

We affirm in part, vacate in part, and remand with instructions.

BACKGROUND

The relevant events occurred as follows:

- April 6, 1999 Marjorie filed a complaint for divorce.
- January 8-9, 2001 Judge Darryl Y. C. Choy conducted the trial.
- February 20, 2001 The court entered its "Findings of Fact, Conclusions of Law, and Order Re: Divorce Trial," in relevant part, as follows:

FINDINGS OF FACT

- 1. The parties were married on June 6, 1987.
- 2. The parties separated in October 1998.
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- 4. . . . This is only a property division case.
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- 6. [Marjorie] is presently 65 years old and began receiving Social Security benefits last year. [Melvin] is presently 60 years old and will be receiving Social Security benefits in the future.
- 7. The major asset of this marriage is the residence of the parties located at 44-341 Kaneohe Bay Drive, Kaneohe, Hawaii 96744.
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- 9. Prior to the marriage of the parties, in 1987 [Marjorie's] former husband bought out her interest in real property in which [Marjorie] and her former husband had a joint interest. [Marjorie] used \$50,000 of the proceeds of this buy-out, after the parties were married, to purchase a property in Flagstaff, Arizona, for \$29,000 in 1987 and to pay for marriage and honeymoon expenses for the parties in 1987. The Flagstaff, Arizona, property was eventually sold in 1994, and proceeds of this sale were used to help fund [Melvin's] lawsuit against his former employer, Raytheon Services Nevada. This lawsuit was eventually settled in 1994, and the proceeds from the lawsuit were used in part to pay off the balances on the first and second mortgages on the parties' residence.
- 10. In 1991, [Marjorie] received approximately \$11,000 from a personal injury lawsuit, and this sum was used to pay down the second mortgage on the parties' residence.

11. In May 1987, just prior to the marriage of the parties in June 19[8]7, the parties entered into a purchase agreement whereby [Marjorie] agreed to purchase a one-half interest in the parties' residence, which at that time was owned solely by [Melvin]. Under the terms of the agreement, [Marjorie] was to pay \$57,475, being one-half of the then outstanding mortgage balance, on a monthly basis as mortgage payments were due, and [Marjorie] was to pay the balance due of \$9,825 within five years after the mortgage was paid off, or in such longer time as agreed by [Melvin]. Once the parties were married, the first mortgage was paid with the joint earnings of the parties. A portion of the second mortgage was paid, as noted above, with the proceeds of [Marjorie's] personal injury lawsuit, and the outstanding balances on the first and second mortgage were paid off with the proceeds of [Melvin's] lawsuit, also as noted above.

12. As to [Marjorie's] Oppenheimer Acct. . . . , \$2,200 of this account was funded by money [Marjorie] brought into the marriage.

13. As to [Marjorie's] Polaris mutual fund accounts, \$10,000 of this account was funded by money inherited by [Marjorie] during the marriage from her father's estate.

. . . .

15. As to [Melvin's] Pearl Harbor Naval Shipyard ([PHNSY]) TSP, \$13,000 of this account was funded by a previous [PHNSY] retirement fund which [Melvin] accumulated prior to the marriage.

. . . .

CONCLUSIONS OF LAW

. . . .

4. Each party is awarded and shall keep as his or her sole and separate property his or her own Social Security benefits now being received or to be received in the future.

. . . .

6. [Marjorie's] request for \$50,000 Category 1 credit with respect to the amount mentioned in Findings of Fact, paragraph 9 above, is denied. This sum was incorporated into the parties' residence.

7. [Marjorie] fulfilled her obligation under the purchase agreement for the parties' residence to pay for one-half of the first mortgage as it existed on the purchase date in May 1987. The first mortgage was paid off with joint funds of the marriage which belonged one-half to [Marjorie]. [Marjorie] is not in default on the purchase agreement. [Marjorie] still owes [Melvin] the balance of \$9,825 on the purchase agreement.

8. [Marjorie] is entitled to Category 1 credit for the sums of \$2,200 and \$7,200 which she brought into the marriage and are now portions of her Oppenheimer and ICAP accounts respectively as set out in paragraphs 12 and 14 above. These amounts are not subject to division.

9. [Marjorie] is entitled to Category 3 credit for the sum of \$10,000 she inherited from her father during the marriage which is now a portion of her Polaris account as set out in paragraph 13 above. This amount is not subject to division.

10. [Melvin] is entitled to Category 1 credit for the sum of \$13,000 which was accumulated in a [PHNSY] retirement plan prior to the marriage and is now a portion of his [PHNSY] TSP as set out in paragraph 15 above. This amount is not subject to division.

. . . .

17. Based upon the distribution of assets set out above, [Marjorie] receives \$159,200 in total assets subject to division, and [Melvin] receives \$383,900 in total assets subject to division. This requires an equalization payment to be made from [Melvin] to [Marjorie] in the amount of \$112,350. From this equalization payment, the sum of \$9,825, owed by [Marjorie] to [Melvin] pursuant to the residence purchase agreement, must be deducted, leaving a net equalization payment due from [Melvin] to [Marjorie] of \$102,525.

February 20, 2001 The court entered its "Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Award of Costs and Attorneys' Fees Pursuant to Rule 68, Hawaii Family Court Rules and Judgment" requiring Melvin to pay Marjorie \$4,576.94 costs and \$23,296.00 attorney fees on or before June 1, 2001.

February 20, 2001 The court entered the Divorce Decree.

MELVIN'S APPEAL

1.

When the parties married, Marjorie had a \$50,000 Home Investment Government Guarantee fund that needed to be rolled over to avoid capital gains. Pursuant to a May 11, 1987 written "Agreement of Purchase of Interest in Real Property" (Purchase Agreement), Marjorie purchased one-half of Melvin's Kaneohe Bay

Drive residence (KBD Residence) for \$67,300 payable by payment of one-half of the \$114,950 mortgage and \$9,825 after the mortgage was paid.

The March 9, 2000 "Order Granting Plaintiff's Motion for Partial Summary Judgment Filed February 10, 2000" (March 9, 2000 PSJ Order) entered by Judge Gale L. F. Ching states, in relevant part, as follows:

- (1) [Marjorie] had purchased a one-half interest in the real property located at 44-341 Kaneohe Bay Drive, . . . (hereinafter "Kaneohe Property") prior to the Parties' marriage on or about June 6, 1987;
- (2) The Kaneohe Property is a marital asset that should be divided equally between the Parties;
- (3) [Marjorie] is not in default on the agreement, and even if so, the Kaneohe Property is to be divided as one-half to each party subject to proper adjustments owed by [Marjorie] to [Melvin] under the terms and conditions of the agreement.

Melvin challenges the March 9, 2000 PSJ Order quoted above. He contends that "[t]he [court] should have denied partial summary judgment and left the issue of breach of the agreement for resolution at trial because of a dispute of material facts on that issue." He contends that "Judge Ching should have at least left the issue of the breach of the Agreement for Purchase by [Marjorie] for determination at trial."

In support of his argument that the Purchase Agreement and its alleged breach are material, Melvin notes that

there was no dispute that [Marjorie] did not intend to use her own source of monies to pay her share of the mortgage (\$57,475.00 of the \$114,950.00 mortgage). There was also no dispute that she did not pay to [Melvin] the \$9,825.00 as required under said Agreement for Purchase up to the date of the hearing on said motion. There was an issue of [Marjorie's] motivation for not paying [Melvin].

Melvin argues, "If the trial court scrupulously followed the Hussey[v. Hussey, 77 Hawai'i 202, 206-07, 881 P.2d 1270, 1274-75 (App. 1994)] ruling, then upon a finding that a 'valid' [Purchase Agreement] existed between the parties, the trial court was obligated to exclude the marital residence from the marital partnership assets." Melvin bases this argument on precedent that (a) "[a] party who has materially breached a contract cannot seek performance of that contract by the other party" and (b) "[f]or real property transactions, the trial court must consider whether a purchaser's claim for specific performance will be allowed despite the purchaser's breach where, absent gross negligence or bad faith conduct of the purchaser, forfeiture would be harsh and unreasonable."

In other words, Melvin argues: (1) if there was a valid Purchase Agreement, Marjorie breached it and cannot seek its performance; (2) consequently, Marjorie did not purchase one-half of Melvin's KBD Residence; and (3) consequently, Melvin's KBD Residence is "Marital Separate Property" of the kind defined in Hussey as follows: "All property that was excluded from the marital partnership by a valid contract."

We disagree with Melvin. First, the conveyance from Melvin to Marjorie having already occurred, Marjorie is not seeking specific performance. Second, there is no possibility that the value of the KBD Residence is Melvin's Marital Separate Property as defined above.

Based on the following facts, we conclude that the family court erred in its calculations. In the Purchase Agreement, the parties agreed that Marjorie was purchasing a one-half interest of the KBD Residence for \$67,300, thus indicating that the net value of the KBD Residence was then \$134,600. In other words, Melvin entered the marital partnership with a \$134,600 Category 1 value of real property. Melvin admits that the Purchase Agreement required Marjorie to pay for her half of it with her Category 1 and/or Category 3 funds. Had Marjorie done so, she would have had a \$67,300 Category 1 or 3 value of real property and Melvin would have had a \$67,300 Category 1 value of real property and \$67,300 Category 1 or 3 cash. Marjorie's non-compliance with the Purchase Agreement left Melvin with a \$134,600 Category 1 value of real property and Marjorie with no Category 1 or 3 value of real property. It does not cause the KBD Residence to be Melvin's Marital Separate Property.

2. and 3.

Melvin challenges conclusions of law nos. 7 and 17. We conclude that conclusion of law no. 17 and the last sentence of conclusion of law no. 7 are wrong. The appropriate analysis is as follows.

Marjorie brought a Category 1 \$50,000 into the marital partnership (finding of fact no. 9). Conclusion of law no. 6 is inconsistent with finding of fact no. 9 and is wrong. Marjorie is entitled to a \$50,000 Category 1 credit. Marjorie also brought into the marital partnership a Category 1 \$2,200 (conclusion of law no. 8), a Category 1 \$7,200 (conclusion of law no. 8), and a Category 3 \$10,000 (conclusion of law no. 9).

Melvin brought a \$134,600 Category 1 value into the marital partnership (finding of fact no. 11). Marjorie's failure to pay a Category 1 or Category 3 \$57,475 on the mortgage was harmless because the mortgage was paid. The payment of the mortgage with Category 5 funds did not change Melvin's right to a \$134,600 Category 1 credit. Melvin also brought a Category 1 \$13,000, conclusion of law no. 10, into the marital partnership.

Therefore, of the \$543,100 divisible, \$134,600 and \$13,000 (a total of \$147,600) should be awarded to Melvin to satisfy his Category 1 investments into the marital partnership; \$50,000, \$2,200, \$7,200, and \$10,000 (a total of \$69,400) should be awarded to Marjorie to satisfy her Category 1 and 3 investments into the marital partnership; and the \$326,100

balance should be divided equally, as follows:

| | MELVIN | MARJORIE |
|----------------------|----------------|----------------|
| CATEGORIES 1 & 3 | \$147,600 | \$ 69,400 |
| HALF OF BALANCE | <u>163,050</u> | <u>163,050</u> |
| ENTITLEMENTS | 310,650 | 232,450 |
| ACTUALS | <u>383,900</u> | <u>159,200</u> |
| EQUALIZATION PAYMENT | (\$ 73,250) | \$ 73,250 |

In other words, Melvin has been awarded \$73,250 more than his Partnership Model share, and Marjorie has been awarded \$73,250 less than her Partnership Model share. The equalization payment due from Melvin to Marjorie is \$73,250. The second and third sentences of conclusion of law no. 17 are wrong.

4. and 5.

On November 3, 2000, Melvin moved for an extension of time to allow submission of "the report of Island Pension Group (Philip Green) regarding the present value and marital share of [Marjorie's] Social Security retirement benefits[.]" This motion was denied by Judge Bode A. Uale's order entered on November 9, 2000. On November 16, 2000, Judge Allene Suemori entered an order resetting the trial and stating "exhibit lists and exhibits due 12/29/00."

Melvin contends that the court "erred in excluding expert testimony and documents related to the present value of [Marjorie's] Social Security benefits given the continuance of trial and extension of time to submit exhibits by Judge Suemori."

Marjorie responds that

Judge Choy allowed questioning of [Marjorie] about her Social Security payments, and [Marjorie] stated that she was receiving \$982 per month When [Melvin] testified on direct examination during his case-in-chief, he was allowed to testify, . . . on the present value of [Marjorie's] Social Security payments and that his estimate . . . was \$70,151.05 [Marjorie] later testified on rebuttal . . . that [Melvin] would be getting about \$200 more per month than she was getting when he became eligible to receive benefits at age 62 ([Melvin] was 60 at the time of trial . . .).

Melvin challenges conclusion of law no. 4 and contends that the court "erred in failing to divide the Social Security benefits as a marital asset either on a monthly or lump-sum basis, but instead awarded each party their own respective benefits." Melvin argues that

[t]he trial court should have divided the Social Security benefits as a marital asset on a lump-sum basis given that the trial court allowed [Melvin] to testify that the value of [Marjorie's] Social Security benefits accrued during the time of marriage was \$70,151.05. In the alternative, the trial court should have awarded each party a Linson formula share in the other party's Social Security benefits.

(Record citation omitted.)

Upon a review of the record, we conclude that Melvin failed to factually establish that conclusion of law no. 4 was an abuse of the family court's discretion. There is no evidence or offer of proof that conclusion of law no. 4 is advantageous to Marjorie and/or detrimental to Melvin.

MARJORIE'S CROSS-APPEAL

1. and 2.

In conclusion of law no. 16, the court awarded the Polaris accounts to Marjorie as follows: \$10,000 Category 3, and

\$13,500 Category 5. Marjorie contends that "the trial court incorrectly ruled that [Marjorie] should receive 'Category 3' credit only for this [\$10,000] amount and that the increase in value in the Polaris accounts during the marriage should be divided 50/50 between the parties (as a Category 4 asset)."

In conclusion of law no. 16, the court awarded (a) the \$8,000 Oppenheimer account all to Marjorie and (b) the \$7,500 Oppenheimer account, \$2,200 to Marjorie and \$5,300 to Melvin. "[Marjorie] had argued that the entire value of the Oppenheimer 116 account should have been awarded 100% to her as marital separate property."

Marjorie contends that both the Polaris accounts and the Oppenheimer accounts were her Marital Separate Property. We disagree. The relevant facts do not satisfy any of the three definitions of Marital Separate Property stated in Hussey, 77 Hawai'i at 206-07, 881 P.2d at 1274-75.

3.

Marjorie challenges conclusion of law no. 6. As noted above, we agree with her challenge.

4.

In conclusion of law no. 16, the court awarded the \$17,600 PHNSY TSP account \$13,100 to Melvin as his Category 1 value and \$4,500 as a Category 5 value. Marjorie contends that "the Pearl Harbor TSP . . . was totally created and funded during

the marriage[.]" In other words, she contends that there was no Category 1 value involved. Upon a review of the record, we decide that finding of fact no. 15 is not clearly erroneous.

5.

Marjorie states that "[i]f this appeal results in a equalization payment to [Marjorie] which is still in excess of \$75,000, [Marjorie] should be awarded her costs and attorney's fees for perfecting this appeal." This is not an issue because this appeal results in an equalization payment of \$73,250.

CONCLUSION

Accordingly, regarding the family court's February 20, 2001 "Findings of Fact, Conclusions of Law, and Order Re: Divorce Trial," we vacate: (a) conclusion of law no. 6, (b) the first and the last sentences of conclusion of law no. 7, and (c) the second and the last sentences of conclusion of law no. 17.

Regarding the family court's Divorce Decree, in paragraph 9, we vacate that part of the decree that awards the amount "\$102,525" and remand to the family court to enter an amended decree wherein that amount in paragraph 9 is replaced with the amount "\$73,250."

We affirm the family court's February 20, 2001 "Findings of Fact, Conclusions of Law, and Order Granting

Plaintiff's Motion for Award of Costs and Attorneys' Fees
Pursuant to Rule 68, Hawaii Family Court Rules and Judgment."

DATED: Honolulu, Hawai'i, February 7, 2003.

On the briefs:

Stephen T. Hioki
for Defendant-Appellant/
Cross-Appellee.

Chief Judge

Samuel P. King, Jr.,
for Plaintiff-Appellee/
Cross-Appellant.

Associate Judge

Associate Judge