

NO. 24159

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

JANE DOE, Plaintiff-Appellee, v.  
JOHN DOE, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT  
(FC-D NO. 99-0415)

MEMORANDUM OPINION

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

Defendant-Appellant John Doe (John) appeals from the February 9, 2001 "Judgment Granting Divorce and Awarding Child Custody" (Divorce Judgment) entered in the Family Court of the Second Circuit. We vacate, in part, and otherwise affirm and remand for action consistent with this opinion.

John and Plaintiff-Appellee Jane Doe (Jane) were married on December 24, 1988.<sup>1</sup> Their daughter was born on October 20, 1989, and their son was born on July 8, 1996.

On September 1, 1999, Jane filed a complaint for divorce. District Family Judge Eric G. Romanchak presided in the case.

On October 24, 2000, Jane filed a "Motion for Pre-Decree Relief" that was heard on November 1, 2000. The

---

<sup>1</sup> The Matrimonial Action Information form filed in this case erroneously states that the date of marriage was "December 24, 1998."

November 27, 2000 "Order on Plaintiff's Motion for Pre-Decree Relief Filed on 10/24/00" states, in relevant part, as follows:

3. Sale of Marital Residence - The parties shall equally share in the cost of an appraisal to be performed by ACM Appraisals, Inc. The parties shall be bound by the appraisal. In the event [Jane] is able to secure financing, she may have first option to acquire said property based on the appraisal amount. [John's] proceeds shall be one-half of the expected net proceeds as if the property was sold to a third party. "Expected net proceeds" shall be defined as the net proceeds remaining after all traditional costs of sale, including, but not limited to traditional commission, closing costs and any outstanding mortgage have been deducted from the acquisition price. [Jane] nor her broker shall be entitled to make any commission off of [Jane's] acquisition of the residence. [Jane] shall not in any way profit from her acquisition of the marital residence. [John's] net proceeds are to remain in escrow until further order of the court.

A trial occurred on December 15 and 18, 2000.

On January 17, 2001, the court entered an "Interim Trial Order," which states, in relevant part, as follows:

[John] shall sign the quitclaim deed transferring his interest to [Jane] immediately after the hearing. All proceeds shall be held in escrow until further [order] of the court. However, a minimum of \$21,000 shall be separately held in escrow until all issues surrounding the claim made by Century 21 for a commission is resolved.

On January 18, 2001, the court entered an "Order Re: Marital Residence." In relevant part, it stated that "[p]ursuant to this court's prior order entered herein on November 27, 2000, the real property . . . is awarded to [Jane] according to the terms of said order."

The Divorce Judgment was ordered to be "effective nunc pro tunc from December 17, 2000." It awarded legal and physical custody of the children to Jane subject to John's reasonable rights of visitation specified to be every other weekend from Saturday at 8:30 a.m. until Sunday at 6:00 p.m., after school

every Wednesday at 2:15 p.m. until 7:00 p.m. that day, and on Father's day. It stated that "[John] may not take the children off island for more than one night without [Jane's] written consent or further order of the court." It ordered that "[John] shall continue to pay to [Jane], as and for the support of the parties' children, \$515.00 per child per month for a total sum of \$1,030.00 per month" "through the Child Support Enforcement Agency" and "[Jane] shall continue to maintain medical and dental insurance for the benefit of the children for so long as any of them are minors. Each party shall pay one-half of all medical and dental expenses not covered by insurance." It ordered that child support payments

shall continue for each child until that child attains the age of 18 years and so long as the child continues his or her education post high school on a full-time basis at an accredited college or university, or in a vocational or trade school, or until said child attains the age of 23 years, whichever occurs first.

Regarding the "Children's Trust Monies," it ordered that "[e]ach party shall be responsible for setting up a trust account for each child in the amount of \$4,500.00 for a total of \$18,000.00 within one year of the date of this decree." It stated that

[Jane] was awarded sole ownership of the marital residence . . . . The court finds that for purposes of determining [John's] share of the equity interest, the appraised value of \$350,000 shall be used, less traditional commission of 6% and traditional closing costs of 1% for a starting value of \$325,5000 [sic]. [John's] share of the net equity shall be one-half of the proceeds remaining after the outstanding mortgage is deducted from the \$325,5000 [sic].

It ordered payment from escrow to Jane, from John's share of the net equity, all child support obligations that are due, \$256.02

to reimburse insurance payments on John's car, \$166.60 to repair the front door, \$756.72 to reimburse one-half of the home maintenance expenses, \$764.11 to reimburse one-half of the principal payments, \$4,031.36 to pay the increase in mortgage finance charges from March 2000, \$232.56 to reimburse one-half of the children's medical expenses not covered by insurance, \$2,754.12 to reimburse one-half of the daughter's tuition, and \$225 to pay one-half of the cost of the appraisal. It ordered the balance held in escrow in an interest-bearing account for a period of one year to secure John's payment of future child support, one-half of the children's tuition and uninsured medical expenses, and for the reason stated in the January 17, 2001 Interim Trial Order. Subject to specified exceptions, it awarded each party all personal property then in his or her title or possession.

On Tuesday, February 20, 2001, the day after a holiday, John timely filed, ex officio, "Defendant's Motion for Relief from Judgment or Order, Motion for Reconsideration and Stay Pending Reconsideration and/or Further Hearing"<sup>2</sup> seeking reconsideration of the award to Jane of the custody of the children, of the award to John of less than the minimal visitation, of the amount of child support he was ordered to pay,

---

<sup>2</sup> This motion was filed within the time limit permitted by Hawai'i Family Court Rules Rule 59(e) (2002).

and of the various deductions from his share of the value of the residence.

On February 22, 2001, John's attorney filed a Motion for Attorney's Fees and Costs and/or for a Charging Lien in Favor of Counsel for Defendant seeking payment of \$11,684.64 from the funds in escrow payable to John.

On February 23, 2001, Jane filed an "Ex Parte Motion for Temporary Suspension of Defendant's Rights of Visitation" because John allegedly had stated "that if he can get a flight, he intends to take both children to California this weekend." On that same date, the court entered an order granting the motion and scheduled a hearing on February 28, 2001. On March 2, 2001, the order was continued and a hearing was scheduled on March 8, 2001.

On February 27, 2001, John filed a notice that he had "filed a chapter 7 bankruptcy petition facsimile filing on February 27, 2001. Automatic stay is in effect pursuant to 11 U.S.C. section 362." We note that, on October 26, 2001, John's Chapter 7 Bankruptcy No. 01-0717 was closed.

On March 9, 2001, while the bankruptcy stay was in effect, John filed a notice of appeal of the Divorce Judgment.<sup>3</sup>

---

<sup>3</sup> This premature notice of appeal was authorized by Hawai'i Rules of Appellate Procedure Rule 4(a)(2) (2002).

On March 27, 2001, the court denied John's "Ex Parte Motion for Order Limiting Visitation Between Maternal Grandfather and the Parties' Minor Children."

On April 5, 2001, the court entered its "Order Denying Defendant's Motion for Relief from Judgment or Order, Motion for Reconsideration and Stay Pending Reconsideration and/or Further Hearing."

In his opening brief filed on July 19, 2001, John asks that we "reverse the Family Court's judgment, or in the alternative, remand this case directing the Family Court to make appropriate findings of fact." John contends that "[f]ollowing the notice of appeal the family court erred when it failed to provide any explanation by way of findings of fact or conclusions of law regarding its order re: marital residence on January 18, 2001, and its judgment granting divorce and awarding child custody on February 9, 2001."

We agree that the family court failed in its duty, pursuant to Hawai'i Family Court Rules (HFCR) Rule 52(a), to enter findings and conclusions. On the other hand, if John truly desired written findings and conclusions, he would have asked for a remand for their entry prior to the filing of his opening brief.

John contends

that the court, in awarding their marital property to [Jane] committed error: (1) when it took a 6% commission and a 1% closing cost from the starting appraised value of \$350,000.00; (2) when it

deviated from the Partnership Model Division in regards to the parties' joint interest in this property, and (3) when it failed to provide, pursuant to HFCR Rule 52(a), findings of fact and conclusions of law to explain its decision.

Contention (3) above has no merit because it is obvious that the court granted Jane's request in her October 24, 2000 Motion for Pre-Decree Relief for "[a]n order allowing [Jane] to purchase [John's] interest in the marital residence for \$44,750.00, based on a reduced price of \$350,000, less commission of 6% and other closing costs."

Nevertheless, we agree with contentions (1) and (2) above. We decide that the court abused its discretion when it, in effect, awarded the value of these deductions all to Jane. In her declaration in support of her motion, Jane stated, in relevant part, that "[i]f this court will allow me to buy out [John's] interest . . . I will then be able to keep our children in a home that they love." The "starting value" should have been \$350,000, not \$325,500. There was no purchase/sale, no 6% commission, and no "traditional closing costs of 1%[.]" There may have been an actual conveyance cost/escrow fee. Moreover, the reduction contradicts the following two prohibitions in the family court's Divorce Judgment: "[Jane] nor her broker shall be entitled to make any commission off of [Jane's] acquisition of the residence. [Jane] shall not in any way profit from her acquisition of the marital residence."

John contends that "[t]he family court erred when it awarded sole physical and legal custody to [Jane] based upon wanting to punish [John], rather than looking to the children's best interests." Upon a review of the record, we conclude that the allegation of fact upon which this point on appeal is based is not a fact.

John contends that "the family court erred in failing to determine all of the distribution of the parties' personal and household items without first identifying and determining the market values of all of the parties' personal and household items." There having been no dispute regarding the division and distribution of "personal and household items," and no relevant evidence, this point is without merit.

John contends that "THE FAMILY COURT ERRED IN ORDERING THAT ANY FURTHER ACCESS TO THE CHILDREN BY [JOHN] WAS CONDITIONED UPON THEIR CURRENT THERAPIST, JEANETTE EVANS, APPROVING OF ANY ADDITIONAL ACCESS." As noted above, the family court first awarded John specific visitation rights and then ordered that "[John] shall not be entitled to any other access until the children are further evaluated, **their current therapist Jeanette Evans approves of additional access** and a modification is ordered by this court." (Emphasis added.) John challenges that part of the quoted order that is in bold print. We agree with John that the part in bold print is either an improper delegation of



judicial authority or a premature decision not based on the evidence.

John contends that the family court abused its discretion when determining the amount of child support and when it failed to provide, pursuant to HFCR Rule 52(a), findings of fact and conclusions of law to explain its child support decision. We disagree. John's reduction in income was temporary because John had changed employers. John testified, in relevant part, as follows: "I have a chance of making 20 percent higher flat off commissions and then I get an override on everybody else's commissions there. So I have a chance of making a substantial more than I was able to make at Four Star [Mortgage]." The family court's decision was based on John's testimony. We decide that the family court did not abuse its discretion.

John contends "that the family court abused its discretion when ordering that his share of the net equity in the marital property be held in escrow to pay to [Jane] the unproven expenses listed." Upon a review of the record, we disagree with the allegation that the expenses were unproven and decide that the family court did not abuse its discretion.

John contends that

[t]he court also abused its discretion in ordering that [John] be held responsible for setting up a trust account for each child in the amount of \$4,500.00 for a total of \$18,000.00. [Jane] admitted that she withdrew the children's trust monies. [John] should not be held responsible for [Jane's] admitted withdrawals.

(Record citations omitted.) We disagree. John ignores Jane's other relevant testimony. Jane testified that the reason she spent the money was

[t]o pay home expenses, cuz at that time, um, we moved over here and [John] messed up and his -- the company's [sic] he was working with were holding all his check pending an investigation on their part on whether or not he really deserved them, the commissions that they -- that he was asking for, and we didn't have anything to live off of, and we had to borrow from [the] account and he was full aware of it.

In other words, the money was spent on family expenses.

Accordingly, we vacate the following parts of the November 27, 2000 "Order on Plaintiff's Motion for Pre-Decree Relief Filed on 10/24/00" outlined in bold print and order the addition of the following italicized parts:

3. Sale of Marital Residence - The parties shall equally share in the cost of an appraisal to be performed by ACM Appraisals, Inc. The parties shall be bound by the appraisal. In the event [Jane] is able to secure financing, she may have first option to acquire said property based on the appraisal amount. [John's] proceeds shall be one-half of the expected net proceeds **as if the property was sold to a third party**. "Expected net proceeds" shall be defined as the net proceeds remaining after **all traditional costs of sale, including, but not limited to traditional commission, closing costs** *the actual closing cost/escrow fee* and any outstanding mortgage have been deducted from the acquisition price. [Jane] nor her broker shall be entitled to make any commission off of [Jane's] acquisition of the residence. [Jane] shall not in any way profit from her acquisition of the marital residence. [John's] net proceeds are to remain in escrow until further order of the court.

Similarly, we vacate the following parts of the family court's February 9, 2001 Judgment Granting Divorce and Awarding Child Custody outlined in bold print and order the addition of the following italicized parts:

4. Access Schedule:

. . . .

b. Other Access: . . . [John] shall not be entitled to any other access until the children are further evaluated, **their current therapist Jeanette Evans approves of additional access** and a modification is ordered by this court. . . .

. . . .

5. Other matters covered by this judgment are as follows:

a. Child Support: . . . . Payments shall continue for each child until that child attains the age of 18 years and *thereafter* so long as the child continues his or her education post high school on a full time basis at an accredited college or university, or in a vocational or trade school, *but not past or until said child attains* the age of 23 years, **whichever occurs first.**

. . . .

g. Escrow Monies from Transfer of Real Property:

[Jane] was awarded sole ownership of the marital residence . . . . The court finds that for purposes of determining [John's] share of the equity interest, the appraised value of \$350,000 shall be used, **less traditional commission of 6% and traditional closing costs of 1% for a starting value of \$325,500 [sic].** [John's] share of the net equity shall be one-half of the proceeds remaining after the outstanding mortgage *and the actual closing cost/escrow fee* is deducted from the **\$325,500 [sic]** \$350,000.

In all other respects we affirm. We remand for action consistent with this opinion.

DATED: Honolulu, Hawai'i, September 27, 2002.

On the briefs:

Herman H. M. Ling  
for Defendant-Appellant. Chief Judge

Linda N. Monden  
(Rush Moore Craven Sutton  
Morry & Beh)  
for Plaintiff-Appellee. Associate Judge

Associate Judge