

NO. 24326

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

AGENHART WAYNE KAEO, Plaintiff-Appellant, v.
SHEILA ANNETT KAEO, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 00-01-2368)

MEMORANDUM OPINION

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

Defendant-Appellant Agenhart Wayne Kaeo (Agenhart) appeals the division and distribution of the property and debts of the parties part of the Decree Granting Absolute Divorce entered on May 9, 2001. We vacate that part and remand.

BACKGROUND

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|-------------------|--|
| June 15, 1968 | Agenhart and Defendant-Appellee Sheila Annett Kaeo (Sheila) were married. |
| May 14, 1969 | Their first child was born. |
| August 10, 1971 | Their second child was born. |
| April 1974 | Agenhart commenced employment at Oahu Transportation Services as a bus driver. |
| February 12, 1977 | Their third child was born. |
| 1977 | Agenhart and Sheila physically separated. |
| July 19, 2000 | Agenhart, represented by counsel, filed a complaint for divorce. |

August 11, 2000 Sheila, *pro se*, filed a handwritten answer.

September 21, 2000 Agenhart filed a motion to set and a proposed decree of divorce awarding each party all of his or her own life insurance cash values and retirement benefits. Agenhart's Income and Expense Statement reports that his gross income is \$3,816 per month.

November 16, 2000 Agenhart's motion to set was heard by District Family Judge Darryl Y. C. Choy. Sheila stated that she had been working for Gomes Bus Company for two years. When Judge Choy set the case to be heard at 10:30 a.m. on December 22, 2000, the response from Agenhart's counsel was, "I got a sentencing at 10 before Judge Perkins, but it should be short."

November 20, 2000 Judge Choy filed Pretrial Order No. 1 which noted that the only issues in dispute related to Agenhart's retirement benefits and the cash value of his life insurance policy.

December 22, 2000 Sheila's Income and Expense Statement states that her gross income per month is \$500 from Gomes Bus Company and \$134 from food stamps.

December 22, 2000 The trial commenced at 10:37 a.m. on December 22, 2000. District Family Judge Allene Suemori presided. Although the court knew that Agenhart's counsel was busy in criminal court in the same building, it conducted the hearing and stated its decision without him, and then added, "What I'm gonna do is - [Agenhart's counsel] is stuck up in criminal court. When he comes down, . . . I can give him all the terms of the divorce." After a recess of unknown length, Agenhart's counsel arrived and, in the presence of the parties, the court advised him of the decision.

February 7, 2001 Agenhart filed a Motion for Reconsideration of Decision Awarding Defendant Retirement Benefits or for New Trial asking for "an order that concludes that [Sheila] is not entitled to [Agenhart's] retirement benefits

or only a proportionate share of three years of those benefits or to grant a new trial on that issue."

March 23, 2001 Without a hearing, Judge Choy, for Judge Suemori, entered an order denying Agenhart's motion for reconsideration.

May 9, 2001 On May 9, 2001, Judge Suemori entered a Decree Granting Absolute Divorce, which stated, in relevant part, as follows:

3. Property.

. . . .

(c) Life Insurance. Each party is awarded . . . his/her life insurance policies, together with any cash surrender values.

(d) Retirement. Each party is awarded a percentage share of each other's retirement benefits to be one-half of the percent derived by dividing the participant's total months of service in the retirement plan divided by the number of months of service in the plan that occurred during the marriage.

DISCUSSION

Agenhart contends that the family court "erred in its determination of property division in this matter" and "the decree in this matter should be vacated as to the award of pension benefits and remanded for further hearing on the matter." Agenhart argues that he "in his Motion for Reconsideration adduced evidence that would support a division of his pension benefits based upon the date of the final separation of the parties." The "evidence" referred to is Agenhart's declaration¹ stating, in relevant part, as follows:

¹ The "**DECLARATION OF AGENHART WAYNE KAE0**" is signed by Plaintiff-Appellant Agenhart Wayne Kaeo but commences with the words "Michael G. M. Ostendorp declares that[.]"

2. My wife and I separated in February of 1976; I moved out of our marital residence informing my wife that I intended obtaining a divorce;

. . . .

5. At no time have my wife and I ever attempted any reconciliation; the only reason that no actual divorce was entered was the fact that neither my wife nor I have contemplated a new marriage.

Paragraphs 2 and 5 quoted above are contradicted by Sheila's pregnancy that resulted in the birth of their third child on February 12, 1977, and ignore the following testimony by Agenhart:

THE COURT: Okay. Then how come you didn't get a divorce?

[AGENHART]: Well, because I felt she wasn't working --

THE COURT: Uh-huh.

[AGENHART]: -- and I have medical for her.

. . . .

THE COURT: Let me ask you something, and -- do you have a girlfriend now? Is that what's happening?

[AGENHART]: Yes.

In his opening brief, Agenhart contends that the Hawai'i Supreme Court has never "disavowed the use of the date of final separation in contemplation of divorce" as the date for dividing the property of the parties at the time of the divorce. Agenhart does not explain the continued life of Categories 1 through 5 as described in Tougas v. Tougas, 76 Hawai'i 19, 27, 868 P.2d 437, 445 (1994), and the contrasting death of Category 6. Category 6 included the increase in value of the property of the parties between the date of final separation in contemplation of divorce and the date of the conclusion of the

evidentiary part of the trial. In Myers v. Myers, 70 Haw. 143, 764 P.2d 1237 (1988), the Hawai'i Supreme Court abolished Category 6 and emphatically stated, in relevant part, as follows:

Our divorce and separation laws do "not contemplate any [final] division of property other than where the person is divorced a *vinculo [matrimonii]*." Clifford v. Clifford, 42 Haw. 279, 283 (1958). This is consistent with the notion that "marriage is a partnership to which both parties bring their financial resources as well as their individual energies and efforts. That one partner brings to the marriage substantially greater [resources] than the other does not make this any less the case." Cassiday v. Cassiday, 68 Haw. at ----, 716 P.2d at 1136. A presumption that the non-owning spouse is not entitled to any part of the appreciation in property legally owned by the other after a declaration by either that the marriage has ended is inconsistent with the partnership model of marriage we have accepted and the rule that a final division of marital property can be decreed only when the partnership is dissolved.

70 Haw. at 154, 764 P.2d at 1244 (brackets in original).

In his opening brief, Agenhart also argues that

[p]roceeding to trial in the absence of [Agenhart's] counsel prejudiced him. [Agenhart] was unable to adduce evidence relating to property division, specifically his pension benefits, the only real issue at trial. As has been demonstrated above, the Court engaged in no careful elicitation of testimony on facts relevant to the division of property which it should have employed in deciding that issue. The presence of counsel would have allowed [Agenhart] to adduce such evidence and make a record for [a]ppellate review.

Although Agenhart fails to state what relevant facts are not in the record that he would have introduced, we agree with Agenhart that the court erred when it tried and decided the case before his counsel of record appeared. On remand, the family court must afford counsel for Agenhart an opportunity to present and argue Agenhart's case prior to entering its judgment.

CONCLUSION

Accordingly, we grant Agenhart the relief sought by him. We vacate only that part of the Decree Granting Absolute

Divorce that divides and distributes the property and debts of the parties (specifically parts 3 and 4) and remand that part of the case for a new hearing.

DATED: Honolulu, Hawai'i, November 19, 2002.

On the briefs:

Michael G. M. Ostendorp,
for Plaintiff-Appellant.

Chief Judge

Associate Judge

Associate Judge