

NO. 24664

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

NATALIE K. DUNSTER, Plaintiff-Appellant/Cross-Appellee, v.
JEFFREY DUNSTER, Defendant-Appellee/Cross-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 97-0547)

MEMORANDUM OPINION

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

Plaintiff-Appellant/Cross-Appellee Natalie K. Dunster (Natalie) appeals from the family court's October 3, 2001 "Order Re Plaintiff's Motion and Affidavit for Post-Decree Relief Filed on January 29, 2001 Seeking Enforcement of Prior Court Orders." In part, we affirm. In part, we vacate and remand with instructions.

BACKGROUND

August 7, 1991 Defendant-Appellee/Cross-Appellant Jeffrey Dunster (Jeffrey) and Natalie were married.

May 26, 1998 Judge Karen M. Radius entered a "Decree Granting Absolute Divorce and Awarding Child Custody" (Divorce Decree) stating, in relevant part, as follows:

15. Note Receivable. [Jeffrey] shall pay \$100,000.00 directly to a third-party seller of a primary residence which [Natalie] may seek to purchase for the lifetime use and benefit of [Natalie], subject to the terms hereinafter stated. Such sum shall be treated as a loan to [Natalie], without interest, and shall be repayable to [Jeffrey] in full when the property is sold, leased, or otherwise hypothecated, provided that if a substitute primary residence is purchased by [Natalie] the repayment of such sum shall be deferred until the death of [Natalie] or her sale of

such primary residence, without purchasing or contracting for the purchase of a substitute residence concurrently with the sale of such former marital residence. . . .

[Jeffrey] shall exercise his best efforts to cause the acceleration of the payment of \$100,000.00 owing to him by Jain Ye Corp. In the event [Jeffrey] is required to offer Jain Ye Corp. a discount as an inducement to an accelerated payment, [Jeffrey] shall personally supplement the amount paid by Jain Ye Corp. so as to make available the entire sum of \$100,000.00 incident to this paragraph. In no event shall such sum be made available to [Natalie] later than one (1) year from the effective date of this divorce.

- November 1998 Natalie purchased a Crosspointe residence.
- November 30, 1999 Judge Diana Warrington ordered Jeffrey "to pay the outstanding mortgage balance as of October 18, 1999 which was determined to be in the amount of . . . \$91,350.00."
- June 13, 2000 After a March 22, 2000 hearing, Judge Warrington approved an order requiring Jeffrey, inter alia, to pay "Three (3) months of mortgage arrearages totaling approximately \$2,436.00" and

Notwithstanding the foregoing, [Jeffrey] shall pay in advance the sum of \$812.00 for the mortgage payment for March 2000. Such payment shall be credited against total sums owing to [Natalie] hereunder. [Jeffrey] shall timely pay future mortgage payments, and [Jeffrey] will fax to [Natalie] proof of the mortgage payments as they are made.

- June 15, 2000 Judge Warrington ordered Jeffrey, inter alia, to pay "\$1624.00 for (2) months mortgage arrearages plus \$38.28 for late fees X 2 for each month plus 10% interest until paid."
- January 29, 2001 Judge Christine E. Kuriyama ordered Jeffrey to: "Immediately pay [Natalie] the sum of \$91,350.88 due and owing as of January 15, 2000, or timely pay [Natalie's] monthly mortgage as was ordered previously by the Court[,] " [i]mmediately pay to [Natalie] the sum of \$2,550.84 for the outstanding mortgage payments due and owing for the months of September, October and November of 2000[,] " and "[i]mmediately reimburse [Natalie] for the mortgage arrearages, including late fees and 10% interest, which she paid for the months of January and February 2000, in the

total sum of \$1,842.47." It further stated, "The automatic bank transfers from [Jeffrey's] bank account to pay [Natalie's] monthly mortgage payments are authorized on the 10th of each month, commencing in February of 2001."

- January 29, 2001 Natalie filed a motion for post-decree relief seeking enforcement of prior orders.
- February 20, 2001 Jeffrey filed a motion for post-decree relief seeking termination of the \$100,000 loan obligation.
- June 22, 2001 Judge Kuriyama heard Natalie's January 29, 2001 motion and Jeffrey's February 20, 2001 motion.
- October 3, 2001 Judge Kuriyama entered an order stating, in relevant, part as follows:

The \$100,000.00 was to be treated as an interest free loan to [Natalie], subject to repayment in full to [Jeffrey] when the property purchased by [Natalie] is "sold, leased, or otherwise hypothecated";

According to her testimony . . . , [Natalie] has rented out her Crosspointe property . . . , and has been residing with her fiancé in Kaneohe as of May 1, 2001. . . . The Court therefore finds, pursuant to the provisions of Section 15 of the Decree, that [Jeffrey] no longer is obligated to pay [Natalie] the sum of \$100,000.00, or any portion of such sum as may previously have been ordered by the Court. . . .

At the time of the June 22, 2001 hearing, [Jeffrey] had tendered to Countrywide, [Natalie's] lender, the total sum of \$5,874.00 for [Natalie's] mortgage and insurance payments, and as of the date of the hearing, [Natalie] had incurred the total sum of \$2,839.67 owing to Countrywide [comprised of \$115.55 in late charges, \$2,083.33 in attorney's fees and a \$36.00 property inspection fee to avoid foreclosure against the property, as well as \$604.90 in interest], as a result of [Jeffrey's] failure to timely pay her mortgage and insurance payments as he previously had been ordered to do by the Court. Consistent with the provisions of Section 15 of the Decree, [Natalie] is ordered to repay [Jeffrey] the loan amounts he has provided for [Natalie's] Crosspointe property, i.e., the total sum of \$3,034.33[.]

- October 19, 2001 Natalie filed a "Motion for Reconsideration" in which she noted that "[a]lthough [Jeffrey] claims he has paid \$5,874.00 to [Natalie's] lender, only \$1,152.34 was allocated towards the principal of the loan The

remainder paid interest, mortgage insurance and late fees." Natalie admits that "[Natalie] understands that this motion has not been filed timely[.]"

December 31, 2001 Judge Kuriyama entered an "Order Denying Plaintiff's Motion for Reconsideration Filed October 19, 2001."

November 2, 2001 Natalie filed her notice of appeal.

December 31, 2001 Judge Kuriyama entered "Findings of Fact and Conclusions of Law" (FsOF and CsOL) stating, in relevant part, as follows:

FINDINGS OF FACT

. . . .

3. Section 15 of the Divorce Decree, entitled "Note Receivable", states:

[Jeffrey] shall pay \$100,000.00 directly to a third-party seller of a primary residence which [Natalie] may seek to purchase for the lifetime use and benefit of [Natalie], subject to the terms hereinafter stated. Such sum shall be treated as a loan to [Natalie], without interest, and shall be repayable to [Jeffrey] in full when the property is sold, leased, or otherwise hypothecated, provided that if a substitute primary residence is purchased by [Natalie] the repayment of such sum shall be deferred until the death of [Natalie] or her sale of such primary residence, without purchasing or contracting for the purchase of a substitute residence concurrently with the sale of such former marital residence. It is the intent of the parties that [Natalie] shall not ever have direct control or possession of said sum. Said sum shall be repaid in full, regardless of any diminution in value for any reason to the residence which has been purchased with such funds. [Jeffrey] may, at his sole option, cause appropriate documents(s) to be recorded to secure his right to such repayment with which [Natalie] shall fully cooperate, provided that the parties hereby agree that lack of recordation will not affect the validity, enforceability, or priority of such indebtedness.

. . . .

[Jeffrey] shall exercise his best efforts to cause the acceleration of the payment of \$100,000.00 owing to him by Jain Ye Corp. In the event [Jeffrey] is required to offer Jain Ye Corp. a discount as an inducement to an accelerated payment, [Jeffrey] shall personally supplement the amount paid by Jain Ye Corp. so as to make available the entire sum of \$100,000.00 incident to this paragraph. In no event

shall such sum be made available to [Natalie] later than one (1) year from the effective date of this [divorce].

This section shall be subject to the continuing jurisdiction of the Family Court of the First Circuit.

4. In approximately November of 1998, [Natalie] purchased a primary residence . . . (the "Crosspointe property").

5. [Jeffrey] failed to pay [Natalie] [sic] the sum of \$100,000.00 within one (1) year from the effective date of the parties' divorce and the Court modified Section 15 of the Divorce Decree by its November 30, 1999 Order . . . , which states, in relevant part:

[Jeffrey] is ordered to pay the outstanding mortgage balance as of October 18, 1999 which was determined to be in the amount of \$94,350.88 less \$3,000.00 which thereby totals \$91,350.00. . . .

. . . .

If [Jeffrey] does not pay the \$91,350.88 by January 15, 2000, [Jeffrey] shall be responsible to timely pay the loan and mortgage insurance payments under [Natalie's] mortgage obligations in such amount as then applies. Payment shall be made directly to the lender. . . .

6. [Jeffrey] failed to pay [Natalie] [sic] the sum of \$91,350.88 pursuant to the November 30, 1999 Order, and at the time of trial, had not fully complied with the following orders which subsequently had been entered by the Court with respect to [Natalie's] mortgage obligations: the June 13, 2000 Stipulated Order . . . ; the June 15, 2000 Order . . . ; and the January 29, 2001 Order

. . . .

10. At the time of trial, [Jeffrey] had tendered to Countrywide, [Natalie's] lender for the Crosspointe property, the total sum of \$5,874.00 for [Natalie's] mortgage and insurance payments, and [Natalie] had incurred the total sum of \$2,839.67 owing to Countrywide [comprised of \$115.55 in late charges, \$2,083.33 in attorney's fees and a \$36.00 property inspection fee to avoid foreclosure against the property, as well as \$604.90 in interest], as a result of [Jeffrey's] failure to comply with the prior orders of the Court.

11. At the time of trial, [Natalie], by the following actions, had failed to comply with the provisions of Section 15 of the Divorce Decree regarding the note receivable which would mandate the continuation of [Jeffrey's] loan obligation to her: (a) [Natalie's] Crosspointe property was being rented to a third party and thus no longer could be considered as [Natalie's] primary residence, and (b) as of approximately May, 2001, [Natalie] was residing in Kaneohe in a home which she had neither purchased nor contracted to purchase.

. . . .

CONCLUSIONS OF LAW

. . . .

3. [Jeffrey] no longer is obligated to pay [Natalie] the sum of \$100,000.00, or any portion of such sum as may previously have been ordered by the Court.

4. [Jeffrey] is entitled to repayment of the loan amounts he has provided for [Natalie's] Crosspointe property, excluding \$3,034.33 [sic] in costs incurred by [Natalie] due to [Jeffrey's] failure to timely make these payments as previously ordered by the Court.

RELIEF SOUGHT

In her opening brief, Natalie states that

this Court should reverse the Family Court's Order that [Natalie] must repay [Jeffrey] under Section 15 of the Decree. The Family Court abused its discretion when it ordered [Natalie] to repay [Jeffrey] before [Jeffrey] fulfilled his obligation under the Decree and subsequent orders. The Order should be reversed and the matter remanded with instructions directing the Family Court to enforce the Decree and subsequent orders, which compel [Jeffrey] to make the full amount of the loan available to [Natalie].

In the alternative, even if the Family Court was correct in determining that [Natalie] had to repay [Jeffrey] before he fulfilled his obligation of fully lending her the \$100,000.00, the Family Court clearly abused its discretion when it ordered [Natalie] to repay [Jeffrey] monies that did not go towards the \$100,000.00 mortgage principal. The order should be reversed and [Natalie] should only be compelled to repay those amounts, which [Jeffrey] paid towards the \$100,000.00 mortgage principal.

POINTS ON APPEAL

Natalie presents the following points on appeal.

1. CsOL nos. 3 and 4 are clearly erroneous in light of FsOF nos. 5, 6, and 10.

2. The FsOF and CsOL that Jeffrey failed to comply with the court's orders are inconsistent with the finding that Natalie failed to comply with Section 15 of the Divorce Decree.

3. "[N]o fact finding was done as to the intent of the parties regarding Section 15 of the Decree when the stipulation was entered into, specifically, whether the full loan of \$100,000.00 was meant to be a condition precedent to the repayment of any portion of the loan."¹

4. The family court "erred when it did not exercise its equitable discretion when it looked at why the loan has (arguably) become due in the first place: the loan is due because [Natalie] is not living in the residence, but [Natalie] is not living in the residence because [Jeffrey] never made the loan."

5. The family court "erred when it ordered [Natalie] to repay [Jeffrey] monies that did not go to the \$100,000.00 mortgage principal."

DISCUSSION

The record is clear that, without seeking the family court's prior permission to do so while not causing the consequences specified in Section 15 of the Divorce Decree, Natalie performed an act that caused those consequences, namely, that terminated Jeffrey's obligation to pay the loan specified in Section 15 of the Divorce Decree and caused any amounts Jeffrey loaned to Natalie pursuant to Section 15 of the Divorce Decree to

¹ When interpreting a family court decree, the intent of the parties is not relevant.

be repayable by her to Jeffrey. Natalie's after-the-act effort to persuade the family court that her prior act was justified and should not be deemed to have caused the consequences expressly stated in Section 15 of the Divorce Decree is too late.

The record also is clear that prior to Natalie's performance of the act that caused the consequences specified in Section 15 of the Divorce Decree, Jeffrey failed to comply with Section 15 of the Divorce Decree and with subsequent family court orders requiring him to pay the amount of money specified and costs incurred by Natalie as a result of his failure to pay it. In its October 3, 2001 order, the family court recognized that Jeffrey and not Natalie should pay

\$2,839.67 owing to Countrywide [comprised of \$115.55 in late charges, \$2,083.33 in attorney's fees and a \$36.00 property inspection fee to avoid foreclosure against the property, as well as \$604.90 in interest], as a result of [Jeffrey's] failure to timely pay her mortgage and insurance payments as he previously had been ordered to do by the Court.

In FOF no. 10, the family court found that Jeffrey had paid \$5,874.00 and that Natalie had incurred the \$2,839.67 as a result of Jeffrey's failure to make the loan to her. The family court assumed, without any evidence to support the assumption, that all of the remaining \$3,304.33 was applied to pay for costs not incurred by Natalie due to Jeffrey's failure to timely make payments as previously ordered by the Court. In COL no. 4, the family court stated that Jeffrey is entitled to repayment of the

\$5,874.00 "excluding \$3,034.33 [sic] in costs incurred by [Natalie] due to [Jeffrey's] failure to timely make these payments as previously ordered by the Court."

Natalie contends that more than \$2,839.67 of the amount paid by Jeffrey was applied to pay costs incurred by Natalie due to Jeffrey's failure to timely make payments as previously ordered by the Court. The family court must decide this fact and must not order Natalie to repay Jeffrey any of the \$3,304.33 that was applied to pay costs incurred by Natalie due to Jeffrey's failure to timely make payments as previously ordered by the Court.

CONCLUSION

Accordingly, we affirm the family court's October 3, 2001 "Order Re Plaintiff's Motion and Affidavit for Post-Decree Relief Filed on January 29, 2001 Seeking Enforcement of Prior Court Orders," except that we vacate the last paragraph of part 1 on page 3 thereof. We also vacate FOF no. 10 and COL no. 4.

We remand for (1) a determination of exactly how much of the remaining \$3,304.33 was not applied to pay costs incurred by Natalie due to Jeffrey's failure to timely make payments as previously ordered by the Court and (2) the entry of an order requiring Natalie to reimburse Jeffrey only that amount.

DATED: Honolulu, Hawai'i, February 18, 2003.

On the briefs:

Zibilla Lee Wolfe
for Plaintiff-Appellant/
Cross-Appellee.

Chief Judge

Gary Victor Dubin
for Defendant-Appellee/
Cross-Appellant.

Associate Judge

Associate Judge