NOT FOR PUBLICATION

NO. 24882

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

BETTY LAURENE LEVY, Plaintiff-Appellee/Cross-Appellant, v.
WILLIAM BENJAMIN LEVY, Defendant-Appellant/Cross-Appellee

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-D NO. 99-0036K)

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

Defendant-Appellant/Cross-Appellee William Benjamin Levy (William) appeals from the Divorce Decree entered in the Family Court of the Third Circuit, Judge Aley K. Auna, Jr., presiding, on December 28, 2001. Plaintiff-Appellee/Cross-Appellant Betty Laurene Levy, now known as Betty Laurene Bratwold (Laurene), cross-appeals.

We conclude that (1) factual parts of the August 31, 2000 "Order Re: Divorce, Spousal Support, Property Division, Validity of Pre-Nuptial Agreement and Attorney's Fees" (August 31, 2000 Order), the September 28, 2001 "Corrected Order on Defendant's Motion for New Trial on Certain Issues, or to Reconsider, Alter, or Amend Certain Parts of Order Re: Divorce, Spousal Support, Property Division, Validity of Pre-Nuptial Agreement and Attorney's Fees, Filed August 31, 2000"

(September 28, 2001 Corrected Order), and of the Divorce Decree are not supported by substantial evidence and (2) the court erred when it failed to allow William the opportunity to prove the allegations of his Hawai‘i Family Court Rules (HFCR) Rule 59 motion for reconsideration of a part of the Divorce Decree. As a result, we vacate those parts and other related parts of the August 31, 2000 Order, the September 28, 2001 Corrected Order, and the Divorce Decree and remand for further proceedings consistent with this opinion.

BACKGROUND

May 28, 1917	Birth date of William.
May 5, 1937	Birth date of Laurene.
November 2, 1981	Date of William's and Laurene's Pre-Nuptial Agreement (Pre-Nuptial Agreement) stating, in relevant part, as follows:[1]

> 4. Each party shall, during his or her lifetime, keep and retain sole ownership, control and enjoyment of all property, real and personal, now owned or hereafter acquired by him or her and regardless of where located, free and clear of any claim by the other.[2]
>
> . . . .

[1] Hawaii Revised Statutes Chapter 572D (1993) is Hawai‘i's Uniform Premarital Agreement Act.

[2] No interpretation of the phrase "now owned or hereafter acquired by him or her" was argued or made. Does it refer to only legal title or does it include equitable title?

> 8. (a) If at any time after their marriage, [William] and [Laurene] separate (within the intendment of that term as defined in subparagraph 8(e) of this agreement) [Laurene] shall be entitled to receive from [William] . . . the amounts recited in subparagraph 8(b).
>
> (b) [Laurene] in the event of separation shall be entitled to an immediate payment of $10,000 in cash. In addition, she shall be entitled to $2,100 per month for each full month between the date of the marriage and the date of the separation, but not less than 24 months nor more than 120 months regardless of the length of the period between the marriage and the separation.
>
> (c) The monthly payments contemplated in this paragraph 8 shall cease at the death or remarriage of [Laurene]. [Laurene] shall be deemed to have remarried for this purpose if she enters into an open and continuing cohabitation arrangement (sometimes colloquially referred to as "living together") with a man whether or not preceded by a legally recognized formal marriage.
>
> (d) [William's] obligation under this paragraph 8 shall survive his death and be an obligation of his estate thereafter.
>
> (e) Separation for purposes of this agreement shall mean the parties ceasing to live together as husband and wife with a stated resolve on the part of either party to live separately, whether or not such separation is accompanied by a written agreement or judicial proceeding.
>
> . . . .
>
> 10. [Laurene] agrees that assuming compliance by [William] and [William's] estate with the terms of this agreement, she will make no claim for support, alimony, division of property or interest in [William's] estate under any circumstances.

November 19, 1981 William and Laurene were married.

June 12, 1989 William executed a charitable remainder annuity trust (the CRAT) named the "William B. Levy Irrevocable Annuity Trust[.]" The CRAT named William as its Trustee. William conveyed the following property to the CRAT:

600 Class A Units of Midfarms Limited Partnership
500 Class B Units of Midfarms Limited Partnership
1,000 Class C Units of Midfarms Limited Partnership
10 General Partnership Units of Midfarms Limited Partnership[3]

The CRAT states, in relevant part, as follows:

> FIRST: The Trustee shall hold and dispose of the Trust Estate as follows:
>
> (A) (1) (a) For each taxable year during the Annuity Trust Period (as described in Subparagraph (1)(c) of this Section (A)), except as modified by Paragraph 5 of this Section (A), the Trustee shall pay jointly to or for the use of William B. Levy and Laurene Levy (hereinafter sometimes called the "Beneficiary" or "Surviving Beneficiary" singularly or the "Beneficiaries" collectively) in equal shares for their joint life, and then to the survivor of them for his or her life, the Annuity Trust Amount (as described in Subparagraph (1)(b) of this Section (A)).
>
> (b) The "Annuity Trust Amount" shall be an amount equal to eleven and two-tenths percent (11.2%) of the initial net fair market value of the assets of the Trust Estate.
>
> (c) The period beginning on the date of the execution of this Annuity Trust Agreement and ending on the date of death of the Surviving Beneficiary shall be called the "Annuity Trust Period."
>
> (d) The Trustee, with the consent of each Beneficiary, may pay amounts other than the Annuity Trust Amount to or for the use of any organization described in Code Section 170(c).

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[3] In a September 11, 2000 declaration, Defendant-Appellant/Cross-Appellee William Benjamin Levy (William) stated that

> in 1980 a family business partnership, Midfarms Limited Partnership (hereinafter "Midfarms"), was created with my son and me as General Partners, and my daughter as a Limited Partner. The nature of the business was real estate investment of the principal assets, which consisted of approximately 620 acres of farmland. This land was acquired by the exchange of properties many years before my marriage to [Plaintiff-Appellee/Cross-Appellant Betty Laurene Levy (Laurene)]. Prior to certain recent sales in 1999 of this land, Midfarms earned income from rental of vacant agricultural land.

(2) The Annuity Trust Amount shall be paid in equal quarterly installments on or about the last days of March, June, September and December of each taxable year of the Annuity Trust.

(3) The taxable year of the Annuity Trust shall be the twelve-month period ending December 31. . . .

(4) No additional contributions may be made to this Annuity Trust after the Grantor's contribution hereunder as described in Schedule A.

. . . .

(6) Any income of the Trust Estate not required to be distributed currently hereunder shall be added to and become part of the principal of the Trust Estate.

. . . .

(B) Upon the termination of the Annuity Trust Period, the Annuity Trust shall terminate, and the entire Trust Estate, other than any amounts then due to the Beneficiaries or Beneficiary or either of their estates, shall be paid over and distributed to the following organizations in the following proportions: one-fifth (20%) to the University of Michigan, Ann Arbor, Michigan, . . . ; fifteen percent (15%) to the College of Engineering at the University of Michigan, Ann Arbor, Michigan; and sixty-five percent (65%) to be divided equally among the following [twenty-one charitable] organizations[.]

The Annual Annuity Trust Amount was approximately $224,000.00 per year, or $18,666.67 per month.

The CRAT authorized

that the Grantor, at any time by testamentary or inter vivos instrument, may designate one or more charitable organizations . . . to be added to or substituted for the Remaindermen named herein, and may change the percentage distributions to the named and/or substituted or added Remaindermen[.]

December 4, 1989 An "Amendment to William B. Levy Irrevocable Annuity Trust" (Amendment) was signed by William as Trustee. As Beneficiaries, William and Laurene consented to this Amendment. There is no evidence of the consent of any of the remainder beneficiaries. This Amendment states, in relevant part, as follows:

> (A) (1) (a) For each taxable year during the Annuity Trust Period (as described in Subparagraph (1)(c) of this Section (A)), . . . the Trustee shall pay jointly to or for the use of William B. Levy and of Laurene Levy, as long as she shall be married to and living with William B. Levy, (hereinafter sometimes called the "Beneficiary" or "Surviving Beneficiary" singularly or the "Beneficiaries" collectively) for their joint life, or until such time as Laurene Levy shall no longer be married to and living with William B. Levy, and then to William B. Levy or, if he is not then living, to Laurene Levy, if she survives William B. Levy and is married and living with William B. Levy at his death, for his or her life, the Annuity Trust Amount (as described in Subparagraph (1)(b) of this Section (A)).

January 1999	Laurene paid $5,000 to her attorney via William's VISA card.
February 3, 1999	Laurene filed the Complaint for Divorce.
May 25, 1999	Judge Victor M. Cox entered an "Order on Plaintiff's Motion for Temporary Relief Filed February 12, 1999" stating, in relevant part, as follows: "Temporary support is awarded to [Laurene] in the amount of $3,000.00 per month, payable on the 1st of each month, commencing February 12, 1999, without prejudice to any party's claims or defenses as to the ultimate decision on any issue[.]"
August 24, 1999	Judge Cox entered an "Amended Decision/Order on Defendant's Motion for Rehearing, Reconsideration and Further Relief Filed May 17, 1999." "[William] shall advance to [Laurene's] attorney the amount of $5[,]000 for fees and costs within ten days of this order without prejudice to any parties[']claims or defenses as to any issue on final disposition."
November 29, 1999	William filed his position statement. In essence, he sought enforcement of the Pre-Nuptial Agreement.
April 12, 2000	The "Third Amended Asset and Debt Statement of William Benjamin Levy" was filed. It states that William owns a "CRT - Note

Receivable" valued at $1,462,447 and a "CRT - Annuity Receivable" valued at $520,165.

April 12, 2000 — The "Third Amended Income and Expense Statement of William B. Levy" was filed.

April 14, 2000 — Laurene filed "Plaintiff's Position Statement" stating, in relevant part, as follows:

> If the Prenuptial Agreement is found to be valid, the court needs to consider the disposition of all of the property, retirement plans and marital income earned during the marriage which are not covered under the terms of the prenuptial agreement, as well as a determination of a fair and reasonable amount for alimony at the present time.

Laurene did not identify "the property, retirement plans and marital income earned during the marriage which are not covered under the terms of the prenuptial agreement[.]" Laurene likewise did not explain how, in light of paragraph "4" of the Pre-Nuptial Agreement, there could be any such "property, retirement plans and marital income[.]"

May 22, 2000 — The "Asset and Debt Statement of Laurene Levy" was filed.

May 22, 2000 — The "Income and Expense Statement of Laurene Levy" was filed.

May 26, 2000 — Judge Auna held a trial. The first question addressed was whether the Pre-Nuptial Agreement was valid and enforceable.

June 1, 2000 — The trial continued.

June 2, 2000 — The trial continued and was completed. One of the exhibits received into evidence was Exhibit No. 74, which is William's "Personal Financial Statement As of March 16, 1999." On its page 4, it lists the following Accounts and Notes Receivable by William:

CRT-Note Receivable		1,838,807
CRT Annuity Receivable		143,805
DI-Loan Receivable		90,173
	TOTAL	**2,072,785**

It further states as follows:

Re: Charitable Remainder Annuity Trust (CRT)/Midfarms, L.P.

The following is a description of this plan, word for word, as written by Chris Singleton, Merrill Lynch, on June 2, 1989:

> A charitable remainder annuity trust is an irrevocable trust in which the donor retains an income interest in the property transferred to it for life or for a term of years, with the remainder interest in the trust to pass to one or more qualified charities on termination of the life interest or the designated term. If properly structured in accordance with Internal Revenue Code requirements, creation and funding of such a trust qualifies for income, estate, and gift tax deductions.
>
> Under an annuity trust arrangement, you receive an annuity from the trust, payable in an annual amount which is determined as either a stated sum or with reference to a fixed percentage of the initial value of the trust. Based upon your cash flow needs, and an analysis of the tax benefits that would accrue to you under various payout rates, the annual payment from your annuity will be approximately $224,000.
>
> Under the annuity trust arrangement, you will be entitled to receive the same dollar amount each year regardless of any increase or decrease in the value of the trust.

1-CRT Note Receivable $1,838,807: This is the present value as of 3/16/99 which includes all the Promissory Notes less any distributions/payments made to [William]. Promissory Notes, done on a quarterly basis, are transacted in the form of a "Letter of Authorization"--$55,513.13 for the first two quarters, and $55,513.14 for the last two quarters. The first Promissory Note took effect December 18, 1989, in the amount of $123,497.17 which was the initial payment for the short taxable year June 12-December 31, 1989.

2-CRT Annuity Receivable $143,805: The net fair market value of [William's] interest in Midfarms Limited Partnerships gifted into the CRT is $1,982,612.00. Taking this figure at the elected 11.20% Payout Rate, equals $222,052.54 which is the amount to be received for each full taxable year (this amount is processed quarterly as indicated in Item 1). So the difference between $1,982,612 and the CRT Note Receivable balance of $1,838,807 is [sic] indicated here as the long term or future payments expected.

3-DI Loan Receivable $90,173: This is the total Principal balance only, due from the Delsteel loan.

The court orally decided that, in the Pre-Nuptial Agreement, (1) the property division provision is valid and enforceable and (2) the spousal support amount is unconscionable and unenforceable.

June 15, 2000 Laurene filed a memorandum on property division and spousal support stating, in relevant part, as follows:

> [William] admitted at trial, that at the time he created the [CRAT] in 1989, he gifted to [Laurene] a one-half interest in the income to be paid by trust. From 1989 to the date of separation, [William] accepted promissory notes from the [CRAT] in lieu of payment of the income interest payable to the parties. By the date of separation, these promissory notes from the trust payable jointly to the parties totaled $1,838,807.00. [William] admits he has not paid [Laurene] any of the income or any portion of these promissory notes to [Laurene].[4]
>
> [Laurene] should be awarded her one-half interest in the promissory notes together with any accrued but unpaid interest from the date of separation to the present. [Laurene] should also be awarded her one-half of the income stream from the [CRAT] from the date of separation. All other separate property held in the parties' individual names should be awarded to the party in whose name the property is held, or in whose possession the property is held.
>
> The Court determined that the spousal support provision of the Prenuptial Agreement was unconscionable. The Court should now determine reasonable and equitable support for [Laurene] applying the factors set forth in H.R.S. § 580-47. [Laurene] should also be awarded [a] one-time payment of $20,000.00 ($10,000.00 adjusted for inflation) provided in the Prenuptial Agreement to allow her to set up her own household. The Court should exercise its

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[4] This paragraph, which the court ultimately agreed with, is misleading. Generally, it misunderstands the wording of the charitable remainder annuity trust (the CRAT) and the definition of the word "income". Specifically, the first sentence misrepresents the wording of the CRAT. The second and third sentences allege the following facts neither admitted by William nor supported by substantial evidence: (a) that William accepted promissory notes from the CRAT "in lieu of payment of the income interest payable to the parties" and (b) these promissory notes from the CRAT are "payable jointly to the parties[.]" The fourth sentence misrepresents that "these promissory notes" have "income". William alleges that the promissory notes are in the amount of his loans and are payable without interest.

discretion and reject the prenuptial provision requiring the termination of spousal support upon the cohabitation by [Laurene].

August 31, 2000 The court entered its August 31, 2000 Order stating, in relevant part, as follows:

1. The parties . . . separated on February 12, 1999.

. . . .

7. . . . .

. . . .

f. Unlike spousal support provisions, the unconscionability of provisions in the Agreement governing division of property must be evaluated at the time the Agreement was executed.

. . . .

8. The Court finds and concludes that the Agreement was freely and voluntarily made.

. . . .

9. The Court finds and concludes that the provisions regarding spousal support (Paragraph No. 8) and division of property (Paragraph No. 4) of the Agreement are not integrated. . . .

. . . .

11. The Court finds and concludes that the property division provision (Paragraph 4) of the Agreement is not one-sided.

. . . .

b. . . . [T]herefore, it is enforceable.

12. The Court finds and concludes that Paragraph 8(b) of the Agreement regarding the amount of spousal support is one-sided, and thus, unenforceable. All other subsections of Paragraph 8, including the remaining portion of Paragraph 8(b), are not one-sided, and thus, enforceable.

a. Paragraph 8(b) of the Agreement pertaining to the amount of spousal support must be evaluated at the time of the divorce by considering all relevant factors and circumstances, ...

b. Paragraph 8(b) of the Agreement called for spousal support upon separation as follows: $10,000 immediate payment and

$2,100 per month for a maximum of 10 years. It also called for the spousal support to survive the death of [William].

c. If this provision had an inflation factor . . . or some other factor that would allow a review of the financial condition of the parties at the time of divorce, then perhaps that provision of the Agreement would not have been so one-sided.

d. Although the amounts stated in Paragraph 8(b) may have been reasonable at the time of execution (and the evidence has supported this conclusion), due to changed circumstances enforcement would be unconscionable today given the present circumstances of the parties.

13. The Court finds and concludes that spousal support in the amount of $8,000.00 (inclusive of taxes) per month from March 1, 1999 (the month after the date of separation) to February 29, 2000 (the month commencing cohabitation) is reasonable and equitable under the circumstances. [William] is entitled to a credit for all payments made under a previous court order for temporary spousal support.

. . . .

15. [William] created an Irrevocable Annuity Trust dated June 12, 1989 ("Trust") and gifted a one-half interest in the income of the Trust to [Laurene]. From 1989 to the date of separation, [William] accepted promissory notes from the Trust in lieu of payment of the income interest payable to the parties. By the date of separation, these promissory notes payable jointly to the parties totaled $1,838,807.00. No cash payments have been made to [Laurene]. The Trust has not been amended to exclude [Laurene]. [Laurene] is entitled to a one-half interest in the promissory notes; to be paid in accordance with the terms as set forth in the promissory notes. Further, [Laurene] is awarded one-half of the income from the Trust from the date of separation; to be paid pursuant to the terms of the Trust.

16. Paragraph 8(b) of the Agreement indicated a lump sum payment of $10,000 upon separation. [William] testified that this lump sum payment was to get [Laurene] through the initial stages of the divorce. [William] has already paid [Laurene] a total of $15,000.00 as and for [Laurene's] attorney's fees and costs. The Court considers these payments reasonable and equitable and will not order [William] to make any further payments to [Laurene] for her attorney's fees and costs.

Based upon the foregoing and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

. . . .

3. [William] shall pay [Laurene] as and for spousal support the amount of $8,000.00 (inclusive of taxes) per month

from March 1, 1999 to February 29, 2000. [William] is entitled to a credit for all payments made under a previous court order for temporary spousal support.

4. [Laurene] is entitled to a one-half interest in the promissory notes ($1,838,807.00); to be paid in accordance with the terms of the promissory notes.

5. [Laurene] is awarded one-half of the income from the Trust from the date of separation; to be paid pursuant to the terms of the Trust.

September 11, 2000 William filed "Defendant's Motion for New Trial on Certain Issues, or to Reconsider, Alter, or Amend Certain Parts of Order Re: Divorce, Spousal Support, Property Division, Validity of Pre-Nuptial Agreement and Attorney's Fees, Filed August 31, 2000" (HFCR Rule 59 Motion) seeking

an order granting a new trial solely on the findings of fact and conclusions of law stated and contained in paragraph 15, of the August 31, 2000 Order, and/or pursuant to Rule 59(e), HFCR, an order to reconsider, alter or amend solely the findings of fact and conclusions of law stated and contained in paragraph 15, of the August 31, 2000 Order.

In an accompanying memorandum, counsel for William stated

[William] seeks a new trial or reconsideration, alteration or amendment of the following findings of fact and conclusions of law contained in paragraph 15, because they were not supported by a preponderance of the evidence, are factually incorrect, and because of unfair surprise and lack of notice:

1. That [William] gifted a one-half interest in the income of the Trust to [Laurene].[5]

2. That from 1989 to the date of separation, [William] accepted promissory notes from the Trust in lieu of payment of the income interest payable to the parties.

3. That no cash payments have been made to [Laurene].

4. That the Trust has not been amended to exclude [Laurene].

[5] William admits that "annual payments" were due and payable to William and Laurene from the CRAT while Laurene was "married to and living with" William. William alleges that all "annual payments" due and payable were paid to William and Laurene.

5. That [Laurene] is entitled to a one-half interest in the promissory notes; and

6. That [Laurene] should be awarded one-half of the income from the Trust from the date of separation.

In an accompanying declaration, William stated, in relevant part, as follows:

4. The basis of this motion is that I was caught completely by surprise by the position taken by [Laurene] on the last day of trial, and argued extensively in her June 15, 2000 post trial memorandum. Although I carefully read all of the pleadings in this case, taking particular care to understand the positions espoused by [Laurene], I did not understand from anything I saw or read that she was claiming that I had irrevocably gifted to her a one-half interest in the income or promissory notes that I signed as Trustee of my Charitable Remainder Trust, also referred to as my Irrevocable Annuity Trust or Charitable Remainder Annuity Trust, that I established in 1989. I was also surprised by the claims, which were obviously false, made by [Laurene's] counsel in her post trial memorandum.

. . . .

7. As stated in my Answers to Interrogatories in this case, verified on September 4, 1999, in 1980 a family business partnership, Midfarms Limited Partnership (hereinafter "Midfarms"), was created with my son and me as General Partners, and my daughter as a Limited Partner. The nature of the business was real estate investment of the principal assets, which consisted of approximately 620 acres of farmland. This land was acquired by the exchange of properties many years before my marriage to [Laurene]. Prior to certain recent sales in 1999 of this land, Midfarms earned income from rental of vacant agricultural land.

8. Only my partnership interests in Midfarms, not the land itself, were transferred to the CRAT. This transferred interest was valued at $1,982,612.00, based on the net fair market value of my Midfarms interest, at the date of the transfer into the Trust. In exchange for my transfer to the CRAT of my partnership interests, the trust guaranteed an "annuity", not a "gift", payable in an annual amount to the beneficiaries (myself and [Laurene]) or for our use until the termination of the CRAT period, after which time, the remainder interest in the CRAT would be passed on to the various charities chosen. The CRAT was designed to terminate at the date of death of the Surviving Beneficiary or when it ran out of monies.

9. Shortly after creating the CRAT, I realized that it overlooked the clear intentions in my pre-marital agreement.

> Consequently, I had the CRAT amended to conform to my pre-marriage contractual agreement. I discussed this with [Laurene], and she signed and consented, and acknowledged receipt of the Amendment to the CRAT on December 4, 1989. (Exhibit "B", annexed hereto). As the attorneys advised me, by amending the CRAT, something I had the right and power to do as Trustee, pursuant to Article THIRD(A)(ii) of the June 1989 CRAT, [Laurene's] interest in the trust's income was made contingent upon her being married to and living with me. The creation of the Trust was not a "gift" to [Laurene], because as Trustee I had the power, acting alone, to amend the CRAT in any manner I chose, consistent with the IRS Code and Treasury Regulations.[6] When I created the CRAT I did not intend to make any irrevocable gift.

10. Unfortunately, since the June 1989 creation of the CRAT the additional trust income expected from the sale of the farm lands was delayed. Until such time that sufficient trust income would become available, Merrill Lynch and their attorneys required that a promissory note be executed by me as Trustee of the CRAT, so that I could borrow from myself individually and later as Grantor and Trustee of the Revocable Trust of William B. Levy dated February 21,1975, as amended, in order to meet the CRAT's guaranteed, quarterly annuity payments. (Exhibits "C" and "Cl", annexed hereto is a true and correct copy of the forms of the promissory notes used).

11. [Laurene] was never a party to, included or named in, or a beneficiary of any of the promissory notes. The promissory notes were never made payable to myself and [Laurene] jointly. The CRAT's only obligation under these promissory notes is to me individually or as Trustee of my 1975 Revocable Trust.

12. In addition to the promissory notes, Merrill Lynch required signed Letters of Authorization (LOA), which were all signed by me and [Laurene], for each account that the monies had to move from and to, the three Cash Management Accounts (CMA) /Investor accounts at Merrill Lynch. [Laurene] signed "her consent" to all these authorizations. (Exhibit "D", is an example of these LOAs). Basically, Merrill Lynch performed internal transfers among my CMA accounts to allow for the quarterly payments required by the CRAT. Thus, the money was always available for the CRAT to make the quarterly annuity payments. I never accepted the promissory notes from the Trust in lieu of payment of the annuity income payments to myself and the Plaintiff as [Laurene] argues and the court found. All such annuity payments were in fact made by the CRAT. This money, in the form of the CRAT's

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[6] William did not point to any language in the June 12, 1989 "William B. Levy Irrevocable Annuity Trust" supporting this statement and we did not find any such language.

annuity income payments, was marital income, which is in part what we used to support the lifestyles of myself and [Laurene] during our marriage. To conclude that no cash payments of these moneys were made to [Laurene] is factually incorrect.

13. The CRAT annuity payments were made to us or for our use, every quarter, and were used to sustain and pay for our life style and needs. The FIRST Article, Section (A)(l)(a) of the CRAT provides: ". . . the Trustee shall pay jointly to or for the use of William B. Levy and Laurene Levy . . . in equal shares for their joint life and then to the survivor of them for his or her life the annuity trust amount. . ." (Emphasis added). All of these payments were made from the CRAT to us, and used by both of us to support ourselves.

14. In fact, the CRAT now owes me personally more than $1,400,000 on the promissory notes, as a result of the pre-marital money I personally loaned to the CRAT in order for it to have the resources to pay the income to us or for our use.

15. Finally, in May 1999 approximately 77.5 acres of land belonging to Midfarms was sold, and the CRAT received its payment from Midfarms. Subsequently, more of the land has been sold, with further corresponding distributions made to the CRAT.

16. Thus, for the Court to find that I accepted promissory notes from the Trust in lieu of payment of the income interest to the parties is factually wrong; for the Court to find that these promissory notes were payable jointly to the parties is factually wrong; for the Court to find that no cash payments were made to [Laurene] is factually wrong; for the Court to find that [Laurene] is entitled to a one-half interest in the promissory notes is legally and factually wrong; and for the Court to find [Laurene] is entitled to one-half of the income from the Trust since the date of separation is factually and legally wrong.

(Emphases in original.)

Exhibit "E" to William's declaration is a letter dated September 11, 2000, from William's counsel in New York to counsel for Laurene in Hawai‘i, stating, in relevant part:

I am responding to your request that I describe the origin and history of operations of the William B. Levy Irrevocable Annuity Trust ("Trust"). You have asked me both because I am the attorney who drafted the trust and because, as an attorney with a

concentration in the areas of trust and estate law and exempt organization law, I am competent to comment upon the Trust. . . .

. . . .

. . . [William's] intent was that some of the partnerships' real estate would be sold so that the Trust would be able to make its required annuity payment to the Levys from a combination of rental income and sales proceeds distributed from the partnerships. In fact, when the Trust was executed, [William] indicated confidence that a sale could be arranged within a matter of months.

In October of 1989, while I was on maternity leave, [William] contacted a colleague of mine, Douglas Allen, at Reid & Priest to amend the document to be in accord with [William's] prenuptial agreement with [Laurene]. . . .

[William] at the end of 1989 contacted Mr. Allen again to explain that certain of the real property owned by the partnerships was mired in Delaware condemnation proceedings and that therefore no sales had occurred. As a result, the Trust had insufficient cash to make the required annuity payout. After discussion, [William] opted to make an interest-free loan to the Trust so that it would have cash to distribute the annuity. The loan was made from [William's] personal or revocable trust account; [Laurene] did not participate in the loan. The Trust then made its required annuity payment; I am told that the payment went into a joint account. The Trust also issued to [William] personally a promissory note in the amount of the loan. I have reviewed a copy of the promissory note drafted by Douglas Allen and it was payable to [William] individually. . . .

In early 1997, I was contacted by [William] and his advisors, including his accountant, and learned that, unfortunately, the state proceedings had continued unresolved and that as of that time no property had been sold. I was informed that [William] had continued annually a pattern of making interest-free loans from his personal assets to the Trust so that it could make its required payouts. The Trust made its required annuity payments each year, reportedly into an account owned jointly by [William] and [Laurene], and each year issued to [William] a promissory note. I have been told that each note was modeled on the one drafted by Douglas Allen, so that all of the notes were made to [William] personally. Through this mechanism, the Trustee had cash each year sufficient to satisfy the Trust's obligation to make the annual annuity payment on a timely basis. The promissory notes were not issued in lieu of the annuity payments.

I have been informed by [William's] office that properties began to be sold last year, eliminating the need for [William] to make additional loans to the Trust. However, I understand that there are still amounts owing to [William] as the holder of the notes.

September 21, 2000 Laurene filed her objection in which she stated, in relevant part:

> [William's] assertion that he loaned the money to the trust to pay the income interest is not supported by the very documentation that he attaches to his Affidavit as Exhibit D which shows that the money purportedly loaned to the Irrevocable Annuity Trust to pay the income interest came from the joint account which is where those income proceeds were actually deposited. Therefore, it is disingenuous to believe [William's] assertions that he individually loaned the money to the Irrevocable Annuity Trust.

(Emphases in original.)

October 5, 2000 William filed his reply essentially repeating his prior allegations.

October 9, 2000 Judge Auna heard arguments on the HFCR Rule 59 Motion and stated, in relevant part, as follows:

> [T]here are actually two questions for this Court. One is whether or not the amendment is an effective amendment . . . .
>
> . . . .
>
> The second issue is what [William] argues is that it was not a gift . . . because [William] had revoking powers, hence it was not a gift and therefore would not be included in this category three property. . . .
>
> . . . .
>
> I think if the Court were to make decisions on those two issues, then I think things would fall into place one way or the other. And so what I'm going to ask is you folks to help me out here.
>
> I'd like to have memorandum of law addressing those two issues and then the Court will make a decision on whether or not good cause has been shown to grant a new trial or in the alternative . . . modify the Court's previous order to eliminate paragraph 15 of the findings of fact and conclusions of law.

November 9, 2000 Counsel for William filed a memorandum. In it, one of the arguments he made was that "[William's] clear intent to make [Laurene's] interest in the trust future income was contingent on her remaining married to and living with [William]." It appears that this

limitation was his only reason for arguing that William did not "gift" "a one-half interest in the income of the trust to [Laurene][.]"

November 13, 2000 — Counsel for Laurene filed a memorandum. In it, she argued that (1) the CRAT was a completed gift, (2) William did not have the power to amend the CRAT without disqualifying the CRAT under Section 664 of the Internal Revenue Code, and (3) William did not successfully amend the CRAT because he failed to obtain the consent of all of the remaindermen.

August 13, 2001 — Judge Auna orally decided, in relevant part, as follows:

> Now, [Laurene] . . . argues that because the University of Michigan . . . had not signed the amendment, the amendment is not enforceable . . . . , hence, there was no amendment, and then goes on to argue about the Internal Revenue Service and charitable remainder trust and so forth. And what I looked at and have concluded . . . that [Laurene] is a very knowledgeable individual and had the benefit of resources available to her to assist her in making decisions and that even before the marriage, before the parties were married. And so as it at least relates to her, you know, those changes were made and she was -- she understood what those changes were.
>
> I did find before that the [CRAT] was not amended to exclude her and that is true. It did not exclude her. It just changed the time in which she could receive benefits.
>
> Now, as the evidence has been presented to me, and this . . . would be Exhibit number 74, that promissory notes were made in lieu of actual payment and those promissory notes, at least to the date of separation, totaled $1,838,807.[7]
>
> Now, as we know, promissory notes are just that. It's a specific amount to be paid at a time stated, whether it be over time or one lump sum.
>
> The problem I've had in this case was that there was no evidence of the promissory notes presented. And so what I have -- have had to deal with was just what was presented, a financial statement indicating that there were promissory notes. And as we

[7] Plaintiff's Exhibit No. 74 is not substantial evidence "that promissory notes were made in lieu of actual payment[.]"

look into that financial statement, at least it was quite -- quite clear to the Court that payments were to be made at some point in the future.

Now, you know, all this read in conjunction with the prenuptial agreement indicates to me that there was a clear intention of the parties that if and when [Laurene] and [William] no longer lived together, in order [sic] words separated or were no longer married, that that would be the end of at least most of the portion of the agreement that they entered into.

And so the Court is going to look at the date of separation, which I've done so already, as the end date for any -- any financial obligation pursuant to the irrevocable annuity trust and the amendment thereto. If [William] has problems with the IRS or whoever -- whatever agencies that are out there looking over charitable trusts, it's something that he's going to have to deal with if the trust was not making a profit, or at least what I've got to deal with is what's before me.

So having said all of that, the Court is going to amend finding number 15 to delete that portion that refers to any income[8] from the trust after the date of separation, to wit, the last sentence of number 15. . . . Reconsidering the Court's decision, the Court is going to delete order number 5. So that would be the order of the Court with regards to that issue.

September 28, 2001 Judge Auna entered the September 28, 2001 Corrected Order stating, in relevant part, as follows:

1. . . . The parties . . . separated on February 12, 1999[.]

. . . .

5. The [CRAT] states that the Trustee shall pay the [CRAT] benefits jointly to or for the use of both parties as long as [Laurene] was married to and living with [William].

. . . .

7. The date of the parties' separation is the end date for any financial obligation to [Laurene] under the [CRAT].

8. Trial Exhibit 74 refers to promissory notes totaling $1,838,807.00 given in lieu of payment of benefits under the [CRAT]. Although no evidence of the promissory notes was presented at trial, [William's] financial statements reference promissory notes.

[8] The continuing reference to "income from the Trust" is misleading.

9. Regardless of the possible consequence that may result to [William] from the Internal Revenue Service due to the failure of the University of Michigan to sign the Amendment to the [CRAT], [Laurene] knew of and consented to the change in the [CRAT].

10. FOF #15 of the Order of August 31, 2000 is amended by the deletion of the last sentence of that paragraph. This sentence, reading "Further, [Laurene] is awarded one-half of the income from the Trust from the date of separation; to be paid pursuant to the terms of the Trust", is removed from FOF #15.

11. Conclusions [sic] of Law #5 of the Order of August 31, 2000 is accordingly deleted in its entirety.

October 8, 2001 Laurene filed a motion for reconsideration of the September 28, 2001 Corrected Order. Essentially, she challenged the Court's application of the Amendment to her.

November 2, 2001 The court entered an "Order Granting Plaintiff's Motion for Attorney's Fees and Costs Filed June 15, 2001" (November 2, 2001 Order) stating, in relevant part, as follows: "[Laurene] is awarded Six Thousand and No/100 Dollars ($6,000.00) as and for attorney's fees and costs for the post-trial period[.]"

December 28, 2001 Judge Auna entered the Divorce Decree stating, in relevant part, as follows:

(7) ALIMONY

[William] shall pay to [Laurene] spousal support in the amount of $8,000.00 (inclusive of taxes) per month from March 1, 1999 (the month after the date of separation) to February 29, 2000 (the month commencing cohabitation). [William] shall be entitled to a credit for all payments made under a previous court order for temporary spousal support.

(8) PROPERTY DIVISION

A. [Laurene] is entitled to a one-half interest in the promissory notes which, by the date of separation, equals $919,403.50 (one-half of $1,838,807.00), accepted by [William] from the [CRAT], dated June 12, 1989, in lieu of payment by the Trust of the income interest to the parties, to be paid in accordance with the terms as set forth in the promissory notes.

> . . . .
>
> E. [William] has already paid to [Laurene] a total of $15,0000.00 as and for [Laurene's] attorney's fees and costs through the divorce trial. This Court considers these payments reasonable and equitable and will not order [William] to make any further payments to [Laurene] for her attorney's fees and costs, except as noted in the November 2, 2001 Order Granting Plaintiff's Motion for Attorney's Fees and Costs, filed June 15, 2001.
>
> (9) OTHER MATTERS
>
> A. All provisions of the Pre-Nuptial Agreement signed by [Laurene] on November 2, 1981, and by [William] on November 13, 1981, except as stated herein, are valid and enforceable.

WILLIAM'S POINTS ON APPEAL

In his points on appeal, William contends that the court reversibly erred when it:

1. failed to accord William a new trial;

2. decided that William accepted the promissory notes from the Trust in lieu of payment by the Trust to the parties;

3. awarded Laurene one-half of the promissory notes; and

4. found that no cash payments were made to Laurene.

In William's reply brief, counsel for William states, in relevant part, as follows:

> [William] appeals from those portions of the Divorce Decree . . . and post trial Orders . . . which found: that he accepted promissory notes payable jointly to the parties from his Irrevocable Annuity Trust/Charitable Remainder Trust . . . in lieu of payment by the Trust of income to the parties; that no payments were made to [Laurene]; and consequently awarded [Laurene] a one-half interest in the promissory notes.
>
> . . . .
>
> What he did not know was that [Laurene] would claim that: the Trust had not in fact distributed the annuity income to the

> parties; that the promissory notes issued by the Trust were made payable jointly to the parties; that [William] had accepted the promissory notes from the Trust in lieu of payment of the annuity income; and that [Laurene] was claiming an interest in the notes. These are the real issues and basis for [William's] claim of prejudice and entitlement to a new trial.
>
> [Laurene] did not make her position clear, as she now claims, on any of these issues, and did not state the claims she had - in violation of Rule 94, HFCR, until post trial, and the findings of fact and conclusions of law made by the Family Court consistent therewith surprised [William], and require the grant of a new trial.
>
> [William] also claims a lack of substantial evidence in the record to support the Family Court's findings and conclusions: that the Trust's promissory notes were made payable jointly to the parties, and that [William] accepted the notes from the Trust in lieu of payment of the Trust's income interest to the parties.
>
> . . . .
>
> Lastly, [Laurene's] interpretation of certain documentary evidence to provide substantial evidence is misleading, inconsistent with and contradicted by the records themselves.

(Emphases in original.)

LAURENE'S POINTS ON APPEAL

In her cross-appeal, Laurene presents the following points on appeal:

1. Laurene challenges the conclusions in the September 28, 2001 Corrected Order that (a) the Amendment is enforceable against her and (b) her beneficiary interest in the Annuity Trust Amount terminated as of the date of separation. Specifically, she challenges sections 5, 7, and 9, the amendment of finding of fact no. 15, and the deletion of conclusion of law no. 5. She contends that the court made an "[e]rror of law in the interpretation of the United States Internal Revenue Code and

Regulations as they apply to the grantor's power to amend [Laurene's] beneficial interest in the [CRAT] and the interpretation of the powers retained by the Grantor under the terms of the trust."

2. Laurene contends that the court abused its discretion in its August 31, 2000 Order when it failed to award her continuing spousal support.

3. Laurene contends that the court abused its discretion in its August 31, 2000 Order and its November 2, 2001 Order when it failed to award her reasonable attorney fees and costs.

4. Laurene contends that the court abused its discretion in paragraph 16 of its August 31, 2000 Order when it failed to award the $10,000 payment for property settlement referred to in paragraph 8b of the Pre-Nuptial Agreement.

DISCUSSION

For the obvious reason that the answers to the latter issues depend upon the answer to the former issue, a decision regarding the division and distribution of the property and debts of the parties must precede any decisions on the questions of spousal support and attorney fees and costs.

Regarding the division and distribution of the property and debts of the parties, the family court's decision that the

Pre-Nuptial Agreement is valid and enforceable has not been challenged.

Laurene presented the question of whether the Amendment is valid and enforceable against Laurene. Based on the evidence, the court answered this question in the affirmative. Laurene contends that this answer is wrong because of the absence of the consent to the Amendment by the remainder beneficiaries. It appears that Laurene does not understand that the Internal Revenue Code and related regulations govern the tax consequences of the amendment, not the power to make the amendment. We will allow her, on remand, another opportunity to argue this important question of law.

William's HFCR Rule 59 Motion questioned the validity of FOF no. 15 which, as noted above, states as follows:

> 15. [William] created an Irrevocable Annuity Trust dated June 12, 1989 ("Trust") and gifted a one-half interest in the income of the Trust to [Laurene]. From 1989 to the date of separation, [William] accepted promissory notes from the Trust in lieu of payment of the income interest payable to the parties. By the date of separation, these promissory notes payable jointly to the parties totaled $1,838,807.00. No cash payments have been made to [Laurene]. The Trust has not been amended to exclude [Laurene]. [Laurene] is entitled to a one-half interest in the promissory notes; to be paid in accordance with the terms as set forth in the promissory notes. Further, [Laurene] is awarded one-half of the income from the Trust from the date of separation; to be paid pursuant to the terms of the Trust.

William's opening brief states, in relevant part, as follows:

> The Family Court erred when it concluded that [William] accepted the promissory notes from the Trust in lieu of payment by

> the Trust of the income interest to the parties. Such a finding was clearly erroneous because it was not supported by substantial evidence. There was an incomplete and inadequate record upon which the Family Court could make such a finding or reach such a conclusion. As a result, the Family Court erred when it awarded [Laurene] a one-half interest in the promissory notes.
>
> [William] in his post trial Declaration . . . detailed that the assets that comprise the Trust corpus came from his premarital assets, his interest in the Midfarms Limited Partnership; he stated that his intent in creating the Trust was not to make a gift to anyone, but to create an annuity that he as Trustee had the power and right to amend; that when the Trust could not pay the income required, he loaned money to the Trust to do so, giving promissory notes to himself, evidencing the loans; that [Laurene] was never a party to or held any interest in the promissory notes; that as a result of the loans he made to the Trust, the Trust in fact paid the annuity income to himself and [Laurene] or for their use throughout their marriage; and that the promissory notes were never accepted by him in lieu of such payments.
>
> [Laurene] offered neither sworn statements from anyone post trial nor any evidence at the trial to controvert these facts. [Laurene] cannot point to any document in evidence, including any promissory note issued by the Trust, that would evidence that the promissory notes were made payable jointly to the parties, or were issued in lieu of the annuity payments, as the Family Court found.
>
> . . . .
>
> Plaintiff's Trial Exhibit 261 is a copy of the June 12, 1989 Trust. Part of this Exhibit contains a copy of a letter to [William] from an attorney of the New York law firm of Reid & Priest. In part, the letter states:
>
> > "The Promissory Note is provided to permit you, as Trustee, to borrow from yourself, as Grantor, to meet the required 11.2% Annuity Trust Amount, payable quarterly."
>
> [Laurene's] trial exhibits do not support the finding that the promissory notes were ever payable jointly to the parties or accepted in lieu of payment by the Trust of the interest income, as the Court found.

Laurene's answering brief responds, in relevant part, as follows:

> The exhibits in evidence at the trial show that [William] did not receive all of the Annuity Trust Income during the pre-separation periods. [William] testified that since there was little income from the farmland itself, the Annuity Income Amount could only be paid when the farmland was sold and the proceeds

> received by the Trust. (T.6/2/2000 at 79-80)[9] (*See also* Exhibit 287:T.4/7/99 at 41-42.) In periods when no land had been sold, and there were no liquid assets in the Irrevocable Annuity Trust to pay the annuity income, [William] indicated that he accepted promissory notes from the Trust for the annuity income which was accrued but unpaid according to [William's] Personal Financial Statement dated July 31, 1998. The notes to the Financial Statement on page 4 show that as of July 31, 1998 the Charitable Remainder Trust notes were equal to $1,682,268.00 (Appendix F, Trial Exhibit 73, p4). In 1997, [William] acknowledges receiving only $20,429.00 of income from the Midfarms CRT (Appendix F, p.1), substantially less than the $224,000.00 the parties were to receive. The balance was represented by promissory notes from the Trust, as noted on the Assets section of the Financial Statement.
>
> In [William's] Financial Statement for the year 1989 (Appendix G, Plaintiff's Exhibit 74, p.1), he states he only received $18,374.00 in income from the Irrevocable Annuity Trust and the balance of the promissory notes for the accrued but unpaid interest changes accordingly to $1,838,807.00 (Appendix G, p4).

William's reply brief responds, in relevant part, as follows:

---

[9] The preceding summary of this cited evidence is not supported by this cited evidence. The cited evidence is of William's testimony as follows:

> Q. The income that's shown on there, net monthly income of $30,493; is that accurate at this time?
>
> A. Yes, it is.
>
> Q. Okay. And what is that based on?
>
> A. The main part of it would be based on distribution from the charitable remainder trust.
>
> Q. That's your income interest under that trust at 11.2 percent --
>
> A. Yes.
>
> Q. -- of the net assets; correct?
>
> A. Yes.
>
> Q. Okay. And that's being paid out on what basis?
>
> A. That's being paid out periodically from the trust and based pretty much on inflow into the trust through the sale of Midfarms property.

As [Laurene] points out in her Answering Brief, she questioned [William] about the creation of the Trust in June 1989 by the donation of his premarital interest in the Midfarms partnership to the Trust; that under the premarital agreement he was able to make gifts to [Laurene]; and that when he created the Trust he gave [Laurene] a one-half interest in the Trust's annuity income from the Midfarms partnership. . . . But here the area of inquiry by [Laurene] ended. No questions were asked of [William] regarding whether or not such distributions were made or what happened to or how the marital income was used, or anything about the promissory notes.

The Court itself later asked about and [William] confirmed that the Trust was still in existence . . . ; and that payments to him of interest income were still being made pursuant to the trust agreement. When asked by the Court if payments were being made to [Laurene] "at this time", [William] responded, "No", because, he explained, the Trust had been amended many years ago to exclude [Laurene] "if we were not living together". . . .

From this "evidence" [Laurene] concluded and argued in her post trial memorandum . . . that even if the premarital agreement was binding and enforceable, [William] had "accepted promissory notes from the Trust in lieu of payment of the income interest payable to the parties"; and "admits that he had not paid any of the income or any portion of the promissory notes to [Laurene];" that "(f)rom 1989 to the date of separation, ([William]) accepted promissory notes from the Irrevocable Annuity Trust in lieu of payment of the income interest payable to the parties"; that "(b)y the date of separation, these promissory notes from the trust payable jointly to the parties totaled $1,838,807.00"; and that "([William]) admits that he had not paid any of the income or any portion of these promissory notes to [Laurene]". . . .

. . . .

The surprise was not the existence of the Trust, but rather [Laurene's] position after trial that [William] accepted promissory notes from the Trust in lieu of income interest payments; that the promissory notes were made payable jointly to the parties; and that the parties received no interest income from the Trust during the marriage.

[William] had no basis or reason to believe that these claims or arguments would be made at trial, or were part of [Laurene's] theory as to how the marital *res* should be divided. [William] did not realize or have a good faith basis for believing that such claims were being advanced during the portion of the trial to determine the amount and duration of spousal support payments. [William] did acknowledge at trial that he gifted the Trust's joint income to himself and [Laurene]. But he was never asked and did not have reason to establish that such "gifts" were in fact made by the Trust and received by the parties jointly or for their use since the Trust's establishment and until the parties' separation. [William] had no reason to introduce into

> evidence the basis for issuance of or the promissory notes themselves to show that they were never made to both parties jointly, because this was not an issue at trial. It was never claimed that these notes were a joint or marital asset, or that the notes had been issued or accepted in lieu of payment of the Trust's income interest.

FOF no. 15 is the court's agreement with Laurene's June 15, 2000 memorandum that is the topic of footnote 4 above. William's HFCR Rule 59 Motion challenged the following four sentences of FOF no. 15:

> [William] created an Irrevocable Annuity Trust dated June 12, 1989 ("Trust") and gifted a one-half interest in the income of the Trust to [Laurene]. From 1989 to the date of separation, [William] accepted promissory notes from the Trust in lieu of payment of the income interest payable to the parties. By the date of separation, these promissory notes payable jointly to the parties totaled $1,838,807.00. No cash payments have been made to [Laurene].

The limitation in the first sentence to "income of the Trust" is misleading. The statement that William "gifted a one-half interest in the income of the Trust to [Laurene]" is likewise misleading. The "annual payment" of the Trust was payable to William and Laurene. If made, this "annual payment" was all principal or some principal and some income. The possibility that it included some income was reduced by the provision in the CRAT that "[a]ny income of the Trust Estate not required to be distributed currently hereunder shall be added to and become part of the principal of the Trust Estate."

The record lacks sufficient evidence to support the second, third, and fourth sentences. Via his HFCR Rule 59

Motion, William sought the opportunity to prove that the second, third, and fourth sentences are false. As noted above, William alleged:

> 10. Unfortunately, since the June 1989 creation of the CRAT the additional trust income expected from the sale of the farm lands was delayed. Until such time that sufficient trust income would become available, Merrill Lynch and their attorneys required that a promissory note be executed by me as Trustee of the CRAT, so that I could borrow from myself individually and later as Grantor and Trustee of the Revocable Trust of William B. Levy dated February 21,1975, as amended, in order to meet the CRAT's guaranteed, quarterly annuity payments. (Exhibits "C" and "Cl", annexed hereto is a true and correct copy of the forms of the promissory notes used).

The court erred when it did not provide William with an opportunity to prove that: (1) all of the "annual payments" of the Trust due to William and Laurene were paid to William and Laurene; (2) William's money, and not William's and Laurene's money, was loaned to the Trust to fund the payment by the Trust of its "annual payments" to William and Laurene; (3) the promissory notes from the Trust were made payable to William in consideration of William's loan of William's money to the Trust; and (4) William is the sole payee of the promissory notes. If William proves these facts, then the promissory notes are his separate property and not marital or joint property.

The unchallenged Pre-Nuptial Agreement is valid and enforceable against Laurene. It states, in relevant part, as follows: "Each party shall, during his or her lifetime, keep and

retain sole ownership, control and enjoyment of all property, real and personal, now owned or hereafter acquired by him or her and regardless of where located, free and clear of any claim by the other." As noted above, Plaintiff's Exhibit No. 74 indicates that the following Accounts and Notes Receivable are receivable by William:

CRT-Note Receivable		1,838,807
CRT Annuity Receivable		143,805
DI-Loan Receivable		90,173
	TOTAL	**2,072,785**

If these Accounts and Notes Receivable are receivable by William, the Pre-Nuptial Agreement requires that these Accounts and Notes Receivable be awarded to William. If Laurene contends that these Accounts and Notes Receivable are, or should have been, receivable by William and Laurene, it is Laurene's burden to argue and prove her contention. Unless and until it is validly decided that these Accounts and Notes Receivable are or should have been receivable by William and Laurene, they must be awarded to William pursuant to paragraph "4" of the Pre-Nuptial Agreement.

The family court's conclusion that "Trial Exhibit 74 refers to promissory notes totaling $1,838,807.00 given in lieu of payment of benefits under the [CRAT]" is wrong. Trial Exhibit 74 is not substantial evidence that "promissory notes

totaling $1,838,807.00 [were] given in lieu of payment of benefits under the [CRAT]." Possibilities are not probabilities.

After a decision is made regarding the division and distribution of the property and debts of the parties, especially the accounts and notes receivable, then the court can move on to the questions of spousal support (including the validity of the spousal support provision of the Pre-Nuptial Agreement) and attorney fees and costs.

CONCLUSION

Accordingly, we vacate the following parts of the following orders.

August 31, 2000 Order:

> 12. The Court finds and concludes that Paragraph 8(b) of the Agreement regarding the amount of spousal support is one-sided, and thus, unenforceable. All other subsections of Paragraph 8, including the remaining portion of Paragraph 8(b), are not one-sided, and thus, enforceable.
>
> . . . .
>
> c. If this provision had an inflation factor . . . or some other factor that would allow a review of the financial condition of the parties at the time of divorce, then perhaps that provision of the Agreement would not have been so one-sided.
>
> d. Although the amounts stated in Paragraph 8(b) may have been reasonable at the time of execution (and the evidence has supported this conclusion), due to changed circumstances enforcement would be unconscionable today given the present circumstances of the parties.
>
> 13. The Court finds and concludes that spousal support in the amount of $8,000.00 (inclusive of taxes) per month from March 1, 1999 (the month after the date of separation) to February 29, 2000 (the month commencing cohabitation) is reasonable and equitable under the circumstances. [William] is entitled to a credit for all payments made under a previous court order for temporary spousal support.

. . . .

15. [William] created an Irrevocable Annuity Trust dated June 12, 1989 ("Trust") and gifted a one-half interest in the income of the Trust to [Laurene]. From 1989 to the date of separation, [William] accepted promissory notes from the Trust in lieu of payment of the income interest payable to the parties. By the date of separation, these promissory notes payable jointly to the parties totaled $1,838,807.00. No cash payments have been made to [Laurene]. The Trust has not been amended to exclude [Laurene]. [Laurene] is entitled to a one-half interest in the promissory notes; to be paid in accordance with the terms as set forth in the promissory notes. Further, [Laurene] is awarded one-half of the income from the Trust from the date of separation; to be paid pursuant to the terms of the Trust.

16. Paragraph 8(b) of the Agreement indicated a lump sum payment of $10,000 upon separation. [William] testified that this lump sum payment was to get [Laurene] through the initial stages of the divorce. [William] has already paid [Laurene] a total of $15,000.00 as and for [Laurene's] attorney's fees and costs. The Court considers these payments reasonable and equitable and will not order [William] to make any further payments to [Laurene] for her attorney's fees and costs.

Based upon the foregoing and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

. . . .

3. [William] shall pay [Laurene] as and for spousal support the amount of $8,000.00 (inclusive of taxes) per month from March 1, 1999 to February 29, 2000. [William] is entitled to a credit for all payments made under a previous court order for temporary spousal support.

4. [Laurene] is entitled to a one-half interest in the promissory notes ($1,838,807.00); to be paid in accordance with the terms of the promissory notes.

5. [Laurene] is awarded one-half of the income from the Trust from the date of separation; to be paid pursuant to the terms of the Trust.

<u>September 28, 2001 Corrected Order</u>:

8. Trial Exhibit 74 refers to promissory notes totaling $1,838,807.00 given in lieu of payment of benefits under the [CRAT]. Although no evidence of the promissory notes was presented at trial, [William's] financial statements reference promissory notes.

. . . .

> 11. Conclusions [sic] of Law #5 of the Order of August 31, 2000 is accordingly deleted in its entirety.

December 28, 2001 Divorce Decree:

> (7) ALIMONY
>
> [William] shall pay to [Laurene] spousal support in the amount of $8,000.00 (inclusive of taxes) per month from March 1, 1999 (the month after the date of separation) to February 29, 2000 (the month commencing cohabitation). [William] shall be entitled to a credit for all payments made under a previous court order for temporary spousal support.
>
> (8) PROPERTY DIVISION
>
> A. [Laurene] is entitled to a one-half interest in the promissory notes which, by the date of separation, equals $919,403.50 (one-half of $1,838,807.00), accepted by [William] from the [CRAT], dated June 12, 1989, in lieu of payment by the Trust of the income interest to the parties, to be paid in accordance with the terms as set forth in the promissory notes.
>
> . . . .
>
> E. [William] has already paid to [Laurene] a total of $15,000.00 as and for [Laurene's] attorney's fees and costs through the divorce trial. This Court considers these payments reasonable and equitable and will not order [William] to make any further payments to [Laurene] for her attorney's fees and costs, except as noted in the November 2, 2001 Order Granting Plaintiff's Motion for Attorney's Fees and Costs, filed June 15, 2001.

We remand for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai‘i, November 19, 2003.

On the briefs:

Sarah J. Smith
for Plaintiff-Appellee/
Cross-Appellant.

Chief Judge

Ira Leitel
for Defendant-Appellant/
Cross-Appellee.

Associate Judge

Associate Judge