

NOT FOR PUBLICATION

NO. 24882

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

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)

ORDER DENYING PLAINTIFF-APPELLEE/CROSS-APPELLANT'S
MOTION FOR RECONSIDERATION

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

The William B. Levy Irrevocable Annuity Trust (CRAT)

states, in relevant part, as follows:

THIRD: (A) It is the intention of the Grantor and the Trustee in executing this [CRAT] to create a charitable remainder annuity trust, within the meaning of Code Section 664 and the Treasury Regulations thereunder, and to obtain, for the Grantor or for his estate, as the case may be, the full benefit of any income, gift and/or estate tax charitable deduction to which he (or his estate) may be entitled. All of the provisions hereof shall be interpreted, and the Trust Estate shall be valued, managed and invested, in a manner consistent with (i) the pronouncements issued by the Internal Revenue Service with respect thereto and (ii) the intention expressed in this Article THIRD. Accordingly, in the event of any conflict between Federal law and any applicable state law, it is the intention of the Grantor and the Trustee that Federal law shall control. The Trustee shall have the power, acting alone, to amend this [CRAT] in any manner necessary to comply with the requirements for qualification as a charitable remainder annuity trust, as set forth in Code Section 664 and Treasury Regulations Sections 1.664-1 and 1.664-2, and shall have the further power to amend this [CRAT] in any

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manner which will not cause the Annuity Trust to fail to qualify as a charitable remainder annuity trust under those Code and Treasury Regulations provisions. However, no person shall have the power to alter or amend this [CRAT] in a manner which provides that the remainder interest, or any part thereof, is for the benefit of a person other than an organization described in Code Sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a).

In its Memorandum Opinion filed on November 19, 2003, this court stated, in relevant part, as follows:

[Plaintiff-Appellee/Cross-Appellant Betty Laurene Levy (Laurene)] presented the question of whether the Amendment [to the William B. Levy Irrevocable Annuity Trust (hereinafter CRAT)] 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.

. . . .

The court erred when it did not provide [Defendant-Appellant/Cross-Appellee William Benjamin Levy (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.

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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
<u>DI-Loan Receivable</u>	<u>90,173</u>
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.

In her motion for reconsideration, Laurene contends in relevant part as follows:

1. The Appellate Court misapprehended that the terms of the William B. Levy Irrevocable Annuity Trust (hereinafter [CRAT]) which specifically incorporated by reference sections of the Internal Revenue Code and regulations as a limitation upon the Grantor's power to amend the trust. As a matter of Hawaii State law, [William] did not have the power to amend the Irrevocable Annuity Trust (Exhibit 261) without the consent of all of the beneficiaries to the trust, including the remaindermen. . . .

2. The second request for reconsideration . . . involves the Appellate Court's shifting of the burden

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of proof to [Laurene] to prove that Trustee [William] had not, in fact, made loans to the [CRAT] from his individual, separate resources, to allow the [CRAT] to pay the Annuity Trust Amount. . . .

[William] was the trustee of the [CRAT] and stands in a position of fiduciary responsibility under Hawaii State law to [Laurene] both as the trustee and as her husband. It is well recognized under Hawaii State law that in transactions with the trust (obtaining promissory notes from the trust), [William] has the burden of proving that this transaction is not in breach of his fiduciary duty to [Laurene]. A trustee, as a fiduciary of the trust, is required to provide a clear accounting of all of the receipts of the trust, any disbursements made to the beneficiaries, the application of these disbursements and any transactions with the trust. [William], as trustee, is the only one in a position to render this accounting since he is solely in charge of the records for the trust and the holder of any such promissory notes. No such accounting has previously been done by [William] or provided to [Laurene]. [William] is uniquely situated to be able to provide this information and has a fiduciary duty to do so as the trustee of the [CRAT].

In addition, [William] was both a trustee and beneficiary of the [CRAT] whose interests in the Annuity Trust Amount were in conflict with those of [Laurene]. Any loans between [William] and the [CRAT] are transactions that require special scrutiny of the Court. All of the records with respect to these purported loans and promissory notes are exclusively in the trustee's possession and control. To shift the burden of an accounting to [Laurene] and for the proof of the source of funds used for any loans made by [William] to the [CRAT] is an incorrect application of the burden of proof and an error of law.

Addressing contention "1", the only "limitation upon the Grantor's power to amend the trust" stated in the CRAT is the following language in the CRAT:

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The Trustee shall have the power, acting alone, to amend this [CRAT] in any manner necessary to comply with the requirements for qualification as a charitable remainder annuity trust, as set forth in Code Section 664 and Treasury Regulations Sections 1.664-1 and 1.664-2, and shall have the further power to amend this [CRAT] in any manner which will not cause the Annuity Trust to fail to qualify as a charitable remainder annuity trust under those Code and Treasury Regulations provisions.

Laurene contends that "[William] did not have the power to amend the Irrevocable Annuity Trust (Exhibit 261) without the consent of all of the beneficiaries to the trust, including the remaindermen." It is Laurene's burden to specifically cite fact(s) in the record and law proving that she is right. Thus far, she has not done so.

In contention "2", Laurene alleges that this court has shifted "the burden of proof to [Laurene] to prove that [Trustee William] had not, in fact, made loans to the [CRAT] from his individual, separate resources, to allow the [CRAT] to pay the Annuity Trust Amount." This interpretation of this court's Memorandum Opinion is wrong.

As noted above, this court's Memorandum Opinion placed the burden on William when it stated that "[i]f William proves these [three specified] facts, then the promissory notes are his separate property and not marital or joint property."

This court's Memorandum Opinion further noted that

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[i]f 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.

This language did not shift "the burden of proof to [Laurene] to prove that [Trustee William] had not, in fact, made loans to the [CRAT] from his individual, separate resources, to allow the [CRAT] to pay the Annuity Trust Amount." It merely says that "[i]f 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." In other words, if Laurene wants the court to believe her factual allegations and agree with her legal conclusions, it is her burden to argue and prove them. Thus far, she has not done so.

THEREFORE, IT IS HEREBY ORDERED that the motion of consideration is denied.

DATED: Honolulu, Hawai'i, December 9, 2003.

Sarah J. Smith,
on the motion, for
Plaintiff-Appellee/
Cross-Appellant.

Chief Judge

Associate Judge

Associate Judge