

NOT FOR PUBLICATION

NO. 25067

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

MARILYN J. BROTT, Plaintiff-Appellant, v.
DAVID T. BROTT, Defendant-Appellee

APPEAL FROM FAMILY COURT OF THE SECOND CIRCUIT
(FC-D NO. 99-0398)

MEMORANDUM OPINION

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

Plaintiff-Appellant Marilyn J. Brott (Marilyn) appeals from the family court's¹ March 22, 2002 "Order and Judgment on Defendant's Motion for Enforcement and Other Post-Decree Relief Filed on 8/22/01" (March 22, 2002 Order and Judgment). We affirm.

Marilyn was born on March 14, 1937. Defendant-Appellee David T. Brott (David) was born on November 8, 1943. The parties commenced living together in 1967. The parties were married on December 14, 1982 and have no children. Marilyn filed a Complaint for Divorce on August 23, 1999. The trial occurred on September 26, 2000. The family court entered its Divorce Decree on October 20, 2000.

On August 22, 2001, David filed Defendant's Motion for

¹ Judge Eric G. Romanchak presided in this case.

Enforcement and Other Post-Decree Relief. In response to this motion, the March 22, 2002 Order and Judgment required Marilyn to pay David, "out of her share of the escrow proceeds being held on the sale of 9 Akahale Street[,]" specific sums of money for specified reasons. In this appeal, Marilyn challenges some of those orders.

I.

With one exception, the Divorce Decree awarded to David the balance due on the promissory note secured by the second purchase money mortgage on the Las Vegas property sold by the parties. The exception was that "the interest generated by said second purchase money mortgage shall be used to pay the monthly short fall on the White Pearl condominium until it is sold."

The March 22, 2002 Order and Judgment required Marilyn to pay David "\$1,830.83, representing principal payments received by [Marilyn] on the Las Vegas second purchase money mortgage which was awarded solely to [David] in the parties' Divorce Decree filed herein on October 20, 2000[.]"

It appears that a payment or payments were sent by the mortgage company to Marilyn and she kept that payment or those payments. It further appears that when the White Pearl Condominium was sold, there was a deficiency and Marilyn's 50% share of that shortfall was "2,900 - plus dollars." In the words of counsel for Marilyn:

So, our argument is, these amounts that were part of the shortfall had to do with amounts that [David] did not pay. And, in addition, we believe that the monies should have been held to pay for all the shortfalls. Whether you want to interpret it as a monthly shortfall or a shortfall from the sale, we believe . . . the intent of that provision is to . . . make up the shortfall.

In his Answering Brief, David responds, "Why [Marilyn's] counsel cannot see the difference between a 'monthly shortfall' and the final 'deficiency upon sale' is beyond anyone's comprehension." We agree with counsel for David.

II.

The March 22, 2002 Order and Judgment states:

3. Kelly Hare Note and Ohana Account - [Marilyn] shall pay to [David] out of her share of the escrow proceeds the amount of \$3,500.49, representing one-half of the monies improperly used or not otherwise accounted for from the check register of the Ohana account which should have been applied toward the outstanding balance on the loan at the closing of the sale of 9 Akahale Street pursuant to the parties' Divorce Decree.

The Divorce Decree states:

The marital residence located at 9 Akahale, Lahaina, Hawaii shall be sold pursuant to the "Order on Continued Hearing on Plaintiff's and Defendant's Motions for Pre-Decree Relief" filed herein on August 17, 2000; The proceeds of the sale from the residence shall first be applied to all debts on the property, including the . . . home equity line and Kelly Hare personal note (after any amounts remaining in the Ohana savings account maintained by [Marilyn] is applied), commission and traditional sellers' closing costs. An amount of \$15,000 shall be retained in an interest bearing escrow account until the parties' White Pearl condominium is sold, in order to cover any expected deficiency. All proceeds remaining shall immediately be divided equally between the parties. . . . [Marilyn] shall be entitled to keep all rental proceeds generated from this residence. [Marilyn] shall be entitled to claim all mortgage interest for the year 2000 and until said property is sold; all interest from the Kelly Hare personal note; and all utility payments as deductions against rental income. Neither party shall have access to any funds from the home equity line. Once the White Pearl condominium is sold and any deficiency is satisfied from the escrow account, any remaining proceeds shall be divided equally. Deficiency shall mean the actual deficiency or reimbursement to the parties in the exact amount one or both of them may have had to contribute toward

NOT FOR PUBLICATION

the deficiency at closing of White Pearl prior to the closing of 9 Akahale Street.

In her Opening Brief, Marilyn contends that the divorce decree clearly stated that she "shall be entitled to keep all rental proceeds generated from [9 Akahale]." In his Answering Brief, David responds that "[Marilyn] was never able to properly account for at least \$7,000.98 [in the Ohana savings account] and therefore, half of same was awarded to [David]." We agree with David.

III.

The Divorce Decree states:

[David] shall pay to [Marilyn] alimony in the amount of \$1,500.00 per month, commencing the month following the closing of the sale of the marital residence located at 9 Akahale, Lahaina, Hawaii, through the month [Marilyn] attains the age of 65 years on March 14, 2002. Thereafter, [David] shall pay to [Marilyn] alimony in the amount of \$1,000.00 per month through the month [David] attains the age of 62 years on November 8, 2005.

All utility payments made to [Marilyn], or on behalf of [Marilyn], and all mortgage interest on 9 Akahale Street, Lahaina, Hawaii paid by [David] pursuant to court order during the year 2000 and thereafter, shall constitute alimony to [David]. [Marilyn] shall be entitled to claim the utility expenses and mortgage interest as deductions on the rental income generated at 9 Akahale Street, Lahaina, Hawaii.

Alimony payments shall cease in the event of: (1) [Marilyn's] or [David's] death; or [Marilyn's] remarriage or cohabitation with a significant other.

The March 22, 2002 Order and Judgment states:

5. Affirming Amounts Offset as Alimony Paid - To the extent that amounts owed by [Marilyn] to [David] were offset against [David's] obligation of alimony to [Marilyn] in the "Order on Evidentiary Hearing on Defendant's Motion Filed on 6/6/01", filed herein on August 3, 2001 and that [David's] remaining obligation of alimony to [Marilyn] for the remainder of the year 2001 were satisfied by the execution of the "Order on Hearing of 12/26/01", filed herein on December 26, 2001, this court recognizes that [David's] obligation of alimony to [Marilyn] for the entire year of 2001 has been satisfied and considered paid by [David] to [Marilyn].

In her Opening Brief, Marilyn contends that

pursuant to the divorce decree, and contrary to the court's order, David should have paid her alimony in the amount of \$1,500.00 per month following the closing of the sale of the 9 Akahale property. Instead of David paying Marilyn the alimony owed her, the family court allowed David to neglect alimony payments and thereafter argue for an alleged off-set of this obligation. Moreover, the court failed to explain its order that David's obligation of alimony to Marilyn for the entire year 2001 was satisfied and considered paid by David to Marilyn.

In his Answering Brief, David responds that "[t]he Family Court merely offset one judgment against another as it is entitled to do so."

We conclude that in its August 3, 2001 "Order on Evidentiary Hearing on Defendant's Motion Filed on 6/6/01," and its December 26, 2001 "Order on Hearing of 12/26/01," the court explained how some of David's total alimony obligation to Marilyn for the year 2001 had been or was being offset/credited/paid and how the balance of it was to "be paid from [David's] share of the parties' proceeds from the sale of 9 Akahale Street[.]"

IV.

The March 22, 2002 Order and Judgment required Marilyn to pay David

\$7,271.62, representing this court's award of the attorney's fees and costs incurred by [David] in bringing "Defendant's Motion for Enforcement and Other Post-Decree Relief," filed herein on August 22, 2001, to judgment; attorney's fees incurred in bringing "Defendant's Motion for Enforcement, Clarification and Sequestration," filed on June 6, 2001, to judgment; and attorney's fees incurred in the preparation of the findings of fact and conclusions of law.

In her Opening Brief, Marilyn contends that

the previous motions filed by David's attorney, . . . , were not only unnecessary, but Marilyn also prevailed on some of the issues raised

. . . .

The point that council [sic] was making at the evidentiary hearing, and now makes on appeal is that [counsel for David] is seeking attorney's fees for motions that she filed based upon her client's bad faith. [Counsel for David] further seeks attorney's fees for preparing Findings of Fact and Conclusions of Law that she prepared. Marilyn contends that she should not have to pay for attorney's fees for the preparation of the Findings of Fact and Conclusions of Law as they were prepared by [counsel for David] for the sole purpose of supporting David's positions.

Furthermore, although it is unclear as to why the family court made such an attorney's fees and costs determination, Marilyn contends that given . . . her present and future situation, the family court's order regarding attorney's fees is inequitable.

The Divorce Decree states, in relevant part, as follows:

If either party fails to so perform any of the obligations which he or she has agreed to perform under the provisions of this Decree and enforcement becomes necessary, the failing party may be held responsible for all attorney's fees and costs incurred by the other party to the extent that such fees and costs were reasonably necessary to enforce performance by the failing party.

We decide that Marilyn has failed her burden of showing that the family court abused its discretion.

V.

Marilyn challenges that part of the March 22, 2002 Order and Judgment requiring her to pay David \$1,797.81.

The court's August 3, 2001 Order on Evidentiary Hearing on Defendant's Motion Filed on 6/6/01 states, in relevant part, as follows:

4. Federal Tax Refund - [David] shall be awarded the parties' 1999 Federal tax refund in the amount of \$1,768.00 as his sole and separate property. [Marilyn] is ordered to return to [David] the expired check made out to both parties. After a replacement check is issued, [Marilyn] shall endorse said check within five business days of presentment to her counsel.

Marilyn did not comply. The March 22, 2002 Order and Judgment

NOT FOR PUBLICATION

sought to solve the problem with the following order:

Federal Refund Check -- [Marilyn] shall pay to [David] through her share of the escrow proceeds, the total amount of \$1,797.81, representing the value of the federal refund check that was awarded to [David] per this court's order filed on August 3, 2001. [David] shall endorse the expired federal refund check and transmit same to [Marilyn's] counsel. Thereafter, [Marilyn] may request a replacement check and all proceeds from said replacement check, including any additional interest that may be added by the United States Treasury shall be awarded to [Marilyn]. [David] shall sign any documents or endorse any check, presented by [Marilyn], that would facilitate her receiving the replacement funds."

In her Opening Brief, Marilyn contends that "it was inequitable and an abuse of the family court's discretion to order Marilyn to advance the amount of \$1,797.81, which represented the value of the federal refund check, to David." In light of the fact that the problem was caused by Marilyn's noncompliance with the court's August 3, 2001 "Order on Evidentiary Hearing on Defendant's Motion Filed on 6/6/01," we disagree.

CONCLUSION

Accordingly, we affirm the family court's March 22, 2002 "Order and Judgment on Defendant's Motion for Enforcement and Other Post-Decree Relief Filed on 8/22/01."

DATED: Honolulu, Hawai'i, December 19, 2003.

On the briefs:

Herman H.M. Ling
for Plaintiff-Appellant.

Chief Judge

Linda N. Monden
for Defendant-Appellee.

Associate Judge

Associate Judge