

**NOT FOR PUBLICATION**

---

NOS. 25119 and 25496

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

DARLENE R. CARRILHO, Plaintiff-Appellant, v.  
LAURENCE CARRILHO II, Defendant-Appellee

APPEAL FROM FAMILY COURT OF THE FIRST CIRCUIT  
(FC-D NO. 01-1-2000)

MEMORANDUM OPINION

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

In appeal No. 25119, Plaintiff-Appellant Darlene R. Carrilho (Darlene) appeals from (a) the Divorce Decree filed on April 26, 2002 (Divorce Decree) and (b) the May 9, 2002 "Order Denying Plaintiff's Motion for Reconsideration, Filed on April 11, 2002" entered in the Family Court of the First Circuit, Judge Bode A. Uale presiding. Darlene argues that the trial court reversibly erred when it: (1) (a) failed to identify the valid and relevant considerations for its deviation from the Partnership Model Division of the Marital Partnership Property and (b) decided not to deviate from the Partnership Model Division; (2) awarded Darlene spousal support (a) of only \$900 per month and (b) only for one year; and (3) denied Darlene's motion for reconsideration. We affirm in part, vacate in part, and remand.

In appeal No. 25496, Darlene appeals from Judge Uale's November 20, 2002 "Order Denying Plaintiff's October 1, 2002

Motion for Relief from Final Judgment. We affirm.

Pursuant to a motion for consolidation of appeals filed and approved on October 8, 2003, appeals No. 25119 and No. 25496 have been consolidated for decision.

I. APPEAL NO. 25119

A. BACKGROUND

Darlene and Defendant-Appellee Laurence Carrilho II (Larry) started dating in October 1984. Darlene was attending junior college in San Diego and Larry was attending the University of San Diego. Larry eventually transferred to Chaminade University in Hawai'i. In January of 1986, Darlene was injured in a car accident. She fractured her pelvis, clavicle, and wrist.<sup>1</sup> In July 1987, Darlene moved to Hawai'i to live with Larry in an apartment in the Koa Hotel and Apartments<sup>2</sup> (KH&A) in Wai-kīkī. The KH&A was owned by Larry's father and aunt. The couple did not have to pay rent. During this period, Larry attended Chaminade University and did maintenance work for the KH&A. He was paid at an hourly rate. Larry also did a brief stint as a security guard. His family also gave him money. Darlene worked at Trappers at the Hyatt. The parties shared

---

<sup>1</sup> At the trial in March of 2002, Plaintiff-Appellant Darlene R. Carrilho (Darlene) testified that her doctors advised her that her seizure disorder that began approximately six years later was caused by this accident.

<sup>2</sup> The Koa Hotel and Apartments (KH&A) was described as "a four-story walk-up with a saimin noodle shop downstairs and a gift shop."

their incomes to pay their expenses.

In 1988, after Larry completed his MBA, Darlene and Larry moved back to San Diego. They stayed in Darlene's parents' rental homes and did not have to pay rent for the first year. Darlene worked at the Hyatt in San Diego. Larry had difficulties finding a job but eventually found one as a rental clerk for Budget Rent-a-Car at the airport. The couple supplemented their income with gifts from their parents and other family members.

In 1991, Darlene and Larry lost their jobs and moved back to Hawai'i. Larry's mother, Ethel Beatrice Carrilho (Larry's Mother), had become ill and asked the couple to move back to Hawai'i and live in her second apartment rent-free. However, conflicts occurred between Larry and Larry's Mother and the couple was evicted after a couple of months.

In October of 1992, the couple moved back into one of the KH&A apartments rent-free. Larry continued to do maintenance work at the KH&A. After moving to the KH&A, Darlene started having seizures. She testified that the doctors informed her that "it's very common for head traumas to start to experience seizures seven -- six to eight years after the head trauma but they need to be going through a very stressful . . . and then it's a problem that just keeps going." At the trial in March of 2002, however, Darlene testified that although she never lost her driver's license, she had not used it until she had been

seizure-free for a year. As a result of medication, she had been seizure-free for a year, was driving to work in a borrowed car, and was in the process of purchasing a truck for her personal use.

Larry and Darlene were married on April 18, 1994.

Larry's Mother died in December of 1995. Plaintiff's Exhibit 3 in evidence, entitled "The Stipulation Re: Property Valuation filed on March 11, 2002," states, in relevant part, as follows:

PARK AT PEARL RIDGE APARTMENT

1. [Larry] owns a one-third interest in Apartment A1703 (a penthouse apartment) located at Park at Pearl Ridge, Pearl City, Hawaii. [Larry's] half-sister and half-brother each own a one-third interest in the apartment.

2. [Larry] and his half-siblings acquired their interest in the apartment when their mother, Ethel Carrilho, died on December 7, 1995.

. . . .

KULA MAUI PROPERTY

1. [Larry] owns a one-third interest in lot 1-A-3-A Omaopio, Kula, Maui, Hawaii (TMK 2-3-003-050) - an unimproved vacant lot. [Larry's] half-sister and half-brother each own a one-third interest in this property.

2. [Larry] and his half-siblings acquired their interest in the Kula, Maui property when their mother, Ethel Carrilho, died on December 7, 1995.

In 1996, Darlene's problem with seizures caused her to quit her job. Larry and Darlene started a new business operated "[o]ut of a warehouse in Sand Island." It was "a franchise of selling wakeboards and wakeboard equipment" and its name was "K Board Sports".

**NOT FOR PUBLICATION**

---

Larry's father passed away in April 1997. His one-half interest in the KH&A passed to Larry. When Larry's aunt passed away in January 2001, the other one-half interest passed to Larry's aunt's daughter (Larry's Cousin).

Soon after Larry's father died, Larry started a new "surf shop" business called "Koa Board Sports" (KBS) and operated it out of his KH&A apartment. Initially, Larry and Darlene worked together. When they worked together, however, they argued about personal and business matters. The arguments made both customers and employees very uncomfortable. When Larry's employees threatened to quit, Larry asked Darlene to stop working at KBS and she did so.

The parties separated in March 2001. On June 13, 2001, Darlene filed a complaint for divorce.

On June 13, 2001, Darlene filed an Asset and Debt Statement on pre-printed "Asset and Debt Statement 1F-P-063" "Form No. 073925 R12/97". The "Maui property" is listed in the "REAL PROPERTY" section of this Asset and Debt Statement and, under the heading "**Title (H,W,J)**", it reports that the title to the "Maui property" then was "?". In Plaintiff's Supplemental Memorandum in Support of Plaintiff's Motion for Pre-Decree Relief, counsel for Darlene wrote, in relevant part, as follows:

[Larry] acquired substantial assets by inheritance from his mother and father. When his mother died in 1994, [Larry] inherited about \$200,000 in cash and a 27 acre property on Maui with his step-brother and step-sister. [Darlene] has been advised by [Larry]

that [Darlene's] name is on the Maui property as well, but [Darlene] is not sure about this. [Larry] also inherited a one-third interest in his mother's penthouse at the Park at Pearl Ridge. When [Larry's] father died, he inherited about \$100,000 in cash and more than a one-half interest in the Koa Hotel. All of these inherited assets have substantially increased in value during the marriage, and under Hawaii law, [Darlene] is entitled to an award of one-half of the increase in value of the assets (and [Darlene] may even have an ownership interest in [Larry's] inherited Maui property).

On July 6, 2001, Larry filed an Asset and Debt Statement. The "Kula, Maui (land)" is listed in the "**REAL PROPERTY**" section of this Asset and Debt Statement and, under the heading "Title", it states that the title to the "Kula, Maui (land)" then was "J.". In an accompanying footnote, this Asset and Debt Statement states that "[Larry] inherited" this "Kula, Maui (land)".

A July 11, 2001 order entered by Judge Allene Suemori states:

1) [Larry] to pay [Darlene] temporary support of \$1350/mo beg. 7/16/01. Payments to [Darlene's] atty. 2) [Larry] to pay atty's fee of \$1800 at rate of \$450 every two weeks beginning 7/16/01. 3) [Larry] to maintain medical insurance. 4) Parties to engage in discovery and return 8/16/01 at 2:30 pm. 5) [Darlene] to attempt to find employment & show proof." **R.64**

Larry's January 17, 2002 Position Statement states, in relevant part, as follows:

1. Divorce and Background. . . .

. . . .

[Larry's] mother died on December 5, 1995. After his mother's death, [Larry] inherited a one-third (1/3) leasehold interest in Apartment #A-1703 at the Park at Pearlridge (hereinafter "the apartment"). His siblings are the other two (2) owners. [Larry] also inherited a one-third (1/3) interest in undeveloped, agricultural land in Maui (hereinafter "the Maui land") from his mother's estate. His two (2) siblings own the remaining two-thirds (2/3) of the Maui land.

. . . . .

Over the course of the last six (6) years, [Larry] also inherited a total of approximately \$100,000.00 in cash from his parent's estates. Approximately \$60,000.00 of [Larry's] inheritance was used to start Koa Board Sports (hereinafter "KBS"), a shop specializing in surf board and surfing-related products. The remaining \$40,000.00 cash was put into KBS over time and also used for the parties' living expenses.

. . . . .

3. Real Property. [Larry] inherited the apartment, the Koa Hotel, and the Maui land from his parents during the marriage and he should be awarded his Category 3 interest in these properties. Therefore, [Darlene] is only entitled to a portion of the Category 4 increase or decrease in value of these properties.

. . . . .

c. The Maui Land. An appraisal conducted by ACM, Inc. at the time of [Larry's] inheritance in December, 1995 (hereinafter "the 1995 appraisal") concluded the Fair Market Value of the property was \$650,000.00. . . .

An appraisal conducted by ACM, Inc. for this case (hereinafter "the 2001 appraisal") states that the value of [Larry's] ownership interest in the Maui land should be discounted by 25% because he only owns a one-third (1/3) interest. The appraiser, TED YAMAMURA, would testify that the same discount percentage should be applied to the value of [Larry's] one third (1/3) interest as of the date of his inheritance. Therefore, the value of [Larry's] Category 3 interest for the Maui land should be \$162,500.00.

. . . . .

Since the Maui land doesn't have water and neither [Larry] nor his siblings intend to put water on the land, the \$667,000.00 value of the Maui land should be used to determine [Larry's] Category 4 interest and the current value of [Larry's] one-third (1/3) interest would be \$166,750.00. Therefore, the value of [Larry's] Category 4 interest would be \$4,250.00 . . . .

In sum, . . . [t]he Category 4 value from the Maui land is \$4,250.00. . . . Therefore, [Darlene's] share of [Larry's] Category 4 real estate pursuant to marital partnership Principles is between \$2,125.00 and \$16,769.00. However, as discussed later, this amount should be offset by the repayment of [Larry's] capital contribution to the marital estate.

Defendant's Exhibit B in evidence, which is Larry's Asset and Debt Statement filed on March 7, 2002, states that the title to the Maui land then was "J." and its value then was

**NOT FOR PUBLICATION**

---

"\$166,750.00." The footnote to that valuation states: "(d) H. owns a one-third (1/3) interest in this property and the value shown is his discounted one-third (1/3) interest only."

At the trial on March 18, 2002, Larry testified, in relevant part, as follows:

Q. Okay. How many pieces of real property do you own?

A. I am part-owner in three different properties. I have three partners in a property in Aiea, an apartment condo and --

Q. You have three partners?

A. Two partners, excuse me.

Q. There's three of you together?

A. Three of us together. Also, with the same people I have land on Maui and then on the opposite side with my aunt's daughter I have the apartment building in Waikiki.

Q. And you inherited all of these properties?

A. Yes, I did.

Q. Do you and your family members have -- any of your family members for any of these properties have any plans to sell these properties?

A. No. These properties have been in the family for many generations; they were handed down. None of us want to sell.

Q. Regarding the Maui lot, that's a vacant lot --

A. Correct.

-- correct, and you own that with your half-brother and half-sister?

A. Correct.

Q. And you just testified there's no plans to sell that. Do you have any plans to develop that lot -- you and your siblings, I should say.

A. Not at this time. We would like to pass it down through more generations, so right now it's owned for agriculture and the yearly fee is \$60 and we wish to not incur any other expenses than that.

Q. Do you own a controlling interest in any of these properties?



**NOT FOR PUBLICATION**

---

A. No, I don't.

Q. Would you be able to force your family members to sell these properties?

A. The only way I would be able to do that would be by taking them to court, which I would not do.

At the time of the trial in March 2002, Darlene was working for about 30 hours per week as a restaurant manager at Pizza Bob's at a gross monthly income of \$882.44 and expected to go to full-time employment in the following six months or so.

At the conclusion of the trial on March 18, 2002, Judge Uale orally decided the case and stated, in relevant part, as follows: "The Court deems that all personal property of the parties have been divided; each to keep what is currently in each person's possession."

On April 11, 2002, Darlene filed a motion for reconsideration "of this Court's ruling regarding property division as to one item of personal property: [Darlene's] Mikasa dinnerware (plates and goblettes and serving pieces)." In an accompanying declaration, counsel for Darlene states, in relevant part, as follows:

In this case, [Darlene] received as gifts from her parents prior to the marriage Mikasa dinnerware (a 12-place setting of plates, goblettes, coffee cups and saucers, and associated serving pieces). When [Darlene] asked [Larry] (both through counsel) for these Mikasa items back after the trial was over, his response was that he is "using them." In other words, [Larry] refuses to return [Darlene's] Mikasa items which she brought into the marriage as gifts from her parents.

As this Court ruled that the parties should keep whatever personal items are in their possession, technically [Larry] does not have to return the Mikasa items to [Darlene] because they are presently in his "possession." [Darlene] never removed her Mikasa items from the Koa Hotel simply because they are difficult to move

and she did not have any place to store them. Now that the divorce action is over, [Darlene] wants her Mikasa items returned. [Darlene] respectfully requests that this Court order [Larry] to deliver [Darlene's] Mikasa items to her.

On April 22, 2002, Larry filed a memorandum in opposition to Darlene's motion for reconsideration in which he argued that "[i]n sum, [Darlene] had the ability to request the dinnerware at trial. She should not now be rewarded for failing to do so. [Darlene] is essentially attempting to re-litigate this issue by presenting evidence she should have presented at trial. [Darlene's] conduct is unfair and improper and should not be rewarded."

The Divorce Decree was filed on April 26, 2002.

On May 9, 2002, Judge Uale entered an "Order Denying Plaintiff's Motion for Reconsideration Filed on April 11, 2002," denying Darlene's motion for reconsideration on the basis "that the instant pleadings fail to show good cause to warrant reconsideration or a further hearing or New Trial under Rule 59, Hawaii Family Court Rules."

Darlene filed a notice of appeal on May 23, 2002. On June 14, 2002, Judge Uale entered Findings of Fact and Conclusions of Law in relevant part as follows:

II. Findings of Facts

. . . .

6. The parties have been married for seven (7) years.<sup>3</sup>

---

<sup>3</sup> Defendant-Appellee Laurence Carrilho II (Larry) notes that this finding would be more accurate if it said that the time between the date of marriage and the date of the conclusion of the evidentiary part of the trial was

7. No children were born of this marriage.

. . . .

9. Prior to the parties' marriage, they lived together for seven (7) years.

10. During the period of premarital cohabitation, both parties worked. In addition, the parties accepted financial assistance from their parents during this time.

11. The parties brought minimal property to the marriage.

12. Both parties worked throughout most of the parties' marriage.

14. [Larry] is the resident manager of the Koa Hotel apartments and also is the owner and operator of Koa Board Sports. [Larry's] income varies from year to year but his gross monthly income is approximately \$3,000.00 a month.<sup>4</sup>

15. [Darlene] currently works at Pizza Bob's part-time but expects her hours and income to increase. [Darlene's] gross monthly income from Pizza Bob's at this time is \$882.44.

16. [Darlene] has received temporary alimony of \$1,350.00 a month since July, 2000.

17. [Darlene] has also received financial assistance from her parents since the parties' separation.

18. [Darlene's] income during the parties' separation has been sufficient to meet her needs without incurring debt.

Real Property

19. [Larry] inherited partial interests in three (3) pieces of real property from his parents during the parties' marriage.

20. On March 11, 2002, the parties filed a Stipulation Re: Property Valuation which deal with the values of these three (3) real properties.

21. [Larry's] mother died on December 5, 1995.

22. After his mother's death, [Larry] inherited a one-third (1/3) leasehold interest in Apartment #A-1703 at the Park at Pearlridge (hereinafter "the apartment"). His siblings are the other two (2) owners and each holds a one-third (1/3) leasehold interest.

---

"just one month short of eight (8) years of marriage."

<sup>4</sup> This finding of fact no. 14 does not account for finding of fact no. 67.

**NOT FOR PUBLICATION**

---

23. The parties stipulated that the total fair market value of the apartment on the date of [Larry's] inheritance was \$190,000.00.

24. The parties stipulated that the current total fair market value of the apartment was \$169,000.00. Therefore, the apartment has decreased \$21,000.00 in value since [Larry] inherited it.

26. Since [Larry] owns one-third (1/3) of the apartment, his Category 3 interest in this property is \$63,333.33.

27. Since [Larry] owns one-third (1/3) of the apartment, the total Category 4 loss for the apartment is \$7,000.00 (\$21,000 ÷ 3). Therefore each party's Category 4 loss for the apartment is \$3,5000.00.

28. [Larry] also inherited a one-third (1/3) interest in undeveloped, agricultural land in Maui (hereinafter, "the Maui land") from his mother's estate. His two (2) siblings own the remaining two-thirds (2/3) of the Maui land.

29. The parties stipulated that the total value of the Maui land as of the date [Larry] and his two (2) siblings inherited it was \$650,000.00.

. . . .

32. The parties have stipulated that the appraiser found that the current fair market value of the Maui Land (after adjustment) is \$667,000.00. The parties also stipulated that the appraiser recommended that the value of [Larry's] one-third (1/3) interest be discounted by 25% due to his partial ownership interest.

33. The appraiser's calculation of the current fair market value of the Maui Land and his recommendations regarding discounting [Larry's] partial interest are fair and reasonable.

34. Therefore, the current fair market value of [Larry's] one-third (1/3) interest in the Maui Land (including a 25% discount) is \$166,750.00.

35. The value of [Larry's] Category 3 interest should likewise be discounted by 25% as recommended by the appraiser. With this discount, [Larry's] Category 3 interest is \$162,500.00.

36. Therefore, the Category 4 value of the Maui Land is \$4,250 (\$166,750.00 - \$162,500.00). Each party's Category 4 interest is \$2,125.00.

37. The parties have not worked to improve or add value to the apartment or the Maui land.

38. [Larry's] father was diagnosed with brain cancer in 1997 and died on April 26, 1997.

39. After his father's death, [Larry] inherited one-half (1/2) of the Koa Hotel Apartments in Waikiki (hereinafter "Koa

Hotel"). The other one-half (1/2) owner is [Larry's] cousin.

40. The Koa Hotel provides both residential and commercial space. [Larry] lives in the Koa Hotel and acts as its resident manager.

41. The parties have stipulated that the fair market value of the one-half (1/2) interest in the Koa Hotel which [Larry] inherited was \$500,890.00 on the date of his inheritance.

42. . . . [Larry] agreed . . . that this value probably did not include a discount for partial ownership.

. . . .

48. The current fair market value of [Larry's] one-half (1/2) interest in the Koa Hotel should be \$430,000.00, the same as [Larry's cousin].

49. A 20% discount for partial ownership should be applied to the value of [Larry's] one-half (1/2) interest on the date of his inheritance. Therefore, [Larry's] Category 3 interest in the Koa Hotel is \$400,712.00.

50. The Category 4 value of the Koa Hotel is \$29,288.00 (\$430,000.00 - \$400,712.00). Therefore, each party's Category 4 interest is \$14,644.00.

51. [Darlene] has not worked to improve or add value to the Koa Hotel.<sup>5</sup>

52. In sum, the Category 4 values for the real properties are: (1) a loss of \$7,000.00 for the apartment; (2) \$29,288.00 for the Koa Hotel; and (3) \$4,250.00 for the Maui Land.

53. [Darlene's] one-half (1/2) share of the Category 4 values pursuant to Marital Partnership Principles is \$13,269.00.

54. [Larry] doesn't own a majority interest in any of these real properties and can't force a sale of these properties.

55. [Larry's] family members don't want to sell these real properties.

56. [Larry's] siblings want to preserve the apartment and Maui land for their children.

Cash inheritance

57. Over the course of the last six (6) years, [Larry] also inherited a total of approximately \$100,000.00 in cash from his parents' estates.

58. [Larry] used these funds to open a business, Koa Board

---

<sup>5</sup> This finding of fact no. 51 erroneously suggests that Larry and Darlene were not economic partners during their economic partnership.

---

**NOT FOR PUBLICATION**

---

Sports, and for the parties' living expenses.

59. This \$100,000.00 cash no longer exists.

60. [Larry] will not inherit any more cash from his parent's [sic] estates.

Koa Board Sports

61. Approximately \$60,000.00 of [Larry's] cash inheritance was used to open Koa Board Sports (hereinafter "KBS") a shop specializing in surf board and surfing-related products. KBS is located in the Koa Hotel.

62. The remaining \$40,000.00 cash was put into KBS over time and also used for the parties' living expenses.

63. [Larry] opened KBS in 1998 as a sole proprietorship. Although [Darlene] is neither a partner nor a partial owner of KBS, she did work at KBS when it first opened. However, [Darlene] never worked at KBS on a full-time basis.

64. In January 2001, [Darlene] tried to increase her work hours at KBS. [Darlene] would go into KBS during business hours when [Larry] was working. Unfortunately, when [Larry] and [Darlene] worked at KBS together, they would argue about personal and business matters.

65. The arguments made both customers and employees very uncomfortable. Among other things, [Darlene] tried to talk to employees and customers about her marital problem with [Larry]. Eventually, [Larry's] employees threatened to quit. For this reason, [Larry] asked [Darlene] to stop working at KBS.

66. Since the events of September 11, 2001, KBS' business has suffered. KBS relies primarily on tourism to stay in business. Even prior to September 11, 2001, KBS was not a hugely successful business.

67. KBS had a loss of \$16,415.00 in 1998, a minimal net profit of \$3,658.00 in 1999, and a net profit of \$25,212.00 in 2000.<sup>6</sup>

68. KBS doesn't pay rent since it is situated in the Koa Hotel.

69. If KBS did pay rent, it would not have shown a profit in 1998, 1999, or 2000.

70. If KBS was sold, [Larry] would charge a new owner rent.

71. Whatever profits were made by KBS were put back into

---

<sup>6</sup> See finding of fact no. 14. Defendant's Exhibit A in evidence indicates that \$3,000 per month is the amount of Larry's income from the KH&A. It does not include his income from the Park at Pearlridge apartment or Koa Board Sports.

the business.

72. Since KBS is a sole proprietorship, the income from KBS must be reported on [Larry's] income tax returns. However, [Larry] doesn't receive this income.

Other Assets

73. [Darlene] has \$14,000.00 in her American Savings Bank checking account.

74. There was no credible evidence or testimony that [Darlene] owed her parents any money.<sup>7</sup>

75. [Darlene] owns \$1,400.00 worth of securities.

76. [Darlene] has a total of \$15,400.00 in liquid assets.

77. [Larry] has \$2,397.66 in his Central Pacific Bank Savings account and \$345.56 in the parties' joint Honolulu City & County Federal Credit Union checking account.

78. [Larry] owns \$1,827.54 in securities.

79. [Larry] has \$4,570.76 in liquid assets.

. . . .

Marital Debts

82. The parties owed \$8,699.00 in federal income taxes and \$2,346.00 in state income taxes for tax year 2000.

83. [Larry] borrowed approximately \$9,200.00 from friends and family to pay this tax debt.

84. [Larry] has been making monthly payments to these individuals to pay off these loans.

85. The parties charged both business and personal expenses to the credit cards titled in [Larry's] name. As of March, 6, 2002, the parties' personal expenses on those credit cards totaled approximately \$7,700.00.

86. [Larry] has been making monthly payments on this credit card debt.

Household Furniture, Furnishings, and Effects

87. In or about March, 2001, [Darlene] voluntarily moved out of the parties' apartment.

---

<sup>7</sup> Darlene initially testified that the \$14,000 mentioned in finding of fact no. 73 came from a "\$3,000 gift and \$11,000 loan from [her] parents[.]" When asked, "What's the 11,000 for?" she responded, "to purchase this truck." When subsequently asked, "Right now do you have any assets at all?" she responded, "I have the 14 that my parents gave me for retirement."

88. When [Darlene] moved out of the apartment she took clothes, the stereo, all of her jewelry, other personal items, personal papers, her two (2) surfboards, and [Larry's] two (2) dogs.

89. In July, 2001, [Darlene] had another opportunity to remove items from the marital residence without any supervision by [Larry]. [Darlene] removed personal items with the help of her parents at this time.

90. Subsequently, [Darlene] asked [Larry] to pack up all of the photographs from the marital residence for her. [Larry] did so.

91. [Darlene] testified that the only item [sic] she left at the marital residence were her calendars.

[Darlene's] Motion for Reconsideration

92. On January 17, 2002, [Larry] filed his Position Statement stating that each party should keep the household furniture, furnishings and effects currently in his or her possession.

93. On January 23, 2002, [Darlene] filed her Position Statement wherein she stated that she had numerous personal items at the marital residence (including furniture) which needed to be returned to her.

94. Trial in this case was set for May, 18, 2002 from 8:30 a.m. to 12:00 p.m.

95. At trial, both parties presented their case in full.

96. The trial concluded early at 11:30 a.m.

97. At trial, [Darlene] testified on cross-examination that sometime in July, 2001, she and her parents went to the marital residence and removed items with [Larry's] permission. [Darlene] admitted that [Larry] was not present during this time.

98. [Darlene] also admitted that subsequently, [Larry] packed up boxes of photographs she had requested and provided them to her.

99. [Darlene] also testified on cross-examination that she had removed clothing, jewelry, and personal papers from the marital residence. [Darlene] also testified that the only thing she didn't remove from the marital residence were her calendars.

100. At no time during [Darlene's] direct examination testimony or cross-examination testimony, did she ever state that she wanted any dinnerware returned to her. Nor did [Darlene] make any such claim in her pleadings although she certainly had numerous opportunities to do so.

101. At trial, [Darlene] did not present any evidence regarding the Mikasa dinnerware.



102. At the conclusion of the trial, each party was ordered to keep the household furniture, furnishings, and effects currently in his or her possession.

103. On April 11, 2002, [Darlene] filed her Motion for Reconsideration (hereinafter "Darlene's Motion") requesting that [Larry] be ordered to give her Mikasa dinnerware (hereinafter "dinnerware") awarded to him.

. . . .

Deviation

106. There are insufficient liquid assets in the marital estate to award [Darlene] the \$200,000.00 in cash she is requesting.

107. In order to award [Darlene] the \$200,000.00 she is requesting, she would have to file an action to partition one or more of [Larry's] real properties and force a sale. [Darlene] testified that this is how she would obtain the \$200,000.00 if it was awarded to her.<sup>8</sup>

III. CONCLUSIONS OF LAW

. . . .

10. The marital partnership begins on the date of marriage.<sup>9</sup>

. . . .

14. The Court finds that [Larry] was credible and reliable and [Darlene] was not.<sup>10</sup>

. . . .

Divorce Decree

16. The factual statements contained in [Larry's] Position Statement and adopted by [Larry] at trial were credible and are admitted into evidence.<sup>11</sup>

---

<sup>8</sup> In response to FOF nos. 106 and 107, Darlene argues that "if Darlene were awarded a fixed value amount, Larry and his half-brother and half-sister and cousin could determine how to pay the award. There were a number of obvious options available for an award in the \$100,000 to \$150,000 range."

<sup>9</sup> In this case, the marital partnership began before the marriage.

<sup>10</sup> Darlene contends that "[t]his blanket statement drafted by Larry's attorney for the court to sign is meaningless." We agree.

<sup>11</sup> This adoption by Larry and admission into evidence by the court occurred at trial during Larry's testimony as follows:

**NOT FOR PUBLICATION**

---

Property Division and Debt Allocation

17. In determining the division of assets and the allocation of debts between the parties, the Court considered the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left by the divorce, and all other circumstances of the case as required under Section 580-47, HRS. Accordingly, it is just and equitable that the following orders regarding division of property and allocation of debts be entered.

18. Pursuant to Marital Partnership Principles, [Larry] is entitled to a return of his Category 3 interests in the apartment, the Koa Hotel and the Maui land.

19. [Larry] shall be responsible for all of the parties' joint debts totaling \$16,900.00. Each party shall be responsible for these debts titled in his or her name alone.

20. It would be inequitable to award [Larry] a credit for his \$100,000.00 Category 3 capital contribution.

21. In light of the foregoing allocation of debts, the fact that [Larry] only owns a partial interest in the apartment, the Koa Hotel, and the Maui land, and the Court's decision not to award [Larry] a capital contribution credit, [Larry] shall be awarded all of the parties' Category 4 interests in the apartment, the Koa Hotel, and the Maui land.

---

Q. [BY COUNSEL FOR LARRY]: Have you viewed the position statement . . . that I filed on your behalf?

A. Yes, I have.

Q. And do you adopt the facts and positions set forth in those documents?

A. Yes, I do.

. . . .

[COUNSEL FOR DARLENE]: Well, Judge, I still object to just wholesale adopting things. Again, you know, I'd have to go back look at the position statement and see whether there may or may not be objectionable things in there. You know, if he is going to testify, let him testify.

THE COURT: That's overruled. You have the right to cross-examine.

On appeal, Darlene contends that it was "error for the court to accept into evidence Larry's January 2002 position statement which he 'adopted' at trial as his testimony." We disagree. Consequently, we also disagree with Darlene's point on appeal that findings of fact nos. 63, 64, and 65 entered on June 14, 2002, are not "supported by the admissible facts at trial."

**NOT FOR PUBLICATION**

---

22. There is no valid and relevant consideration warranting a deviation from Marital Partnership Principles and award of \$200,000.00 to Darlene in this case.<sup>12</sup>

23. It would be inequitable to deviate from Marital Partnership Principles in this case due to [Larry's] partial ownership interests in the real properties.

24. [Larry] shall be awarded the joint Honolulu City & County Federal Credit Union checking account, the business account for the Koa Hotel titled in his name, and any deposit accounts titled in his name alone. [Darlene] shall be awarded the checking account at American Savings Bank and any other deposit accounts titled in her name alone.

25. [Larry] shall be awarded the Leap Wireless securities and CFSB Direct securities titled in his name alone. [Darlene] shall be awarded the America Funds titled in her name alone.

. . . .

27. [Larry] shall be awarded Koa Board Sports and all assets and debts associated therewith.

28. [Darlene] shall be awarded the parties' two (2) dogs, KOA and KEA.

. . . .

31. Each party shall assume and pay his or her own attorney's fees and costs in this case.

Alimony

32. The Court concludes that [Darlene] requires one (1) year of transitional alimony in the amount of \$900.00 a month payable in one (1) monthly installment.

33. The Court concludes that Plaintiff's Motion for Reconsideration did not warrant a hearing.

34. The Court concludes that little or no weight should be given to [Darlene's] Declaration regarding the Mikasa dinnerware because that testimony was inconsistent with her testimony at trial.

35. The Court concludes that the division of household furniture, furnishings, and effect[s] was an issue at trial.

---

<sup>12</sup> COL no. 22 addresses only Darlene's request for an award of \$200,000. It does not address the relevant question whether Darlene should be awarded a lesser amount.

B. STANDARDS OF REVIEW

Appellate review of a court's findings of fact (FsOF) and conclusions of law (CsOL) is done pursuant to the clearly erroneous standard.

"A[n] [FOF] is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed." State v. Kane, 87 Hawai'i 71, 74, 951 P.2d 934, 937 (1998) (quoting Aickin v. Ocean View Investments Co., 84 Hawai'i 447, 453, 935 P.2d 992, 998 (1997) (quoting Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994))). An FOF is also clearly erroneous when "the record lacks substantial evidence to support the finding." Alejado v. City and County of Honolulu, 89 Hawai'i 221, 225, 971 P.2d 310, 314 (App. 1998) (quoting Nishitani v. Baker, 82 Hawai'i 281, 287, 921 P.2d 1182, 1188 (App. 1996)). See also State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995). "We have defined 'substantial evidence' as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Roxas v. Marcos, 89 Hawai'i 91, 116, 969 P.2d 1209, 1234 (1998) (quoting Kawamata Farms v. United Agri Products, 86 Hawai'i 214, 253, 948 P.2d 1055, 1094 (1997) (quoting Takayama v. Kaiser Found. Hosp., 82 Hawai'i 486, 495, 923 P.2d 903, 912 (1996) (citation, some internal quotation marks, and original brackets omitted))).

[State v. ]Kotis, 91 Hawai'i[, 319,] 328, 984 P.2d[, 78,] 87[ (1999)] (footnote omitted) (brackets in original).

Hawai'i appellate courts review conclusions of law de novo, under the right/wrong standard. See Associates Fin. Services Co. of Hawai'i, Inc. [v. Mijol], 87 Hawai'i[, 19,] 28, 950 P.2d[, 1219,] 1228 [(1998)]. "Under the right/wrong standard, this court 'examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it.'" Estate of Marcos, 88 Hawai'i at 153, 963 P.2d at 1129 (citation omitted).

Robert's Hawai'i School Bus, Inc. v. Laupahoehoe Transportation Co., Inc., 91 Hawai'i 224, 239, 982 P.2d 853, 868 (1999).

Leslie v. Estate of Tavares, 91 Hawai'i 394, 399, 984 P.2d 1220, 1225 (1999) (quotations and brackets in original).

Appellate courts review "[a] trial court's ruling on a motion for reconsideration . . . under the abuse of discretion standard." Assoc. of Apartment Owners of Wailea Elua v. Wailea

Resort Co., Ltd., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (2002) (internal citations omitted). An abuse of discretion occurs if the trial court has "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992) (citations omitted).

C. DISCUSSION

1.

We agree with Darlene that the last seven words of FOF no. 54 are an "erroneous statement of law." Although FOF no. 107 suggests that the error in FOF no. 54 is harmless, CsOL nos. 21 and 23 establish that the error is not harmless. Regarding COL no. 23, the court does not explain why the fact that Larry "only owns a partial interest in the apartment, the Koa Hotel, and the Maui land" causes it to "be inequitable to deviate from marital Partnership Principles in this case[.]" It appears that the court's reason is specified in FOF no. 55 ("[Larry's] family members don't want to sell these real properties") and FOF no. 56 ("[Larry's] siblings want to preserve the apartment and Maui land for their children.") We conclude that while these considerations may be relevant in determining how the award should be paid, they are not relevant to, and must not be considered when deciding, the question of whether an award should

be made to Darlene.

2.

Darlene contends that:

1. The trial court erred in finding that there was no basis for an "equitable deviation from the partnership model in this case and in refusing to grant an "equitable deviation" of the assets in this case from Larry to Darlene. There were numerous grounds upon which the court could and should have based a ruling for "equitable deviation." The court failed to list these grounds and failed to state why they did not constitute valid bases for "equitable deviation."

In response to CsOL nos. 17, 18, 21, 22, 23, Darlene argues that "[t]here were ample grounds which the court should have listed for 'equitable deviation,' and the court should have listed them and stated whether it would 'deviate' based on these grounds. It was error for the court not to have 'deviated' in this case."

In order to understand the role of "deviation" in a Partnership Model Division, we must first understand the goal of the Partnership Model. In Gussin v. Gussin, the Hawai'i Supreme Court concluded that: "1. Marriage is a partnership to which both parties bring their financial resources as well as their individual energies and efforts and, in divorce proceedings regarding division and distribution of the parties' estate, partnership principles guide and limit the range of the family court's choices." Hussey v. Hussey, 881 P.2d 1270, 1274, 77 Hawai'i 202, 206 (App. 1994) (quoting Gussin v. Gussin, 73 Haw. 470, 836 P.2d 484 (1992)).

In Jackson v. Jackson, 84 Hawai'i 319, 324 n.2, 933

P.2d 1353, 1358 n.2 (App. 1997), this court describes the Partnership Model, which defines the five categories of net market values (NMVs)<sup>13</sup> and states the uniform starting point for the division and distribution of those NMVs to the parties.

Under the Partnership Model, assuming all valid and relevant considerations are equal,

1. The Category 1 and 3 NMVs are the "partner's contributions" to the Marital Partnership Property that, assuming all valid and relevant considerations are equal, are repaid to the contributing spouse; and

2. The Category 2, 4, and 5 NMVs are Marital Partnership Property that, assuming all valid and relevant considerations are equal, are awarded one-half to each spouse.

Hussey v. Hussey, 77 Hawai'i 202, 207-08, 881 P.2d 1270, 1275-76 (App. 1994). We label this Hussey division the Partnership Model Division.

---

<sup>13</sup> The five categories of net market values (NMVs) are as follows:

Category 1. The [NMV], plus or minus, of all property separately owned by one spouse on the date of marriage (DOM) but excluding the NMV attributable to property that is subsequently legally gifted by the owner to the other spouse, to both spouses, or to a third party.

Category 2. The increase in the NMV of all property whose NMV on the DOM is included in category 1 and that the owner separately owns continuously from the DOM to the DOCOEPOE [date of the conclusion of the evidentiary part of the trial].

Category 3. The date-of-acquisition NMV, plus or minus, of property separately acquired by gift or inheritance during the marriage but excluding the NMV attributable to property that is subsequently legally gifted by the owner to the other spouse, to both spouses or to a third party.

Category 4. The increase in the NMV of all property whose NMV on the date of acquisition during the marriage is included in category 3 and that the owner separately owns continuously from the date of acquisition to the DOCOEPOE.

Category 5. The difference between the NMVs, plus or minus, of all property owned by one or both of the spouses on the DOCOEPOE minus the NMVs, plus or minus, includable in categories 1,2,3, and 4.

Tougas v. Tougas, 76 Hawai'i 19, 27, 868 P.2d 437, 445 (1994) (quoting Malek v. Malek, 7 Haw. App. 377, 380-81 n.1, 768 P.2d 243, 246-47 n.1 (1989)) (brackets in original).

Thus, under the Partnership Model Division, Category 2, 4, and 5 NMVs are divided 50% to the owner and 50% to the nonowner. Id.

The Partnership Model requires the family court, when deciding the division and distribution of the Marital Partnership Property of the parties part of divorce cases, to proceed as follows: (1) find the relevant facts; start at the Partnership Model Division and (2) (a) decide whether or not the facts present any valid and relevant considerations; authorize a deviation from the Partnership Model Division and, if so, (b) itemize those considerations; if the answer to question (2) (a) is "yes," exercise its discretion and (3) decide whether or not there will be a deviation; and, if the answer to question (3) is "yes," exercise its discretion and (4) decide the extent of the deviation.

Question (2) (a) is a question of law. The family court's answer to it is reviewed under the right/wrong standard of appellate review. Questions (3) and (4) are discretionary matters. The family court's answers to them are reviewed under the abuse of discretion standard of appellate review.

Jackson, 84 Hawai'i at 332-333, 933 P.2d at 1366-1367.

On the subject of valid considerations and invalid considerations, we have stated that:

In determining whether one or more valid and relevant considerations authorize the family court to deviate from the Partnership Model, the family "court shall take into consideration: the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left by the divorce, the burdens imposed upon either party for the benefit of the children of the parties, and all other circumstances of the case." HRS § 580-47(a) (1993). Other than relative circumstances of the parties when they entered into the marital partnership and possible exceptional situations, the above quoted part of HRS § 580-47 (a) requires the family court to focus on the present and the future, not the past.

Jackson, 84 Hawai'i at 333, 933 P.2d at 1367.

The basis for Darlene's request for deviation is Larry's Category 3 NMV and Category 4 NMV, including the NMVs of the apartment, the KH&A, and the Maui land. Darlene argues that the family court "failed in its primary duty to list reasons why 'equitable deviation' might be appropriate in this case." We disagree. As noted above, this court's opinion in Jackson states



**NOT FOR PUBLICATION**

---

The Partnership Model requires the family court, when deciding the division and distribution of the Marital Partnership Property of the parties part of divorce cases, to proceed as follows: (1) find the relevant facts; start at the Partnership Model Division and (2) (a) decide whether or not the facts present any valid and relevant considerations authorize a deviation from the Partnership Model Division and, if so, (b) itemize those considerations; if the answer to question (2) (a) is "yes," exercise its discretion and (3) decide whether or not there will be a deviation; and, if the answer to question (3) is "yes," exercise its discretion and (4) decide the extent of the deviation.

We agree that the family court failed to comply with some of the requirements specified in Jackson.

Darlene further argues that

the trial court should have awarded "equitable deviation" in favor of Darlene for the following reasons: 1) all of the marital assets were Category 3 assets, 2) if no award of the Category 3 marital assets were made to Darlene, she would be left penniless after the divorce, 3) if approximately \$200,000 of Category 3 marital assets were awarded to Darlene, Larry would still be left with assets valued in excess of \$500,000, at least one of which ([KH&A]) was an income producing asset, and Larry would be financially set for life, 4) the parties had been married for eight years and had been an "economic partnership" for almost fifteen years, 5) Larry had a post-college (MBA) and great earning potential and assets to over \$500,000 in assets, while Darlene had no college degree and limited prospects for employment, 6) Darlene suffered from seizures which resulted from a combination of a car accident and extreme stress brought on by the difficult relationship between Larry and his mother, 7) Darlene was constantly told by Larry before and during the marriage not to attempt to save any money because Larry would earn a lot as an MBA and because [KH&A] would be their "retirement," so Darlene saved no money while Larry intended to walk off with 100% of his interest in the [KH&A] leaving Darlene with nothing, 8) an award to Darlene of \$200,000 in assets would give her a chance to start her own business, have a "nest egg" to rely on, and pursue any further education she felt she needed depending on her decisions for future employment (especially considering her seizure problem), and 9) an award to Darlene of \$200,000 in assets was only about 26%, or half, of the maximum 50% which the court could have awarded to Darlene of Larry's Category 3 assets.

Reason No. 1

The fact that almost all of the NMV of the Marital Partnership Property remaining at the termination of the Marital Partnership was Larry's Category 3 NMV is not, by itself, a

reason for deviating from the Partnership Model Division.

Reason No. 2

If true, Darlene's allegation that she would be left penniless after the divorce if "no award of the Category 3 marital assets were made to Darlene" is not, by itself, a reason for deviating from the Partnership Model Division. Moreover, the allegation is not true. Darlene was earning \$880 per month working about thirty hours per week at Pizza Bob's. Darlene had testified that "she was hoping to be working full-time in about six months." In addition, she had \$14,000 in her checking account and no debt.

Reason No. 3

Darlene does not explain her math. The total value of Larry's share of the three inherited assets is \$626,545.<sup>14</sup>

Reason No. 4

The record shows that the economic partnership of the parties commenced in July 1987. Raupp v. Raupp, 3 Haw. App. 602, 609 n.7, 658 P.2d 329, 335 n.7 (1993). Darlene emphasizes that the "parties had been married for almost eight years and had been an 'economic partnership' for about fifteen years." Darlene ignores the facts that the record also shows (1) that, during its

---

<sup>14</sup> Unchallenged FOF no. 26 finds that the value of Larry's Category 3 interest in the apartment is \$63,333.33. Unchallenged FOF no. 35 finds that the value of Larry's Category 3 interest in the Maui Land is \$162,500.00. Unchallenged FOF no. 49 finds that the value of Larry's Category 3 interest in the Koa Hotel is \$400,712.

existence, the economic partnership was substantially subsidized by Larry's contribution of Category 3 funds, and (2) the economic result of this "economic partnership" was substantially negative.

Reason No. 5

Although it is clear that Larry has a substantial Category 3 NMV, Darlene does not point to any evidence that Larry has "great earning potential[.]"

Reason Nos. 6 and 7

Darlene's statement "that her seizures stem from a combination of a car accident and extreme stress brought on by the difficult relationship between Larry and his mother" is an allegation. The question whether it is a fact is not relevant.

Darlene's statement that Larry told her "before and during the marriage not to attempt to save any money because Larry would earn a lot as an MBA and because Koa Hotel would be their 'retirement'" is an allegation and, even if it is a fact, it violates the rule that the court must "focus on the present and the future, not the past."

As for Darlene's seizures, she is currently taking medication, appears to have been seizure-free long enough to use her driver's license, and there is no evidence of her physical condition inhibiting her opportunities for employment.

Reason No. 8

Darlene alleges that "an award to Darlene of \$200,000

in assets would give her a chance to start her own business, have a 'nest egg' to rely on, and pursue any further education . . . ." This allegation is true. However, although such an award would give her a chance to do these and other things, that fact, by itself, is not a relevant criteria.

Reason No. 9

Darlene alleges that an award of \$200,000 would be only about 26% of the maximum 50% which the court could have awarded to Darlene of Larry's Category 3 NMV. This allegation assumes that 100% is \$769,230, and 50% is \$384,615. Darlene does not explain her numbers.

Reasons 1 through 9

The family court deviated in favor of Darlene when it divided and distributed the Marital Partnership Property. The question is whether the family court abused its discretion when it decided not to deviate further in favor of Darlene.

3. Spousal Support

Darlene challenges COL no. 32 and part "4" of the Divorce Decree. She argues that the family court abused its discretion when it awarded her spousal support of only \$900 per month for only one year. She alleges that her seizure condition limits her employment prospects, and that she has limited income and no assets because she was totally dependent on Larry's assets and income.

**NOT FOR PUBLICATION**

---

Hawaii Revised Statutes § 580-47 (Supp. 2002) states that in ordering spousal support and maintenance, the court shall consider the following factors:

- (1) Financial resources of the parties;
- (2) Ability of the party seeking support and maintenance to meet his or her needs independently;
- (3) Duration of the marriage;
- (4) Standard of living established during the marriage;
- (5) Age of the parties;
- (6) Physical and emotional condition of the parties;
- (7) Usual occupation of the parties during the marriage;
- (8) Vocational skills and employability of the party seeking support and maintenance;
- (9) Needs of the parties;
- (10) Custodial and child support responsibilities;
- (11) Ability of the party from whom support and maintenance is sought to meet his or her own needs while meeting the needs of the party seeking support and maintenance;
- (12) Other factors which measure the financial condition in which the parties will be left as the result of the action under which the determination of maintenance is made; and
- (13) Probable duration of the need of the party seeking support and maintenance.

The court may order support and maintenance to a party for an indefinite period or until further order of the court; provided that in the event the court determines that support and maintenance shall be ordered for a specific duration wholly or partly based on competent evidence as to the amount of time which will be required for the party seeking support and maintenance to secure adequate training, education, skills or other qualifications necessary to qualify for appropriate employment[.]

Larry had been making monthly payments on his credit card debt and to those individuals who loaned him money to pay off his tax debt. Larry had \$4,570.76 in liquid assets. Darlene had a total of \$15,500.00 in liquid assets including \$14,000.00

in her checking account. Darlene had received financial assistance from her parents since the parties' separation. There was no credible testimony or other evidence that Darlene owed her parents any money. Larry will not inherit any more from his parents. Larry's income varies from year to year but his gross monthly income is approximately \$3,000.00 a month plus income or minus loss, if any, from the Park at Pearlridge apartment and Koa Board Sports.

Both parties worked throughout most of their economic partnership. Darlene is currently working at Pizza Bob's and there is no evidence of employment problems caused by seizures. Darlene testified that she was being trained for a management position. Darlene did not challenge FOF no. 18. Moreover, Darlene appears to ignore the sentence in part "4." of the Divorce Decree stating that "[a]ll of the foregoing [orders pertaining to spousal support] shall be subject to further order of the Court."

#### 4. Motion for Reconsideration

After the trial concluded on March 18, 2002, Darlene filed a motion for reconsideration on April 11, 2002, requesting that the court modify its rulings regarding property division so that she would be able to obtain possession and ownership of the Mikasa dinnerware from Larry's apartment. In her motion for reconsideration, she states, in relevant part, as follows:

As I testified at trial, we moved to San Diego from Hawaii in approximately 1988 and remained living together in San Diego until approximately 1992. . . . During this period we were living in San Diego (1988-1992), my parents began giving me as gifts Mikasa dinnerware. By the time Larry and I moved back to Hawaii in 1992, my parents had given me a full 12 place setting of dinnerware (12-place setting of plates, salad plates, coffee cups and saucers, wine goblettes, and serving pieces). . . . The Mikasa dinnerware was packed in San Diego and shipped to Hawaii shortly after Larry and I arrived in Hawaii. The Mikasa dinnerware was then stored in Hawaii and not used. As I testified at trial, Larry and I were married in 1994 and we began to have problems with the marriage in approximately 1999. It was only then that I opened the stored Mikasa dinnerware and began using it for myself. After Larry and I separated, the Mikasa dinnerware remained stored at the Koa Hotel because I had no place to put it.

The Mikasa dinnerware was never part of the marriage. I brought the Mikasa dinnerware into the marriage, and it is still owned exclusively by me. The Mikasa dinnerware should be returned to me. I did not testify about this dinnerware at trial because the main issues at trial involved the distribution of the major assets and debt of the marriage, not the smaller personal property items like the Mikasa dinnerware which can be handled without resorting to valuable trial time."

On May 9, 2002, the court denied Darlene's motion for reconsideration, concluding that "the instant pleadings fail to show good cause to warrant reconsideration or a further hearing or New Trial under Rule 59, Hawaii Family Court Rules."

On appeal, Darlene challenges CsOL nos. 34, 36 and 37 and argues that the court erred in denying her motion for reconsideration because,

the parties concentrated at trial on the major issues between the parties, the division of Larry's Category 3 and 4 assets. The question of the return of a few remaining personal property items belonging to Darlene was not appropriate for discussion during a half-day trial. The normal manner in which minor personal belongings are handled at a divorce trial is for the court to order the parties to distribute what few items are left to argue about and to come back to court or to mediate if there is any remaining dispute.

The purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments, not to re-

litigate old matters or raise arguments or evidence that could and should have been brought during the earlier proceeding.

Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (2002) (citations, internal quotations and brackets omitted).

The court's denial of Darlene's motion for reconsideration is not an abuse of discretion. At trial, the parties discussed at great length whether Darlene was able to retrieve all of her belongings from their apartment.

Q. July of 2001, you and your parents went to the apartment and removed things from the apartment?

A. Only clothing because I was told I could only take clothing.

. . . .

Q. And subsequently isn't it true sometime late last year at your request, you asked for some photographs that you had taken and [Larry] boxed all of those up and left those for you to pick up or for your parents to pick up?

A. Yes, he did. That was very nice of him, yes.

Q. Correct? Okay. So you've had a couple opportunities to obtain things from the apartment, isn't that true?

A. Yes, and I've requested but never have received.

Q. And who told you that you could only take clothes out of the apartment?

A. [My attorney]. [My attorney] said anything that was jointly owned to leave and that I shouldn't take anything other than clothing. I did take some of my files.

Q. So you did take some of your files?

A. My work files, yes, things that belong to me that was my work history that had nothing to do with Larry . . . .

Q. . . . Did you take your jewelry?

A. I took my jewelry a long time ago and put it --

Q. So you took your jewelry --



A. -- yeah, and took it and left it at my friend's house.

Darlene's motion for reconsideration does not raise any new arguments. The dinnerware, given to her by her parents prior to marriage but not prior to the commencement of the economic partnership, is her Category 3 property. Darlene's post-trial desire to include the dinnerware in her list of her Category 3 property is neither a "new argument" or "new evidence" that could not have been brought up in the earlier trial proceedings. Therefore, the court did not abuse its discretion when it denied Darlene's motion for reconsideration.

II. APPEAL NO 25496

On October 1, 2002, while Appeal No. 25119 was pending, Darlene filed, pursuant to Rule 60(b) of the Hawaii Family Court Rule, a Motion for Relief from Final Judgment, in which she states, in relevant part, as follows:

[Darlene] requests that this Court reconsider its orders regarding the division of assets between the parties based on the misrepresentation made by [Larry] during the proceedings and trial in this case that [Darlene] had no interest in the Maui property when in truth and in fact [Larry] well knew that [Darlene] owned an undivided one-half interest in [Larry's] one-third interest in the Maui property. [Darlene] requests that her undivided one-half interest in the Maui property be awarded to her.

The Ethel Beatrice Carrilho Revocable Living Trust states, in relevant part, that "[u]pon termination, my successor Trustee shall distribute the Trust Estate, as it is then constituted, outright and free from trust, to my issue per stirpes." In this case, the successor Trustee is the Bank of Hawaii. The "Regular System" "Limited Warranty Deed" of "1.422

acres, more or less" of "land situate at Kula, Makawao, Island and County of Maui, State of Hawaii" was signed by that trustee on January 15, 1998, and by Larry and Darlene on March 11, 1998. This deed conveyed "[a]n undivided one-third (1/3rd) interest to [Larry] and [Darlene], husband and wife, as tenants by the entirety, with full rights of survivorship."

At a hearing on October 23, 2002, Darlene testified, in relevant part, as follows:

Q. At any time during the divorce proceeding, did you know that you were a part owner of the Maui property?

A. No.

. . . .

CROSS-EXAMINATION

. . . .

Q. I just want to clarify a few things, [Darlene]. You testified that [Larry] did tell you when you were married that you were on title to the property?

A. He never said I was on title. He always said that I owned part of the property. Title was never an issue.

. . . .

Q. And your testimony today is that you signed exhibit 1, the -- deed transferring title into yours and [Larry's] name, is that correct?

A. I don't recall signing it. But as -- but I see my signature.

. . . .

Q. Attached to my memorandum in opposition was an asset and debt statement that you filed in this case. It's exhibit A. And on that asset and debt statement, under real property, you actually list a question mark as to the title for the Maui property. So it was in your head that title may not be with your husband, is that correct?

. . . .

A. At that time, I was believing my husband, what he told

me, that I -- that I also owned part of the property with him.

. . . .

Q. Okay. And, in fact, you made statements to that effect in the supplemental memo which you attached to your motion. It's exhibit B attached to my memorandum in opposition. You stated in there -- or, I'm sorry, [your counsel] stated on your behalf that you had been advised that your name is on the Maui property as well. Do you dispute that?

A. No, I don't dispute this. . . .

At the October 23, 2002 hearing, Larry testified, in relevant part, as follows:

Q. Okay. As a factual matter, did she or did she not have her name listed on the transfer certificate of title for the Maui property as a part owner?

A. Yes, she did.

Q. Okay. Did you ever disclose that to -- during the divorce proceeding, did you or your attorney, to your knowledge, ever disclose that to me or [Darlene]?

A. I do so on my asset and debt statement.

At the conclusion of the hearing, counsel for Darlene argued, in relevant part, as follows:

[COUNSEL FOR DARLENE]: Judge, if you want to know what it was like being in our position in this trial, all you have to do is go back to the trial and think about what it was like being in your position, because the same representations that were made to us were made to you. I am sure that in this trial, you didn't have an inkling of the fact that our client had an interest in the Maui property. In fact, . . . the way your judgment is drafted, when you award [Larry] his interest in the Maui property, you make no statement whatsoever about my client's interest in the Maui properties because you didn't know she had an interest in the Maui property, and neither did we.

. . . .

We had 16 hundred dollars to try this case. We couldn't run around going and getting title searches and -- and valuations of the property and paying a lot of money. . . .

So we should have been told about the one-third. And obviously, we didn't know about it. If we had, we would have made arguments about it. We didn't know because it wasn't told to us, and it was represented to us in the exact opposite. . . .

On November 20, 2002, the court entered an Order

Denying Plaintiff's October 1, 2002 Motion for Relief from Final Judgment.

On December 12, 2002, the court entered its Findings of Fact and Conclusions of Law, in relevant part, as follows:

4. [Larry] also inherited a one-third (1/3) interest in undeveloped, agricultural land in Maui (hereinafter "the Maui land") from his mother. His two (2) siblings own the remaining two-thirds (2/3) of the Maui land.

5. Although title to [Larry's] one third (1/3) interest in the Maui land was subsequently placed in both [Larry's] and [Darlene's] names, [Larry's] mother left the Maui land to her three (3) children alone.

6. It was never [Larry's] mother's intent to leave any of her estate to [Darlene].

. . . .

8. [Darlene] signed the title document which placed title to [Larry's] one-third (1/3) interest in the Maui land in the parties' joint names in 1998.

9. [Darlene] also admits that [Larry] told her she was on title to the Maui land.

10. On June 13, 2001, [Darlene] filed a Motion and Affidavit for Pre-Decree Relief (hereinafter "June 13, 2001 Motion"). [Darlene's] Asset and Debt Statement attached to her June 13, 2001 Motion listed the Maui land, the apartment, and the Koa Hotel as assets.

11. [Darlene] indicated that the apartment and the Koa Hotel were assets titled in [Larry's] name alone. [Darlene] listed the title to the Maui land as "?" which indicates that [Darlene] knew that the Maui land was not titled in [Larry's] name alone.

12. In addition, [Darlene's] Asset and Debt Statement attached to her June 13, 2001 Motion indicated that the Maui land was "inherited".

13. [Darlene] filed a Supplemental Memorandum in Support of Plaintiff's Motion for Pre-Decree Relief . . . on June 25, 2001. In her Supplemental memorandum, [Darlene] specifically stated, "[Larry] inherited . . . a 27 acre property on Maui with his step-brother and step-sister. [Darlene] has been advised by [Larry] that [Darlene's] name is on the Maui property as well, but [Darlene] is not sure about this."

14. [Darlene's] Supplemental Memorandum also stated that [Darlene] "may even have an ownership interest in [Larry's] inherited Maui property".

15. Each of the three (3) Asset and Debt Statements [Larry] filed . . . in this case stated that title to the Maui land was joint.

16. Although title was listed as "J" for the Maui land on [Larry's] Asset and Debt Statements, "J" is a term of art in divorce cases indicating that an asset is titled jointly between Husband and Wife.

17. The Court finds that [Larry's] testimony was credible and reliable and [Darlene's] testimony was not credible and reliable on this issue.<sup>15</sup>

III. CONCLUSIONS OF LAW.

. . . .

2. "Generally, the broad power granted by Rule 60(b), HFCR, is not for the purpose of relieving a party from free, calculated, and deliberate choices he, she, or it has made. . . . It should be used only where the relief will further justice without adversely affecting substantial rights of the parties." Nakata v. Nakata, 3 Haw. App. 51, 56, 641 P.2d 333, 336 (1982) (internal citations omitted).

3. "Under Rule 60(b)(3), the movant must (1) prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct, and (2) establish that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense." Kawamata Farms v. united Agri Products, 86 Hawai'i 2144, 252, 948 P.2d 1055, 1093 (1997) (citations omitted) (brackets omitted).

4. Although Kawamata addressed Rule 60(b)(3), Hawai'i Rules of Civil Procedure, that rule is identical to HFCR [Rule] 60(b)(3) and Kawamata is therefore instructive.

5. Under Kawamata, [Darlene] must satisfy a two (2) prong test. She must prove by clear and convincing evidence that [Larry] committed fraud, misrepresentation, or other misconduct. She must also prove that the conduct she is complaining about prevented her from presenting her case.

6. Under partnership law, a partner who invests money into partnership accounts and/or real and/or personal property into the partnership name or the names of the partners does not thereby gift the invested money and/or real and/or personal property to his/her partners." Wong v. Wong, 87 Hawai'i 475, 482, 960 P.2d 145, 152 (App. 1998).

7. In addition, "when one marital partner conveys Category 1 and/or Category 3 property to the other marital partner

---

<sup>15</sup> In such findings, we recommend as much specificity as possible. It appears that the court did not mean to say that all of Darlene's testimony "on this issue" is incredible and unreliable. Otherwise, it would thereby also be saying that finding of fact no. 9 is clearly erroneous.

**NOT FOR PUBLICATION**

---

or to both marital partners, there is no presumption of a gift of the Category 1 and/or Category 3 net market value". Wong at 482, 960 P.2d at 152.

. . . .

12. [Darlene] has not proven fraud, misrepresentation, or other misconduct by clear and convincing evidence.

13. [Darlene] had actual notice that she was on title to the Maui land.

14. [Darlene] had constructive notice that she was on title to the Maui land.

15. [Darlene] . . . knew or should have known that she was on title to the Maui land.

16. [Darlene] was not prevented from presenting her case by the conduct she complains of.

17. [Larry's] pleadings and testimony reflected his position that he inherited the Maui land and that the property was his property regardless of how it was titled. Title to the Maui land happened to be placed in the names of [Larry] and [Darlene], a fact that [Larry] disclosed to [Darlene] both verbally and on his Asset and Debt Statements. However, [Larry's] position has always been that all of the properties he inherited from his parents are his properties.

18. [Larry] had no duty to concede that [Darlene] was entitled to a portion of the Maui land, nor did he have a duty to inform [Darlene] of the legal arguments available to her.

19. It was [Darlene's] duty and obligation to make the appropriate arguments at trial.

20. [Larry's] position and arguments did not constitute fraud and did not prevent [Darlene] from presenting her arguments at trial.

21. [Darlene] is essentially arguing that [Larry's] Category 3 property was "transmuted" into Category 5 property by virtue of the fact that it is jointly titled. However, the Supreme Court has already rejected the doctrine of transmutation. Gussin v. Gussin, 73 Haw. 470 (1992).

22. [Darlene] does not own a one-third (1/3) interest in the Maui land. [Darlene] is on title to the Maui land. The one-third (1/3) interest was inherited by [Larry] and has not been converted into a Category 5 property.

23. [Darlene] has always known the property was inherited. Therefore, [Larry's] interest in the Maui land is still a Category 3 property.

In her opening brief, Darlene states, in relevant part,

as follows:

Although it is true that the "Ethel Beatrice Carrilho Revocable Living Trust" attached as Exhibit J to Larry's opposition memorandum to Darlene's Rule 60(b) motion (ROA2, p.43) states that Larry's mother's property is to go to Larry and his two siblings, there is no explanation for why the deed directly from the trust with respect to the Maui land has Darlene's name on it. The first Darlene and her attorney ever saw of the trust document was when it was attached as an exhibit to Larry's opposition memorandum filed a few days before the hearing on the Rule 60(b) motion. Darlene did not have any time or opportunity to engage in any discovery with respect to the Rule 60(b) motion so Darlene does not know whether there may have been amendments to the trust document which stated that Larry's mother intended that Darlene have an interest in the Maui land.

Even if the trust document was not amended, still, there is no explanation for the presence of Darlene's name on the Maui land. Darlene's name does not appear on the Park at Pearl Ridge apartment which was also received by Larry through his mother's trust. If there was no amendment, the only other explanation is that Larry gifted this interest in the Maui land to Darlene and directed the trustee to issue the deed in Larry's and Darlene's names as to Larry's one-third interest in the property. This is not a situation like that described in Wong v. Wong, 87 Haw. 475, 960 P.2d 145 (App. 1998), cited by Larry, in which the husband in that case received money from his father directly into the marriage. In this case, when the interest in the Maui land was received directly into the marriage, it was not received from Larry's mother's trust directly only to Larry. It was received directly from the trust and directly into the marriage by *both* Larry and Darlene. The interest in the Maui land did not become Category 3 property until it came out of Larry's mother's trust. When the interest in the Maui land did come out of Larry's mother's trust, it came to *Larry and Darlene*, therefore they both received Category 3 property.

Darlene further states that "[t]he question was whether Larry and his attorney 'intentionally withheld material evidence' from Darlene and her attorney."

#### DISCUSSION

The evidence that Darlene and Larry were joint owners of an undivided one-third of the Maui land was material only if and to the extent Darlene alleged that Larry's Mother and/or Larry thereby gifted one-half of one-third of Larry's Category 3

net market value of the Maui land to Darlene. The relevant rule of law is as follows:

[W]hen one marital partner conveys Category 1 and/or Category 3 property to the other marital partner or to both marital partners, there is no presumption of a gift of the Category 1 and/or Category 3 net market value (NMV) and the marital partner who alleges the gift has the burden of proving a gift.

Wong v. Wong, 87 Hawai'i 475, 482, 960 P.2d 145, 152 (App. 1998).

There is no evidence explaining why the deed from the Trustee Bank of Hawaii conveyed the one-third interest in the Maui land to Larry and Darlene, as tenants by the entirety, rather than only to Larry. Darlene did not present evidence that Larry's Mother gifted one-half of one-third of the Maui land to Darlene and the court's finding that no such gift occurred is not clearly erroneous. Darlene has not alleged that Larry gifted one-half of his Category 3 value of his one-third of the Maui land to Darlene. Moreover, Darlene has not presented the specific evidence necessary to satisfy her burden of showing that, although she allegedly did not know that Larry had caused the title of his Category 3 real property to be placed in their joint names, the conveyance to Larry and Darlene was Larry's gift of one-half of his Category 3 net market value to Darlene.

### III. CONCLUSION

Accordingly, as to appeal No. 25119:

1. We affirm the May 9, 2002 "Order Denying Plaintiff's Motion for Reconsideration, Filed on April 11, 2002";
2. We affirm the June 14, 2002 Findings of Fact and



Conclusions of Law except that we vacate finding of fact no. 54 and conclusions of law no. 10, 21, 22, and 23;

3. We affirm the April 26, 2002 Divorce Decree, except that we vacate and remand the following paragraph: "11. Deviation from Marital partnership Principles. Plaintiff's request that the Court deviate from Marital Partnership Principles is denied." On remand, the family court shall comply with the requirements specified in Jackson, exercise its discretion, and decide whether or not it will deviate further in favor of Darlene. In doing so, the family court shall not consider "the fact that [Larry] only owns a partial interest in the apartment, the Koa Hotel, and the Maui land," or the facts stated in Conclusions of Law nos. 55 and 56.

As to appeal No. 25496, we affirm the November 20, 2002 Order Denying Plaintiff's October 1, 2002 Motion for Relief from Final Judgment.

DATED: Honolulu, Hawai'i, December 24, 2003.

On the briefs:

Samuel P. King, Jr., for Plaintiff-Appellant.	Chief Judge
Dyan M. Medeiros (Stirling & Kleintop) for Defendant-Appellee.	Associate Judge
	Associate Judge