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NO. 25258

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

MARTIN DAVID SCHILLER, Plaintiff-Appellant, v.  
JANET LOUISE SCHILLER, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
(FC-D NO. 00-1-1585)

MEMORANDUM OPINION

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

Plaintiff-Appellant Martin David Schiller (Martin) appeals from the August 6, 2002 Decree of Absolute Divorce (Divorce Decree) entered in the Family Court of the First Circuit, Judge Gale L. F. Ching, presiding.

The Divorce Decree entered orders pertaining to the following discrete parts of this divorce case: (1) dissolution of the marriage; (2) spousal support; and (3) division and distribution of property and debts.

We affirm part (1), the dissolution of the marriage. We conclude that we do not have appellate jurisdiction to decide the appeal of part (3) division and distribution of property and debts. We conclude that we have appellate jurisdiction to decide the appeal of part (2) spousal support. In light of our lack of jurisdiction to decide the appeal of part (3), however, we vacate the parts of the Divorce Decree and the findings of fact and

conclusion of law relating to part (2) and remand part (2) for reconsideration.

BACKGROUND

Martin was born on December 24, 1938.

Defendant-Appellee Janet Louise Schiller (Janet) was born on November 5, 1938. Martin and Janet were married on October 4, 1969, in Los Angeles, California. Their son (Son) was born on December 7, 1970, and their daughter (Daughter) was born on March 10, 1975. Martin and Janet physically separated in September 1998 when Janet exited the marital residence on Honua Street, Kāhala, Hawai'i, and moved to the Missouri Avenue residence in Santa Monica, California.

Martin exited the Honua Street residence when it was sold in October 2000.

Martin commenced this case on May 12, 2000. The trial occurred on August 6 and 7, 2001. At the conclusion of the trial, the court allowed both counsel until September 6, 2001 at 4:30 p.m. to submit written arguments. Both counsel filed written arguments on that date.

On February 22, 2002, Martin filed Plaintiff's Motion for Reconsideration asking for "reconsideration and clarification of its decision announced in the unfiled Minute Order issued

herein on February 12, 2002."<sup>1</sup> A copy of the unfiled Minute Order was attached to the motion as an exhibit. The record does not reveal the location of the original. The motion noted that "[t]he Court's decision addresses and decides some but not all issues." One of the issues allegedly decided was:

**C. Regarding Household Effects and Furniture**

The Parties shall meet and attempt to divide such properties in an [sic] fair and equitable fashion. If the Parties are unsuccessful, then the Parties shall submit an agreed upon list of the disputed items to the Court and the Court shall then render a decision as to such properties.

On May 21, 2002, the court filed its Order Regarding Plaintiff's Motion for Reconsideration, Filed on February 22, 2000, wherein it decided some of the issues allegedly not decided by the February 12, 2002 unfiled Minute Order.

On May 31, 2002, Martin filed Plaintiff's Second Motion for Reconsideration. On July 25, 2002, the court entered its Order Denying Plaintiff's Second Motion For Reconsideration Filed May 31, 2002.

On August 6, 2002, the court entered its Divorce Decree prepared by counsel for Janet. This Divorce Decree states, in relevant part, as follows:

4. Personal and Real Property Matters. The personal and real property matters covered by this decree are as follows:

A) Alimony. No order for alimony shall enter at this time, subject however to the condition that the order is without prejudice to [Janet] and the Court her[e]by reserves jurisdiction over this matter.

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<sup>1</sup> If the original of an order signed by a judge is not filed in the record, it is not a part of the record on appeal described in Hawai'i Rules of Appellate Procedure Rule 10(a) (2004).

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B) Real Property. The parties own real property at [sic] located at 11637 Missouri Ave., Los Angeles, California.

(1) The property is awarded to [Janet] subject to all liabilities connected therewith. The title shall be transferred to [Janet] as Tenant in Severalty forthwith. If [Martin] dies before he transfers his interest in the property to [Janet], his heirs shall be under a similar duty to transfer said property interests to [Janet].

(2) The Court shall retain jurisdiction to effectuate these orders until the properties are transferred in accordance to this Decree.

C) Garnett [sic]<sup>2</sup> Partnership Interests. [Martin] shall be awarded his interest in the Garnett [sic] Partnership interest [sic] and be solely responsible for any liabilities attached thereto.

D) Personal Effects. Each party is awarded his or her own personal effects, clothing and jewelry. If there is a dispute as to any particular item of item, then the parties shall submit an agreed upon list of such disputed items to the Court and the Court shall then render a decision as to such disputed properties.

E) Household Furniture, Furnishings and Effects. The parties' household goods and effects, and their furniture and appliances are to be divided by mutual agreement. If there is a dispute as to any particular item of item, then the parties shall submit an agreed upon list of such disputed items to the Court and the Court shall then render a decision as to such disputed properties.

F) Bank Accounts. The parties have closed all of their joint accounts. Any and all bank, checking, savings or credit union accounts which are currently maintained in the sole and separate name of [Martin] or [Janet] shall become the sole and separate property of the respective party who so maintains said account or accounts. [Martin] is awarded the Hawaii National Bank and Bankoh accounts. [Janet] is awarded the bank account from Bank of America.

G) Securities. Each party shall be awarded all stock in their own names, subject to any indebtedness owing thereon. [Janet] is awarded her Fidelity Investments and Schwab accounts. [Martin] is awarded such stock accounts that he has in his own name.

H) Life Insurance. Each party is awarded their own life insurance policies as their sole and separate property, including any cash value and debts thereto.

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<sup>2</sup> The correct spelling is "Garnet".

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I) Vehicles.

(1) 1997 Nissan SUV The 1997 Nissan SUV automobile, currently held in the name of [Janet], shall become her sole and separate property, subject to all debts thereon, if any.

(2) 1983 and 1997 Jaguars The 1983 and 1997 Jaguar automobiles, currently held in the name of [Martin], shall become his sole and separate property subject to all debts thereon, if any.

J) Honua Street Property. Each party has shared in the sale proceeds of the Honua Street property as an advancement in contemplation of their divorce and said advancement is treated as a credit to each party. Any moneys remaining or generated by any party's use of their own half share of the Honua Street proceeds shall be awarded to that party. [Janet's] Honua funds are identified as her Paine Webber account.

K) Retirement Assets. [Martin] is awarded the Mass Mutual 401(k) and Schwab IRA in his name. [Janet] is awarded the Fidelity Keogh, Schwab SEP IRA, Dean Witter Keogh and Fidelity SEP IRA accounts in her name.

L) Other Assets. [Martin] is awarded the USAA Subscribers Savings Account and the Waialae Country Club Certificate and any other private club memberships.

Martin filed a notice of appeal on August 13, 2002. On November 21, 2002, the court entered its Findings of Fact and Conclusions of Law (FsOF and CsOL), many of which lack the specificity necessary to be material or relevant. This appeal was assigned to this court on April 3, 2003.

### THE ISSUES

Martin's view of the court's division and distribution of the dollar values of the assets and liabilities of the parties is as follows:

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MARTIN		JANET	
250.00	Hawaii Nat'l Bank	653.26	Bank of America
1,250.00	Bank of Hawaii	57,830.58	Fidelity
		131,597.12	Schwab
2,500.00	1983 Jaguar	188,975.25	Paine Webber
20,000.00	1997 Jaguar	13,700.00	1997 Nissan
		420,000.00	Missouri Ave.
		[252,700.00]	mortgage
72,930.94	Mass Mutual 401(k)	240,784.06	Fidelity Keogh
70.60	Schwab IRA	104,111.75	Schwab SEP IRA
		11,336.70	Dean Witter Keogh
		53,669.54	Fidelity SEP IRA
11,848.43	USAA Savings	5,000.00	Furniture/ Electronics
<u>6,000.00</u>	<u>Waialae C. C.</u>	<u>4,000.00</u>	<u>Jewelry</u>
114,849.97	TOTAL ASSETS	978,957.60 <sup>3</sup>	TOTAL ASSETS
397,770.01 <sup>4</sup>	TOTAL DEBTS	61,497.54	TOTAL DEBTS
282,920.04	NET NEGATIVE	917,460.06	NET POSITIVE

In her answering brief, Janet contends that, for the reasons stated, the following should be added to the dollar values of the assets awarded to Martin:

8,000.00	The value of the 1997 Jaguar is \$28,000 <sup>5</sup> .
139,000.00	The value of the Garnet Property according to FOF no. 78.
210,753.24	Martin's part of the net proceeds from the sale of the Honua Street residence allegedly dissipated by Martin after it was paid to him but before the date of the conclusion of the evidentiary part of the trial (DOCOEPOT).
463,581.00	The Retirement Credit allegedly dissipated by Martin after the September 1998 separation but before the DOCOEPOT.
40,000.00	The alleged value of the Furniture/Electronics allegedly kept by Martin <sup>6</sup> .

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<sup>3</sup> The accurate total is \$978,958.26.

<sup>4</sup> As will be seen later, the accurate total is \$397,763.47.

<sup>5</sup> The court's November 21, 2002 Findings of Fact (FsOF) do not decide the value of the 1997 Jaguar.

<sup>6</sup> The court's FsOF do not decide what Furniture/Electronics, if any, were kept by Martin, or their value.

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In her answering brief, Janet contends that, for the reason stated, the following should be subtracted from the dollar values of the assets awarded to Janet:

81,965            According to FOF no. 80, the net market value (after deduction of the mortgage) of the Missouri Ave. residence is \$85,700 because the gross market value (before deduction of mortgage) is \$338,035 and not \$420,000.<sup>7</sup>

Thus, Janet's version of the division and distribution of the dollar values of the assets and liabilities is as follows:

MARTIN		JANET	
250.00	Hawaii Nat'l Bank	653.26	Bank of America
1,250.00	Bank of Hawaii	57,830.58	Fidelity
		131,597.12	Schwab
		188,975.25	Paine Webber
2,500.00	1983 Jaguar	13,700.00	1997 Nissan
28,000.00	1997 Jaguar		
		338,035.00	Missouri Ave. mortgage
		[252,700.00]	
72,930.94	Mass Mutual 401(k)	240,784.06	Fidelity Keogh
70.60	Schwab IRA	104,111.75	Schwab SEP IRA
		11,336.70	DeanWitter Keogh <sup>8</sup>
		53,669.54	Fidelity SEP IRA
11,848.43	USAA Savings	5,000.00	Furniture/ Electronics
6,000.00	Waialae C. C.	4,000.00	Jewelry
139,000.00	Garnet property		
210,753.24	Honua Street credit		
40,000.00	Furniture/Electronics		
463,581.00	Retirement credit		
976,184.21	TOTAL ASSETS	896,993.26	TOTAL ASSETS
397,770.01	TOTAL DEBTS	61,497.54	TOTAL DEBTS
578,414.20	NET POSITIVE	835,495.72	NET POSITIVE

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<sup>7</sup> Exhibit L is the "Annual Property Tax Bill" for fiscal year 2000-01 and it reports that the "net taxable value" of the Missouri Avenue residence is \$338,035.

<sup>8</sup> In her answering brief, without explanation, Defendant-Appellee Janet Louise Schiller (Janet) omitted this item from her chart.

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In his reply brief, Martin defends the challenged dollar values stated in his chart but is silent regarding his omission of the \$40,000 for "Furniture/Electronics".

The \$459,261.01 debts of the parties include the following debts stated in dollar amounts:

MARTIN		JANET	
40,000.00	Bank of Hawaii (J)	8,264.24	Visa First Card
4,360.94	AT&T Universal Card	314.41	AMEX
18,674.47	UAL VISA card	604.92	Neiman Marcus
6,052.06	Master Card (HAL/Wells Fargo)	1,320.35	CC 95-462-230
66,876.60	AMEX checking	3,016.25	Steven Gleitman
24,210.53	AMEX checking	39,293.51	Fidelity Trust
6,606.31	AMEX Optima Card	8,683.86	G. Hamilton
28,153.64	AMEX Platinum Card		
38,900.00	American Savings		
54,976.17	Master Card (Wells Fargo)		
10,000.00	Hawaii National Bank		
12,723.23	Hawaii National Bank		
14,200.00	Toyota (Daughter's car)		
25,500.00	Mass Mutual		
21,129.52	Stirling & Kleintop		
1,400.00	Dr. Laura Darke (son, Janet)		
22,000.00	The Schiller Group		
2,000.00	Gregory Beck		
TOTALS	397,763.47	61,497.54	

It appears that Martin's debt of \$21,129.52 to Stirling & Kleintop is a debt relating to his attorney fees and costs in this divorce case. Similarly, it appears that Janet's debt of \$8,683.86 to G. Hamilton is a debt relating to her attorney fees and costs in this divorce case.

Counsel for Martin inserted the \$252,700.00 mortgage debt secured by the Missouri Avenue property as a deduction from



the value of Janet's assets rather than as an addition to the amount of Janet's debts.

Emphasizing in bold the FsOF and CsOL challenged by Martin in this appeal, the court's FsOF and CsOL state, in relevant part, as follows:

FINDINGS OF FACT

. . . .

3. [Janet] moved out of the martial [sic] residence on Honua Street in September, 1998 and that is considered to be the separation date.

4. [Janet] has lived in [Santa Monica,] California since 1998 at the Missouri Street residence.

. . . .

6. [Martin] is in the advertising business and was the owner of The Schiller Group.

7. . . . Neither [Son] nor [Daughter is] educationally dependant upon the parties for support.

8. Although both children are emancipated, each was given significant financial support by [Martin] during the last three (3) years since the date of separation.

**9. There is a significant difference in the ability of each party to gainfully support themselves after the divorce.**

**10. There is also a significant difference in their respective future employment prospects.**

. . . .

12. The parties have enjoyed a higher than average standard of living through most of the years of marriage.

13. The parties established a high standard of living during the marriage that included living in a Kahala home, the children attending private schools, belonging to 3 different private country clubs, and driving luxury cars such as Jaguars.

14. [Janet's] current standard of living is lower than when she lived in Hawaii.

15. [Janet] does not belong to any private country clubs, is driving a Nissan, and has had to decrease her living expenses in a downward fashion.

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16. **[Martin's] standard of living has remained about the same as established during the marriage.**

17. [Martin] still belongs to Waiialae Country Club and Outrigger Canoe Club.<sup>9</sup>

18. [Martin] owns two [J]aguars, having purchased the lease for the 1997 Jaguar during the separation.

19. . . . [Janet] has significant medical problems such as borderline osteoporosis, suffers from severe osteoarthritis to her fingers with resulting pain to her fingers, has pain to her knee and shoulder areas, has no vision in her left eye (she is fitted with an artificial eye), has a tear in her right retina that makes that eye subject to sudden blindness, has been undergoing medical tests for gastrointestinal problems, and has been diagnosed and treated for squamous cell skin cancer.

20. . . . [Janet's] age and the aforementioned health problems drastically limits her ability to work and be gainfully employed.

21. [Janet] will have to obtain her own health insurance after the divorce and may also have to wait a year for coverage due to preexisting health problems.

**22. [Janet] has not been successful in obtaining a job due to her health, age and a lack of computer program knowledge.**

**23. [Janet's] skin cancer also drastically reduced her job opportunities due to an inability to be in the sun.**

24. For a period of time, [Janet] was able to produce income by the various investments she earlier had made in the stock market.

25. The downward turn in the market has terminated that financial avenue and has resulted in a decrease in the value of the investments.

**26. [Janet] had earlier been a successful real estate agent in Hawaii during the period of the "Japanese bubble".**

27. Presently, [Janet] does not have any network in California in regards to business contacts or resources in the real estate field and has no viable source of income other than her stock portfolio.

**28. [Janet] will have to live off of the stock and assets awarded to her by selling them as needed and also paying capital gains taxes which may be incurred.**

29. [Martin] was previously the owner and CEO of The Schiller Group, an advertising agency and is the owner of the Schiller Agency, a limited liability company.

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<sup>9</sup> The FsOF do not answer the question of how much these memberships cost and how much of that cost, if any, was unreasonable.

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**30. [Martin] has been in the advertising field for over thirty (30) years, and [Martin] has ongoing business contacts and networks that will continue to serve him in his business endeavors.**

31. [Martin] is well known in the advertising field in Hawaii. In 1995, when he left his position with Ogilvy & Mather, [Martin] opened his own firm and became successful.

32. [Martin's] agency began to experience financial difficulties and began to work out a repayment plan with its creditors in the year 2000. The evidence suggests that approximately fifty-seven (57) of sixty-one (61) creditors had agreed to a plan.

**33. [Martin's] agency was meeting its current expenses.**

34. Notwithstanding, [Martin's] company filed for bankruptcy protection on August 2, 2001, four (4) days before the divorce.

35. The Court finds the timing of the corporate bankruptcy questionable and questions the credibility of [Martin] as to the reasons for the timing of the filing of the bankruptcy.<sup>10</sup>

36. . . . [Martin] clearly intends to continue to "serve clients personally" along with the assistance of others "working as independent contractors".

37. . . . [Martin] intends to operate a new agency, and manifested the intent to "rehire as many Schiller Group staff members as possible".

**38. . . . [Martin] has the ability and the opportunity to continue and maintain a successful and lucrative career.**

**39. . . . [T]he evidence presented demonstrates that [Martin] will soon begin to enjoy a significant income.**

**40. . . . [Martin] will be able to add significantly to his assets after the divorce, due to his work experience and abilities while [Janet] will not.**

41. The skills, abilities, business contacts and business network currently enjoyed by [Martin] have all been developed by [Martin] during this . . . marriage.

**42. [Martin] is a forty percent (40%) owner of commercial real estate in California that produces income, as shown by its balance sheets.**

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<sup>10</sup> FOF no. 35 states that the court does not believe the reasons that Martin gave for the timing of the filing of the bankruptcy. The FsOF do not state what the court believed were Martin's actual reason(s) for the timing of the filing of the bankruptcy.

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43. [Martin] received K-1 forms and reports the allocated income on his tax returns. This is future income to [Martin] that is independent of his personal earnings.

44. [Janet's] income and expense statement reflects a monthly deficiency of \$5,854.50.

45. \$5,854.50 is the amount of [Janet's] reasonable monthly needs which have to be met.<sup>11</sup>

46. [Janet] will have to sell the stocks in her portfolios to meet her expenses.

47. [Janet] has no income or any assurance of future income as is the case with [Martin].

48. [Janet] has no ability to continue with any sort of career as is the case with [Martin].

49. [Janet] presented evidence through her expert, Mr. William McRoberts, to address meeting [Janet's] future expenses and needs based upon the use of the retirement and stock accounts.

49. . . . [I]f [Janet] is awarded \$748,191, based upon an "aggressive 7% assumption" on a rate of return, the funds would be consumed in eighteen (18) years, eight (8) months, when [Janet] reaches the age of 81.

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<sup>11</sup> Janet's Exhibit H-1 reports that these expenses, in dollars, are as follows:

2,107	housing (at Missouri Avenue, including 200 per month maintenance)
116	insurance
300	real property taxes (for Missouri Avenue)
484.50	utilities including telephone
300	car insurance
50	car maintenance
200	car operation

TOTAL 3,557.50

varies	debt service
650	food
350	clothing
650	medical and dental
50	laundry and cleaning
150	personal articles
150	recreation
200	household
97	estimated taxes

TOTAL 2,297 (plus debt service)

GRAND TOTAL 5,854.50 (plus debt service)

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51. . . . [I]f [Janet] is awarded \$559,824, based upon an "aggressive 7% assumption" on a rate of return, the funds would be consumed in 10 years, when [Janet] reaches the age of 73.

52. **No credible evidence refuted the opinions of Mr. McRoberts. The Court has the obligation to look at the condition that a party is left at the time of the divorce. In this instance, [Janet] will be left in a position that will not provide for her future well being unless she is awarded sufficient funds to provide for her future welfare.**

53. [Martin's] reported income was \$97,888 in 2000, \$168,627 in 1999, and \$202,000 in 1998.

. . . .

54. In addition to [Martin's] reported income, the evidence reflects that his business was responsible for paying many other expenses of [Martin] in the amount of \$15,000 a month, including the memberships in at least three (3) private clubs.<sup>12</sup>

55. [Martin] did not adjust his lifestyle to fit the financial difficulties his company was experiencing or to fit his actual cash flow.<sup>13</sup>

56. [Martin] began to borrow and withdraw funds from his retirement accounts to support his extravagant lifestyle.<sup>14</sup>

57. [Martin] incurred significant personal charge card debts to support his life style.

58. [Martin] dispersed marital funds to provide for the ongoing support for the adult children without the consent of [Janet] and to the detriment of the marital estate.<sup>15</sup>

59. [Janet's] report by her expert Gary Kuba, reflected charges paid by [Martin's] company that amounted to approximately \$4,778 per month in 2001, \$2,357 a month for 2000 and \$3,692 a month for 1999.<sup>16</sup>

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<sup>12</sup> FOF no. 54 is as specific as the FsOF are with respect to these "other expenses of [Martin]".

<sup>13</sup> The FsOF do not decide the difference between what Martin did as compared to what he should have done.

<sup>14</sup> The FsOF do not decide the specifics of Martin's "extravagant lifestyle."

<sup>15</sup> The FsOF do not decide how much was spent when and for what. FOF no. 71 is the most specific the FsOF are on this question.

<sup>16</sup> Gary Kuba's report, Martin's Exhibit I-2, decides the business and personal expenses incurred by Martin, and the personal expenses incurred by Son and Daughter, all on the same American Express Credit Cards. It does not

60. In addition to his income and paid monthly expenses, [Martin] both borrowed money and withdrew money from his Mass Mutual and Schwab retirement accounts in the amount of \$463,581 from December, 1998 through the year 2000.

61. On December 2, 1998, a loan of \$27,050 of funds was made from [Martin's] Mass Mutual retirement funds.

62. In 1999, [Martin] withdrew \$325,044 from his Mass Mutual retirement account and another \$44,038 from his Schwab IRA for a total of \$369,082.

63. In 2000, [Martin] withdrew another \$44,004 from his Mass Mutual retirement account and another \$10,555 from his Schwab account. The total withdrawn from the IRAs in 2000 was \$54,559. There were also two Mass Mutual loans made in 2000, one for \$12,890 and one for \$9,035.

64. [Martin] unilaterally reduced his retirement accounts by \$463,581 after the parties separated.

**65. [Martin] failed to properly explain where or how all of the retirement funds were spent.<sup>17</sup>**

. . . .

66. . . . [T]here was an agreement between the parties to divide the Honua Street property's sale proceeds between themselves on or about September 29, 2000.

67. Each party received \$210,753.24 of the proceeds of the Honua Street sale.

68. [Martin] received an additional \$19,000 as some form of reimbursement for repairs.

**69. The disbursement of the Honua proceeds, half to each party, was an advance to each party of marital assets in contemplation of the divorce.**

**70. . . . [Martin] spent his share of the Honua Street house sale proceeds on himself or personal living expenses in less than one year.**

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decide how much, or for what, each of the three spent.

<sup>17</sup> The wording of FOF no. 65 leaves open the question whether Martin properly explained where or how some (as opposed to "all") of the retirement funds were spent.

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71. . . . [T]hese expenditures were for personal living expenses, including the purchase of the lease on a Jaguar, payments made on behalf of the adult children (of at least \$58,238.50), including payments on loans owed by the adult married son.

72. . . . [Janet] saved a large portion of her share of these proceeds.

73. [Janet's] portion of the Honua Street sales proceeds should be segregated out and awarded to her "off the top" as [Martin] has already received and spent his share of these proceeds. [Janet's] share of the Honua Street sales proceeds are to be credited to [Janet] from her Paine Webber and Schwab One accounts.

. . . .

74. Each party is to be awarded their own vehicles with the appropriate off sets and credits.

75. [Martin] stands in line to inherit properties from his Mother. The value of the properties were estimated to be around three million dollars (\$3,000,000.00) by [Janet] who is personally familiar with many of the properties.

76. [Janet] does not anticipate any inheritances.

77. [Janet] will have to account for capital gains taxes when she sells any of the stock. The stocks are a disappearing asset. Once they are gone, there will be nothing left for [Janet] to use for living expenses.

78. . . . [T]he net market value of [Martin's] interest in Garnet Avenue Property is \$139,000 (\$225,000-\$86,000).

79. . . . [T]he Garnet Avenue property is Category 5 marital partnership Property.

80. . . . [T]he net market value of the Missouri Street property is \$85,700.

81. Each party is to be responsible for their own individual debts and any and all debts that they incurred. [Martin] shall be solely responsible for all his credit card debts and any other personal debts, especially as he has stated that he used the credit cards for his living expenses.

82. In the event there are any joint credit card debts, then the party who actually incurred the debt is to be responsible for payment of the debt.

83. The certificate of ownership for the Waialae Country club is worth \$6,000 and [Martin] is to be awarded the certificate, subject to an off set of \$3,000 to [Janet].

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CONCLUSIONS OF LAW

. . . .

2. Taking all of the foregoing Findings of Fact into consideration, this Court concludes that [Janet] is entitled to a deviation from the normal division of marital property.

3. This Court is ordering a property division deviation in lieu of an award of alimony at the current time to [Janet].

4. This Court concludes that [Janet's] employment prospects post-divorce are extremely limited and her ability to earn sufficient income to support herself are [sic] also very limited. These facts are valid and relevant considerations (VARCs) warranting a deviation in the amount of assets awarded to [Janet]. See generally, Raupp v. Raupp, 3 Haw. App. 602 (1983) and Jones v. Jones, 7 Haw. App. 496 (1989) and related cases.

5. [Martin's] work skills are a form of marital assets that should be considered and given due weight by the Court in reaching any award.

6. This Court concludes that the evidence proves that [Martin] wasted and dissipated some marital assets to the detriment of [Janet] and the marital estate. Wasting and dissipation of marital assets can be considered as valid and relevant consideration (VARC) supporting a deviation in the property division. See generally, Kreytak v Kreytak, 84 Haw. 543 (1996) and related cases.

7. This Court concludes that it would not be fair or equitable to allow [Martin] to be awarded half of [Janet's] proceeds of the Honua Street property sale that were disbursed by agreement to [Janet] after he already spent his on personal expenses.

8. This Court concludes that it is equitable that [Martin] should be awarded his interest in his remaining IRA retirement funds and be credited with the \$463,581 that he removed from his various IRA retirement accounts. Accordingly, [Janet] should be awarded a corresponding amount from her SEP and IRA accounts.

9. This Court concludes that [Martin] was a constructive trustee of the retirement funds. [Janet] was the beneficiary of said retirement funds, and had a marital interest in the funds. As such, the unilateral transfer and utilization of the funds, to the detriment of [Janet], must be taken into consideration.

POINTS ON APPEAL

As noted above, Martin challenges certain parts of the Divorce Decree and certain FsOF and CsOL. Martin contends that



the court

(1) ignored compelling evidence adduced at trial and awarded [Janet] a grossly disproportionate share of the marital estate; (2) misapplied Hawai'i's well-established Marital Partnership Principles and divided the parties' estate in violation of the meaning and intent of Hawaii Revised Statutes (hereinafter "HRS") § 580-47 (Supp. 2003); and (3) failed to identify and explain any valid and relevant considerations (hereinafter "VARCs") that would justify such a stunning deviation from Marital Partnership Principles.

Martin does not, however, challenge COL no. 3.

In essence, the contests on appeal pertain to the following:

1. The court's decisions that Janet has a limited ability and opportunity to be gainfully employed and that Martin has the ability and opportunity to continue and maintain a successful and lucrative career and that these considerations warrant an award of an unspecified additional dollar value of assets to Janet.

2. The court's possible agreement<sup>18</sup> with Janet that, for the reasons stated, the following should be added to Martin's list of the dollar values of the assets awarded to Martin:

8,000.00 The value of the 1997 Jaguar is \$28,000.

40,000.00 The value of the Furniture/Electronics kept by Martin.

3. The court's agreement with Janet that the following should be added to Martin's list of the dollar values of the assets awarded to Martin:

139,000.00 The net market value of Martin's interest in the Garnet

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<sup>18</sup> We say "possible agreement" because, as noted in footnotes 5, 6 and 18 above, the court's FsOF do not decide these questions of fact.

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Property (FsOF nos. 78 and 79).

210,753.24 Martin's half of the net proceeds from the sale of the Honua Street residence (FsOF nos. 66-73).

463,581.00 The Retirement Credit spent by Martin (FsOF nos. 56, 60-65).

4. The court's agreement with Janet that, for the reason stated, the following should be subtracted from Martin's list of the dollar values of the assets awarded to Janet:

81,965 According to FOF no. 80, the net market value of the Missouri Ave. residence after deduction of the mortgage is \$85,700, and not \$167,300, because its net market value before deduction of the \$252,700.00 mortgage is \$338,035, and not 420,000.00.

LACK OF APPELLATE JURISDICTION OVER THE DISTRIBUTION  
OF PROPERTY AND DEBTS PART OF THE DIVORCE DECREE

*Sua sponte* we conclude that we do not have appellate jurisdiction over the part of this divorce case that involves the division and distribution of the property and debts of the parties.

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

D) Personal Effects. Each party is awarded his or her own personal effects, clothing and jewelry. If there is a dispute as to any particular item of item, then the parties shall submit an agreed upon list of such disputed items to the Court and the Court shall then render a decision as to such disputed properties.

E) Household Furniture, Furnishings and Effects. The parties' household goods and effects, and their furniture and appliances are to be divided by mutual agreement. If there is a dispute as to any particular item of item, then the parties shall submit an agreed upon list of such disputed items to the Court and the Court shall then render a decision as to such disputed properties.

In Eaton v. Eaton, 7 Haw. App. 111, 113-119. 748 P.2d 801, 804-806 (1987), this court stated, in relevant part as

follows:

In relevant part, the August 6, 1986 FOF&COL state:

CONCLUSIONS OF LAW

. . . .

6. The personal property of the Plaintiff and Defendant which have not yet been distributed should be divided in such a manner agreeable to the parties so that each receives approximately equal value.

. . . .

*Sua sponte* we conclude that we do not have appellate jurisdiction to review the district family court's decisions and orders as to the division and distribution of the property and debts over which the district family court had jurisdiction.

Hawaii divorce cases involve a maximum of four discrete parts: (1) dissolution of the marriage; (2) child custody, visitation, and support; (3) spousal support; and (4) division and distribution of property and debts. Black v. Black, 6 Haw. App. 493, 728 P.2d 1303 (1986). In Cleveland v. Cleveland, 57 Haw. 519, 559 P.2d 744 (1977), the Hawaii Supreme Court held that an order which finally decides parts (1) and (4) is final and appealable even if part (2) remains undecided. Although we recommend that, except in exceptionally compelling circumstances, all parts be decided simultaneously and that part (1) not be finally decided prior to a decision on all the other parts, we conclude that an order which finally decides part (1) is final and appealable when decided even if parts (2), (3), and (4) remain undecided; that parts (2), (3), and (4) are each separately final and appealable as and when they are decided, but only if part (1) has previously or simultaneously been decided; and that if parts (2), (3), and/or (4) have been decided before part (1) has been finally decided, they become final and appealable when part (1) is finally decided.

In this case, parts (1) and (3) were final and appealable on August 6, 1986. Part (4), however, is not final and appealable because the district family court has not fully and finally divided and distributed all of the property and debts of the Plaintiff and the Defendant over which it had jurisdiction. See Black v. Black, *supra*. The family court is required in divorce cases to divide and distribute all the property and debts over which it has jurisdiction. HRS § 580-47(a)(3). In this case, the district family court refused to perform its duty.

In many divorce cases, the family court expressly specifically and/or generally finally divides and distributes all of the property and debts of the parties over which it has jurisdiction. We recommend this practice in all cases. In some divorce cases, the family court expressly divides and distributes some of the property and debts of the parties and implicitly divides and distributes the remainder. See DeMello v. DeMello, 3 Haw. App. 165, 646 P.2d 409 (1982); Jendrusch v. Jendrusch, 1 Haw.

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App. 605, 623 P.2d 893 (1981). In this case, the district family court neither expressly nor implicitly divided and distributed the personal property of the parties.

(Footnote omitted.) With respect to appellate jurisdiction over the division and distribution of the property and debts part of the case, the instant case presents us with the same situation as did Eaton.

SPOUSAL SUPPORT

As noted above, part 4 of the Divorce Decree states, in relevant part:

A) Alimony. No order for alimony shall enter at this time, subject however to the condition that the order is without prejudice to [Janet] and the Court her[e]by reserves jurisdiction over this matter.

As noted above, the FsOF state, in relevant part, as follows:<sup>19</sup>

28. [Janet] will have to live off of the stock and assets awarded to her by selling them as needed and also paying capital gains taxes which may be incurred.

. . . .

46. [Janet] will have to sell the stocks in her portfolios to meet her expenses.

47. [Janet] has no income or any assurance of future income as is the case with [Martin].

48. [Janet] has no ability to continue with any sort of career as is the case with [Martin].

49. [Janet] presented evidence through her expert, Mr. William McRoberts, to address meeting [Janet's] future expenses and needs based upon the use of the retirement and stock accounts.

50. . . . [I]f [Janet] is awarded \$748,191, based upon an "aggressive 7% assumption" on a rate of return, the funds would be consumed in eighteen (18) years, eight (8) months, when [Janet] reaches the age of 81.

51. . . . [I]f [Janet] is awarded \$559,824, based upon an

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<sup>19</sup> Janet was born on November 5, 1938. She testified that she would wait until age 65 to obtain social security benefits. These FsOF do not consider the impact of these expected benefits.

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"aggressive 7% assumption" on a rate of return, the funds would be consumed in 10 years, when [Janet] reaches the age of 73.

52. No credible evidence refuted the opinions of Mr. McRoberts. The Court has the obligation to look at the condition that a party is left at the time of the divorce. In this instance, [Janet] will be left in a position that will not provide for her future well being unless she is awarded sufficient funds to provide for her future welfare.

As noted above, COL no. 3 states:

3. This Court is ordering a property division deviation in lieu of an award of alimony at the current time to [Janet].

The connection between the part of the Divorce Decree pertaining to spousal support and the part pertaining to the division and distribution of the property and debts motivates us to vacate part 4.A of the Divorce Decree, FsOF nos. 28 and 46-52, and COL no. 3, and to remand the spousal support part of this case for a final decision when the division and distribution of property and debts part of this case is finally decided.

CONCLUSION

Accordingly, we affirm the dissolution of the marriage. We conclude that we do not have appellate jurisdiction to decide the appeal of the part of this case pertaining to the division and distribution of property and debts. We vacate part 4.A of the August 6, 2002 Decree of Absolute Divorce Decree relating to spousal support and Findings of Fact nos. 28 and 46-52 and Conclusion of Law no. 3 of the November 21, 2002 Findings of Fact

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and Conclusions of Law and remand the spousal support part of this case for reconsideration.

DATED: Honolulu, Hawai'i, May 4, 2004.

On the briefs:

Thomas L. Stirling, Jr.,  
and Darcy H. Kishida  
(Stirling & Kleintop)                      Chief Judge  
for Plaintiff-Appellant.

Ryan Cuskaden  
for Defendant-Appellee.                      Associate Judge

Associate Judge.