

NOT FOR PUBLICATION

NO. 25688

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

CRISPINA A. SIMCOCK, Plaintiff-Appellee, v.
ALAN F. SIMCOCK, Defendant-Appellant

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 01-1-1193)

MEMORANDUM OPINION

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

Defendant-Appellant Alan F. Simcock (Alan) appeals from the division and distribution of assets and debts part of the January 7, 2003 Decree Granting Absolute Divorce and Awarding Child Custody (Divorce Decree) entered by Judge Gale Ching of the Family Court of the First Circuit. We vacate the appealed part of the Divorce Decree and remand with instructions.

The date of marriage (DOM) is July 16, 1982. A child was born on April 11, 1983. A second child was born on July 11, 1986. Twins were born on August 1, 1987. The date of final separation in contemplation of divorce (DOFSICOD) is November 1, 2000. Plaintiff-Appellee Crispina A. Simcock (Crispina) filed a complaint for divorce on April 6, 2001. The trial occurred on July 2, 2002. On November 8, 2002, the court filed its First Amended Findings of Fact, Conclusions of Law and Orders (FsOF and CsOL). On January 7, 2003, the court entered the Divorce Decree.

1.

Finding of Fact (FOF) no. 41 states that "[a]t the time of the separation, [Crispina] and [Alan] attempted to divide certain assets, but [Alan] had obtained approximately \$70,000.00 more than [Crispina] did."

Alan's reply brief states, in relevant part, as follows:

Alan and Crispina divided up the couple's stock accounts shortly after DOFSICOD, leaving Alan with \$70,000 more than Crispina in this division. After the trial, Crispina filed proposed findings asking that Family Court Judge Gale Ching award each party their separate stock accounts received at DOFSICOD, and credit Crispina with a \$70,000 "equalization payment" to reflect the difference. Alan agreed to this treatment of the stock accounts, but requested reimbursement of his pre-marital assets, including half of the \$85,000 janitorial business he founded nine years before DOM, and a \$25,000 down payment he made on the marital residence purchased two months before DOM.

Paragraph "9d" of the Divorce Decree states, in relevant part, as follows:

Charles Schwab IRA. [Alan's] IRA account with Charles Schwab in the approximate amount of \$82,673.00 shall be used to pay off [Crispina's] settlement award of \$56,000.00 and for child support arrears of \$26,000.00, for a total of \$82,000.00.

In the following quote from her answering brief, Crispina admits that paragraph "9d" of the Divorce Decree erroneously differs from FOF no. 41:

At the outset, Crispina agrees with Alan's contention that Paragraph 9d of the January 7, 2003, Decree, is in err[or] and should be amended to conform to the family court's November 8, 2002, Amended Findings of Fact and Conclusions of Law. . . .

. . . .

That portion concerning payment to [Crispina] of \$56,000 needs to be deleted. [Paragraph] 9d should be amended to read that [Alan's] IRA account with Charles Schwab in the approximate amount of \$82,673 shall be awarded to [Alan] as his sole and separate property. . . .

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With that revision, the family court's final division and distribution of the parties' marital estate is consistent with the partnership principles. Contrary to Alan's argument, the final award gave each party approximately 50% of the marital estate with Alan receiving slightly more than Crispina.

The "stock accounts" involved in this DOFSICOD division by the parties were not identified. Nevertheless, the agreement of the parties that those stock accounts have been divided, that the net market value (NMV) of the stock Alan received was \$70,000 more than the NMV of the stock Crispina received, is final and decisive. Therefore, the Marital Partnership Division chart should not include the NMV of any of the stock accounts that were divided by the parties and should reflect only that Alan has been awarded a stock account NMV of \$70,000. Moreover, Paragraph 9d of the Divorce Decree must be amended in conformity with this decision.

2.

Alan alleges that the court erroneously failed to credit him with the following two Category 1 NMVs: (a) the NMV of the marital residence at the DOM, and (b) the NMV of Alan's business at the DOM.

Regarding the marital residence, Alan states:

It is undisputed that Alan bought the marital residence two months before DOM with his own money. It is undisputed that he paid a down payment from his own funds, either \$25,000 (according to Alan) or \$10,000 (according to Crispina). As such, it is undisputed that Alan brought at least \$10,000 of his own money into this marriage in 1982. It is not necessary to introduce evidence of a 1982 NMV of the marital residence to establish this asset.

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We disagree with Alan. In this case, the Category 1 NMV is the NMV on the DOM. Alan did not bring \$25,000 or \$10,000 into the marriage. He brought the marital residence into the marriage. To obtain credit for that asset's Category 1 NMV, it was his burden to prove its Category 1 NMV (the NMV of the residence on the DOM), and he failed to do so. His response that "[i]t is not necessary to introduce evidence of a 1982 NMV of the marital residence to establish this asset" is wrong. Booth v. Booth, 90 Hawai'i 413, 978 P.2d 851 (1999).

Regarding the NMV of Alan's business at the DOM, Alan stated, in Defendant's Closing Argument filed on July 16, 2002, that

Defendant's Exhibit L is the business valuation . . . of Coral Janitorial Service ("Coral") of \$85,000. [Alan] testified that he opened Coral in or around 1973. . . . An analysis of the premarital valuation should consider the following - [Alan] testified that at the present time, Coral has between 20 and 30 employees; he then testified that at the time of marriage, Coral had approximately 20 employees. Coral was running for approximately nine years prior to the parties being married. Although a DOM appraisal was not conducted, it is reasonable to project that at least 50% of the business' value (\$42,500.00) is premarital category 3 [sic] property.

(Emphasis in original.)

In his opening brief, Alan states as follows:

Both parties acknowledged that Alan's Coral Janitorial Services started nine years before DOM, and operated with 15 employees in 1982. Both agreed the company had 26 employees at DOCOEPOT [date of the conclusion of the evidentiary part of the trial], and was worth \$85,000. In his closing argument, Alan requested reimbursement of half the DOCOEPOT value of the company, or \$42,500, as a Category 1 pre-marital contribution to the marital partnership.

Alan brought Coral Janitorial Services into the marriage. To obtain credit for the Category 1 NMV of that asset,

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it was his burden to prove the NMV of that asset on the DOM, and he failed to do so. Booth, supra.

3.

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.

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 authorizing 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 v. Jackson, 84 Hawai'i 319, 332-33, 933 P.2d 1353, 1366-67 (App.1997) (footnote omitted).

Alan contends that the Divorce Decree awarded Crispina 60% of the NMV of the marital estate without identifying a valid and relevant consideration for deviating from the partnership

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model. Crispina responds that the Divorce Decree awarded each party "about 50%[.]"

In this case, the family court failed to find "the Partnership Model Division." In her answering brief, Crispina presents a list of the actual division of assets and debts by the family court. Some of the NMVs of the items in this list are validated by the FsOF and CsOL. Although many of the NMVs of the other items in this list are validated by statements in the Divorce Decree, some are not. As a result, we are unable to determine the Partnership Model Division and whether there was "a deviation from the Partnership Model Division[.]" Jackson, 84 Hawai'i at 332, 933 P.2d at 1366. The family court did not decide the Partnership Model Division, whether there was "a deviation from the Partnership Model Division[,]" if so, "whether or not the facts present any valid and relevant considerations authorizing a deviation from the Partnership Model Division and, if so," it did not "itemize those considerations[.]" Id.

Accordingly, we vacate sections "8" through "18" of the January 7, 2003 Divorce Decree and remand with the following instructions:

1. Determine the Partnership Model Division by finding the assets and debts of the parties and the values of those assets and debts, and categorize those assets, debts, and values.

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2. (a) Decide whether or not the facts present any valid and relevant considerations authorizing a deviation from the Partnership Model Division and, if so, (b) itemize those considerations.

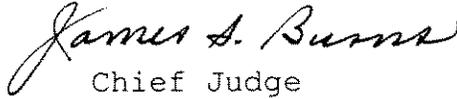
3. If the answer to question 2(a) is "yes," decide whether or not there will be a deviation from the Partnership Model Division.

4. If the answer to question 3 is "yes," decide the extent of the deviation and state the reason(s) for it.

DATED: Honolulu, Hawai'i, March 28, 2005.

On the briefs:

Peter Van Name Esser
for Defendant-Appellant.


Chief Judge

Chunmay Chang
for Plaintiff-Appellee.


Associate Judge


Associate Judge