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NO. 26366

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

SHARON S. LLEWELLYN, nka SHARON E. STARKEY, Plaintiff-Appellant,
v. FRED WARDE LLEWELLYN, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 99-2925)

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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MEMORANDUM OPINION

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

Plaintiff-Appellant Sharon S. Llewellyn (Sharon)

appeals from the December 30, 2003 Order Regarding Remand entered in the Family Court of the First Circuit by Judge Darryl Y.C. Choy. Defendant-Appellee Fred Warde Llewellyn (Fred) contends that Sharon's appeal is without merit. We affirm.

BACKGROUND

This court's Memorandum Opinion filed on July 17, 2003 in appeal no. 24114 states, in relevant part, as follows:

On August 1, 2001, pursuant to Rule 52 of the Hawai'i Family Court Rules, Judge [Darryl Y.C.]Choy filed his Findings of Fact (FsOF) and Conclusions of Law (CsOL), which stated, in relevant part, as follows:

II. [FsOF].

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16. The only Category 1 and/or 2 property owned by either party is an account owned by [Sharon] and managed by [Lincoln Trust]. [Sharon] received a divorce settlement from her former husband and, prior to the marriage, invested the funds with [Lincoln Trust]. The value of the original investment was one hundred and thirty thousand dollars (\$130,000) That sum represents her Category 1 property. As of June 30, 2000, the account held three assets: (1) [a]n insured money market account valued at \$854.00; (2) [a] Life Insurance Policy (#CA034517) having a

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cash value of \$140,981.92; and (3) [a] Life Insurance Policy (#CA034518) having a cash value of \$91,308.51. Thus, the total present value of the account is found by the [c]ourt to be two hundred and thirty-three thousand one hundred and forty-four dollars (\$233,144) The difference of \$103,144 is Category 2 property of the marital estate.

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28. Considering now the entire marital estate (exclusive of Category 1 and 3 assets) the [c]ourt finds that there is \$706,000 in real property, \$103,144 in Category 2 marital assets (see paragraph 16 above), \$14,450 in Category 4 marital assets (see paragraph 18 above showing [Fred] having \$2,586 in Category 4 property, and paragraph 19 showing [Sharon] having \$11,864 in Category 4 property) and \$603,524 in total Category 5 personalty (see paragraph 23 above and add [Sharon's] \$151,138 Category 5 holdings to [Fred's] \$452,386 in Category 5 holdings). Adding these amounts (\$706,000, \$103,144, \$14,450 and \$603,524) the [c]ourt finds the Gross Divisible Marital Estate to be valued at \$1,427,118. This does not include [Sharon's] \$130,000 Category 1 property and \$23,800 Category 3 property, nor [Fred's] \$12,234 Category 3 property. If these sums are included then the Gross Marital Estate is \$1,593,152.

29. The total marital debt is \$327,633 (\$283,000 in mortgage debt, and \$44,633 borrowed against [Fred's] life insurance policies).

30. The [c]ourt finds the Net Marital Estate to be valued at \$1,265,519 (\$1,427,118 [sic] (FN4) - \$327,633). This sum includes \$166,034 in Category 1 and 3 property mentioned in paragraph 24 above. Subtracting the Category 1 and 3 property leaves \$1,099,485 (\$1,265,519 - \$166,034) as the Net Divisible Marital Estate.

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32. [Sharon's] net holdings of the divisible marital estate exceed [Fred's] net holdings by the sum of \$22,807 (\$561,146 - \$538,339). Accordingly, [Sharon] owes [Fred] an equalization payment in the amount of \$11,404.

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34. The following [CsOL], insofar as they may be considered [FsOF], are so found by this [c]ourt to be true in all respects.

III. [CsOL].

Based upon the foregoing [FsOF], the [c]ourt enters the following [CsOL].

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5. It is just and equitable that [Sharon] be awarded all of her interest in the accounts being managed by [Lincoln Trust]. It is just and equitable that \$130,000 in equity be awarded to her as Category 1 property that she brought into the marriage. It is just and equitable that the remaining \$103,144 be and the same is determined to be Category 2 marital property.

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11. It is just and equitable that [Sharon] pay to [Fred] an equalization payment in the amount of \$11,404.

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29. Equalization Payment. In addition to the awards mentioned above, and in further equalization of the property division between the parties, [Sharon] shall pay to [Fred] the sum of \$11,404.00.

ISSUES ON APPEAL

Sharon contends that the family court committed the following errors in dividing the estate of the parties:

(1) The family court failed to reimburse her for her "partnership contributions" to the three houses (the Whittier property, the Camarillo property, and the Waikele house) that were part of the marital estate at the termination of the marriage;

(2) The family court did not consider the factors listed in Cassiday v. Cassiday, 68 Haw. 383, 716 P.2d 1133 (1986) (Cassiday factors) to determine whether it was just and equitable to award her more than fifty percent of the Category 2 earnings on the Lincoln Trust annuity;

(3) The family court abused its discretion when it disregarded a post-nuptial agreement and awarded Fred half of the proceeds Sharon received from the Van Kampen stock sale that Sharon claims was deposited in the Pentagon FCU account; and

(4) The family court ruled that Fred's credit card debts were not marital property but inconsistently included the debts in the marital estate when computing Sharon's equalization payment.

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DISCUSSION

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B. Whether the Family Court Abused Its Discretion by Awarding Half of the Earnings on the Lincoln Trust Account to Fred

The family court awarded half of the after-DOM earnings on Sharon's Lincoln Trust account to Fred. Sharon correctly concedes that these earnings are Category 2 funds and that, assuming "all

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valid and relevant considerations are equal," Category 2 funds are awarded one-half to each spouse. See Hussey v. Hussey, 77 Hawai'i 202, 207, 881 P.2d 1270, 1275 (App. 1994). Her argument on appeal is that the family court erred by not considering the Cassiday factors regarding equitable distribution of marital assets which, Sharon claims, would have resulted in Sharon being awarded more than fifty percent of the Lincoln Trust earnings. (FN10)

This court recently explained what the Partnership Model requires of family court judges who are dividing Category 2, 4, and 5 Marital Partnership Property, such as the Lincoln Trust post-DOM NMV appreciation:

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.

Jackson v. Jackson, 84 Hawai'i [319,] 332, 933 P.2d [1353,] 1366 [(App. 1997)] (footnote omitted). This court also held in Jackson that

[q]uestion 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.

Id. at 332-33, 933 P.2d at 1366-67.

The family court in this case did not explicitly find whether the "facts present[ed] any valid and relevant considerations authorizing a deviation from the Partnership Model Division[.]" Id. at 332, 933 P.2d at 1366. It did find, however, that there was no credible evidence of a premarital or postmarital agreement between Sharon and Fred regarding the Lincoln Trust asset. The family court also found that Sharon had not divested herself of the beneficial ownership of the Lincoln Trust asset and "[i]n fact she testified that the policies, 'will be payable to me after I reach eighty-five years of age.'" The family court also concluded that

[i]t is just and equitable that [Sharon] be awarded all of her interest in the accounts being managed by [Lincoln Trust]. It is just and equitable that \$130,000 in equity be awarded to her as Category 1 property that she brought into the marriage. It is just and equitable that the remaining \$103,144 be and the same is determined to be Category 2 marital property.

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There are three ways to interpret the family court's ruling:

(1) The family court felt that the facts did not "present any valid and relevant considerations authorizing a deviation from the Partnership Model Division";

(2) The family court found that such factors did exist but departure from the Partnership Model Division was not warranted; or

(3) Sharon is correct, and the family court, having found the property to be Category 2, did not examine whether there should be a deviation from the Partnership Model Division.

While we suspect that the family court adequately considered the relevant factors and found that no departure from the Partnership Model Division was called for, we cannot be certain. On remand, we advise the family court to make an explicit ruling on this issue, following the procedures outlined in the Jackson decision, quoted above.

. . . .

D. Whether the Family Court Erred by Counting Fred's Credit Card Debts as Marital Property for the Purposes of the Equalization Payment

After Fred and Sharon had separated in contemplation of divorce, Fred incurred three credit card debts totaling \$21,536. Fred included these debts as marital debts on the proposed property division chart that he submitted to the family court, which the family court apparently used as a basis for entering the divorce decree. At trial, Fred testified that he would take responsibility for all the debts currently on the USAA Visa charge card account. The Decree Granting Absolute Divorce entered on December 22, 2000 provided, in part, that Sharon shall pay Fred a property division equalization payment of \$26,904.

Sharon, thereafter, filed a Motion for Relief from Judgment or Order, Motion for Reconsideration and Stay Pending Reconsideration and/or Further Hearing (Sharon's Reconsideration Motion), arguing, in relevant part, as follows:

At trial, [Fred] testified that he did not intend to hold [Sharon] responsible for his debts, which he accumulated during the parties' separation. [Fred] further testified that if his debts were indeed included in his property division chart which was submitted to the [c]ourt, the chart should be corrected. However, despite [Fred's] testimony at trial, [Fred's] property division chart includes his debts, namely: USAA VISA (\$10,608.00); Citibank VISA (\$9,245); and Homeworld [F]urniture (\$1,683). Accordingly, [Fred] has erroneously understated the value of the marital estate by \$21,536.00.

On January 31, 2001, the family court entered its order granting Sharon's Reconsideration Motion (Reconsideration Order), in part, but denying that portion that sought a modification of Sharon's equalization payment, to the extent it was calculated based on the

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three credit card debts incurred by Fred after the parties had separated in contemplation of divorce. However, when the family court subsequently entered its FsOF and CsOL, it inconsistently found, in FOF No. 26, in part, as follows:

Because of the nature and date of the expenditures for which a debt was incurred, the [c]ourt find [(sic)] that the \$26,115 in credit card debt owed by [Fred] should not be considered marital debt. The only marital debts the [c]ourt recognizes are the two mortgages . . . on the two houses [Sharon] is keeping, and the debt owned on [Fred's] life insurance. By stipulation, [Sharon] will assume the mortgages, and [Fred] has agreed to assume the debt on the life insurance.

Fred concedes that the foregoing finding is inconsistent with the Divorce Decree and the Reconsideration Order. The family court is directed to address this seeming inconsistency on remand.

CONCLUSION

In light of the foregoing discussion, we vacate: (1) section M of the Decree Granting Absolute Divorce entered on December 22, 2000, as amended by the Order Amending Decree Granting Absolute Divorce entered on February 16, 2001; and (2) the following portions of the FsOF and CsOL entered on August 1, 2001 that relate to Fred's credit card debts, the Category 2 Lincoln Trust earnings, and the calculations deriving from these assets: FsOF Nos. 16, 28, 29, 30, and 32 and CsOL Nos. 5, 11, and 29. We also remand this case to the family court, with instructions that it: (1) reconcile any inconsistencies in the FsOF and CsOL regarding Fred's credit card debts; and (2) enter findings as to whether, under Cassiday, it is just and equitable for Sharon to be awarded more than fifty percent of the Category 2 Lincoln Trust earnings.

In all other respects, we affirm.

FN4. It appears that the gross marital estate total of \$1,593,152 should have been used instead of the \$1,427,118 gross divisible marital estate total.

FN10. These Cassiday factors are simply the factors that HRS § 580-47 (Supp.2002) states that family courts must take into account when dividing marital property (or making other related orders).

(Some brackets in original.)

On remand, on December 30, 2003, Judge Choy entered the following:

ORDER REGARDING REMAND

. . . The Court having reviewed the *Memorandum Opinion* of the [Intermediate Court of Appeals (ICA)], the memoranda submitted by counsel and being otherwise fully advised in the premises, it is

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HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. With respect to the issue regarding the Lincoln Trust Annuity, the Court makes the following explicit ruling that the facts of this case did not present any valid and relevant considerations authorizing a deviation from the Partnership Model Division respecting [Sharon's] *Lincoln Trust Annuity*.

2. With respect to the issue regarding the apparent inconsistency respecting the three credit card debts between Finding of Fact #26 . . . and the Decree Granting Absolute Divorce, the Court finds that said finding of fact was in error. Accordingly, Finding of Fact #26 is stricken and amended in relevant part to recite that the credit card debt owed by [Fred] is marital debt.

3. Accordingly, no change is required with respect to the equalization amount previously ordered.

POINTS ON APPEAL

Point on Appeal No. 1

In the opening brief, Sharon contends, in relevant part, as follows:

On December 12, 2003, the court conducted a five-minute status conference and signaled its intention to affirm its prior property division. Judge Choy would merely "recite" the absence of any valid or relevant considerations justifying deviation from partnership [sic] principles, he said, and change the finding regarding Fred's credit card debts.

On December 17, 2003, Sharon filed a remand memorandum contending 1) the entire \$233,144 Lincoln Annuity was Category 1 property, 2) if it is mixed Category 1 and Category 2, then the Category 2 earnings should be awarded entirely to Sharon under Cassiday and Jackson.

On December 30, 2003, without a hearing, without entering any findings or conclusions of law, and without following any of the procedures outlined in Jackson, Judge Choy declared:

With respect to the issue regarding the Lincoln Trust Annuity, the Court makes the following explicit ruling that the facts of this case did not present any valid and relevant considerations authorizing a deviation from Partnership Model Division respecting Sharon's Lincoln Trust Annuity.

The court erred. First, the court's second ruling mirrored its first, in that neither followed the procedures in Jackson or explained the decision under Cassiday. Second, the court therefore did not comply with the ICA's remand. Third, the court

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did not address Sharon's Category 1 arguments. Fourth, the court's sole "finding" is clearly erroneous. Fifth, the court's cavalier ruling shows contempt for the ICA's reversal and instructions on remand, and therefore constitutes an abuse of discretion.

(Brackets in original omitted.)

Point on Appeal No. 2

Sharon further contends that

On December 17, 2003, Sharon filed a memorandum on remand noting Paragraph K in the Divorce Decree, and Findings #26 and #29 and Conclusion #26 in the Findings, and asking the court to modify its equalization payment.

On December 30, 2003, without hearing, without explanation, and without amendment of the Divorce Decree, Judge Choy ruled:

With respect to the apparent inconsistency respecting the credit card debts between Finding of Fact #26 and the Decree Granting Absolute Divorce, the Court finds that said finding of fact was in error. Accordingly, Finding of Fact #26 is stricken and amended in relevant part to recite that the credit card debt owed by Fred is marital debt.

. . . (emphasis added).

The court erred. First, the clear import of the ICA's remand, which vacated provisions regarding the equalization payment but left standing rulings on the credit card debts, was for Judge Choy to recompute the equalization payment and make it consistent with the Findings and the Divorce Decree, not to change his rulings and affirm the erroneous property division. Second, the court "amended" one finding but ignored two others, did not amend the Divorce Decree, and failed to "reconcile the inconsistencies" on this issue. Third, the court's "amended" Finding #26 is clearly erroneous. Fourth, the court's cavalier ruling shows contempt for the instructions on remand, and is an abuse of discretion.

(Brackets omitted.) This appeal was assigned to this court on October 28, 2004.

DISCUSSION

This court remanded "this case to the family court, with instructions that it: (1) reconcile any inconsistencies in the FsOF and CsOL regarding Fred's credit card debts; and (2)

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enter findings as to whether, under Cassiday, it is just and equitable for Sharon to be awarded more than fifty percent of the Category 2 Lincoln Trust earnings." On remand, the family court complied with this court's instructions. None of the decisions on remand were wrong, clearly erroneous, or an abuse of its discretion.

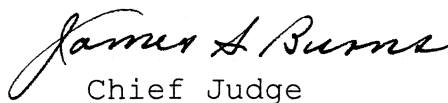
CONCLUSION

Accordingly, we affirm the December 30, 2003 Order Regarding Remand.

DATED: Honolulu, Hawai'i, June 30, 2005.

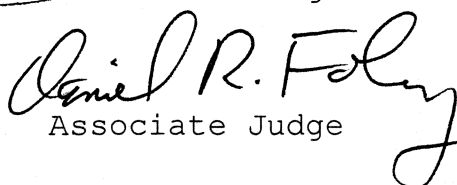
On the briefs:

Peter Van Name Esser and
Chunmay Chang
for Plaintiff-Appellant.


Chief Judge

Robert M. Harris and
Edward R. Lebb
for Defendant-Appellee.


Associate Judge


Associate Judge