NOT FOR PUBLICATION

NO. 26416

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

RODNEY WESLEY BOTELHO, Plaintiff-Appellant, v.
JUDY ANN HARTEY, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D No. 01-1-2614)

SUMMARY DISPOSITION ORDER
(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Plaintiff Rodney Wesley Botelho (Rodney) appeals the January 26, 2004 decree of the Family Court of the First Circuit (family court)[1] that granted him a divorce from Defendant Judy Ann Hartey (Judy).

After a painstaking review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve the points of error as follows:

1. Rodney contends the family court erred in finding that the value of the townhouse, owned 50-50 by the parties as tenants in common throughout the marriage, was $240,000 at the time of the November 10, 2003 divorce trial. At the threshold of this issue, Rodney argues that the family court abused its discretion in considering an appraisal it had excluded from evidence. Rodney's threshold concern over the family court's

[1] The Honorable Bode A. Uale presided.

offhand remark that Judy's testimony about the appraisal was "evidence" is nugatory, because there is absolutely no indication in the record that the family court relied upon the barred appraisal in arriving at the value of the townhouse. Rather, as to Rodney's main concern, there was substantial evidence to support the family court's valuation of the townhouse and hence, its valuation was not clearly erroneous. In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001) (a finding of fact "is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made" (citation and internal quotation marks omitted)). For example, there was Rodney's testimonial appraisal of the townhouse -- "based upon my expert experience as a real estate agent" -- at $295,000 to $305,000, "if the unit was fixed up, clean, painted and all repairs made[.]" There was largely undisputed evidence that the townhouse bore extensive, unrepaired water damage, including structural damage. There was Rodney's ostensible interest in an enhanced valuation. Id. ("it is within the province of the trier of fact to weigh the evidence and to assess the credibility of witnesses" (citation and internal quotation marks omitted)). And, lest we neglect to mention it, there was Rodney's May 15, 2003 asset and debt statement, prepared by Rodney "under penalty of perjury," proffered by

Rodney as "true and correct to the best of [his] knowledge[,]" and admitted at the divorce trial, which listed the "current gross value" of the townhouse as, $240,000.

2. Rodney contends the family court erred when it failed to award him at least $45,000 on his half interest in the townhouse ($150,000 mortgage balance), which the family court awarded to Judy, and instead awarded him only $20,315.83 payable by Judy at the rate of $500 per month. We disagree. As the family court explained in its written decision and order, it awarded the $20,315.83 to Rodney "along with no order for alimony to [Judy] which will be deemed a full satisfaction of [Rodney's] partnership contribution to the marriage through the real property[.]" Judy, who testified that she was totally and permanently disabled, had requested alimony at $400 per month for sixty months, for a total of $24,000 over time. Viewed in this light, the family court's disposition of the townhouse was not an abuse of its discretion. Tougas v. Tougas, 76 Hawai'i 19, 32, 868 P.2d 437, 450 (1994) (in a divorce, the family court "may . . . alter alimony, child support and . . . the ultimate distribution of the marital estate based on the respective separate conditions of the spouses").

3. In her answering brief, Judy makes various arguments in support of her request that the cause be remanded to the family court for an order that Rodney pay net money to her. However, Judy did not cross appeal. Doe v. Doe, 99 Hawai'i 1,

12-13, 52 P.3d 255, 266-67 (2002) (it is "well-settled that an appellee is ordinarily not entitled to attack a judgment without a cross appeal" (citation and internal quotation marks omitted)).

Therefore,

IT IS HEREBY ORDERED that the family court's January 26, 2004 divorce decree is affirmed.

DATED: Honolulu, Hawai'i, August 25, 2005.

Corinne K.A. Watanabe

Acting Chief Judge

On the briefs:

Keith M. Kiuchi
(Kiuchi & Nakamoto),
for Plaintiff-Appellant.

Associate Judge

Naomi Hirayasu,
for Defendant-Appellee.

Associate Judge