

NOT FOR PUBLICATION

NO. 26809

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ANN P. SCHELLER, Plaintiff-Appellant, v.
HANS P. SCHELLER, Defendant-Appellee

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2006 MAR 24 AM 8:19

FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 02-1-2444)

MEMORANDUM OPINION

(By: Burns, C.J., Nakamura and Fujise, JJ.)

Plaintiff-Appellant Ann P. Scheller, nka Ann Plumer (Ann or Plaintiff), appeals from the Order Granting Motion for Amendment of Order entered by Judge Gregg Young on August 16, 2004. We affirm in part, vacate in part, and remand the vacated parts for reconsideration.

On July 7, 2003, Judge R. Mark Browning presided at a trial at which counsel for Ann stated, in relevant part, as follows:

The Leileihua [sic] property which was the marital residence is awarded to [Defendant-Appellee Hans P. Scheller (Hans or Defendant)]. It's our understanding he's already refinanced that property and removed -- I mean it's awarded to Defendant and Defendant has refinanced the property and removed Plaintiff from the mortgage.

. . . .

The net market values of those properties will be part of the equalization process. And in looking at it, we're looking at the appraised values which is [sic] set forth in Exhibit G less the mortgages prior to the refinancing.

On December 2, 2003, Ann filed Plaintiff's Motion for New Trial on Limited Issues. This motion stated, in relevant part, that

NOT FOR PUBLICATION

[t]he issues subject to the present motion are set forth in the draft Divorce Decree attached hereto as Exhibit 1. The portions that reflect yellow highlighting were not initially part of the proof at trial, but should be added.

A non-highlighted part of the "draft Divorce Decree" prepared by counsel for Ann stated as follows:

a. 124 Leilehua, Wahiawa Residence. Said real property shall be awarded to Defendant as his sole and separate property, but subject to equalization. The net market value of said property that shall be subject to equalization is \$118,000.00. Defendant shall remove Plaintiff's name from the present mortgages within 60 days from the effective date of the divorce decree.

On January 15, 2004, counsel for Hans responded, in relevant part, as follows:

One of the particular issues outstanding is the issue of the parties' debts, as the Court's minutes appear to be silent as to that Plaintiff's proposed decree states that the parties' individual debts be "subject to equalization". If that is to be the case, Defendant's position is that all of the parties' individual debts incurred during the marriage be considered. Otherwise, neither parties [sic] debts should be considered in determining the property equalization payment.

As to the other outstanding issues remaining of the proposed decree, Defendant's response is as stated in the letter to opposing counsel [See Exhibit "B"].

Exhibit B, which is a December 12, 2003, letter from counsel for Hans to counsel for Ann, states, in relevant part, as follows:

13. Equalization Payment: As for provision 16, [Hans] does not agree with your client's property division chart, because his debts were not all accounted for. [Hans] refinanced \$30,000 of his various credit card debts (which were otherwise marital and incurred during the marriage), prior to the trial, and they should also be reflected. The net market value for the house was computed based on the appraisal value minus the outstanding mortgage (188,000-70,000 = \$118,000). At the time of trial, [Hans] only had \$10,000 of credit card debt remaining due to the refinance, but at the same time, his mortgage was \$100,000 rather than the original \$70,000 which is the marital portion. [Hans] asks that the \$30,000 difference which represents his marital credit card debt, also be accounted for in the property division chart.

On February 20, 2004, Judge Browning entered an Order for Short Trial that stated, in relevant part, as follows:

NOT FOR PUBLICATION

5. The disputed issue(s) shall be limited to:
(a) Insurance and debts equalization.

.

.

9. Other:
(a) Debt amounts shall be based on balances as of July 7, 2003.

On May 14, 2004, Judge Gregg Young presided over the "short trial".

On May 19, 2004, Judge Browning entered the Divorce Decree. In relevant part, it stated as follows:

9. Real Property Division.

a. 124 Leilehua, Wahiawa Residence. Said real property shall be awarded to Defendant as his sole and separate property, but subject to equalization. The net market value of said property that shall be subject to equalization is \$118,000.00. Defendant shall remove Plaintiff's name from the present mortgages within 60 days from the effective date of the divorce decree.

.

13. Debt Division. The issue of division of marital debts not resolved by this Decree is reserved for further trial. The balance of the debts to be divided shall be as of July 7, 2003, the date of the end of the evidentiary portion of trial.

.

16. Equalization Payment. Equalization of marital assets and debts shall be established upon the resolution of the division of marital debts as set forth in paragraph 13, above.

On June 1, 2004, Ann filed Plaintiff's Motion for Amendment of Order Re Short Trial Filed on 5/19/04 in which she sought

an amendment of the Order Re Short Trial filed herein on May 19, 2004. Said Order did not resolve the division of debts are [sic] required by the Order for Short Trial filed on February 20, 2004.

. . . [T]he Order Re Short Trial filed herein on May 19, 2004 should be amended to also include the following:

The debts of the parties also include Plaintiff's Citibank credit card of \$10,889.44, Plaintiff's Capitol One credit card of \$2,172.37, Plaintiff's AT&T card of \$5,000.00,

NOT FOR PUBLICATION

Plaintiff's legal fees totaling \$11,202.03¹, and Defendant's Citibank credit card of \$10,343.00. Said debts shall be paid by the party whose name is attributed thereto, subject to equalization of all marital assets and debts consistent with the Divorce Decree filed herein.

(Footnote added.) Judge Young heard this motion on June 25, 2004. At the conclusion of that hearing, Judge Young stated, in relevant part, that "[t]he attorney's fees owed to [counsel for Ann] will be rounded off to 10,000 rather than \$11,202.03."

On August 16, 2004, Judge Young entered an Order Granting Motion for Amendment of Order. This order stated, in relevant part, as follows:

1. The parties shall pays [sic] those debts in his/her own name [sic].
2. The Court finds that the total of debts in Defendant's sole name as of July 7, 2004 [sic] is \$40,500.00.
3. The Court finds the total of Plaintiff's debts in her sole name as of July 7, 2004 [sic] was \$28,061.00.
4. Accordingly, and based upon all prior findings and orders filed herein, the Court computes the property equalization payment due from Defendant to Plaintiff is \$44,031.00 based upon the chart set forth below.

.

Accordingly, judgment is hereby entered in favor of Plaintiff against Defendant in the amount of \$44,031.00.

On September 10, 2004, Ann filed Plaintiff's Notice of Appeal from the August 16, 2004 order. On January 21, 2005, Judge Young entered Findings of Fact and Conclusions of Law (FsOF and CsOL). They state, in relevant part:

FINDINGS OF FACT

.

11. The Court finds the total of Plaintiff's debts in her sole name as of July 7, 2003 was \$28,061.

¹ There appears to be no dispute that the relevant debts of the parties as of July 7, 2003, included their debts for their attorney fees incurred in this case.

. . . .

12. The Court finds that, for the purpose of computing an equalization payment, the total of debts in Defendant's sole name as of July 7, 2003 should be considered to be \$40,500.

a. At trial, Judge Browning found that the fair market value of the Wahiawa house in July 2003 was \$118,000. This was based upon a fair market value of \$188,000 and a mortgage loan with a principal balance of \$70,000(. . .).

b. This court will not set aside Judge Browning's finding regarding the net market value of the house. However, it appears that Judge Browning was not aware that Defendant had refinanced the Wahiawa house in 2003, incurring additional debt beyond the \$70,000 figure, and Defendant then used the proceeds to pay off substantial credit card debt which had existed immediately prior to trial.

. . . .

d. By May 22, 2003, when Defendant signed his *Asset & Debt Statement* immediately preceding trial, his listed mortgage balance was \$118,879 and, except for the \$10,343 debt to Citi Platinum, the \$31,416 in other credit card debt that had existed two months prior had disappeared. Plaintiff's Exhibit 6 to a subsequent hearing on May 14, 2004, indicates that the proceeds of the new loan were used to pay off the following debts: Citi Platinum, \$10,300; Chase Master \$7,300; Capitol One \$4,000; MBNA \$9,500 and MBNA \$4,700, for a total of \$40,500.

e. These debts, in these amounts, were either in existence at the time of trial on July 7, 2003 or Defendant should be given constructive credit for paying them off immediately preceding trial. In fact, it is clear to this court that what actually occurred is that Defendant merely restructured his credit card debt as mortgage debt.

CONCLUSIONS OF LAW

1. The court leaves undisturbed the finding of Judge Browning that the fair market value of the house was \$118,000 and the implicit finding that the mortgage debt was \$70,000. However, the *Decree* reserved the issue of other debts and the issue of the equalization payment to be decided by this court in the instant hearing. . . .

2. Accordingly, and based upon all prior findings and orders filed herein, the Court concludes the property equalization payment due from Defendant to Plaintiff is \$44,031 applying the marital partnership model and based upon the chart set forth below.

(Footnotes omitted.) This case was assigned to this court on July 5, 2005.

NOT FOR PUBLICATION

Ann contends that the decision by Judge Browning in the Divorce Decree that the July 7, 2003, net-of-the-mortgage market value of the Wahiawa property was \$118,000 barred Judge Young from subsequently considering any of Hans's debts that Hans had paid with a refinancing of the mortgage prior to Judge Browning's July 7, 2003 trial even though, because of the refinancing, the mortgage debt considered by Judge Browning in computing the net-of-the-mortgage market value of the Wahiawa property was less than the mortgage debt actually owed at the time of Judge Browning's July 7, 2003 trial. We disagree. As noted above, the Divorce Decree states, in relevant part, as follows:

13. Debt Division. The issue of division of marital debts not resolved by this Decree is reserved for further trial. The balance of the debts to be divided shall be as of July 7, 2003, the date of the end of the evidentiary portion of trial.

This paragraph authorized Judge Young to consider all debts owed by Hans on July 7, 2003, even those secured by a mortgage on the Wahiawa property. Moreover, with respect to the division of property and debts, the Divorce Decree was neither a final nor an appealable order. Therefore, Judge Browning would have been, and Judge Young standing in Judge Browning's shoes was, authorized to reconsider Judge Browning's decision in light of the facts presented by the evidence.

Ann contends that when Judge Young was determining her debts as of July 7, 2003, Judge Young reversibly erred when he decided that "[t]he attorney's fees owed to [counsel for Ann] will be rounded off to 10,000 rather than \$11,202.03." We agree.

NOT FOR PUBLICATION

The debt was \$11,202.03 and Judge Young was not authorized to round it off to \$10,000. Thus, the total of Ann's debt was \$29,263.84, not \$28,061.81.

Implicitly, Ann contends that Judge Young may not round off the \$29,263.84 to \$29,263. We disagree.

Sua sponte, we note that FOF no. 12.d. is, in part, clearly erroneous. It states, in relevant part:

d. By May 22, 2003, Defendant signed his *Asset & Debt Statement* immediately preceding trial, his listed mortgage balance was \$118,879 and, except for the \$10,343 debt to Citi Platinum, the \$31,416 in other credit card debt that had existed two months prior had disappeared. Plaintiff's Exhibit 6 to a subsequent hearing on May 14, 2004, indicates that the proceeds of the new loan were used to pay off the following debts: Citi Platinum, \$10,300; Chase Master \$7,300; Capitol One \$4,000; MBNA \$9,500 and MBNA \$4,700, for a total of \$40,500.

(Footnote omitted.) The debts listed do not total \$40,500. They total \$35,800. The genesis of this error is probably the following. Ann's Trial Exhibit 6 is a September 12, 2002, letter from the Hickam Federal Credit Union to Hans informing him of a sixty-day commitment to loan him \$100,000 if certain conditions were met. It further stated that the following credit card debts would be paid by the loan:

1. Citi Platinum	\$10,300	
2. Chase Master	\$ 7,300	
3. Capitol One	\$ 4,000	
4. MBNA	\$ 9,500	
		total <u>\$35,800</u>
5. MBNA	\$ 4,700	- Any remaining proceeds to be applied on this card[.]

The problem is that the first four amounts do not "total \$35,800". They total \$31,100. The five amounts add up to \$35,800. It appears that the family court's \$40,500 amount was

NOT FOR PUBLICATION

the result of adding the \$4,700 MBNA debt to the erroneous \$35,800 amount.

There are more problems with respect to FOF no. 12.d. In his Asset and Debt Statement filed on March 6, 2003, Hans listed a mortgage balance of \$63,518.31 and the following debts: MBNA \$4,630, CITI Platinum \$10,343, CHASE Master \$13,284, CAPITAL ONE \$3,981, and MBNA \$9,521. The total of these debts is \$41,759. In his Asset and Debt Statement signed on May 22, 2003, Hans listed a mortgage balance of \$100,000 and only the following debt: CITI Platinum \$10,343. In other words, some time after March 6, 2003, and prior to May 22, 2003, the mortgage balance had been increased by \$36,481.69, and the CITI Platinum \$10,343 debt had not been paid.

The following questions are obvious. (1) If, on March 6, 2003, the mortgage debt was \$63,518.31, why did Judge Browning decide that, on July 7, 2003, the mortgage debt was \$70,000? (2) When was the mortgage refinanced? (3) What net amount was generated by the refinancing? (4) When and for what was the net amount generated by the refinancing spent? (5) What credit card debts did Hans owe (a) after the expenditure of the refinancing fund and (b) on July 7, 2003?

Therefore, we vacate the following parts of the August 16, 2004 Order Granting Motion for Amendment of Order:

2. The Court finds that the total of debts in Defendant's sole name as of July 7, 2004 [sic] is \$40,500.00.

3. The Court finds the total of Plaintiff's debts in her sole name as of July 7, 2004 [sic] was \$28,061.00.

NOT FOR PUBLICATION

4. Accordingly, and based upon all prior findings and orders filed herein, the Court computes the property equalization payment due from Defendant to Plaintiff is \$44,031.00 based upon the chart set forth below.

.

Accordingly, judgment is hereby entered in favor of Plaintiff against Defendant in the amount of \$44,031.00.

We also vacate the following parts of the January 21, 2005, Findings of Fact and Conclusions of Law:

11. The Court finds the total of Plaintiff's debts in her sole name as of July 7, 2003 was \$28,061.

.

12. The Court finds that, for the purpose of computing an equalization payment, the total of debts in Defendant's sole name as of July 7, 2003 should be considered to be \$40,500.

a. At trial, Judge Browning found that the fair market value of the Wahiawa house in July 2003 was \$118,000. This was based upon a fair market value of \$188,000 and a mortgage loan with a principal balance of \$70,000(. . .).

b. This court will not set aside Judge Browning's finding regarding the net market value of the house. However, it appears that Judge Browning was not aware that Defendant had refinanced the Wahiawa house in 2003, incurring additional debt beyond the \$70,000 figure, and Defendant then used the proceeds to pay off substantial credit card debt which had existed immediately prior to trial.

.

d. By May 22, 2003, when Defendant signed his *Asset & Debt Statement* immediately preceding trial, his listed mortgage balance was \$118,879 and, except for the \$10,343 debt to Citi Platinum, the \$31,416 in other credit card debt that had existed two months prior had disappeared. Plaintiff's Exhibit 6 to a subsequent hearing on May 14, 2004, indicates that the proceeds of the new loan were used to pay off the following debts: Citi Platinum, \$10,300; Chase Master \$7,300; Capitol One \$4,000; MBNA \$9,500 and MBNA \$4,700, for a total of \$40,500.

e. These debts, in these amounts, were either in existence at the time of trial on July 7, 2003 or Defendant should be given constructive credit for paying them off immediately preceding trial. In fact, it is clear to this court that what actually occurred is that Defendant merely restructured his credit card debt as mortgage debt.

CONCLUSIONS OF LAW

1. The court leaves undisturbed the finding of Judge Browning that the fair market value of the house was \$118,000 and the implicit finding that the mortgage debt was \$70,000. However, the Decree reserved the issue of other debts and the issue of the

NOT FOR PUBLICATION

equalization payment to be decided by this court in the instant hearing. . . .

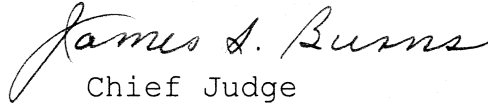
2. Accordingly, and based upon all prior findings and orders filed herein, the Court concludes the property equalization payment due from Defendant to Plaintiff is \$44,031 applying the marital partnership model and based upon the chart set forth below.

(Footnotes omitted.) We remand all vacated parts for reconsideration in light of this opinion. We affirm all parts not vacated.

DATED: Honolulu, Hawai'i, March 24, 2006.

On the briefs:

Stephen T. Hioki
for Plaintiff-Appellant.


Chief Judge

R. Barrie Michelsen
(Coates & Frey)
for Defendant-Appellee.


Associate Judge


Associate Judge