NOT FOR PUBLICATION

NO. 26888

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

BRANDON KALEI BLOCK, Plaintiff-Appellee, v.
CANDICE C.S. BLOCK, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-D NO. 03-1-263K)

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

Defendant-Appellant Candice C.S. Block, nka Candice C.S. Chow (Candice), appeals from the September 29, 2004 Divorce Decree entered in the Family Court of the Third Circuit.[1] We affirm the decree subject to two modifications.

BACKGROUND

Candice has a daughter (First Daughter) born in 1987. Candice and Plaintiff-Appellee Brandon Kalei Block (Brandon) were married on April 1, 1995. They have a son born on November 17, 1995, and a daughter born on September 9, 1999 (collectively "the children").

On October 29, 2003, Brandon filed his complaint for divorce. On January 14, 2004, the court entered an order stating, in relevant part, as follows:

> 1. Temporary physical custody of the two minor children of the marriage, . . . is awarded to [Candice]. The parties shall have temporary joint legal custody.
>
> 2. [Brandon] is awarded reasonable and liberal visitation with reasonable advance notice to [Candice] that he desires to exercise a visitation.

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[1] Judge Aley K. Auna, Jr., presided.

On March 16, 2004, the court entered an Order Clarifying Visitation which states, in relevant part:

> [T]he court noted that the parties' counsels requested clarification of the visitation arrangements since the parties were unable to agree on a schedule pending the trial in this case, so the court enters the following temporary orders:
>
> 1. [Brandon's] visitation shall be every Saturday from 5 PM to prior to school on Monday mornings each week, and on every Tuesday and Thursday from after school until 7:30 PM each week. [Brandon] to provide transportation for the visits.
>
> . . . .
>
> 4. The children shall have unlimited telephone contact with both parents, but parents shall not call the children after 8 PM.

On May 4, 2004, the court entered an order which states, in relevant part:

> 5. The court . . . grants in part, [Candice's] motion for attorney's fees filed on October 31, 2004, which the court had taken under advisement, as follows: [Brandon] shall pay [Candice] $2,000 as and for her attorney's fees and costs[.]

On May 14, 2004, Brandon filed a motion asking the court to order "a custody study to be done in this case by Edith Kawai at [Brandon's] expense, and to order [Candice] to cooperate with Ms. Kawai for the study." The record indicates that Edith Kawai is an attorney-at-law. We note that she is licensed to practice in the State of Hawai‘i.

On June 17, 2004, in conformance with the court's oral decision at a May 19, 2004 hearing, the court entered an order stating, in relevant part, as follows:

> The Court is not going to appoint an evaluator. However, [Brandon] may retain an evaluator of his choosing and one that is recognized by the Court, such as Edith Kawai, to evaluate both parties' homes and to make recommendations concerning custody and visitation. Such evaluation shall be solely at [Brandon's] expense. [Candice] shall fully cooperate with the evaluator. Any report of the evaluator is to be filed with the Court and shared by counsel by the close of business on June 3, 2004.

On June 7, 2004, Edith Kawai filed her report that stated, in relevant part:

> [Candice] did state that she would like the children to attend the Kealakehe Elementary School as that is their correct school district. Currently, the children attend school in Waimea because of the location of her employment. The correct school district for the children, if they live with [Brandon], is Kohala, and Kealakehe if they live with [Candice].
>
> . . .
>
> The children should continue to attend Waimea Elementary School under a district exemption.

At the trial on June 17 and 18, 2004, Edith Kawai testified, in relevant part, "The reason I suggested [joint physical custody] was to make sure that the parents continued talking and that the time would be equal in a way that would be easier for the children and more accessible for the parents."

On July 19, 2004, the court entered an Order Re: Trial Held on June 17 and 18, 2004, which stated, in relevant part, as follows:

> CHILD CUSTODY
>
> . . . .
>
> 13. The children have had significant contact with their paternal grandparents, whom they also love and respect. The parties have often utilized these paternal grandparents for transporting and caring of the children.
>
> 14. The children are still in their tender years and will need constant contact with both parties. . . .
>
> 15. The children have been attending school in the Waimea area since starting their education.
>
> . . . .
>
> 17. [Brandon] resides in Kawaihae. [Candice] resides in Kona. . . .
>
> 18. [Brandon] works primarily in West Hawaii. [Candice] works in Waimea.
>
> . . . .

22. It would be in the best interest of the children that the parties be awarded joint physical custody.

23. Unless otherwise agreed to between the parties, it would be in the best interests of [the] children that:

a. The children attend school in Waimea.

b. The parties have physical custody of the children on an alternating weekly basis with exchanges to occur on Sundays at 5:00 p.m.

c. The party with physical custody for the coming week will be responsible for picking up the children.

. . . .

ALIMONY

. . . .

28. [Brandon] is self-employed and should be considered employed full-time. [Candice] is employed part-time at approximately 24 hours per week.

. . . .

34. [Candice] cannot work more hours at her present employment.

35. For the purposes of establishing alimony and for calculating child support, it is just and equitable to impute income to [Candice]. The Court shall use the Federal minimum wage of $6.25 per hour for the balance of a typical 40-hour work week, which is 16 hours (40 - 24), then add this amount to what [Candice] should be earning at her present employment. . . .

. . . .

. . . .

52. [Brandon] owns 22% of Hoʻonani Kei, LLC ("[Brandon's] business"), a limited liability company doing landscaping and gardening services (Ex. 37 and 41). There are five shareholders, all of whom have a minority share in and work for the company. The Limited Liability Operating Agreement of Hoʻonani Kei, LLC ("Operating Agreement", Ex. 37) limits the transfer of a shareholder's shares and requires the shareholder to give the first right to purchase shares to other shareholders for a price equal to the capital contribution of the shareholder offering the shares.

. . . .

54. . . . [Brandon's] total capital contribution is now $2,200 (Ex. 43). . . .

55. [Brandon's] business grossed $351,873 in 2003 (Ex. 42). . . .

. . . .

58. Under the circumstances of this case, the fair market value of [Brandon's] interest in [Brandon's] business can only be limited to his capital contribution of $2,200.

. . . .

64. [Brandon] testified that he sold his Porsche . . . for $500 . . . to his nephew in January 2004. . . .

. . . .

67. Except for the unsubstantiated claims that $10,000 was put into the Porsche and it was sold for $500, there was no evidence presented that valued the Porsche. [Brandon] did, however, testify that the Porsche was not running. The Court concludes that [the] sale price of the Porsche is the more reasonable value to use.

OTHER ASSET VALUES AND DISTRIBUTION

. . . .

69. [Candice's] Prudential IRA. This marital property was liquidated by [Candice] to pay for her attorney's fees and costs. . . . She received $10,470 (Ex. CCC, rounded off). . . . [Brandon] is . . . entitled to a property equalization payment.

. . . .

MISCELLANEOUS MATTERS

74. Life Insurance. Both parties shall maintain their present life insurance policies and name their children as beneficiaries so long as there is an obligation to pay child support. . . .

. . . .

. . . .

. . . .

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

. . . .

3. Each party shall bear their own attorney's fees and costs.

On September 29, 2004, the court entered a Divorce Decree that stated, in relevant part, as follows:

5. Child Custody/Visitation. Unless otherwise mutually agreed to between the parties:

a. The children shall attend school in Waimea.

b. The parties shall have physical custody of the children on an alternating weekly basis with exchanges to occur on Sundays at 5:00 P.M.

. . . .

f. Neither party may move the children's residence from the County of Hawaii without the other party's written consent or Court order.

. . . .

6. Restraining Order For Protection Of Children

For as long as the children are minors, [Candice] is enjoined and restrained from allowing the parties' children to be left alone with [First Daughter], out of [Candice's] sight, for any period of time whatsoever, and [Candice] shall be responsible for personally supervising the children when [First Daughter] is present in [Candice's] home, or at any time when [First Daughter] is present where the children are also present. [Candice] shall not allow the children to have unsupervised contact with [First Daughter] and shall not allow [First Daughter] to act as a babysitter for the children. [Candice] shall not delegate the children's care to anyone else if [First Daughter] is also going to be present. Violation of this restraining order may be considered child endangerment.

7. Child Support.

. . . .

b. [Brandon's] gross monthly income is $4400.00 . . . .

. . . .

f. [Candice] shall continue to maintain the children on her medical and dental insurance plan.

. . . .

9. Division of Assets.

a. The following assets are awarded to [Brandon] as his sole and separate property:

(1) [Brandon's] 22% interest in Hoʻonani Kei, LLC;

. . . .

b. The following assets are awarded to [Candice] as her sole and separate property:

. . . .

(2) [Candice's] NHCH 401K

. . . .

(6) Prudential Insurance Policy

. . . .

10. Division of Debts.

a. [Brandon] shall be solely and separately responsible for the following debts:

(1) The parties' joint debt with First Hawaiian Bank (approximately $4,000.00)

(2) First Hawaiian Bank Visa (approximately $13,156.99)

(3) Bank of America credit card (approximately $7,367.00)

(4) Dr. & Mrs. Block (approximately $26,500.00)

b. [Candice] shall be solely and separately responsible for the following debts:

(1) [Candice's] debt to Aloha Airlines Mastercard (approximately $1,500.00)

. . . .

12. Life Insurance.

Both parties shall maintain their present life insurance policies and name their [C]hildren . . . as sole beneficiaries so long as there is an obligation to pay child support. . . .

13. Equalization Payment.

To equalize the division of assets, [Brandon] shall pay [Candice] the sum of $630.00 within ninety (90) days of the date of the Court's "Order Re: Trial Held On June 17 And 18, 2004" filed July 19, 2004.

. . . .

15. Attorneys' Fees.

Each party shall bear their own attorney's fees and costs.

In response to Candice's July 29, 2004 motion for reconsideration and a new trial, the court, on September 29, 2004, entered its Order Granting in Part and Denying in Part [Candice's] Motion for Reconsideration and for New Trial that made no changes relevant to this appeal.

On October 8, 2004, Candice filed a Notice of Appeal. This case was assigned to this court on August 1, 2005.

DISCUSSION

In this appeal, Candice challenges eight of the family court's decisions. First, Candice challenges the court's decision awarding "joint physical custody" of the children. In fact, however, the court awarded "split physical custody" of the children. Candice contends that such an award is not appropriate in a high-conflict divorce where parties reside a substantial distance apart. Candice further contends that the testimony by Brandon that "he relies upon his parents extensively for covering his parental responsibilities because he is absent from the home and must work long hours" establishes that the award is in fact an award of custody to the paternal grandparents. Upon a review of the record, we conclude that the family court's award of custody was not an abuse of its discretion.

Second, Candice challenges the court's order that "[t]he children shall attend school in Waimea." In the reply brief, she contends that

> [l]iving in Kona, it then became no longer convenient or feasible for Mother to commute to work in Waimea. Mother . . . planned to obtain part-time employment closer to her home in Kona; that the children wanted to go to school with their new friends in Kona; and that the schools in Kona are superior to Waimea. The trial court's ruling . . . completely disregards Mother and the children's forced change of residence and her reasonable intention of moving her employment and the children's school closer to her new home in Kona.

(Citation to record omitted). Candice further contends that the court's order violates HRS § 302A-1143 (Supp. 2005) which states as follows:

> **Attend school in what district.** All persons of school age shall be required to attend the school of the district in which they reside, unless enrolled in a Hawaiian language medium

> education program, or unless it appears to the department to be desirable to allow the attendance of pupils at a school in some other district, in which case the department may grant this permission.

Upon a review of the record, we conclude that absent permission from the State Department of Education, the family court was not authorized to order that "[t]he children shall attend school in Waimea."

Third, Candice challenges the court's finding that the value of Brandon's interest in Hoʻonani Kei, LLC, is his $2,200 capital contribution (22% of the $10,000 total capital contributed to the business by the owners).

The court found that Hoʻonani Kei, LLC, is a limited liability company doing landscaping and gardening services. It appears that these are repeat services to residence accounts.[2]

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[2] Plaintiff-Appellee Brandon Kalei Block (Brandon) testified, in relevant part, as follows:

> Q. But . . . on one day a week you have business at Hualalai Resort with the residences there?
>
> A. Yes.
>
> Q. You have more than one residence you work on at Hualalai Resort?
>
> A. Two.
>
> Q. Two. And . . . the other places are the Mauna Kea Beach residences; is that right?
>
> A. Yes.
>
> Q. How many there.
>
> A. Five or six.
>
> Q. And you also got accounts at the Mauna Lani?
>
> A. Yes.
>
> Q. How many there.
>
> A. Five or six.

Prior to June 27, 2002, the business was a partnership. Brandon's Exhibit 40 in evidence reports that the relevant 2003 numbers for Ho'onani Kei, LLC, are the following:

$347,695	gross income
$ 75,695	expenses[3]
$272,000	net income

Brandon's tax return for 2003 reports that his income from Ho'onani Kei, LLC, is "2003 Income from Passthroughs". The court found that Brandon's gross monthly income was $4,400, which is $52,800 per year. Schedule K-1 of Brandon's 2003 federal income tax return reports the following "Analysis of partner's capital account:"

(a)	Capital account at beginning of year	$ 140
(b)	Capital contributed during year	$ 300
(c)	Partner's share of lines 3, 4, and 7, Form 1065, Schedule M-2	$59,646
(d)	Withdrawals and distributions	$56,990
(e)	Capital account at end of year	$ 3,096

Using the capitalization of earnings method of valuation, Candice's expert opined that the fair market value of the business was $282,000 and, therefore, the value of Brandon's 22% share was $62,040. At a hearing on June 17, 2004, Candice's

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Q. So you guys -- your business has been specializing in high-end homes; is that right?

A. Yes.

[3] Brandon's Exhibit No. 40 in evidence indicates that the expenses were for equipment, fuel, chemicals, irrigation, certified public accountant, sub-contractors, repairs, taxes, materials and miscellaneous. In 2003, the total expense for sub-contractors was $30,319.

expert testified, in relevant part:

> THE WITNESS: The literature that I looked at indicated that 2.5 would be a favorable multiplier. I discounted that more than 50 percent down to one, trying to be as conservative as I could realizing that really what they have for sale is, in my opinion, the client list, reputation of the business, and its phone number. And that does have value, I believe.

Based on that valuation, Candice contends in the Reply Brief that "[Brandon] and his partners conceivably could have sold their entire landscaping business for the appraised fair market value (FMV) of $282,000. [Brandon's] share would yield him 22% x $282,000 = $62,040."

We conclude that there is no evidence that the owner-partners of the business could have sold their business for $282,000. The value of the assets of the business was $11,596. The evidence indicates that the business is akin to a partnership of individuals who personally perform landscaping and gardening services with some assistance from sub-contractors. In essence, the owners are the laborers. The record shows that most, if not all, of the net income of the business is distributed to the individual owner-laborers for their labors. In other words, Ho'onani Kei, LLC, has little, if any, remaining income.

There is no evidence of the client list or its value, or of the reputation of the business or its value, or of the value of the phone number. The expert for Candice did not state a relevant connection between (a) the capitalization of the earnings of the owner-laborers for their labors and (b) the value of the combination of the reputation of the business, its client list, and its phone number.

On the other hand, there is evidence that the value of Brandon's capital account at the end of 2003 was $3,096. We conclude that the court erred when it did not use that amount as the value of Brandon's interest in Hoʻonani Kei, LLC.

Fourth, Candice challenges the court's decision not to require Brandon to pay any of the fees she incurred in hiring experts to value his interest in the business and his Waipahu property. Upon a review of the record, we conclude that the family court's decision was not an abuse of its discretion.

Fifth, Candice challenges the court's finding that the fair market value of Brandon's 1976 Porsche was $500. She did not, however, hire an expert to determine the fair market value of this passenger motor vehicle. The only evidence she presented at a hearing on June 18, 2004 was her testimony:

> Q. . . . Did Brandon ever tell you what the value of the . . . Porsche was?
>
> A. No.
>
> Q. But you saw it around the house or something?
>
> A. Yes. I know how much he put into it.
>
> Q. How much did he put into it?
>
> A. The Porsche he put in at least $10,000.
>
> Q. Of what?
>
> A. His own money to fix it up.
>
> Q. While you were married?
>
> A. Um-hum.

We conclude that evidence of how much was spent during a nine year marriage to "fix . . . up" an inoperable passenger motor vehicle is not substantial evidence of its net market value at

the time of the divorce.

Sixth, because the court also ordered the parties to maintain and not cash in their life insurance policies, Candice challenges the court's decision to divide property as if she was the owner of the cash value of her life insurance policy. Candice fails to recognize that she is the owner of this asset and its value. The fact that she cannot cash in the asset or discontinue it so long as there is an obligation to pay child support does not change her ownership of it or its value.

Seventh, Candice challenges the court's decision to order Brandon to pay only $2,000 of her attorney fees and costs. Upon a review of the record, we conclude that the family court's decision was not an abuse of its discretion.

Eighth, Candice challenges the court's decision to divide property as if Candice continued to own her IRA marital asset which she cashed in to pay her attorney fees and costs in this case. Candice fails to recognize that if the court did not do so, in effect the court would be ordering Brandon to pay one-half of the attorney fees and costs Candice paid with the proceeds from her IRA and would thereby contradict its decision that each party shall pay his or her own attorney fees and costs except for the $2,000 Brandon was ordered to pay for the attorney fees and costs incurred by Candice. The fact that Candice is obligated to pay 100% of the income taxes and early withdrawal penalties incurred because of that withdrawal is the result of her choice to cash in that asset. The court reasonably required

her to pay the financial consequences of that decision by her.

CONCLUSION

Accordingly, we order the family court to amend paragraphs 5.a. and 13 of the September 29, 2004 Divorce Decree to state as follows:

> 5. Child Custody/Visitation. Unless otherwise mutually agreed to between the parties:
>
> a. If permitted by the Department of Education pursuant to Hawaii Revised Statutes § 302A-1143 (Supp. 2005), the children shall attend school in Waimea.
>
> . . . .
>
> 13. Equalization Payment.
>
> To equalize the division of assets, Husband shall pay Wife the sum of $1,078.00 within ninety (90) days of the date of the Court's "Order Re: Trial Held On June 17 And 18, 2004" filed July 19, 2004.

As so amended, we affirm the September 29, 2004 Divorce Decree.

DATED: Honolulu, Hawai'i, April 6, 2006.

On the briefs:

Michael S. Zola
for Defendant-Appellant.

Jeanne L. O'Brien
for Plaintiff-Appellee.

James A. Burns
Chief Judge

Corinne K.A. Watanabe
Associate Judge

Associate Judge