

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 27381

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

JAMES J. HINES, Plaintiff-Appellee, v.
KIMBERLY K. HINES, Defendant-Appellant

K. HAMAKAHO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 03-1-3701)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Kimberly K. Hines (Kimberly)

appeals from the family court's Decree Granting Absolute Divorce and Awarding Child Custody entered on September 19, 2005.

Kimberly and Plaintiff-Appellee James J. Hines (James) were married on September 28, 1996. Their daughter was born on March 20, 1997. Their son was born on February 25, 1999. On November 19, 2003, James filed (1) a complaint for divorce and (2) a Stipulation Re Certain Pre-Trial Matters (Stipulation).

The Stipulation was approved and ordered by Judge R. Mark

Browning and stated, in relevant part, as follows:

1. The Family Court of the First Circuit shall have jurisdiction over this matter.
2. Neither party shall remove the children, . . . from the City and County of Honolulu without the written agreement of the other party or Court order.

In her opening brief, Kimberly states, in relevant

part:

The stipulation filed November 19, 2003, does not waive the issuance service [sic] of summons, it only purports to stipulate that the Family Court of the First Circuit had jurisdiction of the proceeding in which the stipulation really pertained mostly to the

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custody of the children. [Kimberly] was not domiciled in the State because: (1) she was in the military service and housing, (2) had no intention of remaining here indefinitely because she knew she would be ordered to return to the Mainland, and (3) did so in July of 2004 when she went to El Paso, Texas. The record clearly proves [Kimberly] had no domicile here. [James] was domiciled in the Chicago, Illinois area.

On July 14, 2004, Judge Bode A. Uale filed an order allowing Kimberly "to leave Hawaii with the 2 subject children to move to El Paso, Texas."

On July 29, 2004, Judge Uale entered a stipulated order appointing Mitchell Werth, Esq., as the Custody Evaluator. On October 15, 2004, Judge Uale entered an order awarding James "temporary sole legal and physical custody of the subject children."

On December 8, 2004, Kimberly filed a "Pro Se Request for Dismissal of Dissolution Proceedings" "due to [James's] failure to establish a durational residency." On January 26, 2005, Kimberly filed a "Pro Se Motion for Change of Venue".

On February 3, 2005, Judge Uale entered an "Order Re: [James's] Motion for Pre-Decree Relief Filed September 20, 2004, Custody Evaluator's Motion for Order Compelling [Kimberly] to Pay CE Fees and Reducing Fees to Judgment, Filed December 3, 2004 and Other Matters as Were Adduced at the Hearing on December 9, 2004." Among other things, this order denied Kimberly's motion to dismiss and ordered Kimberly to pay \$1,180.00 per month for child support.

On February 3, 2005, Judge Uale entered an "Order Re: Hearing on [James's] November 4, 2004 Motion [for Pre-Decree] Relief and Other Matters at Hearing of December 8, 2004".

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On February 17, 2005, Kimberly filed a notice of appeal and thereby commenced appeal no. 27131. On March 29, 2005, Judge Uale entered findings of fact and conclusions of law. These findings of fact state, in relevant part:

B. [KIMBERLY'S] MOTION TO DISMISS

. . . .

9. . . . There is no dispute between the parties that [Kimberly] has been a resident of the State of Hawaii for at least six (6) months and that she was physically present in the State of Hawaii for the three (3) months next preceding the Divorce Complaint filed in this matter. . . .

10. The parties, by virtue of Paragraph 1 of the November 19, 2003 Stipulation submitted themselves, each of them, to the jurisdiction of this Court.

11. There are no other proceedings in any other state to which this case could be transferred if this Court granted [Kimberly's] Motion to Dismiss.

The following was stated at the February 24, 2005,

hearing:

THE COURT: Why have you not provided the discovery requests?

[KIMBERLY]: He's asking for things that are in storage, and until [James] comes to get the children's things out of storage, I'm unable to get any copies of anything for him. So, I'm still waiting for [James] to come and get the children's furniture from storage unit with all of my boxes of information that he's asking for.

THE COURT: Wait. Where are the boxes of information?

[JAMES]: They're in my storage unit along with the children's furniture.

THE COURT: Where is your storage unit?

[KIMBERLY]: Here in El Paso.

THE COURT: And why haven't you gone and accessed that unit to get your information out to provide that information?

[KIMBERLY]: Because it's packed from head to toe, and the only way I can get to it is to have the furniture removed. . . .
. . . [W]hen I moved in December, I put the children's furniture in storage. [James] told me he was coming to get it the next week. He still has not come to get it. I didn't even have the notice for discovery or anything until after I had put all of the -- all of my stuff into storage. Then I got that information.

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So, I was waiting for [James] to come and . . . get the children's furniture at which point I'd have room to go in and look in my boxes to find this information that they're asking for. And I'm still waiting for [James].

[COUNSEL FOR JAMES]: Judge, that information has never been provided to us. She has never told us that she could not respond to the discovery --

[KIMBERLY]: Exactly. Because [James] keeps telling me that he's coming to get the furniture so I keep waiting for him to get the furniture. He keeps not coming --

. . . .

[KIMBERLY]: -- so I don't know what to tell you other than I can't get you anything until he removes the furniture so I can reach my boxes in the storage unit.

THE COURT: Did you ever respond in writing to that effect, ma'am?

[KIMBERLY]: No, sir. . . .

THE COURT: [Kimberly], didn't I tell you at the beginning that if you were going to represent yourself, that you would have to respond appropriately to any requests from the other side? Didn't I tell you that, ma'am?

[KIMBERLY]: Yes, sir.

. . . .

THE COURT: [Kimberly], trial is coming up next month.

[KIMBERLY]: Yes, sir.

THE COURT: And how can you not provide that information knowing that the trial deadline is so near?

[KIMBERLY]: I can provide them, once again, as soon as he comes and gets the furniture.

THE COURT: [Kimberly], that is not acceptable.

[KIMBERLY]: I can answer the questions, but he won't get any information as far as all of the things that he requested copies of.

Confirming his February 24, 2005 oral order, Judge Uale's March 29, 2005 "Order Granting Plaintiff[f]'s Motion to Compel Discovery and Request for Attorney's Fees and Costs, Filed 2/22/2005" states, in relevant part:

2. [Kimberly] shall comply with [James's] Request for Production of Documents and Interrogatories by March 4, 2005 or [Kimberly] will be precluded from testifying at trial on subject matters which were within the scope of these two (2) discovery

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requests. As to the Production of Documents, topics include: [Kimberly's] military orders, her tax returns, her bank and credit card statements, her LES statements, loan documents or money borrowed, her retirement and her annual statement of compensation. As to interrogatories, subject matters include: purchases of assets over one thousand dollars (\$1,000.00), money held in trust, general questions on the custody issue, reasons why spouse is unfit for custody, information about where the children would reside with [Kimberly], best interests of the children, proposed visitation schedule to the other parent, presence of guests in the home, issues regarding legal custody and issues regarding the Isuzu Rodeo truck.

[Kimberly] must have her psychological evaluation complete by March 4, 2005 or the evaluation will be precluded at trial.

. . . .

4. [James's] request for attorney's fees and costs is GRANTED.

On March 9, 2005, Judge Uale entered an order denying Kimberly's January 26, 2005 motion for change of venue.

On March 15, 2005, Judge Christine E. Kuriyama presided over a trial and on May 31, 2005, entered a written decision and order.

On July 15, 2005, the Hawai'i Supreme Court entered an order dismissing appeal no. 27131 for lack of a final and appealable order.

On August 2, 2005, Judge Kuriyama entered findings of fact and conclusions of law. The findings of fact state, in relevant part:

10. As this case began, both parties and their children all resided in the State of Hawaii. [Kimberly] was employed as a Service Member stationed at the U.S. Army installation at Ft. Shafter, Oahu, Hawaii. [James] was employed as a flight attendant for United Airlines based out of Chicago, Illinois where he spent approximately ten days per month in furtherance of his employment.

11. Both the parties moved away from the State of Hawaii during the summer of 2004,

. . . .

20. Prior to [the Custody Evaluator's] initial recommendation that the children live in Chicago with [James] during the *pendente lite* period, [the Custody Evaluator] traveled

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to conduct home visits both in Chicago, Illinois where [James] resided and in El Paso, Texas, where [Kimberly] was then living.

E. PROPERTY DIVISION MATTERS:

52. Retirement: [James] has a 401K Plan with United Airlines. . . . [Kimberly] has retirement benefits through the U.S. Military. The parties have identical Fidelity Destiny Roth accounts to which identical deposits have been made during the marriage. . . . Both parties testified at trial that they do not wish to assert claims for Linson shares against the retirement plans of the other and each waives claims in that regard. Thus, both parties shall be awarded retirement plans and/or accounts in his or her own name.

53. The "Elgin house". It was uncontroverted that [James] owned a house in Elgin, Illinois on the date of marriage.

54. Received as Exhibit "47" was a variety of escrow documents showing [James] as the purchaser of the house before the date of marriage and showing him as the seller of the house on August 24, 2001. [James] as shown by the escrow settlement statement, page 6 of said exhibit, . . . received the net sum of \$82,717.29 from the closing of this sale.

55. The net value of this house did not increase during the marriage. [James] first listed the house for sale for \$112,000.00 in 1997, soon after the marriage began. He later sold it for \$112,000.00 without a real estate commission since the house was sold to the tenant then in possession.

56. The funds from the sale were deposited into [James's] United Airlines Federal Credit Union account. . . . [James] testified that he deposited to the United Airlines account on August 29, 2001 the sum of \$83,083.29.

58. Thus, there was realized gain in this account, during the marriage, in the amount of \$14,423.00. This gain, divided in half, yields a Category 2 share to [Kimberly] of \$7,211.50.¹

¹ Tracing the whereabouts of the net proceeds of the during-the-marriage sale of a Category 1 property is a confusing waste of time. The following is the most efficient process. First, determine the net market value (NMV) (a) of the Category 1 assets separately owned by each of the parties on the date of marriage and (b) of the Category 3 assets separately owned by each of the parties on the date of the gift or inheritance during the marriage. Second, determine the value of all assets owned at the date of the conclusion of the evidentiary part of the trial (DOCOEPOT). Third, reimburse each party his or her Category 1 and 3 NMV. Fourth, absent one or more reasons for deviation, award one-half of the remaining NMV to each of the parties.

The following are the Category 1 NMVs awarded to Plaintiff-Appellee James J. Hines (James): Elgin house, \$75,000; Merrill Lynch, \$34,000; Firestone FCU, \$13,262; and credit union, \$7,000. The following is the Category 3 NMV awarded to James: Bank One Savings, \$81,340.86.

The "Elgin house" was sold during the marriage. Thus, a Category

59. During trial, [Kimberly] did not dispute any of these calculations concerning the funds from the Elgin property.

60. Since [Kimberly] virtually failed to respond to any of [James's] discovery requests as to property division matters, her position on property division issues was largely unknown during the pretrial and trial phases of this case.

61. The Grayslake house: The parties purchased a home in Grayslake, Illinois during the marriage. [Kimberly] took a position shortly before trial that [James] could not prove the source of his claimed Category 1 funds, in the amount of \$34,000.00, which were used as the down payment to purchase this residence.

63. As the result of [Kimberly's] late revelation that she was now contesting that [James] could prove the source of these funds, he had to access records one to two days prior to trial. Received as Exhibit "92" was a copy of the Merrill Lynch Cash Management Account which showed a withdrawal of funds to purchase this residence. This account was held in [James's] separate name.

64. [James] also testified that he spent another \$7,000.00 from a credit union account on work done to this house prior to its sale.

65. [Kimberly] controverted neither of these facts.

66. Thus, [James's] share in the proceeds from this house is calculated in the following fashion. The parties received from escrow the sum of \$63,517.97. [James] is entitled to a Category 1 credit of \$34,000.00. The remaining sum is \$29,517.97. [James] is further entitled to a Category 1 credit of \$7,000.00. The remaining net sum to be divided between the parties is \$22,547.00 as the total Category 5 gain during the marriage. Thus, [Kimberly's] fifty percent share of this gain is \$11,258.00.

67. Firestone account: Received as Exhibit "48" is a Firestone Account statement for an account held separately by [James] in the amount of \$13,312.00. [Kimberly] stipulated that these funds were premarital funds and waived any claim to them. Accordingly, this account is awarded to [James].

68. Merrill Lynch account. . . . This account is the same account from which the \$34,000.00 deposit for the Grey's Lake house was made. [Kimberly] again stipulated that these funds were [James's] premarital separate funds.

69. Alliant Federal Credit Union account: This account, evidenced by Exhibit "50" is a separate account under [James's] name, the balance of which is comprised of leftover

2 NMV did not result from it. Malek v. Malek, 7 Haw.App. 377, 380-81 n. 1, 768 P.2d 243, 246-47 n. 1 (1989).

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funds which [James] has not spent from his portion of the Grey's Lake and Elgin property sales. It also includes some of the funds which were not moved to the Franklin Templeton account. This account has declined in value during the marriage from \$28,824.98 to the current value of \$19,506.72. . . .

70. Bank One account: Received as Exhibit "83" is an account statement setting forth the value of this account at \$81,840.00. These funds are [James's] Category 3 funds, inherited within the year preceding trial. . . .

. . . .

73. Franklin Templeton account: As discussed above, funds in the Franklin Templeton account, total \$89,423.09. As already discussed above, \$75,000.00 of this account value represents [James's] Category 1 interest in the Elgin property owned by him prior to the date of marriage. The total increase in these funds during the marriage is \$14,423.09 for which [Kimberly] was given credit above in the amount of \$7,211.54 as a Category 2 share in the increase in the value of this account. . . .

. . . .

75. The property division outcome in this case was summarized in Plaintiff's Property Division Chart attached to the Court's May 31, 2005 *Order Regarding Trial Held on March 15, 2005; Exhibit "A"*.

The September 19, 2005 Decree Granting Absolute Divorce and Awarding Child Custody awarded legal and physical custody of the two children to James subject to Kimberly's "rights of reasonable supervised visitation[.]" It ordered Kimberly to pay a specified amount of child support, divided and distributed the property and debts of the parties, did not award spousal support, and ordered each party to pay his or her own attorney fees and costs except as assessed against Kimberly in the March 29, 2005 order.

Kimberly filed a notice of appeal on June 29, 2005. This case was assigned to this court on April 10, 2006.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, and

in accordance with Hawai'i Rules of Appellate Procedure Rule 35, we hold that:

(1) The family court had subject matter and personal jurisdiction.

(2) The family court did not abuse its Hawaii Revised Statutes § 583A-207 (Supp. 2005) discretion when it denied Kimberly's motion for change of venue.

(3) The family court did not abuse its discretion when, at the March 15, 2005 trial, it enforced the February 24, 2005 oral order warning Kimberly that if she did not comply with James's discovery requests by March 4, 2005, she "[would] be precluded from testifying at trial on subject matters which were within the scope of these two (2) discovery requests[,] " and if she did not have her psychological evaluation complete by March 4, 2005, "the evaluation [would] be precluded at trial."

(4) Appeal no. 27131, which commenced on February 17, 2005 and was dismissed on July 15, 2005 for lack of appellate jurisdiction, did not suspend the family court's jurisdiction to conduct the trial and enter orders during the period between February 17, 2005 and July 15, 2005.

(5) The family court's division and distribution of property and debts is in conformity with the applicable partnership model.

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Therefore, IT IS HEREBY ORDERED that the Decree Granting Absolute Divorce and Awarding Child Custody entered on September 19, 2005 is affirmed.

DATED: Honolulu, Hawai'i, August 4, 2006.

On the briefs:

R. Steven Geshell
for Defendant-Appellant.


Chief Judge

Robert M. Harris
for Plaintiff-Appellee.


Associate Judge


Associate Judge