

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27464

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

SANTOS CIDAR RIVERA, JR., Plaintiff-Appellee  
v.  
GLADLEN ALOHILANI RIVERA, Defendant-Appellant

K. HAMAKADO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
(FC-D NO. 03-1-1705)

MEMORANDUM OPINION

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

Defendant-Appellant Gladlen Alohilani Rivera, nka Gladlen Alohilani Pestana (Lennie), appeals from the August 11, 2005 Divorce Decree entered in the Family Court of the First Circuit.<sup>1</sup>

Lennie was born on September 21, 1955. Plaintiff-Appellee Santos Cidar Rivera Jr. (Sonny) was born on June 12, 1953. They were married on January 11, 1974. They purchased the marital residence in 1979 for \$84,000. They have an adult daughter (Daughter).

In 1997, Sonny retired from the Navy as an E-9 with 26 years of service. His gross monthly retirement income is \$2,356 plus \$324 for disability. After subtracting \$192.55 for "FITW" (Federal Income Tax Withholding) and \$285.42 for "allotments/bonds", his net income is \$2,202.03 per month. In 2000, he purchased his co-owner's interest in a commercial charter-fishing boat business and became the sole owner/operator

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of Aikane Sportfishing, Inc. Lennie and Sonny have been separated off and on since no later than his retirement from the Navy. The last time Sonny slept at the marital residence was in July of 2002. Although they filed joint tax returns until 2002, they each maintained their own financial accounts separately from the other. The separateness of their finances is evidenced in part by Lennie's testimony that in 2000, she paid \$7,000 for Daughter's "wedding because Sonny didn't have the money," and she "loaned" Sonny \$14,000 that he needed to purchase the business.

Lennie is the Director of Systems Networking for Pacific Guardian Life Insurance Company. In October of 2004, she completed her twenty-fourth year in its employment. Her semi-monthly gross income is \$2,786.68. Deducting \$312.35 for federal income tax, \$186.33 for state income tax, \$208.83 for FICA, \$111.47 for retirement contribution, and \$34.65 for medical insurance, her semi-monthly net income is \$1,933.05 and her monthly net income is 3,866.10.

On May 23, 2003, Sonny filed a complaint for divorce.

On September 18, 2003, Judge R. Mark Browning ordered:

[Lennie] shall pay home mortgage. Pending refinancing [Sonny] will pay 1/2 of the 2nd mtge payment (about 423.00) for the Oct[ober] and November payments or until refinanced, whichever occurs first.

Parties will cooperate to expedite a refinancing of the existing first and second mortgages which shall not exceed the existing mortgage debt.

Parties will share the closing costs equally.

Attorney's fees are reserved.

In a position statement filed on July 16, 2004, Lennie stated, in part:

[Lennie] did not refinance the mortgage because she had not decided whether to keep the house or not. [Lennie], however, started making the full monthly payments on the second mortgage as well as the first in November 2003, per court order.

Sonny testified in part as follows:

Q . . . [A]bout one year after the court ordered [Lennie] to get new financing you were approached by GMAC to -- with new financing papers; right?

A Yes.

Q And you were asked to sign them?

A Yes.

Q And you did not sign them?

A Yes.

Q Could you tell the court why you did not sign them.

A Okay. Um, was a Mr. Fred White from GMAC called, said that my wife was refinancing the house. I said okay, good. You can come down, sign the papers. Okay. I went down there, looked at the basic, uh, paperwork for me to sign. And I asked if I could see all the loan paperwork. He said, no, we can't show you that. I said, well, why not? I'm signing it. Oh, because I've been ordered by your wife and your wife's attorney. I can't show you any of this paperwork.

I said then what am I signing? You know. I need to know what this loan is about. What am I -- am I gonna be responsible for this? And then as I read it, it looks like I was still gonna be liable. I'm still going to be the borrower. Well, that wasn't gonna work because the idea was for her to refinance the house to get my name off the house. So I said you know what, I need to consult with my lawyer.

The Opening Brief notes that "[t]he appraised value of the property on September 2, 2004 was \$338,000."

On October 20, 2004, Lennie moved for a postponement of the trial which had been set for the week of December 20, 2004. On December 10, 2004, Judge Browning scheduled the trial to occur during the week of April 4, 2005. The settlement conference was rescheduled to March 17, 2005, and the relative deadlines for depositions and discovery were adjusted accordingly. The trial occurred on April 4, 2005.

In fn. 22 of the April 15, 2005 written closing arguments, Lennie stated:

Between 1996 and 1997<sup>2</sup>, [Lennie] inherited \$331,689 (\$214,341 from Maternal Grandfather and \$117,348 from Maternal Uncle). The tangible goods [Lennie] purchased were an automobile and household effects in an amount totaling \$34,142. The cash remainder of her inheritance is \$114,570 (\$87,894 is held in a First Hawaiian Bank Savings/Checking account and \$26,676 is held in an E Trade Securities Account). Of the \$331,689 she inherited, [Lennie] has \$148,712 remaining in cash and tangible goods (\$114,570 + 34,142 = \$148,712). Returning her entire capital contribution will reimburse [Lennie] the \$14,000 she loaned to [Sonny] so he could purchase his share of the charter boat business from his former partner.

(Footnote added.)

Regarding Lennie's inheritances, Sonny testified in part:

Q Now we've spoken about [Lennie's] inheritance. What do you know about that?

A Well, the inheritance she never told me about. I found out about the inheritance one day when I was at her uncle's repair shop trying to get a safety check or something done on my truck. My truck was old. He said, "Why don't you buy a new truck?" "I don't have money." "How come you don't have money? Your wife just got two hundred and" -- I don't know -- "two hundred sixteen, two hundred seventeen thousand dollars worth of inheritance." I say, "Well, I don't know. I never knew about it." He said, "Yeah. You should ask her." That was the first time I heard about that inheritance money. But I never did ask her. I figure if she wanted to tell me, she would tell me.

Q Have you ever asked her about her inheritance?

A Um, I don't know if I ever asked her, but the subject came up, and we talked about it. I don't remember how it came about. I don't know if I asked her or if she started telling me about it. But sometime later I -- we talked about it. I don't remember the exact things, how it went. But, um, that's like the other inheritance money she got from her Uncle Tony. I never even knew about that inheritance money. It was a surprise to me when we saw it listed on a debt asset statement.

Q With the court?

A With the court. I never knew about that money either. And that didn't bother me because if that's her inheritance, you know, then that's -- that's what she earned. That's fine. I wasn't even going to ask for it in the divorce. You know. That was never a point because that's her money. She got it. That's fine. You know. Um, so I got no clue when she got it or how -- how she even spent it. To me, was none of my business.

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<sup>2</sup>

The record indicates that these inheritances were received in 1997 and 1998.

Sonny's Answering Brief notes:

[Sonny] did not claim [Lennie's] inheritances were Marital Separate Property, . . . .

. . . . .

Of the \$192,159.47 for which [Lennie] now seeks reimbursement[,] none of these proceeds were used to make capital contributions to the partnership property. As shown in [Lennie's] Summary re Remainder of Inheritance and Expenditures, she spent approximately \$13,245.00 in airfare to visit her step-mother, attend her brother's wedding and for a family vacation; \$5,400.00 to pay off the parties' daughter's car; \$7,000.00 for the parties' daughter's wedding; \$375.00 for a ukulele which [Lennie] testified at trial was her birthday gift to [Sonny]; \$4,142.99 in household purchases; \$47,413.00 for the purchase of her car and the expenses related to this car; \$1,464.00 in house repairs; \$1,045.00 on the parties' grandson; \$16,000.00 in law fees related to this divorce; and \$15,445.00 "mortgage related". She also invested \$60,000.00 in an E-trade account and loaned [Sonny] \$14,000.00 for his business, all totaling \$185,529.99. The balance of \$114,529.88 remaining from her inheritances consists of cash and checking accounts in her name and an E-trade account of \$26,676.00 in her name.

. . . . .

Counsel contends in his Opening Brief that [Lennie] would not have had to use her inheritance to maintain "family expenses that would have been paid from the parties' joint income pot if [Sonny] were not using the marital income to support his girlfriend". However, counsel does not explain why [Lennie] used her inheritance rather than the "parties' joint marital income pot", namely, her income, which is twice [Sonny's], to pay the family expenses.

(Record citations omitted.)

In his opening statement to the court, counsel for Sonny stated, in part: "[Sonny] is willing to split everything if [Lennie] would base the sharing of the house on a current appraisal. And he's willing to give her the house if she gives him his retirement." Thereafter, Sonny testified in part as follows:

Q But it's also your belief that if you were allowed to keep your retirement, that you could survive on the \$1,900 a month you get from that?

A Yes. That would . . . be a big help. And initially this is what I thought was fair, you know. She worked hard. She

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established her career. She made a good name, reputation for herself. We had a lot of equity built up in the house. She had her good retirement. She had her inheritance. My daughter, my grandson living with her. The last thing I wanted to do was sell the house and put them out.

Q So to me, based on all that, I was willing to give her the house. She can have the house, have her inheritance. She keep her retirement. I keep my retirement and my business. To me I felt that was more than fair 'cause of all the equity built up into the house.

. . . .

Q But you feel it would be in the best interest of the family, the Rivera family, for you to keep your retirement and your business and for her to keep the house?

A Yes. And her retirement and everything in the house, you know.

Q This has been your position since the beginning?

A Since the beginning.

On May 10, 2005, the court entered its decision in an Order Re Trial Held on April 4, 2005. The court's June 8, 2005 order denying Lennie's May 20, 2005 motion for reconsideration states in part:

1. With respect to the \$214,561 which [Lennie] alleges she spent in maintaining the marital residence and for family expenses, the Court correctly found in light of the evidence presented that only \$15,464 of that amount was properly reimbursable to [Lennie] on her Category 3 claim. . . .

2. Inasmuch as the parties failed at the time of trial to provide the Court with a competent and credible present value for the marital residence, the Court acted reasonably in ordering that the property be sold. [Lennie], however, has been afforded the opportunity to buy out [Sonny's] interest if she is able to match the best offer received for the property.

The August 11, 2005 Divorce Decree followed. On August 25, 2005, Lennie filed a notice of appeal. On December 2, 2005, the court entered the Findings of Fact and Conclusions of Law (FsOF and CsOL) that state in part:

FINDINGS OF FACT

3. [Sonny] is a retired Master Chief with the Navy, a self-employed commercial fisherman, and the owner of Aikane Sportsfishing [sic], Inc.

4. [Lennie] is employed as Director of Systems Networking for Pacific Guardian Life Insurance Company.

5. On credible and reliable evidence, the Court finds the parties' following marital property is subject to allocation:

A. Real property located at 91-030 Popoi Place, Ewa Beach, Hawaii. No credible and/or reliable evidence concerning the present market value of the marital residence was presented by either party.

B. The total value of [Sonny's] business, Aikane Sportsfishing [sic], Inc., is \$110,500.00, comprised of the following:

44' Striker	\$ 8,000.00
38' Bertram	89,000.00
Rods/Reels	6,000.00
Tools	2,500.00
1998 Dodge Dakota	<u>5,000.00</u>
	\$110,500.00

H. Debts:

(1) [Sonny] has credit card debts totaling \$39,040.00.

(2) [Lennie] has credit card debts totaling \$54,040.42.

6. [Lennie's] Category 3 Claim:

[Lennie] inherited the total sum of \$331,689.35 during the marriage. Of this amount, she has \$87,893.88 [sic] remaining: \$75,271.69 in a First Hawaiian Bank savings account; \$9,062.24 and \$3,559.95 in two First Hawaiian Bank checking accounts; and an E-trade account of \$26,676.00.<sup>3</sup>

[Lennie] requested the return of \$243,795.47 [sic] of her inheritance which she alleged she spent on family related matters/items. She testified about approximately \$185,529.95 in expenditures, which sum includes a \$60,000 E-trade investment she made for herself in 1999.<sup>4</sup> [Lennie] was unable to account for the remaining expenditures totaling approximately \$58,265.52. She testified that she never gifted theses [sic] sums to various family members, including Plaintiff, the parties' daughter and

<sup>3</sup> These amounts add up to \$114,569.88.

<sup>4</sup> An E-trade account investment of \$60,000 which is now worth \$26,676 is not a \$60,000 expenditure.

grandson, Defendant's stepmother and her brother.<sup>5</sup>

Based upon the credible and reliable evidence, the Court finds that aside from the funds remaining in her bank/securities accounts, [Lennie] is entitled to a return of \$15,464.00 of the foregoing sum: \$14,000.00 loaned to [Sonny] for his business; and \$1,464.00 reimbursement for home repairs.

CONCLUSIONS OF LAW

4. The real property located at 91-030 Popoi Place, Ewa Beach, Hawaii, shall be immediately listed for sale with a realtor mutually agreed upon by the parties.

A. The net sales proceeds, after the \$64,842.00 in mortgages against the property and all related costs of sale have been paid, shall be divided equally between the parties.

B. [Lennie] may buy out [Sonny's] interest in the property if she is able to match the best offer received for the property.

17. In light of the foregoing division of property, [Sonny] shall make an equalization payment of \$28,156.88 to [Lennie].<sup>6</sup> This payment may be offset against [Sonny's] share of the net proceeds from the sale of the marital residence.

19. Each party shall bear his/her own attorney's fees and costs incurred herein.

(Footnotes added.)

Lennie challenges the family court's (1) failure to return her Category 3 net market value to her; (2) determination that the court could not value the marital residence; (3) decision to order the sale of the residence; (4) valuation of Sonny's business, including the Striker; and (5) failure to decide the charter boat Top Gun issue. Lennie also contends that "the judge erred as a matter of law by not imposing at trial the various sanctions as authorized by Hawai'i Family Court Rule

<sup>5</sup> The court's statement of a party's testimony is not a finding of fact.

<sup>6</sup> The court did not explain its calculations in arriving at this \$28,156.88 amount.

37."<sup>7</sup> She argues:

The remedy for the mistake is to vacate the property division, and to remand the case to the trial court with instructions to (1) ignore any value provided by [Sonny], and (2) accept [Lennie's] numbers as the best evidence available to develop a property allocation chart that illustrates the just and equitable division of the marital estate.

After carefully reviewing the record and the briefs submitted by the parties, and duly considering and applying the law relevant to the issues raised and arguments presented:

(1) We decide that the family court should explain why it did not agree with Sonny's position that Lenny should be awarded the house, her inheritance, and her retirement, and Sonny should be awarded his retirement and his business.

(2) We note that the residence was purchased in 1979 for \$84,000, Lennie wanted the residence awarded to her so she could continue to reside in it, and Sonny did not state a reason why it should be sold. A sale would generate costs, fees, and capital gain taxes. Notwithstanding these compelling reasons for not ordering the sale of the residence, the court appears to have decided that the lack of evidence of the fair market value (FMV) of the residence at the time of trial left it with no alternative but to order its sale and to permit Lennie to "buy out [Sonny's] interest in the property if she is able to match the best offer received for the property." We decide that the court should explain why it did not order an appraisal, allow the parties an opportunity to respond to the appraisal, determine the relevant

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<sup>7</sup> The title of Hawai'i Family Court Rule 37 (2006) is "Failure to make discovery; sanctions."

FMV, award the residence to Lennie at that FMV, and determine the division and distribution of the property and debts on that basis.

(3) We note that the following facts caused problems in this case:

(a) Pretrial Order No. 2 filed on March 22, 2005, did not state the agreement of the parties regarding the issues that were listed as not being in dispute;

(b) The court did not follow the Partnership Model procedure described in Jackson v. Jackson, 84 Hawai'i 319, 933 P.2d 1353 (App. 1997), or prepare a property division chart; and

(c) The FsOF do not find the facts relevant to the dispute regarding the charter boat Top Gun.

(4) We decide that, excluding the dispute regarding the charter boat Top Gun, the evidence supports the valuation of Sonny's business, including the valuation of the Striker.

(5) We note that Lennie inherited \$331,689.35. She has \$114,569.88 remaining. The balance is \$217,119.47. She lost \$33,324 in E-trading. She was unable to account for the expenditure of \$58,265.52. She accounted for the expenditure of the remaining \$125,529.95. Some of that \$125,529.95 expenditure was for marital partnership expenses. We decide that the court must segregate the marital partnership expenditures from the non-marital partnership expenditures. If the court does not reimburse Lennie her marital partnership expenses, it must state

its reason(s).

(6) We decide that there is no merit to Lennie's contention that "the judge erred as a matter of law by not imposing at trial the various sanctions as authorized by Hawai'i Family Court Rule 37".

(7) We note that the court decided that "[Lennie] is awarded the return of \$15,464.00 (\$14,000.00 loaned to [Sonny] for his business, and \$1,464.00 reimbursement for home repairs)." We decide that the court must explain why Sonny must reimburse these amounts to Lennie and how Lennie will be paid.

Therefore, IT IS HEREBY ORDERED the following are vacated:

1. Paragraph nos. 2.a., 2.f., 6, and 7 of the May 10, 2005 Order Re Trial Held on April 4, 2005;

2. Paragraph nos. 7, and 8.b.i. of the August 11, 2005 Divorce Decree;

3. The last paragraph of no. 6 of the December 2, 2005 Findings of Fact; and

4. Paragraph nos. 4, 11, 12, the second sentence of paragraph no. 16, and paragraph no. 17 of the December 2, 2005 Conclusions of Law.

IT IS FURTHER ORDERED that this case is remanded for further proceedings consistent with this opinion. In all other respects (a) the May 10, 2005 Order Re Trial Held on April 4, 2005, (b) the August 11, 2005 Divorce Decree, and (c) the December 2, 2005 Findings of Fact and Conclusions of Law are

affirmed.

We note that this opinion causes Hawaii Revised Statutes § 580-56(d) (1993),<sup>8</sup> as interpreted by Todd v. Todd, 9 Haw. App. 214, 832 P.2d 280 (App. 1992), to be applicable.

DATED: Honolulu, Hawai'i, September 19, 2006.

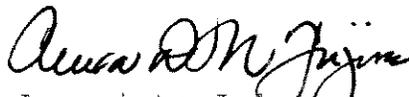
On the briefs:

John W. Schmidtke, Jr.  
for Defendant-Appellant.

  
Chief Judge

Sherman S. Hee  
for Plaintiff-Appellee.

  
Associate Judge

  
Associate Judge

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<sup>8</sup> Hawaii Revised Statutes § 580-56 (1993) states as follows:

(d) Following the entry of a decree of divorce, or the entry of a decree or order finally dividing the property of the parties to a matrimonial action if the same is reserved in the decree of divorce, or the elapse of one year after entry of a decree or order reserving the final division of property of the party, a divorced spouse shall not be entitled to dower or curtesy in the former spouse's real estate, or any part thereof, nor to any share of the former spouse's personal estate.