

NO. 23299

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

AUDREY SMERCH WALLOWER, Plaintiff-Appellant, v.  
HERBERT HOOVER WALLOWER III, Defendant-Appellee

APPEAL FROM FAMILY COURT OF THE FIRST CIRCUIT  
(FC-D NO. 99-2271)

MEMORANDUM OPINION

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

Plaintiff-Appellant Audrey Smerch Wallower (Mother or Plaintiff) appeals the following orders of the family court:<sup>1</sup> the Decision and Order dated February 1, 2000; the March 6, 2000 Further Order Re: Plaintiff's Motion and Affidavit for Pre-Decree Relief Filed July 20, 1999; the March 13, 2000 Order Re: Plaintiff's Motion for Clarification and Reconsideration of Decision and Order Filed February 22, 2000; and the May 15, 2000 Findings of Fact and Conclusions of Law. We remand for clarification of the duty of Defendant-Appellee Herbert Hoover Wallower III (Father) to pay for the children's educational expenses. In all other respects, we affirm.

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<sup>1</sup> District Family Court Judge Lillian Ramirez-Uy presided in this case.

A.

BACKGROUND

December 4, 1942      Mother was born.

April 28, 1949      Father was born.

August 21, 1978      The parties were married.

October 29, 1982      Their son (Son) was born.

October 30, 1988      Their daughter (Daughter) was born.

July 1996              Mother, with Son and Daughter, visited Hawai'i and then, without Father's consent, remained in Hawai'i.

November 6, 1998      In California, Mother filed a complaint for divorce.

June 2, 1999              Following a hearing, the California court entered child support orders but denied Mother's request for spousal support. Mother did not appeal the California court's orders.

July 20, 1999              In Hawai'i, Mother filed a Complaint for Divorce.

August 17, 1999              Father filed a "Motion (A) for Dismissal, Abatement and or Stay of Divorce Action, and (B) for Declination of Custody Jurisdiction and or Stay of Custody Proceedings."

October 4, 1999              In its "Decision & Order Re: Motion (A) for Dismissal, Abatement & or Stay of Divorce Action, and (B) for Declination of Custody Jurisdiction & or Stay of Custody Proceedings Filed August 17, 1999," the Hawai'i family court decided, in relevant part, as follows:

Per Intercourt memo, the California Court/Judge James Brown, issued the following decision and order:

"The portion of this case pertaining to custody and visitation are stayed pending final resolution of those issues by the Hawaii Court, Hawaii Court being found to be the home state of the minor children.

The issues regarding division of property and provision for spousal support and related economic and other property issues, other than permanent child support,<sup>2</sup> shall be litigated [in California] unless within 30 days [Father] files a binding election with [the California court] to submit all issues to the Court in Hawaii."

. . . The alternative Motion for Abatement or Stay as to the issues to which the California court has not relinquished jurisdiction is granted pending final resolution of the custody and visitation issues in Hawaii Court. The Motion for Declination or Stay of the Custody Proceedings is denied.

(Footnote added.)

December 10, 1999 Trial.

February 1, 2000 Decision and Order. (We note that this document was not filed by the court. A copy of it is in the record at page 220 attached to a document filed by Mother. It is quoted verbatim in the family court's May 15, 2000 finding of fact no. 14 at page 314 of the record.)

March 6, 2000 The family court entered a "Further Order Re: Plaintiff's Motion and Affidavit for Pre-Decree Relief Filed July 20, 1999," which ordered, "[p]ursuant to the Decision and Order dated February 1, 2000," the following:

1. **CUSTODY:**

Plaintiff-Mother ("Mother") is awarded sole legal and sole physical custody of the parties' two minor children . . . subject to Defendant-Father's (Father) rights of reasonable visitation.

Prior to Mother making a major decision regarding [Son] or [Daughter], she shall affirmatively invite Father's input as to what would be in the children's best interests, and accord such input serious consideration[.] . . .

2. **VISITATION:**

Father is awarded rights of reasonable visitation pursuant to the "Type B" visitation schedule . . . .

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<sup>2</sup> In his answering brief, Defendant-Appellee Herbert Hoover Wallower III (Father) states, in relevant part, as follows: "Although I believed then as I do now that Hawaii does not have proper jurisdiction over me to order permanent child support, to save the money, aggravation, and the acrimony of appealing, I acquiesced to Hawaii's claim of jurisdiction on the child support issue."

. . . .

**3. PROTECTION FROM PARENTAL DISPUTES:**

a. Neither parent shall engage in, nor permit/encourage any step-parent, fiancée, significant other, grandparent, other relative or other associate, to criticize, disparage, demand, insult, or otherwise "bad-mouth" the other parent, step-parent, significant other, or grandparent to the children or in the presence or hearing of the children. This prohibition shall apply even to information that is truthful and accurate.

b. Neither parent shall fight (verbally or physically) - in person or by telephone - in the presence or hearing of the children.

c. Neither parent shall align or attempt to align the children against the other parent (or other relative), nor allow or encourage anyone else (including relatives and friends) to do so. Neither parent shall directly or indirectly ask the children to choose between parents, to choose to reside with one parent instead of the other, or to choose one household over the other household.

d. Neither parent shall ask the children to pass orders or instructions or uncomplimentary messages to the other parent (orally or in writing). Complimentary messages are allowed, and encouraged.

e. Neither parent shall ask the children to "keep secrets from" the other parent or ask or encourage the children to lie to the other parent about events or persons the children experienced during a visit with the other parent, grandparent or relative.

f. Neither parent shall ask the children to "spy on" the other parent or the other parent's lifestyle or household nor ask any detailed, "probing" questions about the other parent or lifestyle or household of the other parent.

g. Both parents shall encourage a positive parent-child relationship between the children and the other parent, and shall not say or do anything (including "grimace" or put on a "long face") to adversely affect the children's love for the other parent.

h. Neither parent shall interfere with the parent-child relationship with the other parent, and neither parent shall conceal the children from the other parent during the other parent's period of responsibility.

**4. CHILD SUPPORT:**

For the purpose of calculating child support payable by Father to Mother, Father's income is established at \$5,865 per month with credit for the cost of health insurance of \$150 per month. The Court hereby imputes minimum wage at 40 hours a week

of \$1,090 to Mother. Mother shall continue to exert due diligence in seeking gainful employment. . . .

Commencing January 1, 2000, Father shall pay to Mother the sum of \$665.00 per month per child, or the total sum of \$1,330.00 per month, for the support maintenance and education of [Son] and [Daughter], . . . .

. . . .

**5. MEDICAL AND DENTAL INSURANCE AND EXPENSES:**

Father shall continue to provide medical and dental coverage for [Son] and [Daughter]. . . .

Uninsured medical and dental expenses shall be allocated 75% to Father and 25% to Mother.

Any other claim by Mother for payment of past medical and dental expenses is hereby denied.

**6. POST HIGH SCHOOL APPLICATION EXPENSE AND INFORMATION:**

. . . .

Costs of application for college, college-preparatory entrance examination costs, and expenses related to admission shall be shared by the parties 75% to Father and 25% to Mother.

. . . .

**7. TRUST ACCOUNTS FOR THE CHILDREN:**

Any remaining balance(s) in the children's account(s) shall be used exclusively for the children's educational needs and no funds shall be withdrawn from such account(s) for any other purpose. Upon request by Father, Mother shall provide copies of trust account statements.

February 22, 2000      Mother filed a "Motion for Clarification and Reconsideration of [the February 1, 2000] Decision and Order" and requested the following changes:

1.      An order requiring Father to pay 100% of all of the children's uninsured medical and dental expenses rather than only 75%.
2.      An order requiring Father to pay 100% of the children's educational and related expenses including computers and extracurricular activity expenses.
3.      An order requiring Father to immediately deliver to Mother, and to the court, complete copies of each of the children's two Limited Partnerships, each, the amount of their interests, and a complete itemization of all their holdings. "We ask the court to take control of or at [the] very least,

to freeze these partnerships in order to protect the interests of the children."

4. An order requiring Father "to ship, within 30 days of order. At [sic] his own expense, [Son's] Mercedes Benz, after first restoring it to a safe and drivable condition[.]"
5. Clarification of the following issue: Is Father clearly responsible for visitation transportation and directly related expenses such as cab fare to and from the airport?

March 13, 2000            The family court entered its "Order Re Plaintiff's Motion for Clarification and Reconsideration of Decision and Order Filed February 22, 2000," which denied Mother's motion for reconsideration and granted her motion for clarification.

March 23, 2000            The family court conducted a hearing and announced its decision regarding the February 22, 2000 motion.

March 23, 2000            Mother filed a Notice of Appeal.

April 7, 2000            The family court entered its "Order Re: Plaintiff's Motion for Clarification," which states, in relevant part, as follows:

1.        **Transportation Costs for Visitation.** [Father] shall be responsible for costs of transportation for the children which shall include airfare and ground transportation between [Mother's] residence and [Father's] residence.

Transportation expenses for visitation do not include trips that a child may take before or after visitation with [Father].

2.        **Notice for Visitation.** [Father] shall provide [Mother] with written notice of his visitation plans with the children. [Mother] must receive such notice no later than 10 days in advance of the visitation. [Father] shall also provide the tickets for the visit no later than 10 days in advance of the visitation.

3.        **Educational Expenses.** The children's educational expenses are defined as: tuition, room, board, supplies and expenses related to school activities the children are required to participate in or attend.

. . . . .

8.        **Trust Accounts and Mercedes.** The court finds that it does not have jurisdiction to enter any orders relating [to] the trust accounts and the Mercedes.

May 15, 2000

The family court entered it's Findings of Fact and Conclusions of Law. The findings of fact state, in relevant part, as follows:

6. On November 9, 1998 [Mother] filed an *Order to Show Cause* in California asking for spousal support and for child support and fees. Following a hearing, on June 2, 1999, the California court entered child support orders but denied [Mother's] request for spousal support. [Mother] did not appeal the California court's orders.

7. Instead, on June 29, 1999, [Mother] started a completely new lawsuit by signing a *Complaint for Divorce* in the First Circuit, State of Hawaii. The complaint was filed July 20, 1999. [Mother] also filed a *Motion and Affidavit for Pre-Decree Relief* on July 20, 1999. In her motion [Mother] asked for custody of the children, as well as the for [sic] orders concerning the same issues that had just been litigated in California: alimony, child support, and an award of fees.

8. [Mother] also cut [Father] off from the children. . . . On July 19, 1999, the California court determined that it did not have home state jurisdiction over the visitation issue.

. . . .

15. Twenty-one days after the court issued its written decision, on February 22, 2000, [Mother] filed a *Motion for Clarification of Decision and Order*. The motion attempted to argue alleged facts and evidence not presented at the December 10, 1999 trial.

(Emphases in original.)

B.

MOTHER'S FAILURE TO CAUSE RELEVANT TRANSCRIPTS  
TO BE MADE A PART OF THE RECORD ON APPEAL

In this appeal, Mother challenges a variety of the family court's express and implicit findings and discretionary decisions. She also complains of the absence of various findings and decisions on certain issues. She did not, however, cause any transcripts of the relevant hearings to be a part of the record on appeal. Therefore, although the exhibits in evidence are a part of the record on appeal, we do not have a record of the oral

testimony, oral arguments, and oral decisions that were and were not uttered during those relevant hearings.

C.

#### DISCUSSION

Subject to the severe limitation caused by the lack of relevant transcripts, we will discuss Mother's summary of her points on appeal seriatim.

1.

Mother did not assert a point on appeal under this number.

2.

Point: "The Hawaiian Court should hear the divorce here, in [Mother's] Home State, and not defer jurisdiction to California."

Decision: Considering that Mother commenced the California case before she commenced the Hawai'i case and did not terminate the California case, and Father resides in California, this point has no merit.

3.

Point: "Hawaii must accept subject matter jurisdiction for the two minor children."



In her opening brief, Mother asserts, "It was agreed upon by both Courts that the rights of the children should be decided here in Hawaii. This should include their property as well."

Decision: This action started off as a divorce case. It now involves only the issues of child custody, visitation, and child support. The Hawai'i family court has subject matter jurisdiction regarding child custody, visitation, and support, visitation expenses, and medical, dental, and educational expenses for the children. It was within the family court's discretion to order Father to restore Son's Mercedes Benz and to ship it to Hawai'i and, assuming Father had the capability and authority to comply, to order Father to provide information about the children's Limited Partnerships and not to take any action with respect to them pending further order of the court. It also was within the family court's discretion to decline to enter such orders. Mother failed her burden of showing that the family court abused its discretion.

4.

Point: "Support should be made retroactive to July 20, 1999, when the Motion for Pre Decree Relief was filed."

Decision: It appears that a prior child support order was in effect until the family court's March 6, 2000 child support order took effect on January 1, 2000. Nothing in the

record suggests that the family court's selection of the January 1, 2000 date was an abuse of its discretion.

5.

Point: "No income should be imputed to Mother, as she is deemed by the state to be a mendicant."<sup>3</sup>

Decision: Assuming this allegation is true, there is nothing in the record showing that Mother's mendicant status is a result of anything other than Mother's choice.

As noted in finding of fact no. 6, "Following a hearing, on June 2, 1999, the California court . . . denied [Mother's] request for spousal support. [Mother] did not appeal the California court's orders."

The record indicates that Mother is a college graduate. In his answering brief, Father alleges that "[p]rior to her move to Hawaii, [Mother] was contributing equally to the family finances with an income roughly equivalent to mine. Upon moving to Hawaii she immediately ceased making any financial contribution to any of our joint obligations, including a home mortgage, her personal bankruptcy and numerous other bills[.]" Father further alleges that "[Mother] has chosen not to work to help support her children since moving to Hawaii, despite having a college degree and considerable skills. She was a successful sales person when she chose to move to Hawaii, quit her job[.]"

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<sup>3</sup> A "mendicant" is a beggar.

Nothing in the record indicates that Mother is unemployable. The law allows no advantage to voluntary mendicants.

Moreover, in her opening brief, Mother states that "[t]he Court erred in its calculations when it imputed minimum wage to Mother of \$1,090.00 per month. . . . [T]he total imputation should be only \$840.00 per month." In other words, Mother is arguing about the amount imputed rather than the imputation itself. We note that \$1,090 is the gross amount earned per month by a person who works 40 hours a week for \$6.29 per hour, and that \$840 is the gross amount earned per month by a person who works 40 hours a week for \$4.85 per hour. In Hawai'i, the minimum wage is \$5.25 per hour or \$910 per month. Hawai'i Revised Statutes § 587-3 (1993). We conclude that the \$1,090 decision was well within the ambit of the family court's discretion.

6.

Point: "[Father] should be responsible for his children's past unpaid medical bills. Which are now in the hands of collection agencies."

In her opening brief, Mother argues that

[t]he Court was also wrong to find that all the past due medical bills of the children were not Father's responsibility. Yet . . . many of these bills were incurred before the divorce action and all of them were incurred at Father's insistence as Mother is a Christian Scientist and does not believe in using Doctors. Since [Father] has not paid any of them they are now all in collections, and the 2 minor children will be refused medical and emergency care should they ever (God Forbid) need any. . . . [Father] Earns [sic] \$94,400.00, and sits on his million dollar inheritance, and

[Mother] earns zero, yet the Court found that [Mother] should pay all those medical bills.

The exhibits in evidence show the following medical

bills:

October 30, 1998	For services to Daughter on September 1, 1998, Arlene Meyers, MD, is owed \$198.64, \$146.36 of which was paid by Group Health Plan of Prudential Securities Inc., Father's employer.
November 28, 1998	For services to Daughter on September 1, 1998, Wahiawa General Hospital is owed \$146.50.
December 10, 1998	\$106.08 is owed to Arlene Meyers for Son, none of which was covered by the Group Health Plan.
December 15, 1998	\$97.40 is owed to C. Wilcox for Son, \$73.06 of which was covered by the Group Health Plan.
June 9, 1999	\$165.77 is owed to D. Tamash for Son, \$11.83 of which was covered by the Group Health Plan.
July 28, 1999	Pacific Collections, seeks to collect \$154.86 plus \$7.21 interest owed to Arlene D. Meyers, MD, Inc.

Decision: The family court found that Father's income was "\$5,865 per month with credit for the cost of health insurance of \$150 per month." In the absence of a transcript, it cannot be decided that this finding is clearly erroneous. There is no evidence that Father enjoyed a "million dollar inheritance[.]" In his answering brief, Father states, in relevant part, as follows:

[Mother] refers to my separate property inheritance of \$1,000,000. While this issue is beyond the scope of this Court, the fact is that my mother's entire estate was less than that \$900,000 before estate taxes and other expenses. Furthermore, there are three beneficiaries who are to share equally in its division. Also, when I do receive my distribution I will have to pay over a good portion of it to my attorneys.

In the absence of a transcript, we are not able to discern why the family court decided to deny Mother's claim for payment of past medical and dental expenses or whether it abused its discretion in doing so. Therefore, Mother failed her burden on appeal of showing error.

7.

Point: "Child support should be recalculated using [Father's] true and actual income, and real visitation time."

In her opening brief, Mother contends that "[c]hild support was determined based on a fictional amount of [Father's] income." She further contends that "[t]he income amounts used to calculate Child support should be the real and true amounts of zero for the Mother, and \$6883.00 or \$7870.00 per month for the Father." Finally, she contends that

[t]he calculation should also include credit for [Father's] free rent living situation for 4 years and his inheritance of \$1,000,000.00 which was settled on him last year. Also calculated into the child support was the Father's asking to have the children for the entire summer. But this is not reality. This summer, for example, [Father] had [Daughter] for 5 and 1/2 weeks, and [Son] for 3 and ½ weeks. The rest of the time, I am feeding them, so this calculation needs to be adjusted.

Decision: Absent a transcript, Mother has failed her burden on appeal of showing error.

8.

Point: The "[C]hildren's Limited Partnerships must be frozen to protect their assets."

Decision: See no. 3 above.

9.

Point: "Father should be made to reimburse Mother for education expenses immediately, and all further expenses to be paid within 7 days of receipt of notification of such. If no income is imputed to Mother, Father should pay education expenses."

In her opening brief, Mother states, "Regarding the final order, it seems too ambiguous to enforce. It states that Father is responsible for 75% of the children's education expenses, but it does not address how or when this is to be paid."

Decision: In its February 1, 2000 and March 6, 2000 orders, the family court decided, in relevant part, that "[c]osts of application for college, college-preparatory entrance examination costs, and expenses related to admission shall be shared by the parties 75% to Father and 25% to Mother."

In its March 6, 2000 order the family court ordered, in relevant part, as follows:

7. **TRUST ACCOUNTS FOR THE CHILDREN:**

Any remaining balance(s) in the children's account(s) shall be used exclusively for the children's educational needs and no funds shall be withdrawn from such account(s) for any other purpose. Upon request by Father, Mother shall provide copies of trust account statements.

If the family court intended to expressly order the "children's educational expenses" to be paid 75% by Father and 25% by Mother, it did not do so. Moreover, it did not clarify how the payments from the children's accounts would impact upon the obligation of the parties. We remand for reconsideration and clarification.

With respect to payment, both parties owe and should pay their percentage of costs and expenses prior to or when they become due. If one party pays the entire cost or expense, the other party owes and should reimburse the paying party when appropriately notified of the payment and the payment is proved.

10.

Point: "Agreement needs to be reached regarding minimum time of visitation. These dates should not be at the discretion of [Father] but needs [sic] to be agreed upon by both parties."

The type "B" visitation schedule ordered by the court specifies in relevant part as follows:

2. **Vacations.**

a. **Christmas:** Entire vacation in alternate years with the return of the child to the custodial parent at least two days prior to date school begins.

b. **Spring:** Alternate year.

c. **Summer:** Depending on the age of the child, the maximum summer visitation period will be two months. Both parents should be flexible regarding the child's summer activities. The child should be returned at least one week prior to the start of the school year.

3. Special accessibility to the child if the visiting parent comes to the child's usual area of residence. The visiting parent must give at least two weeks notice prior to the scheduled visitation. The visitation should take into account the child's usual school activity schedule, if any. At minimum weekend and one day during week from after school to reasonable right to return on the same day.

Mother complains that the "minimum time of visitation" is "at the discretion of [Father.]" She alleges that although it was agreed that the children would be with Father for the entire summer, "he brought his daughter out and would not take his son until 8 weeks after he was out of school." She contends that "[t]hese dates should not be at the discretion of [Father], but needs [sic] to be agreed upon by both parties." She also contends that the court could protect the children "from this kind of punishment by setting deadlines for tickets and dates, to which both parties would have to adhere."

Decision: The family court decided that "[Father] shall provide [Mother] with written notice of his visitation plans with the children. [Mother] must receive such notice no later than 10 days in advance of the visitation." This decision was within the ambit of the family court's discretion. If and when Father in fact abuses his rights, Mother may seek the assistance of the family court to sanction those abuses and inhibit or prevent further abuses.



Point: "The order for protection from parental disputes needs to be enforced, and carry some consequence when ignored."

Decision: We agree. First, however, it must be violated. Moreover, the family court's order applies to both parties.<sup>4</sup>

In her opening brief, Mother asks, "How can [Mother] 'invite [Father's] input' when he is hostile and inaccessible to her?" The answer is very simple. All Mother has to do is "invite" Father's input by communicating a timely invitation. The rest is up to Father.

#### CONCLUSION

Accordingly, we remand for reconsideration and clarification of the family court's orders regarding the payment of the "children's educational expenses." In all other respects, we affirm the following orders of the family court: February 1, 2000 Decision and Order; March 6, 2000 Further Order Re:

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<sup>4</sup> In her opening brief, Plaintiff-Appellant Audrey Smerch Wallower (Mother) alleges: "The Plaintiff and the children had come to Hawaii, for the summer, to stay on the family's plantation. While there, she learned of her husband's cheating affair with a younger woman . . . in Santa Barbara." The allegation of why Mother decided to stay in Hawaii with the children, which Father denies, is not relevant in this divorce case.

Plaintiff's Motion and Affidavit for Pre-Decree Relief Filed  
July 20, 1999; and May 15, 2000 Findings of Fact and Conclusions  
of Law.

DATED: Honolulu, Hawai'i, July 5, 2001.

On the briefs:

Audrey S. Wallower,  
Plaintiff-Appellant *pro se*.

Chief Judge

Herbert H. Wallower III,  
Defendant-Appellee *pro se*.

Associate Judge

Associate Judge