NOT FOR PUBLICATION

NO. 26088

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

DONALD COLBURN, Plaintiff-Appellant, v.
EMIKO COLBURN, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 01-1-1740)

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

Plaintiff-Appellant Donald Colburn (Donald) appeals from the August 19, 2003 Decree Granting Divorce (Second Divorce Decree) entered by Judge Bode A. Uale in the Family Court of the First Circuit. We vacate specified parts of the Second Divorce Decree pertaining to spousal support and the division and distribution of property and debts. We remand for further proceedings consistent with this opinion.

BACKGROUND

Defendant-Appellee Emiko Colburn (Emiko) was born on February 13, 1935. Donald was born on August 24, 1935. In 1954, Donald joined the Air Force. On January 13, 1958, Donald married Emiko in Japan (First Marriage).

In 1960, Donald and Emiko moved to Hawai'i. In June of 1972, they bought a residence at 955 Alahaki Street, Kailua, Hawai'i.

Donald's parents owned a residence at 181 Kailua Road, Kailua, when it was leasehold. When the fee became available for purchase, Donald bought the fee. There is no evidence of what part, if any, of the net market value of this residence is a Category 3 net market value[1].

In 1974, Donald retired from the Air Force.

Donald and Emiko are the parents of four children. Each child became an emancipated adult prior to 1995.

On February 17, 1995, Judge Diana L. Warrington entered a divorce decree (First Divorce Decree) signed by the parties. This decree approved and ordered the September 12, 1994 Financial and Property Settlement and the January 9, 1995 Addendum. Both of these latter documents had been prepared by Donald and signed by the parties. Both had been signed when neither party was represented by counsel. The First Divorce Decree awarded the following property as follows:

To Emiko: 181 Kailua Road, Kailua, gross value $430,000 to $450,000; and the right to Federal Survivors Annuity Benefits if she survives Donald.

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[1] "Category 3. The date-of-acquisition NMV [net market value], plus or minus, of property separately acquired by gift or inheritance during the marriage but excluding the NMV attributable to property that is subsequently legally gifted by the owner to the other spouse, to both spouses, or to a third party." Malek v. Malek, 7 Haw.App. 377, 380-81 n. 1, 768 P.2d 243, 246-47 n. 1 (1989). Under the Partnership Model, "[t]he Category 1 and [Category] 3 NMVs are the 'partner's contributions' to the Marital Partnership Property that, assuming all valid and relevant considerations are equal, are repaid to the contributing spouse[.]" Hussey v. Hussey, 77 Hawai'i 202, 207, 881 P.2d 1270, 1275 (App.1994).

To Donald: 995 Alahaki Street, Kailua, gross value $330,000 to $350,000; his military retirement benefits; and his Pioneer Tax Free Income Fund, approximate value $55,000.

The First Divorce Decree also awarded all other personal property to the title holder or possessor. It ordered Donald to pay to Emiko spousal support of $500 per month for the rest of her life.

After the First Marriage, Emiko sold the 181 Kailua Road residence and purchased a $250,000 Mutual of Omaha Tax Free Fund. On February 14, 2000, Donald and Emiko were remarried (Second Marriage). It appears that Emiko entered the Second Marriage with much of her $250,000 Mutual of Omaha Tax Free Fund. Exactly how much is undetermined. Donald alleges that the amount is $173,598.35. This allegation fails to explain where, on August 29, 1998, prior to the second marriage, Emiko acquired the funds to transfer $97,000 to Donald. It also fails to explain why Emiko had only $106,000 in her Mutual of Omaha account when, during the Second Marriage, she made her Mutual of Omaha account joint with Donald.

Donald alleges that he entered the Second Marriage with $366,063.24 (the Alahaki Street residence valued at $295,891.22, plus the $70,172.02 value of his Pioneer Tax Free Income Fund).

In May of 2000, Donald and Emiko purchased a residence at 1617 Kanapuu Drive, Kailua, for $405,000. In making this purchase, Donald (1) paid $98,771.03 from his federal credit union (FCU) account on April 27, 2000; (2) sold his 955 Alahaki

Street residence and deposited $295,891.22 into his FCU account on September 25, 2000; and (3) paid $303,008.11 from his FCU account on September 25, 2000.

Donald and Emiko bought furniture and household goods for 1617 Kanapuu Drive and paid $41,624.

In April 2001, Donald and Emiko separated. On May 21, 2001, Donald filed a complaint for divorce. On May 16, 2002, Judge Marilyn Carlsmith entered an order granting a motion for pre-decree relief which awarded Emiko $1,000 per month for temporary spousal support commencing June 5, 2002.

The contested trial was held on January 28, 2003. At that time, not including spousal support, Emiko was receiving $380 per month in social security and Donald was receiving a total of $3,788 per month ($2,853 per month for retirement, $609 per month for disability, and $326 for social security).

In her opening statement, counsel for Emiko stated, in relevant part, as follows:

> Basically, Your Honor, we're going to argue that this . . . is actually one long marriage of 45 years. The first marriage lasted from 1958 to 1995, 37 years. Through the parties' testimony, we'll show that [Donald] emotionally, sexually, psychologically, and financially abused [Emiko] and that he was very controlling, jealous, deceptive, and greedy. . . .
>
> The abuse in the relationship is relevant to show why [Donald] was able to take over $330,000 of [Emiko's] money during the 45-year relationship, leaving her essentially with nothing.
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> . . . .
>
> [Donald] financially abused [Emiko] by keeping her in the dark of all of his financial affairs so she didn't even know . . . she was entitled to any part of his retirement. And she signed the decree because she felt pressured to do it by [Donald]. . . . [S]he was scared of what he would do if she would not sign it.

> Thus, . . . she signed it, but it wasn't a knowing and voluntary signature on the decree.
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> The parties were divorced for five years from 1995 to 2000. Through the parties' testimony, we'll show that they lived together pretty much the entire time . . . during the divorce. They held themselves out to be married, slept in the same bed, continued to have sexual relationships with each other, and basically carried on as if they were married.
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> . . . .
>
> The issues we have are just the retirement, whether she's entitled to her marital share of his retirement based on both marriages, alimony, whether she's entitled to alimony and if such entitlement should be based on both marriages. . . .
>
> For the household goods, the third issue, whether the division should be based on one long marriage or two separate marriages. . . . We went through an inventory of the house, and [Emiko] picked which items she wanted, and they had no objection. So I don't know how much of an issue that's going to be.
>
> The last issue is the house, whether [Emiko] is entitled to her marital share of the home located at 1617 Kanapuu Drive. Basically, what she wants out of . . . this divorce is half the retirement, half the value of the house, $300 in alimony, household goods based on one long marriage, survivor's benefits, and medical coverage.

In other words, at the trial on January 28, 2003, Emiko orally requested relief from the First Divorce Decree entered on February 17, 1995.

At the conclusion of the trial, the court orally ruled as follows:

> This is how I'm ruling based on all the evidence. . . .
>
> Number one, I'm not going to totally vitiate the first decree because I think housewise, that property, and notwithstanding anything else, it came out fairly. . . . I think [Emiko] came out a little short on the property where [Donald] got a house plus his fifty-five . . . but I'm only talking about the houses. I'm keeping that in effect. But based on her having English as a second language, also a ninth grade education from Japan, I'm going to make a finding that she did not know what she was doing when she appeared to have waived her rights to [Donald's] retirement which is a substantial amount. So with regard to the houses and the other property in the first decree, I'm keeping that in effect.
>
> But I'm going back into -- into the division regarding the retirement, and I'm ruling this way. She gets alimony of 14

> hundred dollars a month for life. . . . I'm saying right here that . . . she deserves it because of the length of the marriage, and I'm making a finding that the first marriage can be considered because of her lack of knowledge; also, that, you know, it's a real bleak picture that's painted for me with regard to their relationship. I'm going to make a finding that, you know, [Donald] was somewhat physically abusive of her. But I think psychologically, I think the evidence is clear to me that there was quite a bit of psychological abuse that put her in a situation where she may not have fought. And I'm also going to make a finding that she probably didn't even understand her right to have a portion of his retirement. So in light of that, [Donald], you take care of your retirements, but she gets 14 hundred dollars a month for life. That's her alimony amount that can be part of . . . her right to his retirement . . . that she didn't have information about.

On August 19, 2003, the court entered the Second Divorce Decree. It awarded Emiko a net of $234,454 ($32,500 plus $97,000 plus $99,000[2] plus $11,908 minus $5,954[3]). It awarded Donald 1617 Kanapuu Drive (gross market value $470,000), plus $29,716 plus $5,954 minus $196,000 minus $32,500 for a net of $277,170. It ordered Donald to pay to Emiko "$1,400.00 per month in permanent [spousal support] commencing February 1, 2003" until the death of either.

On September 15, 2003, Donald filed a notice of appeal. On October 20, 2003, the family court entered Findings of Fact and Conclusions of Law (FsOF and CsOL). With those challenged in this appeal printed in bold, the FsOF and CsOL state, in relevant part, as follows:

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[2] The court did not explain why this amount was $99,000 when Finding of Fact (FOF) no. 26 and Conclusion of Law (COL) no. 8 both said the amount was $99,999.

[3] The court required plaintiff-appellant Donald Colburn (Donald) to pay defendant-appellee Emiko Colburn (Emiko) $5,954 for one-half of the value of the household goods awarded to Emiko (FOF no. 33 and COL no. 10) but did not require Donald to pay Emiko $14,858 for one-half of the value of the household goods awarded to Donald.

FINDINGS OF FACT

. . . .

6. [Emiko] had a ninth grade education from Japan and read English at the second to third grade level.

7. [Donald] physically, financially and emotionally abused [Emiko] during the first marriage.

. . . .

10. [Emiko] did not know she was entitled to a portion of [Donald's] retirement when she signed the Financial and Property Settlement.

. . . .

13. [Emiko] did not read or fully understand either the Financial and Property Settlement, the Addendum to the Financial and Property Settlement, or the Divorce Decree before signing them.

14. [Emiko] was too afraid to questions [sic] [Donald] or consult anyone, including, but not limited to attorneys or interpreters, before signing the Financial and Property Settlement, the Addendum to the Financial and Property Settlement, or the Divorce Decree.

15. From the time of the first divorce in February of 1995 to the time of the second marriage in February of 2000, the parties lived together and held themselves out to be married.

16. During this period, [Donald] continued to physically, financially and emotionally abuse [Emiko].

. . . .

19. On August 29, 1998, [Emiko] wrote [Donald] a check for $97,000.00 to build an extension in his house for [Emiko].

20. The house extension was never built and the money was never returned.

. . . .

22. [Donald] continued to abuse [Emiko] physically, financially and emotionally during the second marriage.

23. [Donald] continued to handle the parties' financial affairs during the second marriage.

. . . .

26. On September 7, 2000, [Donald] withdrew $99,999.00 from the Mutual of Omaha account without [Emiko's] knowledge or permission.

. . . .

33. The value of the household goods [Emiko] kept totaled $11,908.00.

34. The value of the household goods [Donald] kept totaled $29,716.00.

. . . .

CONCLUSIONS OF LAW

1. The parties 45-year relationship, (the first marriage, the second marriage, and five year period between marriages), was considered one long marriage for purposes of property division.

2. Because English was [Emiko's] second language and because [Emiko] only had a ninth grade education from Japan, she did not knowingly and voluntarily waive her rights to her share of [Donald's] retirement when she signed the Financial and Property Settlement.

. . . .

4. [Donald] was physically and emotionally abusive to [Emiko] throughout the relationship, which caused her not to argue over or question what she may have been entitled to in the first divorce.

5. [Donald] received an unfair and inequitable financial benefit from the property division in [the] first Divorce Decree.

6. [Emiko] was entitled to an award of $1,400.00 per month in permanent [spousal support] as part of [Donald's] retirement, commencing February 1, 2003.

7. [Emiko] was entitled to reimbursement of the $97,000.00 she gave [Donald] for the house extension which was never built.

8. [Emiko] was entitled to the $99,999.00 [Donald] took from [Emiko's] account without her knowledge or consent.

9. [Emiko] was entitled to one-half the appreciation ($32,500.00) in the residence bought during the second marriage.

10. [Donald] was entitled to a credit of $5,954.00 to offset the division of household goods that [Emiko] wanted.

This case was assigned to this court on June 30, 2004.

POINTS ON APPEAL

Donald contends that the family court erred in the following three respects:

1. It disregarded the doctrine of res judicata and the requirements of Hawai'i Family Court Rules (HFCR) Rule 60(b) (Supp. 2005)[4] and erroneously treated the relationship of the parties as one long marriage for purposes of property division. Donald contends that, in sum, "[t]he financial settlement between the parties may not be exactly equitable, however, [it] could not have been construed as unjustly disproportionate."

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[4] Hawai'i Family Court Rules Rule 60(b) (2005) states as follows:

> **Mistakes; inadvertence; excusable neglect; Newly discovered evidence; fraud.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from any or all of the provisions of a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceedings was entered or taken. For reasons (1) and (3) the averments in the motion shall be made in compliance with Rule 9(b) of these rules. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.

2. It erroneously set aside the First Divorce Decree regarding his military retirement and erroneously awarded Emiko 50% of his military retirement as spousal support.

3. Although he admits that "[t]he record does not have concise evidence of each party's Category I asset on the date of their marriage in February 2000[,]" Donald alleges that he came into the Second Marriage with $366,063.24 and Emiko came in with $173,598.35, but the Second Divorce Decree inequitably awarded Emiko a total of $234,454 ($32,500 plus $97,000 plus $99,000 plus $11,908 minus $5,954) and inequitably awarded Donald $277,170 ($470,000 plus $29,716 plus $5,954 minus $196,000 minus $32,500).

DISCUSSION

Emiko's answering brief contends, in relevant part, that

> the court did not in fact award [Emiko] a portion of [Donald's] retirement. It did not disturb the orders of the prior divorce. Instead, it awarded her permanent alimony in an amount which was established in accordance with the appropriate factors as set forth above. Thus, the issue of res judicata is inapplicable to this case.
>
> . . . .
>
> Similarly, the doctrine of laches is inapplicable to this case. Because the retirement was not divided, the timeliness of a complaint about the first divorce is irrelevant.

In light of the relevant findings and conclusions, we conclude that the family court, in effect, partially granted Emiko's HFCR Rule 60(b)(6) motion for relief from a part of the First Divorce Decree.

Donald does not challenge the manner in which Emiko asserted her HFCR Rule 60(b)(6) motion for relief from a part of the First Divorce Decree and we will not do so *sua sponte*.

When deciding whether or not to grant Emiko's HFCR Rule 60(b)(6) motion for relief from the First Divorce Decree, the family court must carefully weigh all of the conflicting considerations inherent in the application. Hayashi v. Hayashi, 4 Haw. App. 286, 666 P.2d 171 (1983). Thereafter, the family court must expressly decide whether it is or is not granting the HFCR Rule 60(b)(6) motion for relief from the First Divorce Decree. If the family court decides that it is granting the HFCR Rule 60(b)(6) motion for relief from the First Divorce Decree, it shall state its reasons and the specifics of the relief and then proceed in accordance with relevant statutes, rules, and precedent. If the family court decides that it is not granting the HFCR Rule 60(b)(6) motion for relief from the First Divorce Decree, it shall state its reasons and then proceed in accordance with relevant statutes, rules, and precedent.

In this case, the family court did not determine or categorize the relevant net market values. Malek v. Malek, 7 Haw. App. 377, 380-81 n.1, 768 P.2d 243, 246-47 n.1 (1989). It cannot determine the relevant net market values until it decides whether it is or is not granting the HFCR Rule 60(b)(6) motion for relief from the First Divorce Decree. If COL no. 1 is right,

the date for determining the Category 1 net market values is January 13, 1958, rather than February 14, 2000.

CONCLUSION

Accordingly, we vacate parts of the August 19, 2003 Decree Granting Divorce that pertain to spousal support and the division and distribution of property and debts, specifically:

> 4. ALIMONY. [Donald] shall pay directly to [Emiko] $1,400.00 per month in permanent alimony commencing February 1, 2003. Payments shall be made by the first of each month.
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> . . . .
>
> 5. REAL PROPERTY.
> . . . [Donald] shall pay [Emiko] $32,500.00, which represents half the increase in value of the marital home, within ninety (90) days of the filing of this Decree.
>
> . . . .
>
> 9. OTHER PROPERTY DIVISION.
> A. PERSONAL PROPERTY
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> . . . .
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> 4) Household Furniture, Furnishings and Effects. [Donald] shall be credited $5,954.00 representing one-half the value of the household goods ($11,908.00) [Emiko] is requesting. . . . The $5,954.00 shall be offset from the $196,000.00 [Donald] owes [Emiko]. . . .
>
> 5) Other Payments. [Donald] shall reimburse [Emiko] $190,046.00 ($196,000.00-$5,954.00=$190,046.00) within ninety (90) days of the filing of this Decree.
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> . . . .
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> . . . .
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> 13. ATTORNEY'S FEES AND COSTS. Each party shall be responsible for his or her own attorney's fees and costs incurred herein.

In all other respects, the August 19, 2003 Decree Granting Divorce is affirmed.

Of the October 20, 2003 Findings of Fact and Conclusions of Law, we vacate Conclusions of Law nos. 1, 2, 4, 5, 6, 7, 8, 9, and 10. In all other respects, the October 20, 2003 Findings of Fact and Conclusions of Law are affirmed.

We remand for further proceedings consistent with this opinion and with relevant statutes, rules, and precedent.

DATED: Honolulu, Hawai'i, May 16, 2005.

On the briefs:

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for Plaintiff-Appellant.

Mark L. Cokee
for Defendant-Appellee.

James S. Burns
Chief Judge

Associate Judge

Craig H. Nakamura
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