

NOT FOR PUBLICATION

NO. 25995

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

BEN KIKUYAMA, Plaintiff-Appellee, v.
JOYCE KIKUYAMA, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-D NO. 01-1-0480)

KHAMAKAOU
CLERK, APPELLATE COURT
STATE OF HAWAII

2005 MAY 20 AM 9:50

FILED

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Joyce Kikuyama (Joyce) appeals from the Order Granting Plaintiff's Motion for Summary Judgment, entered on April 4, 2003, and the Decree Granting Divorce and Awarding Child Custody (Divorce Decree), entered on July 18, 2003, in the Family Court of the Second Circuit by Judge Eric G. Romanchak.

The following are the relevant dates and events.

- April 7, 1984 Joyce and Plaintiff-Appellee Ben Kikuyama (Ben) were married.
- December 10, 1987 The daughter (Daughter) of Ben and Joyce was born.
- August 29, 2001 Ben filed a complaint for divorce.
- December 19, 2001 In the presence of a notary public, Ben and Joyce signed an Agreement Incident to Divorce (AID) drafted by Herman H.M. Ling, attorney for Joyce. It states, in relevant part, as follows:

WHEREAS, the parties wish to effect a complete agreement resolving all of the issues that are involved in the impending dissolution of their marriage.

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NOW THEREFORE, in consideration of the mutual promises and covenants of this Agreement, the parties agree as follows:

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3. **CUSTODY**. [Ben] and [Joyce] shall be awarded the joint legal custody of [Daughter], with primary physical custody to [Joyce] subject to [Ben's] rights of reasonable visitation. . . .

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4. **WAIVER OF ALIMONY**. Both parties hereby waive any request for alimony. Therefore, no order for alimony shall now or ever be made.

5. **CHILD SUPPORT**. Beginning with a first payment on December 20, 2001 [Ben] shall pay to [Joyce] the sum of \$330.00 per month, for the support, maintenance, and education of [Daughter],

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6. **EDUCATIONAL EXPENSES**. [Ben] shall pay 100% of the educational expenses incurred by [Daughter], while [Daughter] is a full-time student and under the age of twenty-three.

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7. **CHILD HEALTH CARE**. For so long as he shall be obligated to pay child support for [Daughter], [Ben] shall maintain medical and dental insurance for the benefit of [Daughter]. [Joyce] shall pay the medical and dental expenses of [Daughter] not paid by insurance to the extent they do not exceed \$100.00 per calendar year, and additional medical and dental expenses not covered by insurance shall be paid by [Ben] in the same ratio or percentage that [Ben's] income relates to the total available income of the parties for the purposes of calculating child support.

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8. **REAL PROPERTY**. The parties own real property located at 50 Mikiola Street, Makawao, Hawaii 96768. The following provisions govern that property:

(a) [Ben] is awarded the property as his separate property. He shall be solely responsible for all outstanding debt thereon and shall hold [Joyce] harmless from all liability therefore. [Ben] shall pay to [Joyce] the sum of . . . (\$53,000.00) on or before 12/20/01, for her interest in the property. Upon payment, [Joyce] shall execute all documents necessary to convey her interest in said property. If the sum . . . is not paid on or before 12/20/01, the property shall be listed for sale forthwith and the following provisions shall apply.

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(d) [Joyce] shall have exclusive occupancy of the property pending its sale

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(e) [Ben] shall pay the current mortgage debt, property tax debt, insurance expenses and maintenance on the property as it shall fall due until the property is sold.

(f) The proceeds from [sic] the sale of the property shall be used first to pay indebtedness secured by the property, brokerage fees and closing costs. The remaining proceeds shall be divided equally between the parties.

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11. **DEBTS.**

Each party shall be responsible for all debts incurred solely by him or her except that [Joyce] shall pay-off the personal loan from [Ben's] father in the amount of \$17,000.00, which was obtained to pay-off debts incurred during the parties' marriage.

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Each party shall immediately return to the other party every credit card and like instrument in his or her possession which could create indebtedness on the part of the other party.

12. **ATTORNEY'S FEES AND COSTS.**

Each party shall pay his or her own attorney's fees and costs, except that [Ben] shall reimburse [Joyce] the sum of \$500.00 for the preparation of the parties' Agreement Incident to Divorce at his request.

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20. **VOLUNTARY EXECUTION.** Each party acknowledges that he or she has voluntarily executed this Agreement with sufficient knowledge of the facts and the law, and that this Agreement is fair and reasonable. Although [Ben] has chosen not to be represented by counsel, [Ben] had every opportunity to fully review this Agreement and to retain private counsel to assist him in reviewing said Agreement. [Joyce] is represented by HERMAN H.M. LING.

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23. **INCORPORATION OF AGREEMENT IN DECREE.** This Agreement is effective on the date of the signature of the second party to sign. The parties urge the Family Court to approve this Agreement and make it part of the decree divorcing the parties.

December 20, 2001 Ben paid Joyce the sum of \$53,000.00 for her interest in the residence. Upon receiving the payment, Joyce conveyed her interest in the residence to Ben and his father, Ichiro Kikuyama (Ben's Father).

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December 25, 2001 Joyce received a "NOTICE TO VACATE PROPERTY" signed by Ben's Father and stating, with all sics omitted, as follows:

I would like to repair and repaint the house at 50 Mikiola, St., Makawao, Maui, Hi. You have 45 days to vacate the property taking with you all your personel belongings both indoor and outdoor, After Feb. 04, 2002, rent will be charged at \$50.00 a day.

July 10, 2002 Ben filed a motion to set and notice of motion. In an accompanying position statement, he stated, in relevant part, as follows:

This is the first marriage for [Ben] and the second one for [Joyce].

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[Ben] is a self-employed artist who works out of his home. [Joyce] works as a sales clerk at J.C. Penny's Department Store in Kahului. Neither party appears to have any special physical or financial needs.

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The parties had entered into an Agreement Incident to Divorce in December 2001. However, for some unexplained reasons, [Joyce] has rejected said Agreement and has refused to file her Financial Statements. She has also refused to sign the Divorce Decree. . . .

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6. Real Property.

The parties formerly owned real property located at 50 Mikiola Street, Makawao, Maui, Hawaii. Pursuant to an Agreement Incident to Divorce that was executed by the parties last year, on or about December 20, 2001, [Ben] paid [Joyce] the sum of \$53,000.00 for her interest in said property. Upon receiving said payment, [Joyce] conveyed her interest in said property to [Ben] and his father.

July 24, 2002 Acting pro se, Joyce filed her position statement in which she stated, in relevant part, as follows:

Initial seventeen years of marriage to an artist. Ben Kikuyama is a forty-year-old artist. . . .

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Joyce Kikuyama, age 54, is fourteen years older than Ben. She worked as Ben's production assistant through the first

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seventeen years of their marriage, during the difficult years before his career took off. Ben's work is extremely labor-intensive. She was his production assistant. For seventeen years, Joyce babysat to bring in income. While the babies slept, she spent thousands of hours to glue the squares and place the stitches on the originals and reproductions of [Ben's] artwork.

The marital residence. In 1985, seventeen years ago, the parties purchased a home in Makawao. . . . [Joyce] believes that there was at least \$180,000 in equity in the house.

Nonetheless, in 2001, as part of this divorce, she was offered and she agreed to accept \$53,000 in consideration for her interest in the marital home. From these proceeds she paid \$17,000 to her father-in-law to satisfy a loan from him to pay off joint credit cards, leaving her balance of \$36,000. With this \$36,000, she paid additional credit card debts in both parties' name.

Promptly upon conveying the property, Joyce and her daughter were evicted from the marital residence. . . . Joyce suffered what she characterizes as a nervous breakdown. Joyce now works as a clerk at JCPenny's for \$6.45/hour. She does not receive child support. In March, 2002, she applied for welfare.

. . . .

ALIMONY

Joyce believes that her seventeen years in support of her husband's art career left her unprepared for the current job market. The nervous breakdown that followed her eviction has also crippled her earning potential.

July 31, 2002

Judge Romanchak heard Ben's motion to set. The case was scheduled for trial on October 17 and 18, 2002, and the pre-trial settlement conference was set for October 2, 2002, at 2:30 p.m. The court advised counsel for Ben as follows:

THE COURT:

If your position in this case is there are no issues that need to be tried because we have an agreement --

. . . .

THE COURT: -- and one party is not abiding by the agreement, then you file your motion to get a ruling on the enforceability of the agreement. If that covers all of the issues --

. . . .

THE COURT: -- then all you would ask of the Court is, is that that agreement be enforced and it become [sic] the binding agreement of the parties and be part of the judgement in this case

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for a divorce. That's it. All right?

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THE COURT: But you need to move on that. You need to -- if she's not responding and you want it enforced, you know, there is a procedure by which to do that. There is certainly case law that addresses agreements in contemplation of divorce and which ones are enforceable and which ones aren't. In fact, we even have a statute that governs the issue of premarital agreements.

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THE COURT: Okay? So, do you want me to set this case for a trial? You're here on a motion to set.

[COUNSEL FOR BEN]: Well, yes, and I will file a motion in the meantime prior to this thing, I guess.

August 26, 2002 Counsel for Ben moved for enforcement of the AID and summary judgment.

February 21, 2003 Counsel for Joyce moved for rehabilitative spousal support of \$2,000 per month for three years commencing February 2003, and \$10,000 attorney fees. She alleged, in relevant part,

a material change in her circumstance. On January 10, 2002, her employer at Penney's closed its Maui store. As a result, Joyce now supports herself and 15-year-old [Daughter] with her (a) **unemployment check . . .**, (b) **food stamps . . .** and (c) **housing assistance**. Housing assistance became necessary after December 25, 2001, the date on which Ichiro Kikuyama delivered to Joyce a Notice to Vacate 50 Mikiola Place . . ., despite [Daughter's] and [Joyce's] expectation that they could rent the garage there after the dissolution.

(Emphasis in the original.)

April 1, 2003 After a hearing on October 16, 2002, Judge Romanchak ordered Ben "to pay child support in accordance with the Child Support Guidelines . . . based on Ben's gross income of \$3,000 and Joyce's Gross Income of \$1,140" commencing September 23, 2002. That amount was \$410 per month. Effective December 1, 2002, the amount was increased to \$500 per month.

April 4, 2003 After a hearing on October 30, 2002, Judge Romanchak entered an Order Granting Plaintiff's Motion for Summary Judgment. It stated, in relevant part, as follows:

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FINDINGS OF FACT

1. The AID executed on December 19, 2001 is not unconscionable
2. The parties entered into the AID voluntarily.
.....
5. The parties had knowledge of each other's financial condition prior to the execution of the AID.

CONCLUSION OF LAW

The AID dated December 19, 2001 is a valid and enforceable marital agreement.

ORDER

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3. The terms and conditions of the AID shall be incorporated into the provisions of the final Judgment of divorce and Award of Custody as prayed for in the Complaint for Divorce.

July 18, 2003 Judge Romanchak entered the Divorce Decree. It incorporated the AID by reference. It stated, in relevant part, that "[a]ll pending motions not specifically ruled on are hereby denied."

July 24, 2003 Counsel for Joyce filed a notice of appeal from the Order Granting Plaintiff's Motion for Summary Judgment and the Divorce Decree.

September 5, 2003 Judge Romanchak entered the Order Re: Plaintiff's and Defendant's Requests for Attorneys' Fees denying each party's request for attorney's fees.

Joyce asserts the following points on appeal:

1. The trial court erred in refusing to deem the [AID] repudiated because Ben failed to pay the requisite child support, and abandoned the agreement when he failed to pay his share of the debt. . . .
2. Even if the AID is enforceable (it is not), the trial court erred in refusing to grant alimony to mitigate Joyce's reliance on public assistance. . . .
3. The trial court erred in its Order dated April 4, 2003 refusing to deem the AID unconscionable, and granting Plaintiff's Motion for Summary Judgment. The MSJ Order

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. . . states: "The AID dated December 19, 2001 is a valid and enforceable marital agreement." This conclusion of law was erroneous. . . .

4. The trial court erred in denying Joyce's motion for attorney fees pendente lite.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs¹ submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the Order Granting Plaintiff's Motion for Summary Judgment entered on April 4, 2003 and the Decree Granting Divorce and Awarding Child Custody entered on July 18, 2003 are affirmed.

DATED: Honolulu, Hawai'i, May 20, 2005.

On the briefs:

Joy Mademba-Sy Yanagida
for Defendant-Appellant

Guy A. Haywood
for Plaintiff-Appellee


Chief Judge


Associate Judge


Associate Judge

¹ Generally, it is a waste of time, paper, space, and energy to append to the opening brief copies of documents from the trial court record that are part of the record on appeal. All that is necessary is a clear statement of where in the trial court record the document is located. In this case, copies of sixteen documents, amounting to approximately 400 copied pages that are part of the record on appeal were appended to the opening brief. The seventeenth and eighteenth documents appended to the opening brief are copies of orders entered in an Office of Disciplinary Counsel case. It appears that the brief is in noncompliance with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(10) (2005) as both orders are not part of the record on appeal pursuant to HRAP Rule 10(a).