NO. 23021

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

TERRI CHIYEMI TERADA, Plaintiff-Appellee, v.
EARLE TERADA, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 96-3140)

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

Defendant-Appellant Earle R. Terada (Earle or Defendant) appeals the family court's[1] November 10, 1999 Order for Post Decree Relief. We affirm.

BACKGROUND

The relevant events occurred in sequence as follows:

April 10, 1983	Earle and Plaintiff-Appellee Terri Chiyemi Terada (Terri or Plaintiff) were married.
July 24, 1983	Their daughter was born.
September 9, 1996	Terri filed a Complaint for Divorce.
December 31, 1996	Earle ceased living at the marital residence.
September 28, 1998	The court entered Pretrial Order No. 2 stating, in relevant part, that the parties have agreed as follows: "Plaintiff awarded 50% of Defendant's 401(k) as of 12/31/96." "Defendant to pay Plaintiff $12,500.00 from his share of the 401(k) plan or within 60 days following entry of Decree."

[1] District Family Court Judge Marilyn Carlsmith presided in this matter.

November 9, 1998 Paragraph 4K of the Divorce Decree[2] states, in relevant part, as follows:

> K. RETIREMENT:
>
> Plaintiff is awarded and assigned fifty percent (50%) of Defendant's interest in the Familian Corporation 401(k) Savings Plan (hereafter "Plan") as of December 31, 1996. Defendant is awarded the remaining fifty percent (50%) of his interest in said 401(k) plan and the Familian Personal Retirement Account. . . .
>
> Neither party shall be permitted to encumber the other party's percentage interest and the current encumbrance on the Plan, if any, shall be deemed to be an encumbrance on Defendant's fifty (50%) percent share. Any distributions from the Plan (other than loans) shall be paid to the parties in the aforementioned proportional shares: 50% to Plaintiff and 50% to Defendant. . . .
>
> In the event that Defendant elects to pay the equalization payment as provided in paragraph O below, then the percentage shares being divided herein may be recalculated so that Plaintiff's share of Defendant's 401(k) plan will equal 50% of the December 31, 1996 value plus TWELVE THOUSAND FIVE HUNDRED DOLLARS ($12,500.00), which shall be paid net of all taxes to Plaintiff, and Defendant shall be entitled to the balance thereafter remaining.
>
> . . . .
>
> O. EQUALIZATION PAYMENT:
>
> Defendant shall pay to Plaintiff the sum of TWELVE THOUSAND FIVE HUNDRED DOLLARS ($12,500.00) on account of the division of property and allocation of indebtedness between the parties under the terms of this Agreement. Defendant may satisfy this provision either by paying said amount in full within 60 days of entry of this Divorce Decree or by transferring the sum of TWELVE THOUSAND FIVE HUNDRED DOLLARS ($12,500.00) to Plaintiff from Defendant's 50% share of his 401(k) plan as provided for in paragraph [K] above.

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[2] "[A]ll valid and enforceable premarital agreements, marital agreements, and divorce agreements, . . . , must be enforced in divorce proceedings. HRS §§ 572-22, 572D-10." Epp v. Epp, 80 Hawai'i 79, 86, 905 P.2d 54, 61 (App. 1995). The November 9, 1998 Divorce Decree was prepared by the attorney for Plaintiff-Appellee Terri Chiyemi Terada (Terri), approved as to form by the attorney for Terri and the attorney for Defendant-Appellant Earle R. Terada (Earle), and approved as to form and content by Terri and Earle. Assuming the September 28, 1998 pretrial order and the November 9, 1998 Divorce Decree agreement differed, the latter replaced the former.

October 6, 1999 — Terri moved for an order entering her proposed Qualified Domestic Relations Order. This proposed order stated, in relevant part, as follows:

> 10. Amount or Percentage of Alternate Payee's Benefits. The amount of the Alternate Payee's benefits under the Plan shall consist of (a) FIFTY percent (50%) of the amount of the Participant's interest in the 401(k) Savings Plan portion of the Plan as of December 31, 1996 plus any increase or decrease in value therein until distributed to the Alternate Payee[.]

October 27, 1999 — At a hearing, Earle's counsel stated Earle's position as follows:

> [W]e feel the plain language of the decree reflects that the division the [sic] amount of money -- one half of the amount of money as of 12/31/96 paid there on the date of the divorce.
>
> And, since this has taken almost a year later, we have no problem with -- with any increase or decrease -- any increase or increase [sic] from the date of divorce in that sum of money. She should have the benefit of the market.

November 10, 1999 — The family court entered its Order for Post Decree Relief, in relevant part, as follows:

> (1) Defendant shall pay Plaintiff the principal sum of $12,500.00 on or before 11-9-99.
>
> (2) Plaintiff is entitled to receive any increase in her 50% share of Defendant's 401(k) plan from 12-31-96. This provision shall be incorporated into a [Qualified Domestic Relations Order] to be submitted by Plaintiff.
>
> (3) Attorney fees and costs are reserved pending Defendant's compliance with paragraph (1) above.

November 24, 1999 — The family court entered its Qualified Domestic Relations Order identifying Terri as the "Alternate Payee" and stating, in relevant part, as follows:

> 10. Amount or Percentage of Alternate Payee's Benefits. The amount of the Alternate Payee's benefit under the Plan shall consist of FIFTY percent (50%) of the amount of the Participant's interest in the 401(k) Savings Plan portion of the Plan as of December 31, 1996, which is approximately equal to one-half (½) of $97,492.94 or $48,746.47, plus any increase or decrease in value from December 31, 1996, until distributed to the Alternate Payee.
>
> 11. Form of Alternate Payee's Benefits. The Alternate Payee shall be entitled to receive her benefits pursuant to this Order in any form available under the Plan . . . . The form of

benefits shall be elected by the Alternate Payee at the time of distribution pursuant to the election procedures assigned to the Alternate Payee in accordance with Order, [sic] such interest shall be withdrawn from the Participant's account and invested in a separate account under the Plan that shall be maintained for the sole benefit of the Alternate Payee. From the date of this Order and thereafter, with respect to Alternate Payee's interest invested in a separate account maintained for the Alternate Payee, the Alternate Payee shall have the exclusive right as follows:

(a) To designate the beneficiary of survivor benefits from the Alternate Payee's interest after the Alternate Payee's death, . . . ;

(b) To direct and manage, free of Participant's control, the investment of the Alternate Payee's interest, . . . ; and

(c) To direct the Plan Administrator to transfer or roll over the Alternate Payee's interest to a qualified retirement plan or to an Individual Retirement Account established for the Alternate Payee's benefit or to the administrator, trustee, or custodian of such plan or account.

12. Period of Alternate Payee's Benefits. The distribution of the benefit to the Alternate Payee as assigned by this Order, shall commence upon written request of the Alternate Payee . . . .

13. Death [of] Participant. The death of the Participant shall not have an effect on the payment of the Alternate Payee's Benefit as assigned by this Order; provided, however, in the event that the Participant shall die prior to the establishment and funding of the separate account for the sole benefit of the Alternate Payee, the Alternate Payee shall be treated as the "current surviving spouse" for purpose of Code Section 401(a)(11) and Section 417, thereby entitling the Alternate Payee to a percentage of any death benefit provided by the Plan to the Participant, computed in accordance with the formula set forth in Paragraph 10, hereinabove.

DISCUSSION

In his opening brief, Earle states, in relevant part, that

[t]he Court is asked to determine whether the plain and unambiguous language of paragraph 4(K) of the parties' Divorce Decree means that TERRI is to receive on November 9, 1998 (the date of divorce), a sum certain, equal to 50 percent of EARLE's interest in his 401(k) plan as of December 31, 1996 (one-half of $97,492.94, or $48,746.47).

> Or, in the alternative, whether the language of the decree can be interpreted to mean that TERRI is to receive interest or an increase or decrease in value on her share from December 31, 1996 to the date of divorce where the decree makes no such provision.

Earle's position is that

> [t]he Family Court erred in failing to (a) rule that the plain language of paragraph K of the parties' Divorce Decree provides that TERRI was to receive on November 9, 1996 (the date of divorce), a sum certain, equal to 50 percent of EARLE's interest in his 401(k) plan as of December 31, 1996 (one-half of $97,492.94, or $48,746.47) and (b) that the decree does not provide for interest, nor for increase or decrease in value from December 31, 1996 to the date of divorce, and none can be implied.

It is important to note that we are dealing with Earle's interest in the Familian Corporation 401(k) Savings Plan. The Divorce Decree split this interest as of December 31, 1996. Each party was awarded one-half of its value ($48,746.47). It appears that the deposit of Terri's $48,746.47 caused it to increase in value during the periods (1) after December 31, 1996, until the divorce on November 9, 1998, and (2) after the divorce on November 9, 1998.[3] Earle agreed that Terri is entitled to "after the divorce on November 9, 1998" increase in value of her $48,746.47. This appeal is based solely on Earle's position that Terri is not entitled to the "after December 31, 1996, until the divorce on November 9, 1998" increase in value of her $48,746.47.

[3] Nothing in the record suggests that the increase in value of Terri's $48,746.47 was caused by anything other than by a successful savings program. There is no indication of an increase in value caused by additional capital contributions by Earle and/or his employer.

In our view, the Divorce Decree is clear. It awards Terri "fifty percent (50%) of Defendant's interest in the Familian Corporation 401(k) Savings Plan . . . as of December 31, 1996." On that date, the $48,746.47 became Terri's. All subsequent increases or decreases in her $48,746.47 caused by its deposit are also Terri's.

Earle further argues that he

> negotiated and settled this case by agreeing to a division of his 401(k) Savings Plan as of December 31, 1996, the date the parties separated and not the date of divorce or any other date than December 31, 1996. If the parties intended that the plan were to be divided at the date of divorce, the decree would have so stated. By the plain language of the decree, the operative date is December 31, 1996. Again, this date has independent significance and is relevant because this is the date the parties separated.

This argument is unconvincing. Dividing the value as of the December 31, 1996 date of separation allowed Earle to avoid Terri's claim to contributions by Earle and/or Earle's employer to his half, post-separation and pre-divorce, and allowed Terri to avoid the possibility that something she was unaware of would affect her half, post-separation pre-divorce. Nothing suggests that Terri was not entitled to the increase in value of her half, post-separation and pre-divorce, resulting from a successful savings program.

CONCLUSION

Accordingly, we affirm the family court's November 10, 1999 Order for Post Decree Relief.

DATED: Honolulu, Hawai‘i, June 27, 2001.

On the briefs:

James A. Stanton
(of counsel, Stanton Clay
Chapman Crumpton & Iwamura)
for Defendant-Appellant.

Chief Judge

Stephen W. H. A. Lee
for Plaintiff-Appellee.

Associate Judge

Associate Judge