NOS. 23294 AND 23349

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI I

MARILYNN SUEKO UENO, now known as
Marilynn Sueko Aihara, Plaintiff-Appellee, v.
THOMAS TADAO UENO, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 92-1071)

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

Defendant-Appellant Thomas Tadao Ueno (Thomas) appeals from the March 16, 2000 Judgement (Judgment) of the Family Court of the First Circuit, per diem District Family Judge Christine Kuriyama presiding, against him and in favor of Plaintiff-Appellee Marilynn Sueko Ueno, now known as Marilynn Sueko Aihara (Marilynn), in the amount of $75,850.42.[1] We vacate the Judgment and remand with instructions.

BACKGROUND

Marilynn and Thomas were married on October 4, 1969. Their first son (Son 1) was born in 1971. Their second son (Son 2) was born in 1976. Marilynn filed a Complaint for Divorce

[1] The notice of appeal was filed on April 11, 2000. A "full and complete satisfaction" of the March 16, 2000 Judgement was filed on May 25, 2000. "The fact that judgment was satisfied does not make the controversy moot [u]nless there [was] some contemporaneous agreement not to appeal, implicit in a compromise of the claim after judgment, and as long as, upon reversal, restitution can be enforced.'" Forbes v. Hawaii Culinary Corp., 85 Hawai i 501, n.4, 946 P.2d 609, n.4 (1997) (citation omitted). The conditions for making the controversy moot are not present in this case.

on March 16, 1992. At that time, Son 1 was not dependent on the parties for support and Son 2 was in the tenth grade at Punahou School.

The parties' Agreement Incident to Divorce (AITD) was filed on November 25, 1992. The Divorce Decree, filed on December 31, 1992, which approved the AITD and incorporated it by reference, states, in relevant part, as follows:

> 4. CHILD SUPPORT. [Thomas] shall pay to [Marilynn] the sum of $1,045.00 per month for the support, maintenance and education of [Son 2], the minor child of the parties, directly to [Marilynn] by Grant Thornton, as [Thomas] is entitled to receive monthly payment from Grant Thornton relating to his separation and retirement from Grant Thornton. [Thomas] is self employed as a Certified Public Accountant and consultant . . . .
>
> Child support shall commence on the 1st day of September, 1992 and shall continue uninterrupted until [Son 2] attains age eighteen years, or graduates from high school, or discontinues high school, whichever occurs last.
>
> 5. PRIVATE SCHOOL. [Thomas] shall assume and pay for the costs of tuition, fees, books, and other expenses required as a condition of attendance at private school prior to high school graduation for the minor child, [Son 2].
>
> 6. HIGHER EDUCATIONS. Should either of the children of the parties continue his education post-high school on a full-time basis at an educational and/or vocational institution, the cost shall be paid, in the case of [Son 2], first from the value of the Jones Cable Fund, the IDS Fund and the Oppenheimer Asset Allocation Fund, held in trust for the purpose of educating [Son 2] and after those funds have been exhausted, . . . [Thomas] shall assume and pay for two-thirds (2/3) and [Marilynn] shall assume and pay for one-third (1/3) of the educational costs so long as the child continues his education post high school on a full-time basis at an accredited college or university, and/or in a vocational or trade school, until said child's graduation or attainment of the age of 23 years, whichever event shall first occur. For these purposes, educational expenses shall be defined to include tuition, fees, room and board, transportation related to education, the cost of necessary books and other course materials, a reasonable allowance, and all other expenses required as a condition of attendance, or reasonably incurred in connection therewith.

On May 25, 1999, Marilynn filed a Motion and Affidavit for Post-Decree Relief alleging that Thomas only partially paid

his two-third share of the higher education expenses incurred by and on behalf of Son 2 and seeking reimbursement of the balance.

The Judgment states, in relevant part, as follows:

> 1. That [Marilynn] is granted Judgement in her favor and against [Thomas] in the sum of Seventy-Five Thousand Eight Hundred Fifty Dollars and Forty-Two Cents ($75,850.42).
>
> 2. That each party shall bear his/her own cost, expenses and attorney's fees.

The March 16, 2000 Amended Finding of Facts and Conclusions of Law, with those challenged by Thomas in this appeal marked in bold, state, in relevant part, as follows:

> **II. FINDING OF FACTS**
>
> . . . .
>
> THE COURT FINDS[:] That [Son 2] attended Georgetown University in the academic year of 1994-1995 and he attended the Yale University Asian Program in Kyoto during the academic year of 1996-1997 and attended his final year at Yale University for the academic year of 1997-1998.[2]
>
> That [Child 2] graduated from Yale University in 1998.
>
> That the educational expenses for [Son 2's] university education are divided into two (2) categories. The first category is Direct Educational Expenses which include tuition, books, supplies, college expenses, health insurance, air transportation, and other education related lodging.
>
> That such educational expenses for the four (4) year college career totaled . . . ($144,516.95).
>
> The second group of expenses were Indirect Educational Expenses and included graduation expenses, ground transportation expenses, additional food expenses, clothing expenses, telephone expenses, and miscellaneous living expenses. That these indirect educational expenses totaled . . . ($20,081.08) for the four (4) years of [Son 2's] educational career.
>
> That the total direct and indirect expenses is . . . ($164,598.03).
>
> That the parties had accumulated certain investment and savings funds totaling . . . ($22,029.53) prior to the divorce.

[2] It is undisputed that the second son (Son 2) of the parties to this appeal also attended Yale University during the academic year of 1995-96.

That . . . leaving a net divisible expense of . . . [($142,568.50)][3] [Marilynn's] . . . (33 1/3%) share of said amount equaled . . . ($47,518.08) and [Thomas'] 66.67% share . . . is . . . ($95,050.42).

During the course of [Son 2's] educational career [Thomas] contributed a total of . . . ($19,200.00). That [Thomas'] decision to contribute such amount was made unilaterally by [Thomas] and such amount is not relative to the amount of contribution required of [Thomas].

That . . . the balance owing by [Thomas] as his share of [Son 2's] education is . . . ($75,850.42).

That [Marilynn's] claim and prayer for reimbursement of . . . ($10,801.48) as finance charges on [Thomas'] two-third (2/3) share of the educational expenses incurred by reason of the fact that [Marilynn] had to mortgage her home and borrow said sums as well as arrange for other finances is found to be not a reasonable and necessary expense to be charged against [Thomas].

That all of the expenses above-mentioned were paid for by [Marilynn] and/or [Son 2] and that such expenses were reasonable and necessary to [Son 2's] educational career.[4]

That [Marilynn] and [Thomas] existed in a strained relationship with difficulties in communication post-decree. That in view of the circumstance [Marilynn] made reasonable efforts to inform [Thomas] of the expenses being incurred or to be incurred in supporting [Son 2] in his higher educational pursuit.

That [Thomas'] efforts to communicate with [Marilynn] and/or [Son 2] during [Son 2's] educational career regarding the financial requirements and progress in school was less than reasonable.

. . . .

That [Son 2's] attendance at . . . Georgetown and Yale was within the scope of the agreement between the parties and their plans for [Son 2's] educational future.

III. CONCLUSIONS OF LAW

. . . .

2. That the . . . ($164,598.03) expended to finance [Son 2's] education was reasonable and necessary.

. . . .

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[3] While the record reflects an incorrect amount of $142,586.68, all calculations were appropriately made based on the correct amount of $142,568.50.

[4] The challenge by Defendant-Appellant Thomas Tadao Ueno of conclusion of law no. 2 was an implicit challenge of this finding of fact.

> **6. That [Marilynn's] efforts to inform [Thomas] of the educational plans and progress of [Son 2] as well as the plans and progress of financing his education were reasonable.**
>
> **7. [Thomas'] efforts to be informed and to be involved in the plans and progress of [Son 2's] education and of the plans and progress in financing such education were less than reasonable.**
>
> . . . .
>
> **9. That [Marilynn] should have judgement against [Thomas] in the sum of . . . ($75,850.42).**

(Footnotes added, emphases added.)

DISCUSSION

Thomas presents two reasons why the Judgment should be reversed. We will discuss them in the order they were presented in his opening brief.

1.

Thomas contends that he "made payments toward [Son 2's] education. If the payments were inadequate, he was never told the specific amount he still needed to pay. If [Thomas] had been timely informed about the actual educational expenses being incurred, he would have taken steps to minimize these expenses." Those "steps" included seeking to obtain financial grants or aid, to put Son 2 to work, to have Son 2 go to a less expensive school, and/or to seek a modification of the terms of the Divorce Decree.

Thomas contends that Marilynn "should be estopped from seeking reimbursement" because she "intentionally failed to inform him of educational expenses as they were being incurred" and she "intentionally failed to inform him of [Son 2's]

educational expenses until after such expenses were incurred." In his reply brief, Thomas states that "[i]n the answering brief, [Marilynn] sidesteps the central issue of the appeal: whether one parent may intentionally withhold information about expenses from the other parent, but still seek reimbursement for the expenses after they were incurred."

> The most comprehensive definition of equitable estoppel or estoppel in pais is that it is the principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion was allowed.

28 Am. Jur. 2d Estoppel and Waiver § 28 (2000) (footnote omitted).

Before answering the estoppel question presented, we note some additional relevant facts: (a) Thomas knew that when Son 2 applied to Georgetown, Son 2 also applied to Yale, and Thomas did not object; (b) Son 2 was accepted only at Georgetown; (c) Thomas accompanied Son 2 when Son 2 went to Georgetown to start school there; (d) during the summer before his transfer to Yale, Son 2 informed Thomas about his upcoming transfer to Yale; (e) Thomas visited Son 2 at Yale during Son 2's first year there; (f) Thomas does not challenge the family court's finding "[t]hat [Son 2's] attendance at . . . Georgetown and Yale was within the scope of the agreement between the parties and their plans for

[Son 2's] educational future"; (g) on June 19, 1996, at the conclusion of Son 2's first year at Yale, Thomas sent Marilynn a $5,000 check for "[Son 2's] Tuition" with the following note: "I cannot afford to send [Son 2] to Yale. I am enclosing $5,000 for him to finish his schooling at the University of Hawaii"; (h) Thomas did not seek an amendment of the Divorce Decree; (i) each school year, Marilynn and Son 2 applied for grants and financial aid but were minimally successful because the income of Thomas was so high; (j) to pay some of his tuition, Son 2 obtained "personal student [Sallie Mae] loans which [he] took out the maximum of"; and (k) during his last year at Yale, Son 2 worked and earned "not more than two thousand dollars."

We also note that Marilynn testified, in relevant part, as follows:

> Q. Okay.
>
> And how many times did you write to Tom about the amounts for the tuition?
>
> A. At least once a year or more.
>
> . . . .
>
> A. Well, sometimes I sent only one letter once a year and sometimes I sent per semester.
>
> Q. Okay.
>
> . . . .
>
> Well, when he would send over a check did anyone write back to [Thomas] or tell him, "You are short five thousand dollars, four thousand dollars."
>
> A. The next year I wrote and told him.
>
> . . . .

> Q. Okay.
>
> Can you tell me how was [Thomas] supposed to figure out how much he was short if he wasn't being given the actual statements and nobody told him specifically how much he was short?
>
> A. I think you have to know our personalities. Now, I was not one to ask for all these two thirds. I thought Tom would come in and willingly give his share at least for the tuition, you know.
>
> And there was a point - the very last letter I wrote to Tom I told him, "We could settle this by X number of dollars, period."
>
> And he wrote back that nasty note that said, "Here's the last ten thousand dollars. I had to borrow it. Have [Son 2] graduate from the University of Hawaii."

We also note that Son 2 testified, in relevant part, as follows:

> A. But I didn't know his home phone number. Since he had moved it was an unlisted number.
>
> And if I needed to speak to him at his office I'd have to speak to - to - be screened by [his new wife] which is a little intimidating personally and I wasn't even sure if I left a message that it would be returned[.]

The elements of equitable estoppel are stated in the following question: Did Thomas prove that Marilynn did not inform Thomas of the additional amounts he owed and thereby intentionally induced Thomas, who was excusably ignorant of the true facts and who had a right to rely upon such lack of information, to reasonably believe that he did not owe any more and, as a consequence reasonably to be anticipated, act upon this belief and change his position in such a way that he did not seek reasonable alternatives and thereby owes what he otherwise would not owe?

We affirm the family court's decision that Marilynn was not estopped from asserting her claim and we do so on the following three grounds:

First, Thomas did not present substantial evidence of all of the elements of equitable estoppel.

Second, the record contains substantial evidence supporting the family court's findings opposite to some of the elements of equitable estoppel.

Third, there is a court decree ordering the mother to pay one-third and the father to pay two-thirds of their child's college expenses. That decree, however, does not expressly impose upon either a duty to inform the other of the amount of the college expenses payable by one or both of the parties. The facts, assuming they are facts, that the mother paid more than her share of those college expenses and did not inform the father of that fact until after their child's graduation from college does not bar the mother's action for reimbursement by the father of the father's share of those college expenses paid by the mother.[5]

Thomas does not allege that Marilynn told him that he did not owe more. The basis of his claim is his allegation that Marilynn did not tell him that he owed more. Thomas assumes that Marilynn had an affirmative duty to inform Thomas regarding the

[5] No statute of limitation defense has been alleged in this case.

amount he owed or that she was paying his share. We disagree. The duty of Thomas to pay, or to reimburse the person who paid, was not conditioned upon his being timely informed as to the amount of his share. Thomas owed two-thirds of the expenses. If he wanted to know what those expenses were and what his share was, it was his duty to inquire. The record supports the family court's finding and conclusion "[t]hat [Thomas'] efforts to communicate with [Marilynn] and/or [Son 2] during [Son 2's] educational career regarding the financial requirements and progress in school was less than reasonable." Assuming it is fact, Marilynn's intentional failure to inform Thomas is no more a negative than is Thomas' intentional failure to ask her and/or Son 2 for the information.

2.

Thomas contends that "[i]nadmissible or insufficient evidence was used to justify" conclusion of law no. 2 that the expenditure of $164,598.03 was reasonable and necessary.

The ingredients of this amount are as follows:

Direct Educational Expenses	
College Tuition	$110,879.00[6]
College Tuition - Student Loan	$ 13,185.00[7]
Student Loan Processing Fee	$ 572.50
Finance Charges - Student Loan	$ 6,422.20[8]
Books, Supplies, College Expenses	$ 5,538.01
Health Insurance	$ 1,102.40
Air Transportation	$ 6,817.84
TOTAL	$144,516.95
Indirect Educational Expenses	
Graduation Expense	$ 590.78
Ground Transportation Expense	$ 1,055.40
Additional Food Expense	$ 3,508.96
Clothing Expense	$ 7,422.64
Telephone Expense	$ 3,000.54
Miscellaneous Living Expense	$ 4,502.76
TOTAL	$ 20,081.08

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[6] "College Tuition" includes "[d]irect college tuition fees, direct dorm fees, general college fees ([i.e.] linen service), and mandatory meal plan fee."

[7] The payment by Son 2 of tuition with the proceeds of Student Loans was one-third of Plaintiff-Appellant Marilynn Sueko Ueno's (Marilynn) debt and two-thirds of Thomas' debt. If Thomas pays his share of those amounts to Marilynn, then Marilynn receives those amounts for the benefit of the person who paid or owes those loans.

[8] Three Sallie Mae loans were taken on the following dates, in the following amounts, and at the following rate of interest:

2/22/95	$2,625	8.250%
5/7/97	$5,500	7.660%
9/3/97	$5,500	7.660%

The calculation of the "Finance Charges - Student Loan" is explained by Marilynn as follows:

> Finance charges begin six months following the completion of the 1997-8 school year. Repayment of the loan begins six months following the completion of the 1997-8 school year.
>
> Calculation Note - The recommended payment schedule is 120 monthly payments in the amount of $167.06 beginning 11/15/98 (payment due on 12/11/98.) The total principal of the loan is $13,625. The accrued interest to be paid during the loan repayment (assuming no late payments) is $6,422.20.

Except for the $6,422.20 Finance Charges - Student Loan, the family court's approval of the Direct Educational Expenses is supported by admissible and substantial evidence.

The amount of the $6,422.20 Finance Charges - Student Loan must be reexamined because, as noted in footnote 8 above, it appears not to be based on actually incurred finance charges and appears to include finance charges incurred after the Judgment had been entered in this case. The amount cannot be any more than the total of the amount actually paid prior to March 16, 2000, and the amount actually owed on March 16, 2000.

The family court's approval of the following Indirect Educational Expenses is supported by admissible and substantial evidence: Graduation Expense and Telephone Expense.

Although Son 2 kept detailed records of all of his Indirect Educational Expenses during his first year at Georgetown, he did not do so for his two years at Yale in the United States and his one year at Yale in Kyoto. With respect to certain categories of Indirect Educational Expenses, Marilynn and Son 2 merely multiplied the amount of the Indirect Educational Expenses during Son 2's first year at Georgetown times four. These Indirect Educational Expense categories were Ground Transportation Expense (an average of $131.93 per semester), Additional Food Expense (an average of $438.62 per semester), Clothing Expense (an average of $927.83 per semester), and

Miscellaneous Living Expenses (an average of $562.85 per semester).[9] The evidence that these expenses were lesser in the second, third, and fourth years than they were in the first year was Son 2's testimony, in relevant part, as follows:

> Q. Did you in actuality spend . . . an amount equal to the average of the first year in your second, third and fourth years?
>
> A. I think it's a fair method of estimation. In a sense that while some expenses may have gone down during subsequent years other[s] definitely would have gone up.
>
> . . . .
>
> Q. So, your testimony today is again that all of these figures that they [extrapolated] are reasonable figures?
>
> A. Yes.
>
> . . . .
>
> A. It would be -- I think this is a fair representation of the amounts that I spent based on the fact that I did not maintain a log in those three years.

The court decided that the amounts were fair and reasonable.

We conclude that the record lacks substantial evidence of the Ground Transportation Expense, Additional Food Expense, Clothing Expense, and Miscellaneous Living Expense during Son 2's three years at Yale. Therefore, the following of those expenses are supported or unsupported by admissible and substantial evidence:

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[9] The per semester amounts for the first year averaged expenses were as follows:

	Semester 1	Semester 2
Ground Transportation Expense	$ 121.75	$ 142.10
Additional Food Expense	$ 383.19	$ 494.05
Clothing Expense	$ 1,075.48	$ 780.18
Miscellaneous Living Expense	$ 405.76	$ 719.93

	Supported	Unsupported
Ground Transportation Expense	$ 263.85	$ 791.55
Additional Food Expense	$ 877.24	$ 2,631.72
Clothing Expense	$1,855.66	$ 5,566.98
Miscellaneous Living Expense	$1,125.69	$ 3,377.07
TOTAL	$4,122.44	$12,367.32

3.

In his reply brief, Thomas cites McKay v. McKay, 644 N.E.2d 164 (Ind. App. 1994), and Hambrick v. Prestwood, 382 So.2d 474 (Miss. 1980). In Hambrick, the November 1, 1966 divorce decree ordered that upon the daughter's enrollment at Mississippi State University, the father must pay "all necessary cost, such as tuition, matriculation fee, etc., directly to the college, in advance so long as she attends and maintains average grades and until she graduates, unless she becomes emancipated, marries or reaches twenty-one years of age before graduation." Id. at 475. When the daughter sought to enter Mississippi State University in September 1979, the mother sought to enforce the order. The daughter was then age 17. It was a fact that from the time she was age 12, the daughter wanted nothing to do with her father. The court did not determine the daughter's reason(s). When the order requiring the father to pay the daughter's college tuition and fees was enforced, the father appealed. The Mississippi Supreme Court reversed the order and stated, in relevant part, as follows:

> The duty of a father to send a child to college, under the circumstances of this case, is not absolute. It is dependent, not only on the child's aptitude and qualifications for college, but on whether the child's behavior toward, and relationship with the father, makes the child worthy of the additional effort and financial burden that will be placed on him. Sending children to college is expensive and can cause much sacrifice on the part of parents. It cannot ordinarily be demanded, but must be earned by children through respect for their parents, love, affection and appreciation of parental efforts, none of which are present in this instance.

Id. at 477.

Seeking ex post facto application of Mississippi's Hambrick doctrine notwithstanding the fact that its application will be more to the detriment of Marilynn than to Son 2, Thomas alleges that (a) "[Son 2] apparently wants nothing to do with his father, except to force him to pay for his higher educational expenses, after they had been incurred" and notes that (b) "[Thomas] was not even informed that [Son 2] had enrolled at Yale until after the enrollment took place" and (c) "[m]ost telling was the fact that [Thomas] was not even invited to [Son 2's] graduation from Yale."

We do not reach the question of the validity and applicability of Mississippi's Hambrick doctrine. Our review of the record reveals that alleged fact "(a)" is not a fact. According to the record, the distance between Thomas and Son 2 is caused substantially more by Thomas than by Son 2.

Alleged fact "(b)" proves nothing. The information was timely. If Thomas had a problem with the transfer, he had plenty of time to object. Moreover, (i) Thomas had no objections when

Son 2 first applied to Yale; (ii) Thomas testified, "I don't object to him going to Yale" and that "[i]t's not unreasonable for him to want to attend Yale"; and (iii) Thomas does not challenge the family court's finding "[t]hat [Son 2's] attendance at . . . Georgetown and Yale was within the scope of the agreement between the parties and their plans for [Son 2's] educational future."

By itself, and absent alleged fact "(a)," alleged fact "(c)" also proves nothing. Moreover, Son 2 testified, in relevant part, as follows:

> Q. And you didn't invite him to your graduation at Yale either, is that correct?
>
> A. That's correct.
>
> Q. Is there a reason why?
>
> A. Because he didn't seem to show an interest in what I was doing.
>
> I felt - honestly the way I felt was tossed on the side.

CONCLUSION

Accordingly, we vacate the family court's March 16, 2000 Judgement against Defendant-Appellant Thomas Tadao Ueno and in favor of Plaintiff-Appellee Marilynn Sueko Ueno, now known as Marilynn Sueko Aihara, and we remand for reconsideration in the light of this opinion as to (a) the amount of the "Finance Charges - Student Loan" and (b) a reduction of the judgment because of (i) any reduction in the amount of the "Finance Charges - Student Loan" and (ii) the $12,367.32 reduction of the

total of the amounts of the Ground Transportation Expense, Additional Food Expense, Clothing Expense, and Miscellaneous Living Expenses.

DATED: Honolulu, Hawai i, October 16, 2001.

On the briefs:

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