

NO. 27742

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

MICHAEL CHRISTOPHER MANGEL, Plaintiff-Appel
v.
CHRISTINE KIM MANGEL, Defendant-Appellant

K. HANAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

2007 APR 16 AM 7:54

FILED

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-D NO. 04-1-0299K)

MEMORANDUM OPINION

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

Defendant-Appellant Christine Kim Mangel, now known as Christine Kim Dixon (Christine), challenges (1) the November 23, 2005 Order Re: Trial Held on November 10, 2005 (November 23, 2005 Order); (2) the January 5, 2006 Order Re: Defendant's Motion to Reconsider Alter or Amend the Order Re: Trial Held on November 10, 2005, Filed on 11/23/05 (January 5, 2006 Order); and (3) the Divorce Decree filed on January 10, 2006 (Divorce Decree).¹ In part, we affirm. In part, we vacate and remand with instructions.

BACKGROUND

Christine's son (Son) was born on May 24, 1995. On December 4, 2000, Christine and Plaintiff-Appellee Michael Christopher Mangel (Christopher) executed a Premarital Agreement in contemplation of their subsequent marriage. The Premarital Agreement states in part that "[i]t is acknowledged by both

¹ The orders and decree were entered by Judge Jeanne L. O'Brien.

[Christopher] and [Christine] that David E. Smith and the law firm of Van Pernis, Smith & Vancil represent and have advised [Christopher] only. . . . [Christine] has obtained . . . independent legal review and advice from Daniel S. Peters, Esquire[.]" The Premarital Agreement further states, in part:

WHEREAS, each of the parties desires to retain the sole ownership, title, management and control of the properties, assets, debts and expectancies now respectively owned by them or which may be inherited by them in their own right and name during the marriage . . . , whether real or personal, whether in trust or personally held, including any income, issues, rents, profits, appreciation in value, proceeds, successor property and/or replacements acquired therefrom, independently of the other party, the same as though the parties remained unmarried except as hereafter stated; and

WHEREAS, each of [the] parties further desire that any assets purchased or acquired by or as a result of the sale or liquidation of, or with the properties, assets and expectancies referred to above and in paragraphs 1 through 4 below and Exhibits "A" and "B" attached hereto shall be and remain the separate and independent property of the party originally acquiring, owning or earning the property; and

. . . .
. . . Both parties further acknowledge that they do no [sic] intend to look, nor will either look, to the other party for any compensation or support by reason of or arising out of their intended marriage, regardless of present or future circumstances, except as specifically provided in this Agreement.

SEPARATE PROPERTY

1. All properties, whether real or personal, and whether or not in trust, of which [Christopher] is presently seized and possessed, as set forth in Exhibit "A" attached hereto and including any income, issues, rents, profits, appreciation in value, rents, [sic] proceeds, including proceeds from sale or liquidation, successor property, and/or replacements acquired therefrom, shall be held and enjoyed by him and be subject to his disposition by sale, conveyance, pledge, gift, will or otherwise, as his sole, separate and independent property in the same manner as if the proposed marriage had never become legally effective and [Christopher] was not a married man.

2. In addition, any real or personal property or other assets that may be inherited by [Christopher] in his sole name at any time during the marriage including any income, issues, rents, profits, appreciation in value, rents, [sic] proceeds, including

proceeds from sale or liquidation, successor property, and/or replacements acquired therefrom, shall be held and enjoyed by him and be subject to his disposition by sale, conveyance, pledge, gift, will or otherwise, as his sole, separate and independent property in the same manner as if the proposed marriage had never become legally effective and [Christopher] was not a married man.

3. All properties, whether real or personal, and whether or not in trust, of which [Christine] is presently seized and possessed, as set forth in Exhibit "B" attached hereto and including any income, issues, rents, profits, appreciation in value, rents, [sic] proceeds, successor property, and/or replacements acquired therefrom, shall be held and enjoyed by her and be subject to her disposition by sale, conveyance, pledge, gift, will or otherwise, as his sole, separate and independent property in the same manner as if the proposed marriage had never become legally effective and [Christine] was not a married woman.

4. In addition, any real or personal property or other assets that may be inherited by [Christine] in her sole name at any time during the marriage including any income, issues, rents, profits, appreciation in value, rents, [sic] proceeds, including proceeds from sale or liquidation, successor property, and/or replacements acquired therefrom, shall be held and enjoyed by her and be subject to her disposition by sale, conveyance, pledge, gift, will or otherwise, as his [sic] sole, separate and independent property in the same manner as if the proposed marriage had never become legally effective and [Christine] was not a married woman.

5. Upon legal separation or divorce at any time in the future it is acknowledged and agreed by both [Christopher] and [Christine] that neither party shall assert any right to or interest in the property of the other party which is described in paragraphs 1 through 4 above as being the separate and independent property of the respective parties, or any appreciation of or income from such property, nor shall either party in separation or divorce proceedings assert any claim that such property or appreciation or income of the property is a marital or joint asset. Each party hereby knowingly and freely forever waives and releases any right or interest in such property that would otherwise arise by way of their proposed marriage, regardless of any law or precedent.

MARITAL AND/OR JOINTLY OWNED PROPERTY

6. After the date of the marriage of the parties hereto, all wages and salary earned or received by [Christopher] and/or [Christine] from employment, if any, shall be treated in all respects as assets of the marriage and held by [Christopher] and [Christine] as tenants by the entirety. The parties further agree that any other assets or property acquired during the marriage (other than those identified as separate property in paragraphs 1 through 4 above . . .) shall be treated in all respects as assets of the marriage unless agreed in writing otherwise, except that any assets or property purchased entirely with the separate name of the party who provides the funds or assets for acquisition, shall be deemed to be the separate property of the party who provided such funds or assets and took such title in their sole name. . . .

7. . . . [Christopher] currently owns undeveloped real property in his sole name . . . located in the University Heights subdivision. . . . The parties intend to build their martial [sic] residence upon this property and within 120 days after marriage [Christopher] agrees to convey one-half interest in this property (subject to any indebtedness thereon) to [Christine] so that following such conveyance the parties will own the property and home jointly either in Trust or as Tenants by the Entirety.

. . . .

TERMINATION OF MARRIAGE

12. In the event of termination of the contemplated marriage by the decree of any court of competent jurisdiction, it is agreed that the Decree of Dissolution of marriage shall award to each party the separate and independent property of each party as set forth in paragraphs 1 through 4 above . . . , free and clear of any claim thereon by the other party. Any marital property acquired during marriage as set forth in paragraph 7 above, shall be divided equally, except that any property purchased entirely with the separate property of one party and which is listed solely in the name of that party on any documents of title shall be treated in all aspects as the separate property of the spouse who provided the funds for purchase and who is solely stated on the documents of title.

SPOUSAL SUPPORT

13. Further, in the event of termination of the contemplated marriage . . . , [Christopher] agrees to pay [Christine] spousal support commencing on the first day of the first month after termination of the marriage a monthly sum equal to three percent (3%) of [Christopher's] then current net worth or \$6,000.00 per month, whichever amount is less, for six (6) consecutive months. These payments shall cease upon the seventh month after termination of the marriage. . . .

. . . .

GIFTS AND JOINT TITLE

15. The provisions of this Agreement . . . shall not prohibit either party from making any gift in any amount or property to the other party, with that gift then becoming that party's separate property, and shall not prohibit the parties from . . . taking title to any property or asset in their names jointly or as tenants by the entirety, in which case this Agreement shall not control or have any effect on such properties, assets or debts.

MODIFICATIONS

16. This Agreement may be hereafter modified, amended, or rescinded in whole or in part at any time after the solemnization

of the contemplated marriage only by a written agreement between the parties hereto and signed by both of them which specifically refers to this Agreement.

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ENTIRE AGREEMENT

18. The provisions contained in this Agreement represent the entire understanding between the parties hereto pertaining to their respective property and marital rights and is intended to completely supersede and/or replace any and all previous premarital, prenuptial and/or antenuptial agreements.

(Bold print omitted.)

On December 9, 2000, Christine and Christopher were married. Thereafter, Christopher adopted Son. During the marriage, Christopher conveyed the University Heights land at 73-4111 Ihupuni Place, Kailua-Kona, Hawai'i, jointly to Christopher and Christine and the residence was built thereon.

On December 17, 2004, Christopher filed a Complaint for Divorce (Complaint). On July 1, 2005, Christine filed a motion for sole legal and physical custody of Son. On August 23, 2005, Christopher filed Plaintiff's Motion for Partial Summary Judgment On the Issues of Premarital Assets and Gifting (August 23, 2005 MPSJ), requesting the award to him of (1) his "Category 1 contribution of \$86,900 for his purchase of" the University Heights land at 73-4111 Ihupuni Place, Kailua-Kona, Hawai'i, upon which their marital residence was constructed, and (2) (a) the 25% interest in the Keopu Partner's L.L.C.,² which owns a commercial

² Hawaii Revised Statutes § 428-105(a) (1993) states:

(a) The name of a limited liability company must contain "limited liability company" or the abbreviation "L.L.C." or "LLC".

warehouse in Kailua-Kona, "as it was purchased with separate funds and although title was put in joint names, it was for estate planning purposes intended to survive his death and not intended to survive a divorce," or (2) (b) "his Category 1 contribution of the \$125,000 for the purchase of the" 25% interest in the Keopu Partner's L.L.C. On September 2, 2005, Christine filed a memorandum in opposition to Christopher's August 23, 2005 MPSJ.

On October 6, 2005, after a hearing on September 7, 2005, Judge Aley K. Auna, Jr. entered an order granting sole legal and physical custody of Son to Christine, subject to Christopher's right of reasonable visitation, and ordering Christopher to pay Christine \$360 per month child support commencing July 1, 2005.

After a trial on November 10, 2005, the November 23, 2005 Order found, concluded, and/or ordered, inter alia, that (1) pursuant to the stipulation of the parties and court's order, Christine was awarded the legal and physical custody of Son, subject to Christopher's right of reasonable visitation; (2) the Premarital Agreement was valid under Hawai'i's Uniform Premarital Agreement Act as stated in Hawai'i Revised Statutes (HRS) Chapter 572D (1993); (3) the Premarital Agreement contained "conflicting

"Limited" may be abbreviated as "Ltd.", and "company" may be abbreviated as "Co.". The letters in the name of a limited liability company must be letters of the English alphabet.

provisions" regarding disposition of (a) the University Heights land and residence and (b) the 25% interest in the Keopu Partner's L.L.C.; (4) the land on which the University Heights residence is situated is Christopher's separate property; (5) the 25% interest in the Keopu Partner's L.L.C. is Christopher's separate property; (6) Christopher shall pay Christine spousal support in the amount of \$3,870 per month for six (6) months commencing December 1, 2005; and (7) Christopher shall pay Christine child support of (a) \$50 per month for the six months he is paying spousal support to Christine, (b) \$530 per month thereafter until the latter of the date that Son reaches age eighteen or graduates from high school, and (c) \$530 per month thereafter if Son continues to attend a college or university until his graduation, or he reaches age 23, whichever occurs first.

On December 5, 2005 Christine filed "Defendant's Motion to Reconsider, Alter or Amend the Order Re: Trial Held on November 10, 2005, Filed on 11/23/05" (December 5, 2005 MTR). On December 30, 2005, Christopher filed a memorandum in opposition to Christine's December 5, 2005 MTR. The January 5, 2006 Order corrected a mistake in the wording of, but otherwise denied the December 5, 2005 MTR.

Exhibit A, attached to the Divorce Decree, states, in part:

B. DIVISION OF ASSETS

1. The University Heights property and improvements thereon at 74-4111 Ihupuni Place, Kailua-Kona, HI . . . are awarded to [Christopher] as his sole and separate property subject to all encumbrances and expenses associated therewith. Judgment is hereby entered against [Christopher] and in favor of [Christine] for an equalization for her interest in the asset in the amount of \$67,000³. . . .

2. [Christopher] is awarded any and all interest which the parties may have in the Keopu Partners [L.L.C.] as his sole and separate property. . . .

3. [Christine] is awarded as her sole and separate property, all of her personal items, jewelry, clothing, photos, books, and other items of a personal nature belonging to her and any and all property presently in her possession. [Christine] is also awarded . . . [t]he Oneida flatware and the Mikasa chinaware, and any artwork which she personally purchased for herself, and any item of personal property she brought to the marriage or was given to her personally and separately as a gift during the marriage.

. . . .

6. [Christopher] is awarded . . . all property presently in his possession other than the specific items stated that have been awarded to [Christine].

(Footnote added.)

DISCUSSION

I.

Referring to the University Heights land and residence, Christine argues that the "court clearly erred when it concluded the Premarital Agreement was ambiguous, and then construed it . . . to reach the conclusion that the land under the parties' home was [Christopher's] separate property." She argues that the Agreement specifically states that "[a]ny marital property

³ The family court found that, at the time of the divorce, (a) the value of the land and house was \$612,000, (b) the value of the land was \$245,000, (c) the mortgage obligation was \$233,000, and (d) the value in excess of the value of the land and the amount of the mortgage obligation was \$134,000. It awarded Defendant-Appellant one-half of the \$134,000.

acquired . . . as set forth in paragraph 7 . . . shall be divided equally."

Christopher argues that the family court was right in concluding that there were conflicting provisions in the Premarital Agreement. He argues that Exhibit A of the Premarital Agreement listed the University Heights property as his separate property, and the family court was right in looking to the parties' intent, Hokama v. Hokama, 57 Haw. 470, 559 P.2d 279 (1977), and concluding that the University Heights land remained his separate property.

We conclude that the family court was wrong. The November 23, 2005 Order states in part:

27. [Christopher's] unrefuted testimony was that he spent \$199,000 of his separate funds on materials and subcontractors to build the house by selling his stock, which according to the Agreement could be considered a 'replacement' asset that retains its character as separate property. But further testimony, however, was that [Christine's] father was the general contractor on the house and built it, along with [Christopher], at no charge to the parties. In that it appears that both [Christopher] and [Christine] significantly contributed to the building of the house, and due to the language in Section 7 and 12, the court interprets the Agreement to mean that since the parties' [sic] planned to build the house together with contributions from both, the value of the house itself is to be split equally subject to the mortgage.

As noted above, paragraph no. 1 of the Premarital Agreement permits Christopher to own his

properties, whether real or personal, and whether or not in trust, of which [Christopher] is presently seized and possessed, as set forth in Exhibit "A" attached hereto and including any income, issues, rents, profits, appreciation in value, rents, [sic] proceeds, including proceeds from sale or liquidation, successor property, and/or replacements acquired therefrom, . . . subject to his disposition by sale, conveyance, pledge, gift, will or otherwise[.]

Similarly, paragraph no. 15 of the Premarital Agreement states in part:

The provisions of this Agreement . . . shall not prohibit either party from making any gift in any amount or property to the other party, with that gift then becoming that party's separate property, and shall not prohibit the parties from . . . taking title to any property or asset in their names jointly or as tenants by the entirety, in which case this Agreement shall not control or have any effect on such properties, assets or debts.

Consistent with paragraph nos. 1 and 15, paragraph no. 7 of the Premarital Agreement states that "within 120 days after marriage" the University Heights land and residence would become joint property. Although Exhibit A of the Premarital Agreement notes that when the Premarital Agreement became effective, Christopher owned the University Heights land, it did so subject to the following statement: "Currently in [Christopher's] sole name/to be conveyed to [Christopher] and [Christine] jointly after marriage[.]" Nothing suggests that this conveyance would be made subject to Christopher's retention of his Category 1 interest or any other interest. Therefore, the value of Christine's interest is one-half of ($\$612,000 - \$233,000 = \$379,000$) or $\$189,500$.

II.

During the marriage, when the Keopu Partners, L.L.C. was formed, Christopher invested \$125,000 to purchase a 25% "members" interest in the name of "Michael Christopher Mangel and Christine Kim Mangel, husband and wife, Tenants by the Entirety". The Keopu Partners, L.L.C. Operating Agreement was signed by all

of its "Members", including both Christopher and Christine. Although some other members signed as trustees of trusts, Christopher and Christine signed as individuals.

The November 23, 2005 Order states in part:

32. The un rebutted testimony was that the interest in the [L.L.C.] was purchased after marriage for \$125,000 by [Christopher] selling his stock.

. . . .

34. Unrebutted testimony at trial also was that [Christine's] name was put on this [L.L.C.] as tenants by the entirety, but it was done so for estate planning purposes and that neither party intended it to be effective to create marital partnership property in the event of a divorce.

Christine argues that, in light of the fact that Christopher failed to validly prove that he (a) used his own separate funds or assets to acquire their share in the Keopu Partner's L.L.C., and (b) holds ownership of the Keopu Partner's L.L.C. in his sole name (which are two conditions required under the Premarital Agreement), the court erred when it designated the jointly owned share in the Keopu Partner's L.L.C. as Christopher's separate property. Argument "(a)" has no merit. To argument "(b)", Christopher responds that the share in the Keopu Partner's L.L.C. is his separate property because Christine's title as co-tenant-by-the-entirety "was done so for estate planning purposes and that neither party intended it to be effective to create marital partnership property in the event of a divorce."

The sole evidence in support of paragraph no. 34 of the November 23, 2005 Order is the following testimony given by

Christopher while he was being questioned by his counsel:

Q. What was the purpose of putting [Christine's] name on the warehouse?

A. That was for trust purposes only. The trust was developed after - or before the warehouse was purchased. It was meant to survive my death, not my divorce, not my marriage.

We conclude that this evidence is not the substantial evidence necessary to support paragraph no. 34. There is no evidence of a formation of a trust or of Christine's intent. Christopher's testimony is that he conveyed a hybrid co-tenant-by-the-entirety interest to Christine that was ineffective in the event of a divorce. In certain situations, the parol evidence rule permits evidence in support of a request to reform a deed.

Consequently, we reinstate the jury's findings with respect to Count I (reformation) and remand this case with instructions that the trial court enter an order equitably reforming the deed to reflect Lee as the sole owner of the Keha Place property. See Carman v. Athearn, 77 Cal. App.2d 585, 175 P.2d 926, 932 (Cal. Ct. App.1947) (holding that "reforming the writ[ing] by making it conform to what the court was convinced, and the evidence show [ed], had been the true intent of the parties, but which had by mutual mistake or the fraud of defendant been incorrectly expressed," was an appropriate remedy). Because Aiu did not have an interest in the Keha Place property, he had nothing to transfer to the Dixons; thus, they too have no interest in the Keha Place property.

Lee v. Aiu, 85 Hawai'i 19, 31, 936 P.2d 655, 667 (1997). The parol evidence rule does not permit this attempt by Christopher to modify Christine's written co-tenant-by-the-entirety interest based on his oral testimony that she had no interest in the event of a divorce. We conclude that this conveyance by Christopher is governed by paragraph no. 15 of the Premarital Agreement which, as noted above, states in part:

The provisions of this Agreement . . . shall not prohibit the parties from . . . taking title to any property or asset in their names jointly or as tenants by the entirety, in which case this Agreement shall not control or have any effect on such properties, assets or debts.

III.

In paragraph no. 13 of the Premarital Agreement, Christopher agreed "to pay [Christine] spousal support commencing on the first day of the first month after termination of the marriage a monthly sum equal to three percent (3%) of [Christopher's] then current net worth or \$6,000.00 per month, whichever amount is less, for six (6) consecutive months."

In determining spousal support, the family court found that Christopher's "net worth after divorce" was \$794,792,⁴ determined that 3% of \$794,792 is \$23,223, determined that \$23,223 divided by six is \$3,870, noted that \$3,870 is less than \$6,000, and decided that Christopher's spousal support obligation is \$3,870 per month for six months. In other words, the family court decided that Christopher was obligated to pay, for each of six months, the lesser of \$6,000 or one/sixth of 3% of his net worth after the divorce. The family court ignored Christopher's agreement in the Premarital Agreement to pay "a monthly sum equal to three percent (3%) of [Christopher's] then current net worth or \$6,000.00 per month, whichever amount is less, for six (6) consecutive months." In the Premarital Agreement, assuming the

⁴ The November 23, 2005 Order erroneously lists Plaintiff-Appellant Michael Christopher Mangel's net worth as \$794,792. The correct total net worth is \$774,092. Three percent of \$774,092 is \$23,223.

validity of the family court's calculations, Christopher agreed to pay \$23,223 per month or \$6,000 per month, whichever is less, for six consecutive months.

IV.

Christine argues that the court "erred when it awarded a fraction of the parties' household property and effects to [Christine]". We conclude that the findings supporting this award are not clearly erroneous and the court made the award in conformity with the Premarital Agreement.

V.

The November 23, 2005 Order contains the following orders in its subparagraphs 8.c. and e.:

c. Holiday schedule: Every fall and spring break, and 1/2 of every Christmas break, alternating the first half including Christmas Eve and Christmas Day, and the last half including New Years Eve and New Years Day. [Christopher] shall have the first half in odd numbered years and the last half in even numbered years. [Christine] shall have the last half in odd numbered years and the first half in even numbered years. For summer break, [Christine] shall have the first two weeks and the last week, and [Christopher] shall have the rest of the summer break each year. Mother's day shall be with [Christine] and Father's day shall be with [Christopher].

e. Should either party move off the island of Hawaii, [Son's] reasonable visitation with [Christopher] shall be the same as above except that [Son] will spend the entire Christmas break with [Christopher] every other year, and that the weekend visitations during the school year will be at [Christopher's] option, with [Christopher] giving [Christine] at least 7 days advance notice of his intention to exercise a weekend visitation. [Son's] travel expenses for visitation in the event a party moves off the island of Hawaii shall be shared equally by the parties, with [Christine] paying for the spring and fall break round trip airfare and [Christopher] paying for the Christmas and summer break round trip airfare. [Christopher] shall be responsible for any travel expenses for [Son] for the optional weekend visitations.

In subparagraphs A.3.c. and e., the Divorce Decree contains the same orders.

In light of the following precedent, Christine argues that the court erred by ordering [Christine] to pay [Son's] travel expenses for visitation.

In the instant case, the question is what are the limits, if any, of the family court's discretion to order the custodial parent to pay all or a part of the interstate transportation expenses incurred by the children when visiting the noncustodial parent pursuant to the family court's visitation schedule. Our response is as follows: (a) it is within the family court's discretion to enter such an order if the order reasonably can be complied with without decreasing the funds reasonably necessary to support the children and the custodial parent at the relevant standard of living and the order is not otherwise an abuse of discretion; (b) except in situations where it has no reasonable alternative, the family court has no discretion to enter such an order if the order cannot reasonably be complied with without decreasing the funds reasonably necessary to support the children and the custodial parent at the relevant standard of living; and (c) where the family court enters such an order in (b) situations, the order must impact the custodial parent and the noncustodial parent in reasonable proportion to their abilities to pay. In the instant case, alternative (a) is applicable.

Dring v. Dring, 87 Hawai'i 369, 377, 956 P.2d 1301, 1309 (App. 1998).

As far as we are able to determine from the record, neither party has moved "off the island of Hawaii" so neither party is being required to pay for Son's travel expenses for visitation. On remand, the family court shall reword the relevant part of the Divorce Decree to conform with the above-quoted precedent of Dring v. Dring.

CONCLUSION

Accordingly, we vacate paragraphs 8.e., 12., 28, 29, 34, 35, 48, and 52 of the November 23, 2005 Order Re: Trial Held

on November 10, 2005, and paragraphs A.3.e., B.1 and 2, C.1, and D of "Exhibit A [Attachment to Divorce Decree]" of the January 10, 2006 Divorce Decree. We remand for modification of these vacated parts in conformity with this opinion. In all other respects, we affirm.

DATED: Honolulu, Hawai'i, April 16, 2007.

On the briefs:

Daniel S. Peters
for Defendant-Appellant.

James Biven
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge