NO. 21767

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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CONEN MASAKI NAKAMURA, Petitioner-Appellant

vs.

ELISE SONOE NAKAMURA, Respondent-Appellee

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(FC-D NO. 93-0042)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, and Ramil, JJ.
and Circuit Judge Masuoka, in place of Acoba, J., recused)

On June 5, 2000, petitioner-appellant Conen Masaki Nakamura (Conen) filed an application for a writ of certiorari requesting review of Nakamura v. Nakamura, No. 21767 (Haw. Ct. App. May 5, 2000) (the "ICA's decision"). The ICA's decision affirmed in part and vacated in part the findings of fact, conclusions of law, and order of the family court of the third circuit filed on June 24, 1998. In his application, Conen argues that the ICA erred by 1) affirming the family court's decision to award Conen's ex-wife, Elise Nakamura (Elise), one-half of the value of a business started by Conen after the parties had separated; and 2) vacating the family court's decision to set off the award by the additional $20,619 provided in a previous stipulation between the parties filed on December 8, 1995. We disagree with Conen's first point of error and agree with his second and, thus, affirm in part and reverse in part the ICA's decision. However, because the family court's findings are internally contradictory with respect to the second issue, we

remand to the family court for further proceedings consistent with this opinion.

## I. BACKGROUND

We refer to the family court's order for a summary of the pertinent background facts and contested issues in this case. Most of the findings of fact (FOF) and conclusions of law (COL) are undisputed; rulings particularly relevant to the instant application are highlighted.

> FINDINGS OF FACT
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> 2. [Conen] and [Elise] separated in November 1992.
> 3. At the time of the separation, both [Conen] and [Elise] worked for Mihara Transfer, a freight-hauling company. [Elise]'s family owned a controlling interest in Mihara Transfer. . . .
> 5. [Elise] filed for divorce on February 8, 1993.
> 7. In early 1993, [Conen] decided to start his own freight-hauling company. On March 12, 1993, [Conen] filed articles of incorporation for Conen's Freight Transport, Inc. A few weeks later, [Conen] filed an application for motor carrier certificate and license for the corporation with the Public Utilities Commission of the State of Hawaii (PUC).
> 9. In 1993, to finance his new enterprise, [Conen] obtained mainland financing from the Associates in the amount of $50,328.00. He also borrowed $65,000.00 from Fay Nako. In late 1993 or 1994, he used his parents' home to secure a line of credit with First Hawaiian Bank. . . . The line of credit was approximately $60,000 in early 1994, but [Conen]'s corporation now owes his parents approximately $100,000.00.
> 10. [Conen] and his parents did not enter into any written agreement concerning the contribution of the parents towards his business venture. They did have a verbal understanding that stock in the new transportation company would be placed in the name of the parents until the home equity line of credit secured by their home was fully repaid.
> 11. . . . . In March 1993, to expedite the start up of his business, [Conen] purchased James M. Kuwana Inc., an existing corporation with an appropriate motor carrier certificate.
> 12. [Conen] had established another corporation, Conen's Freight Service Inc., and put the shares of stock of that corporation into his father's name. When James M. Kuwana Inc. was purchased, [Conen] inadvertently failed to place the name of his parents on the James M. Kuwana stock. Instead, the stock was transferred into [Conen]'s name.
> 18. [Conen] filed asset and debt statements with the court on March 15, 1994, and February 23, 1995. Neither statement

disclosed any interest of [Conen] in a freight-transport business.

19. After settlement negotiations, [Conen] and [Elise] executed an agreement incident to divorce which was filed with the court on February 28, 1995. . . .

23. At the time the agreement incident to divorce was executed, [Conen] was actually earning an amount far in excess of the amount represented as his gross income in the child support guidelines that were filed in the court. [Conen] substantially misrepresented and underestimated his income both to [Elise] and to the court at the time the agreement incident to divorce was executed and approved.

24. On March 28, 1995, this court issued a divorce decree which incorporated the terms of the agreement incident to divorce above-described. . . .

25. In May or June 1995, [Conen] was exploring the possibility of placing all of his corporate interests under the name Conen's Freight Service Inc., when he discovered that the stock in James Kuwana Inc., was in his name, rather than in the name of his parents. His counsel in this divorce action subsequently advised opposing counsel of [Conen]'s interests in the freight business and corporations.

26. On December 8, 1995, the parties filed with the court a "Stipulation" which purported to redistribute certain assets of the marriage. In addition, the "Stipulation" provided as follows:

> "[Conen] acknowledges and agrees that the parties[']willingness to settle the issues presented by their divorce was at least in part made in reliance upon the Asset and Debt Statements and Income and Expense Statements filed by them. [Conen] acknowledges that he inadvertently failed to disclose on these statements filed with the court or provided to [Elise] any disclosure relating to his business, including James Kuwana, Inc., and Conen's Freight Transportation, Inc., or similarly denominated. Accordingly, [Elise] did not have the benefit of that disclosure at the time that she entered into the settlement of the divorce. However, rather than attempt to set the settlement aside, [Elise] is willing to proceed with the settlement, as supplemented hereby, provided that [Conen] correct that omission and provided that the resulting correction fails to disclose a significant increase in equity (i.e., value in excess of liability) in Conen's financial status as of the date of Elise[']s entry in the Agreement Incident to Divorce, dated January 1, 1995."

27. On September 19, 1996, [Elise] filed a motion and affidavit for order to show cause for relief after order or decree wherein she . . . . contended that [Conen] had failed to disclose the value of certain assets and had failed to further compensate [Elise] for her fair share of the value of the undisclosed assets.

28. On August 1, 1997, both parties stipulated and agreed in open court that the value and division of the entire

marital estate would not be relitigated. Instead, they agreed that the property division issues raised in the motion and affidavit for order to show cause for relief after order or decree filed by [Elise] would be limited to the issue of the fair market value of [Conen]'s business interests and any appropriate compensation due [Elise]. All other provisions for property division contained in the agreement incident to divorce, dated January 1, 1995, as modified by the asset adjustments contained in the stipulation filed on December 8, 1995, would be effective and enforceable.

30. To the extent that this court has equitable discretion to value [Conen]'s business interests after the date of the divorce decree, the court declines to do so for the following reasons:

A. In the stipulation filed with the court on December 8, 1995, the parties stipulated that [Conen]'s failure to disclose his business interests was inadvertent rather than fraudulent.

B. [Conen] did not use marital assets to start his new business. Instead, [Conen] started the business using funds borrowed from his own family and friends after the separation of the parties.

C. [Elise] did not contribute in any way towards the development or success of [Conen]'s new business enterprise. Instead, she and her family regarded the new business as a direct competitor and actively opposed the new enterprise through competition for customers and through proceedings filed before the PUC.

D. Because the parties have agreed that other marital assets were properly valued and divided as of the date of the divorce, it would be inequitable to value and divide [Conen]'s business interests at a later date.

31. The disclosure by [Conen] of his business interests in James Kuwana, Inc., and Conen's Freight Transportation did result in a significant increase in equity (i.e., value in excess of liability) in [Conen]'s financial status as of the date of [Elise]'s entry into the agreement incident to Divorce, dated January 1, 1995.

32. As of March 28, 1995, the fair market value of the businesses of [Conen], including James Kuwana, Inc., and Conen's Freight Transportation, Inc., or similarly denominated, was $100,000. . . .

36. [Conen]'s business was marital partnership property at the time of the divorce, and a marital partnership division of half of the fair market value would provide [Elise] with a set off in the amount of $50,000.

37. None of the facts urged by [Conen] are relevant considerations which would authorize a deviation from the partnership model.

38. The stipulation filed on December 8, 1995, provided [Elise] with a net asset adjustment of an additional $20,619.00 in value to compensate her for the failure of [Conen] to properly disclose his business interests. This sum represents an adjustment for assets already allocated to

> [Elise] and should be deducted from the set off due [Elise] based on the value of [Conen]'s business interests.
> 39. [Elise] is entitled to an additional award of $29,381.00 as her share of the undisclosed value of the freight transportation business of [Conen].
>
> CONCLUSIONS OF LAW
>
> 7. The stipulation purported to reopen the agreement incident to divorce and to make some adjustments in the property settlement; however, such adjustments were contingent on two conditions precedent. First, [Conen] was to correct omissions relating to his business interests. Second, the adjustments in the property settlement would become effective only if the resulting correction did not disclose a significant increase in equity "(i.e., value in excess of liability)" in [Conen]'s financial status as of the date of [Elise]'s entry into the agreement incident to divorce, dated January 1, 1995.
> 11. Under the terms of the stipulation, if [Conen] satisfied the two conditions precedent, [Elise] was entitled to the property division outlined in the agreement incident to divorce, as adjusted by the reallocation of property in the stipulation. . . .
> 12. If the value of [Conen]'s undisclosed business interests are included as part of his financial status, there is a significant increase in equity in [Conen]'s financial status as of January 1, 1995. For this reason, the conditions precedent contained in the stipulation were not satisfied, and [Elise] was not legally bound to accept the property adjustments contained in the stipulation.
> 16. In light of the motion filed and the stipulations of the parties, the court is not required to vacate or void the existing divorce decree and retry the entire case because of the failure of [Conen] to disclose his business interests. Instead, the court has the discretion to set the date of the divorce as the date on which [Conen]'s business interests should be valued for purposes of this motion. Based on equitable considerations, [Conen]'s business interests should be valued as of March 28, 1995, the date that the original decree of divorce was entered.
> 18. [Conen]'s freight-transport business was a Category 5 asset. If all valid and relevant considerations are equal, the marital partnership model awards each party 50 percent of Category 5 net market values.
> 20. [Conen]'s freight-transport business was a Category 5 property. No valid or relevant considerations justify a deviation from an equal division between the parties of the fair market value of this property. [Elise] is entitled to an equalization payment of $50,000.00 or one-half of the fair market value of the business interests of [Conen] as of the date of the divorce decree, less an adjustment for assets already received.

(Emphasis added.)

Both parties appealed, and the case was assigned to the ICA. Before the ICA, Conen argued, inter alia, that the family

court erred by dividing equally Conen's interests in his freight business, "an asset acquired without any contribution from the marital estate and after separation of the parties and actively opposed by the party seeking equitable distribution." Elise argued, inter alia, that the family court erred by subtracting the additional $20,619 provided in the December 8, 1995 stipulation from her $50,000 one-half share in Conen's freight business. The ICA affirmed the family court on the first issue, explaining that, under the relevant marriage partnership rules, Elise properly received a 50% interest in Conen's freight business. See ICA's decision at 20-21. The ICA, however, reversed the family court on the second issue, reasoning that, pursuant to the terms of the stipulation, the additional $20,619 provided by the stipulation was independent of the $50,000 one-half share in Conen's freight business. Id. at 34.

The instant application followed.

## II. STANDARD OF REVIEW

> "We have previously held that the 'family court possesses wide discretion in making its decisions and those decisions will not be set aside unless there is a manifest abuse of discretion.'" In re Jane Doe, Born May 22, 1976, 84 Hawai'i 41, 46, 928 P.2d 883, 888 (1996) (citing In re Jane Doe, 77 Hawai'i 109, 115, 883 P.2d 30, 36 (1994)).
>
> > Under the abuse of discretion standard of review, the appellate court is not authorized to disturb the family court's decision unless (1) the family court disregarded rules or principles of law or practice to the substantial detriment of a party litigant; (2) the family court failed to exercise its equitable discretion; or (3) the family court's decision clearly exceeds the bounds of reason.

Carroll v. Nagatori-Carroll, 90 Hawai'i 376, 381, 978 P.2d 814, 819 (1999) (quoting Wong v. Wong, 87 Hawai'i 475, 486, 960 P.2d 145, 156 (App. 1998)).

## III. DISCUSSION

### A. Division of Conen's Business

Conen first argues that the ICA erred in affirming the family court's order "divid[ing] equally an asset acquired without any contribution from the marital estate after separation of the parties and actively opposed by the party seeking equitable distribution." Conen contends that "such a ruling is against public policy as it does not encourage a person in Conen's situation to actively pursue meaningful and gainful employment or entrepunerial [sic] activities after separation." We reject Conen's argument as contrary to settled marital partnership principles.

Hawai‘i appellate courts recognize five types of net market values [NMVs] in the division of property incident to divorce:

> Category 1. The [NMV], plus or minus, of all property separately owned by one spouse on the date of marriage (DOM) 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.
>
> Category 2. The increase in the NMV of all property whose NMV on the DOM is included in category 1 and that the owner separately owns continuously from the DOM to the DOCOEPOT [date of the conclusion of the evidentiary part of the trial].
>
> Category 3. The date-of-acquisition NMV, 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.
>
> Category 4. The increase in the NMV of all property whose NMV on the date of acquisition during the marriage is included in category 3 and that the owner separately owns continuously from the date of acquisition to the DOCOEPOT.
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> Category 5. The difference between the NMVs, plus or minus, of all property owned by one or both of the spouses on the DOCOEPOT minus the NMVs, plus or minus, includable in

> categories 1, 2, 3, and 4.

Jackson v. Jackson, 84 Hawai‘i 319, 338 n.2, 933 P.2d 1353, 1372 n.2 (App. 1997) (quoting Tougas v. Tougas, 76 Hawai‘i 19, 27, 868 P.2d 437, 445 (1994)) (brackets in original). In this case, it is undisputed that Conen's interest in his freight business fell under "Category 5."

> Under the Partnership Model, assuming all valid and relevant considerations are equal,
>
> 1. The Category 1 and 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; and
>
> 2. The Category 2, 4, and 5 NMVs are Marital Partnership Property that, assuming all valid and relevant considerations are equal, are awarded one-half to each spouse.
>
> Hussey v. Hussey, 77 Hawai‘i 202, 207-08, 881 P.2d 1270, 1275-76 (App.1994). We label this Hussey division the Partnership Model Division.
>
> Thus, under the Partnership Model Division, Category 2, 4, and 5 NMVs are divided 50% to the owner and 50% to the nonowner. Id.

Id. at 332, 933 P.2d 1367.

In Jackson, the ICA considered arguments similar to those raised by Conen here. In that case, the family court considered various factors in deciding to deviate from the "Partnership Model Division" including: (A) much of the Category 2 and 5 NMVs occurred after the parties separated; and (B) much of the Category 2 and 5 NMVs were the result of the appellee's skill and effort. The ICA first rejected consideration (B) as irrelevant and contrary to the "Partnership Model." See id. at 333, 933 P.2d 1368. As for consideration (A), the ICA explained:

> Consideration (A) above has been the subject of Hawai‘i appellate opinions. At the time of Woodworth v. Woodworth, 7 Haw. App. 11, 740 P.2d 36 (1987), the valuation date for Category 2, 4, and 5 NMVs was the DOFSICOD [date of final separation in contemplation of divorce]. In Woodworth, we established a Category 6 NMV covering "[t]he difference

> between the NMVs, plus or minus, of all property owned by one or both of the spouses at the conclusion of the evidentiary part of the trial [the DOCOEPOT] and the total of the NMVs, plus or minus, includable in Categories 1, 2, 3, 4, and 5." In other words, Category 6 covered the difference in the NMVs, plus and minus, between the DOFSICOD and the DOCOEPOT. In Myers v. Myers, 70 Haw. 143, 764 P.2d 1237 (1988), however, the Hawai'i Supreme Court abolished Category 6 and emphatically stated in relevant part as follows:
>
> > Our divorce and separation laws do "not contemplate any [final] division of property other than where the person is divorced a vinculo [matrimonii]." Clifford v. Clifford, 42 Haw. 279, 283 (1958). . . . A presumption that the non-owning spouse is not entitled to any part of the appreciation in property legally owned by the other after a declaration by either that the marriage has ended is inconsistent with the partnership model of marriage we have accepted and the rule that a final division of marital property can be decreed only when the partnership is dissolved.
>
> 70 Haw. at 154, 764 P.2d at 1244 (brackets in original).
>
> Since there is no Category 6, the valuation date for Categories 2, 4, and 5 is the DOCOEPOT rather than the DOFSICOD, and all appreciation/depreciation of Marital Partnership Property that occurs between the DOM and the DOCOEPOT is a Category 2, 4, and/or 5 NMV. Assuming all valid and relevant considerations are equal, the Partnership Model Division awards each party 50% of all Category 2, 4, and 5 NMVs. Since the marital partnership continues until the DOCOEPOT, it follows that one party's post-DOFSICOD, pre-DOCOEPOT activity contributing to the increase of a Category 2, 4, and/or 5 NMV is a marital partnership activity that cannot be used to justify the award of more than 50% to the contributing party and less than 50% to the non-contributing party. Therefore, we conclude that consideration (A) is not a valid consideration authorizing a deviation from the Partnership Model Division.

Id. at 334-35, 933 P.2d 1368-69 (some brackets in original).

Similarly, in this case, Conen's arguments that he began his business after the date of separation and that Elise actively opposed the business carry no significance under the applicable rules of marital property division. We decline Conen's invitation to overturn these settled principles and, accordingly, reject Conen's allegation of error.

B. Supplemental Stipulation Benefits

Conen also contends that the ICA erred in reversing the family court's decision to reduce Elise's $50,000 one-half interest in Conen's business by the supplemental $20,619 provided in the December 8, 1995 stipulation. Conen alleges that the ICA has provided Elise a "windfall." Elise contrarily argues that the plain terms of the stipulation establish that the parties intended Elise to receive the additional $20,619 apart from any subsequently awarded share in Conen's business.

> As a general rule, the construction and legal effect to be given a contract is a question of law. Reed & Martin, Inc. v. City and County of Honolulu, 50 Haw. 347, 440 P.2d 526 (1968); Bishop Trust Co. v. Central Union Church, 3 Haw. App. 624, 656 P.2d 1353 (1983).
>
> > When the terms of a contract are definite and unambiguous there is no room for interpretation. It is only when the language used by the parties leaves some doubt as to the meaning and intention that the courts will apply the rules of construction and interpretation in an effort to ascertain the intention of the parties to the contract.
>
> Hackfeld and Co. v. Grossman, 13 Haw. 725, 729 (1902) (quoted in DiTullio v. Hawaiian Insurance & Guaranty Co., 1 Haw. App. 149, 155, 616 P.2d 221, 226 (1980)). The intent of the parties is a question of fact, and "[i]nasmuch as the determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable men might differ, summary judgment often will be an inappropriate means of resolving an issue of that character." Bishop Trust Co., 3 Haw. App. at 628-29, 656 P.2d at 1356 (citations omitted).

Hanagami v. China Airlines, Ltd., 67 Haw. 357, 364, 688 P.2d 1139, 1144-45 (1984). See also Soukop v. Snyder, 6 Haw. App. 59, 63 n.2, 709 P.2d 109, 113 n.2 (1985) ("Intent becomes a question of fact only where the language of the contract is ambiguous and casts a doubt as to the intent of the parties.").

The stipulation in question stated that Conen failed to disclose previously the existence of his business, and Elise,

therefore, "did not have the benefit of that disclosure at the time she entered into the settlement of the divorce." The stipulation continued:

> However, rather than attempt to set the settlement aside, [Elise] is willing to proceed with the settlement, as supplemented hereby, provided that [Conen] correct that omission and provided that the resulting correction fails to disclose a significant increase in equity (i.e., value in excess of liability) in Conen's financial status as of the date of [Elise]'s entry into the Agreement Incident to Divorce, dated January 1, 1995.

(Emphasis added.) The ICA read this provision to mean that Elise "is entitled to retain her $20,619 Stipulation benefits and be awarded one-half of the 'significant increase' [in Conen's equity]." ICA decision at 34. We disagree. The stipulation expressly conditions the settlement, and the supplement thereto, on the correction of Conen's omission and the lack of any significant increase in equity. Such a "significant increase" having been revealed, the terms of the stipulation provide no indication of how the $20,619 supplement is to be awarded. At best, the stipulation is ambiguous on this issue.

"Where a contract provision is ambiguous, this court is bound by the decision of the fact finder below regarding the intent of the parties, unless the finding is clearly erroneous." SGM Partnership v. Nelson, 5 Haw. App. 526, 530, 705 P.2d 49, 53 (1985). In this case, however, the family court's findings contain an apparent internal contradiction. On the one hand, FOF 38 states that the additional $20,619 "represent[ed] an adjustment for assets already allocated to [Elise] and should be deducted from the set off [$50,000] due [Elise] based on the value of [Conen]'s business interests." On the other hand, FOF

28 states that the parties agreed that the property division issues

> would be limited to the issue of the fair market value of [Conen]'s business interests and any appropriate compensation due [Elise]. All other provisions for property division contained in the agreement incident to divorce, dated January 1, 1995, as modified by the asset adjustments contained in the stipulation filed on December 8, 1995, would be effective and enforceable.

(Emphasis added.) FOF 28 thus apparently contradicts the family court's finding that the parties intended the $20,619 to be deducted from any subsequent award based on Conen's business interests.

Because the stipulation, as worded, is ambiguous with respect to the disposition of the $20,619 supplemental award, the question of the parties' intent regarding this issue becomes a question of fact decided in the first instance by the fact finder. Hanagami, 67 Haw. at 364, 688 P.2d at 1145. Nevertheless, insofar as the family court's findings are internally inconsistent as to the parties' intent, we remand this matter to the family court for further proceedings, including the entry of appropriate findings and conclusions.

## IV. CONCLUSION

For the reasons stated above, we affirm in part and reverse in part the ICA's memorandum opinion and remand for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, October 27, 2000.

On the briefs:

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