

CONCURRING AND DISSENTING OPINION BY NAKAMURA, C.J.

I agree with the result reached by the majority, with one exception: I believe the family court erred in adopting Wife's appraiser's valuations of the properties held by Avalon Cove, Inc. (Avalon Cove), without giving Husband any opportunity to challenge the appraisals.^{1/}

With respect to Avalon Cove, the June 24, 2008, "Decree Granting Absolute Divorce" (Divorce Decree) provided:

Wife is awarded her marital partnership share of the increase in value of Husband's interest in Avalon Cove, Inc. from the date of marriage to the end of trial. If the parties cannot reach an agreement as to a determination of that value, based on Husband's claim that in 2004, Avalon Cove's value was \$100,000, this amount shall be the starting value. The current value of the stocks shall be determined by appraisal to assess the current market price of the Setagaya and Meguro properties. If the revised stockholder equity amount is greater than \$100,000.00, Wife shall have half of the increased amount as equalization payment. (If the parties cannot reach an agreement as to an appraiser, each party may each submit three proposed Japanese real estate appraisers for court's selection within two weeks from the decree. [Husband] shall pay the appraisal costs.)

(Emphasis added.)

The parties apparently could not reach agreement on an appraiser, and the family court selected the appraiser proposed by Wife. After Wife's appraiser submitted the appraisal reports (one for the Setagaya property and one for the Meguro property), the family court held a hearing on October 8, 2009, on Husband's motion to clarify the Divorce Decree. At the hearing, Husband objected to the family court's acceptance of the appraisals prepared by Wife's appraiser without giving Husband the "benefit of cross-examination." The family court expressed its belief that the parties had agreed to this procedure. Husband, however, correctly noted that the procedure for selecting an appraiser was pursuant to the family court's order, not the agreement of the parties, and that the parties had not agreed on a methodology for the appraisals.

^{1/} The parties to this appeal are Hirokazu Nakajima (Husband) and Aki Nakajima (Wife).

On November 26, 2009, the family court issued its order denying Husband's motion to clarify the divorce decree. The family court rejected Husband's argument that it should reconsider using \$100,000 as the starting value for Avalon Cove on the date of marriage. The \$100,000 figure was based on evidence Husband had submitted during trial that he had sold his stock in Avalon Cove to his mother for \$100,000 shortly before his marriage to Wife. However, Husband's counsel had submitted a supplemental declaration on October 1, 2008, implying that the \$100,000 may have only been the book value, not the fair market value, of Avalon Cove. The family court found that the doctrine of quasi-estoppel prohibited it from reconsidering the \$100,000 starting valuation for Avalon Cove, because if \$100,000 was only the book value of Avalon Cove, then it would impeach Husband's position at trial that the transaction to his mother was legitimate.

The family court also justified its determination of the appraised value of the Avalon Cove properties without an evidentiary hearing as "sanctions against [Husband] for concealing assets[.]" Later, in its February 3, 2009, Findings of Fact and Conclusions of Law, the family court stated that "[a]s sanctions for hiding assets, Husband is prohibited from introducing appraised value of the [Avalon Cove] properties."

Regardless of Husband's conduct, the family court had an independent obligation to determine a fair value for Avalon Cove in dividing the parties' property. In other words, even as a sanction, the family court could not adopt an appraisal unless it believed the appraisal provided a fair valuation. Here, the family court used the appraisals of the Avalon Cove properties prepared by Wife's appraiser to determine the valuation for Avalon Cove. In my view, the family court abused its discretion by delegating the responsibility for determining a fair valuation for each of the Avalon Cove properties to Wife's appraiser. The record does not indicate that the family court made any findings or determinations regarding the reasonableness or reliability of

the appraisals prepared by Wife's appraiser. Given the absence of an evidentiary hearing, and the refusal to permit cross-examination or contradictory evidence by Husband, it appears that the family court accepted Wife's appraiser's valuations for the Avalon Cove properties without question. Because the family court had an independent obligation to determine a fair value for Avalon Cove, I believe it was error for the family court to adopt the valuations of Wife's appraiser for the Avalon Cove properties without giving Husband the opportunity to challenge the validity of the appraisals. On this basis, I respectfully dissent.

Craig H. Nakamura