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Supreme Court
SCWC-30070
28-FEB-2014
07:50 AM

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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COLLEEN P. COLLINS, Petitioner/Plaintiff-Appellant,

vs.

JOHN A. WASSELL, Respondent/Defendant-Appellee.

SCWC-30070

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30070; FC-D NO. 07-1-0206)

FEBRUARY 28, 2014

DISSENTING OPINION BY POLLACK, J.

The majority holds that a couple who expressly decide not to marry in order to obtain financial advantages, who agree for this reason to keep separate financial identities while cohabiting, who make this agreement to preserve significant financial aid from two colleges and to ensure that the non-parent is not financially responsible for the college education cost of the other's children, nevertheless created a premarital economic partnership.

The result of this holding means that whenever a couple cohabit before marriage and share some undefined level of expenses, their cohabitation period may be treated as if they were married if their subsequent marriage ends in divorce, with little regard accorded to the parties' intent. This result is reached because of the majority's adoption of the Helbush test, a standard that I believe is inherently flawed, as this case demonstrates, and should be overruled.

In my view, whether a cohabiting couple forms a premarital economic partnership should depend on the intention of the parties with consideration given to whether the parties' actions substantially conformed to their intention. Accordingly, I would remand this case to the family court to determine whether the actions of Collins and Wassell were substantially consistent with their intention to maintain separate economic identities.

I.

In June 2000, Colleen Collins and John Wassell exchanged vows in the presence of their friends, families, and a minister. Immediately after the ceremony, they had second thoughts. Collins realized that a legal marriage would change her tax status and most likely impact her daughters' financial aid awards. Tuition for both daughters to attend prestigious mainland schools amounted to over $52,000 a year. With financial aid calculated on the basis that Collins was a single parent, Collins actually paid only $8,000 per year, a very considerable savings. To maintain her single parent status on the financial aid applications, Collins and Wassell agreed that they would not mail their marriage license and certificate to the Department of Health, and they would keep their financial identities separate. On their wedding day, the couple asked the minister to refrain from submitting the marriage license and certificate to the State Department of Health. Four months later, Collins and Wassell both signed and sent a letter to the Department of Health advising that they had not legally married after all.

After a short honeymoon, Collins and Wassell began living together in Collins' townhouse. During this 18-month period, Wassell did not contribute to the mortgage payments or pay rent to Collins, and rented out his own property. In 2001, Collins sold her property and deposited the money from the sale into a joint account, $4,239.59 of which was used to pay off Wassell's mortgage. Prior to the sale of the townhouse, Wassell made some improvements to the property, including minor repairs, painting, and installing a new water heater. The couple then moved into Wassell's house.

The "joint" account was created in June 2000 when Wassell added Collins' name to an account he held at CU Hawaiʻi FCU. They deposited cash gifts from their June 2000 apparent wedding into the joint account. Collins and Wassell agreed to use the joint account primarily for their shared utility and grocery bills. Both parties were to deposit funds in the joint account, but in reality, Collins made regular monthly deposits of around $500.00 while Wassell made few, if any, deposits from 2000 through 2007.

The family court noted, however, that income and expense statements signed by the parties (Collins dated 9/26/08; Wassell dated 10/24/07) reflected total living expenses (not including rent paid by Collins) of $1,960.00, an amount almost four times the monthly contributions to the joint account. Wassell testified that he paid for the propane, internet, and telephone bills with funds from his individual bank account, and he paid for food between ninety and ninety-five percent of the time that he and Collins went out to eat. The court therefore rejected Collins' contention that the joint account was the primary means of payment for the parties' living expenses. On the contrary, this account covered a relatively small portion of their expenses.

The family court further found that the account was "joint" in name only, and Collins was the primary, if not exclusive, contributor to that account. For example, ten days after depositing the proceeds from the sale of her townhouse, $23,020.74, into the joint account, Collins withdrew $13,647.26 to purchase an automobile in her own name.

During the cohabitation period and into their subsequent marriage, Collins and Wassell also maintained separate individual checking and savings accounts, which appear for each to have been the vehicle for the bulk of their financial activity. Collins and Wassell both kept separate retirement accounts and individual life insurance policies to which they did not name each other as beneficiaries. While cohabiting, Collins and Wassell both purchased cars and held the titles in their individual names. During the period of premarital cohabitation from June 2000 to January 2005, Wassell's assets and debts in his own name included:

a. Wachovia (annuity)
b. TIAA-CREF
c. Hawaii PTS Deferred
d. CU Hawaii FCU (SD-2)
e. CU Hawaii FCU (RS-2)
f. Bank of Hawaii (checking)
g. Real property located in Hawaiian Paradise Park
h. Various items of personal property

Collins' assets in her own name included:

a. VALIC (annuity)
b. HFS FCU (checking and savings)
c. Townhouse in Pacific Heights (sold in December 2001)
d. Various items of personal property

On January 19, 2005, Collins and Wassell were legally married, as there was no longer any need for Collins to submit financial aid applications for her daughters' college educations. It was at this point that Wassell testified that the agreement to maintain separate financial identities was terminated. The couple lived in Wassell's house until their separation on January 1, 2007.

The majority concludes that despite Collins and Wassell's express intention to retain their separate financial identities and despite their actions to effectuate their intention, the couple entered into a premarital economic partnership. Respectfully, I believe this result is reached because the majority gives insufficient weight to the parties' intention and because of the majority's reliance on the Helbush test, which is significantly flawed.

II.

In Helbush v. Helbush, 108 Hawaiʻi 508, 122 P.3d 288 (App. 2005), the ICA held that "a 'premarital economic partnership' occurs when, prior to their subsequent marriage, [two people] cohabit and apply their financial resources as well as their individual energies and efforts to and for the benefit of each other's person, assets, and liabilities." Id. at 515, 122 P.3d at 295 (emphasis added).

The Helbush standard is deficient for multiple reasons, described more fully below. First, it does not consider the intention of the parties in determining whether a premarital economic partnership is formed or whether the parties' actions substantially conformed to their intentions. Second, because the test lacks specific factors, application of the test will inevitably be haphazard. Third, as recognized by the concurrence, the Helbush test subjects all couples to a single test, which manifestly misses the mark in failing to recognize the diversity of parties' intentions. Lastly, Helbush replaced an equitable standard with a categorical one. Consequently, if an economic partnership is found by the family court not to have been formed, the court's equitable discretion cannot be invoked because its authority has been replaced by the Helbush test.

A.

The formation of a premarital economic partnership depends upon the intention of the parties. See Stanford Carr Dev. Corp. v. Unity House, Inc., 111 Hawaiʻi 286, 302, 141 P.3d 459, 475 (2006) (emphasis added). In applying general partnership principles to an unmarried couple's property dispute, the ICA has stated that a partnership "exists where the parties have contracted to share, as common owners or principals, the profits of a business and . . . whether an agreement creates a partnership or not depends upon the intention of the parties." Simmons v. Samulewicz, 129 Hawaiʻi 507, 513, 304 P.3d 648, 654 (App. 2013) (emphasis added) (quoting Dang v. F and S Land Dev. Corp., 62 Haw. 583, 589, 618 P.2d 276, 280 (1980)). "The purported intent . . . to promote a romantic and/or anticipated marital relationship, although including financial decisions, does not constitute an intent to create a partnership." Id. at 514, 304 P.3d at 655. There must be something more for the court to find a valid partnership.

The standard enunciated by the ICA in Helbush lacked any consideration of the parties' intentions. While the majority modifies the Helbush test to a certain extent to include intent, Majority Opinion at 28, it does not give appropriate weight to the intentions of the parties. The intent of the parties should be the most significant factor in the court's analysis, not merely an afterthought. "[A] division of property accumulated during a period of cohabitation must be begun by inquiring into the intent of the parties, and if an intent can be found, it should control that property distribution."[1] Beal v. Beal, 577 P.2d 507, 510 (1978).

As the family court explained, the most obvious example of Collins's and Wassell's intent was the couple's conscious decision not to make their marriage legal "for the express purpose of maintaining separate financial identities." This accomplished two separate purposes: it allowed Collins to take full advantage of the financial aid available for her daughters' college educations, and it enabled Wassell to avoid shouldering any share of that burden. The family court found that Collins and Wassell "agreed that they would not mail their marriage license and certificate to the Department of Health, and each of them would maintain separate financial identities" specifically to avoid the negative financial consequences of a legal marriage.

Collins does not dispute that the parties entered into this agreement, but insists that the decision not to get legally married is different than the decision not to form an economic partnership. However, the decision not to get married had, as

[1] The Oregon Supreme Court expanded on its reasoning:

> While this is obviously true when the parties have executed a written agreement, it is just as true if there is no written agreement. The difference is often only the sophistication of the parties. Thus, absent an express agreement, courts should closely examine the facts in evidence to determine what the parties implicitly agreed upon.

Beal v. Beal, 577 P.2d 507, 510 (1978).

its essential objective, the purpose to maintain separate economic identities in order to preserve significant financial aid. By keeping their economic identities separate, the parties were able to achieve their financial objective.

In the alternative, Collins argues that the decision not to get married is evidence that the parties made a "joint" financial decision that benefitted both parties. MP3: Oral Argument, Hawaiʻi Supreme Court, at 06:45 (Dec. 3, 2013), http://state.hi.us/jud/oa/13/SCOA_120313_30070.mp3. In other words, Collins contends that the joint decision to maintain separate financial identities was a function of their premarital economic partnership since both of them benefitted from maintaining separate economic identities. See Majority Opinion at 37-38. This inverted analysis nullifies the couple's primary purpose of maintaining separate identities, as the financial advantage gained by maintaining separate economic identities is contended to be proof of an economic partnership.

The family court found that "[f]ar from reflecting the parties' intention to 'apply their financial resources to and for the benefit of each other's persons, assets, and liabilities,'" these facts reflected "the parties' express intention not to do so." (Citation and ellipsis omitted). Therefore, Collins and Wassell's express agreement to remain financially separate should be given significant weight and must be considered in evaluating the parties' actions.

B.

In addition to ignoring the parties' intentions, Helbush does not provide guidance as to how the family court should measure other factors, including cohabitation[2] and the commingling of expenses, which may lead to inconsistent results.

1.

As stated, "whether an agreement creates a partnership or not depends upon the intention of the parties." Simmons v. Samulewicz, 129 Hawaiʻi 507, 513, 304 P.3d 648, 654 (App. 2013) (emphasis added). The majority notes that, "[a]bsent an express agreement, in evaluating whether the parties intended to form a premarital economic partnership, the family court must consider the totality of the circumstances, including both the economic and non-economic contributions of the parties." Majority Opinion at 28-29 (citing Cassiday v. Cassiday, 68 Haw. 383, 387, 716 P.2d 1133, 1136 (1986)) (emphasis added).

In this case, it is unnecessary to consider the totality of the circumstances to determine whether the parties

[2] Couples can apply "their financial resources as well as their individual energies and efforts to and for the benefit of each other's person, assets and liabilities" with or without cohabitation. Couples with one or both individuals in the military may not live together before marriage. Others may choose not to for religious reasons.

intended to form a premarital economic partnership, as the record unequivocally demonstrates that the parties intended to maintain separate economic identities.[3] The family court was clearly not erroneous in finding that Collins and Wassell agreed that "each of them would maintain separate financial identities."

Nevertheless, the majority evaluates the totality of circumstances from its perspective and reaches the opposite conclusion regarding the parties' intent: "Collins's interest in receiving financial aid as a single parent is not sufficient to override the parties' apparent intent to engage in a premarital economic partnership in all other aspects of their financial lives." Majority Opinion at 38 (emphasis added).

Respectfully, I do not agree that the record indicates that the parties' "apparent intent" superseded their express intent. This court should not re-determine the parties' intention by giving little deference to the parties' express intention to maintain separate economic identities. The majority is able to override the parties' actual intention because of the inherent flaw of the Helbush test, which does not include the parties' intentions as part of its formulation in determining

[3] "[C]ohabitation, no matter for how long, does not by itself prove the existence" of either an express agreement or contract implied-in-fact entitling a cohabitant to equitable division of separate property acquired or improved during cohabitation. See Aehegma v. Aehegma, 8 Haw. App. 215, 222-223, 797 P.2d 74, 79 (App. 1990); Chen v. Hoeflinger, 127 Hawaiʻi 346, 359, 279 P.3d 11, 24 (App. 2012); Simmons v. Samulewicz, 129 Hawaiʻi at 515, 304 P.3d at 656.

whether a premarital economic partnership existed. And while the majority states that "[w]hether a premarital economic partnership has been formed depends upon the intention of the parties," Majority Opinion at 28, it is abundantly clear that the Helbush test, even as modified by the majority, gives minimal weight to the parties' express intentions, enabling a court to infer an "apparent intent" to override express intent.

In contrast to Helbush, I believe the more appropriate and equitable analysis is to assess whether the parties' actions were substantially consistent with their express intention to maintain separate economic identities.

2.

Helbush also provides no guidance as to what level of sharing of resources or commingling of finances is necessary to constitute an economic partnership. Helbush's ambiguous test appears to be nearly unlimited: a premarital economic partnership is established when a couple who, prior to their marriage, cohabit and "apply their financial resources as well as their individual energies and efforts to and for the benefit of each other's person, assets, and liabilities." Helbush, 108 Hawaiʻi at 515, 122 P.3d at 295 (emphasis added). The test is overly expansive, in failing to account for the fact that couples may apply their financial resources and energies for the benefit of each other but decisively not intend to form an economic partnership. At the same time, the test is unduly narrow, in requiring cohabitation and therefore not including circumstances where one member of a couple is in the military and not living with the other, or one member is working or attending college in another location.

Sharing of some economic expenses and household responsibilities is a basic part of nearly any cohabitating relationship. The family court aptly observed:

> Parties who are emotionally involved with one another and who are cohabiting must inevitably comingle their energies and finances to some extent – the exigencies of normal life and collective activity could scarcely allow it to be otherwise. <u>Therefore, some measure of such commingling is to be expected in every instance of cohabitation</u>, and does not by its mere existence rise to the level necessary to establish a <u>Helbush</u> "economic partnership."

(Emphasis added).

For the <u>Helbush</u> test to be meaningful, it should require a significant level of applying financial resources to the benefit of the other such that separate economic identities are <u>no longer</u> separate. The difficulty in defining such a standard should not result in the absence of one.

In this case, the degree of financial cooperation in the family court's view did not rise to the level of a premarital economic partnership precisely because the couple maintained "distinct separate financial identities." The court noted that at all times during the period of the couple's premarital cohabitation, in addition to their single joint "housekeeping" account, each of the parties maintained separate individual checking, savings, and retirement accounts, life insurance policies, purchased cars in their own names, and kept other parts of their financial lives independent. While it is true that the parties' maintenance of separate financial accounts does not, in and of itself, support the ultimate determination that no premarital economic partnership was formed, see Epp v. Epp, 80 Hawaiʻi 79, 93, 905 P.2d 54, 68 (App. 1995), such actions coincided with the couple's express intention to maintain separate financial identities.

The majority places undue reliance on the parties' maintenance of a joint bank account, which would appear to be a more convenient way to pay shared bills than a reflection of a determination to no longer maintain separate financial identities. The family court found that although the joint account "no doubt reflected a measure of financial cooperation by the parties, [] it seems wholly inadequate to carry the weight of establishing an economic partnership between them." Indeed, as the ICA noted in Aehegma, joint checking accounts between cohabitants do not prove an express agreement for the equitable division of separate property acquired or improved during cohabitation, in the absence of clear and convincing evidence of such intent. 8 Haw. App. 215, 222, 797 P.2d 74, 79 (1990) (considering HRS § 560:6–103(a)). While Collins and Wassell undoubtedly shared small expenses, the facts reveal that they kept large purchases and expenditures separate, except for the modest amount to pay off Wassell's mortgage.

The Helbush test, as applied here, produces more questions than answers. For example, Collins argues that the family court relied on irrelevant factors, including the parties' admitted use of separate financial accounts, her single parent status on her daughters' financial aid forms, and the parties' letter to the Department of Health advising that they did not get married in June 2000. But if Helbush does not articulate which factors are relevant to the analysis, it is difficult to know which factors are irrelevant. In this case, the parties shared small expenses but kept large purchases separate. Helbush does not shed light on whether a single large joint purchase would counter a couple's actions in keeping all other financial transactions separate.

Finally, it may be extremely difficult to determine when a premarital economic partnership begins and ends. A cohabitation relationship may evolve such that a couple's applications of financial resources for the benefit of the other changes over time.

As Justice Acoba points out in his concurrence, the Helbush test "was not helpful in resolving this case but only magnified ordinary living details beyond the significance they had in a larger more comprehensive view of the parties' relationship." Concurring Opinion at 2. Rather than dissecting each and every expense, family courts should focus on the underlying issue: did the parties substantially maintain their separate economic identities? Application of this standard would require determining the parties' intentions and consideration of whether their actions were substantially consistent with that intent.

C.

Because Helbush, as modified, does not depend upon the parties' intentions and actions effectuating such intentions, application of Helbush may lead to challenges of otherwise valid prenuptial agreements. The Hawaiʻi Uniform Prenuptial Agreement Act (HUPAA) states that parties to a premarital agreement may contract with respect to:

> (1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
> (2) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security

> interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
> (3) The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event.

HRS § 572D-3 (2006). The HUPAA requires that the agreement be made in writing and signed by both parties. HRS § 572D-2 (2006). The agreement, which becomes effective upon marriage under HRS § 572D-4 (2006), is enforceable and shall be binding unless the party against whom enforcement is sought proves: "(1) That party did not execute the agreement voluntarily; or (2) The agreement was unconscionable when it was executed[.]" HRS § 572D-6 (2006); see also Lewis v. Lewis, 69 Haw. 497, 500-01, 748 P.2d 1362, 1366 (1988).

The HUPAA provides that an agreement is unconscionable when it was executed and, before execution of the agreement, if a party to the agreement:

> (A) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
> (B) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
> (C) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

HRS § 572D-6(2) (2006) (emphasis added). The vagaries of the Helbush test and the unpredictability of its application may result in unconscionability challenges to the validity of a premarital agreement where the parties divorce, inasmuch as a party that had been involved in a cohabitation relationship prior to marriage would likely not have adequate knowledge of financial obligations that may have existed between the couple as a result of the Helbush standard.

In this case, Collins and Wassell orally agreed to maintain separate financial identities, but did not memorialize their agreement in writing. If an agreement had been signed, this case would be resolved easily based upon their written intention. Because there was no signed agreement, Collins and Wassell are subject to an ambiguous standard that they, like the vast majority of couples, had no reason to know existed. Wassell has argued that a "deal is a deal," as is the usual course in contract and partnership law. MP3: Oral Argument, Hawaiʻi Supreme Court, at 32:20 (Dec. 3, 2013), http://state.hi.us/jud/oa/13/SCOA_120313_30070.mp3. The couple's "deal" was neither inequitable nor entered into involuntarily. But because the Helbush test, as modified, gives inadequate weight to the parties' intention, the agreement is not honored.

Respectfully, application of a test that determined whether Collins' and Wassell's actions were substantially consistent with their intention to maintain separate financial identities would be more consistent with HUPAA, the Partnership

Model, and the parties' expectations, as it would respect their express intentions.

D.

The Helbush standard's one-size-fits-all approach is inappropriate for gauging the financial relationship of partners in a premarital relationship, which is based upon the premise that all cohabitation relationships can be divided into two categories: economic partnership or non-economic partnership. In Marvin v. Marvin, a watershed case concerning premarital rights, the California Supreme Court recognized that partners may enter into a wide variety of economic arrangements:

> [T]hey may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property; conversely they may agree that each partner's earnings and the property acquired from those earnings remains the separate property of the earning partner. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.

557 P.2d 106, 116 (1976) (emphasis added) (footnote omitted). In creating separate categories of marital property, Hawaiʻi courts have likewise recognized that not all partners strive to advance the family and marital unit in every endeavor, and many do not share this expectation.[4] It is therefore problematic to apply

[4] The ICA has recognized that not all partners share the expectation that both strive to "advance the family and the marital unit." Calvin G.C. Pang, Slow-Baked, Flash-Fried, Not to be Devoured: Development of the Partnership Model of Property Division in Hawai#i and Beyond, 20 U. Haw. L. Rev. 1, 92 (1998).

the Helbush test, which casts parties' expectations in all-or-nothing terms. The family court acknowledged that in applying Helbush, "there is no such thing, for these purposes, as a 'partial partnership.'"

As this court has stated, "each [marital] case is factually and circumstantially unique, and therefore outcomes will necessarily be diverse." Gussin v. Gussin, 73 Haw. 470, 486, 836 P.2d 484, 492 (1992). Extending the Helbush test to all cohabitation situations is not constructive. As noted by the concurrence, "where the parties are in a self-defined relationship before marriage, [a]ny attempt, then, to characterize the nature of a relationship as for example, an economic partnership, seems futile and unhelpful." Concurring Opinion at 3.

> By creating a category of "marital separate property" into which spouses may affirmatively and clearly segregate separate property from the partnership, the court allowed spouses to "switch off" the partnership rules for those properties. Those who feel strongly enough to buck the norms of marital sharing are given both the method to, and the burden of, setting alternative expectations.

Id. at 93 (footnotes omitted).

E.

Finally, the Helbush standard is flawed because it undermines the discretion that family courts previously enjoyed under the equitable powers doctrine.[5]

Under HRS § 580-47, the family court is vested with wide discretion in dividing marital property according to what is "just" and "equitable." Tougas v. Tougas, 76 Hawaiʻi 19, 26, 868 P.2d 437, 444 (1994) (citing Gussin, 73 Haw. at 479, 836 P.2d at 489). Accordingly, each case must be decided upon its own facts and circumstances. Gussin, 73 Haw. at 479, 836 P.2d at 489 (citing Carson v. Carson, 50 Haw. 182, 183, 436 P.2d 7, 9 (1967)).

Hawaiʻi family courts adhere to the Partnership Model, which allows for discretion in determining whether deviation is warranted. Helbush, 108 Hawaiʻi at 513-14, 122 P.3d at 293-94.

> The Partnership Model requires the family court, when deciding the division and distribution of the Marital Partnership Property of the parties part of divorce cases, to proceed as follows: (1) find the relevant facts; start at the Partnership Model Division and (2)(a) decide whether or not the facts present any valid and relevant considerations authorizing a deviation from the Partnership Model Division and, if so, (b) itemize those considerations; if the answer to question (2)(a) is "yes," exercise its discretion and (3) decide whether or not there will be a deviation; and, if the answer to question (3) is "yes," exercise its discretion and (4) decide the extent of the deviation.

[5] In her application, Collins raises two additional questions not reached by the majority. She asked whether the rule set forth in Helbush precludes the family court from considering premarital contributions in the absence of a premarital economic partnership.

Helbush, 108 Hawaiʻi at 514, 122 P.3d at 294 (citing Jackson v. Jackson, 84 Hawaiʻi 319, 332-33, 933 P.2d 1353, 1366-67 (App. 1997)). In determining whether other relevant considerations warrant deviation from the Partnership Model, the family court is further directed to consider "the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left by the divorce, the burdens imposed upon either party for the benefit of the children of the parties, and all other considerations of the case." Jackson, 84 Hawaiʻi at 333, 933 P.2d at 1367 (quoting HRS § 580-47(a) (1993)).[6]

> To the extent that a certain degree of "uniformity, stability, clarity or predictabilit" of family court decisions can be attained, while at the same time preserving the wide discretion mandated by HRS § 580-47, judges are compelled to apply the appropriate law to the facts of each case and be guided by reason and conscience to attain a just result.

Gussin, 73 Haw. at 486, 836 P.2d at 492.

Hawaiʻi family courts have "avoided, where possible, the adoption of general rules governing the division of marital assets . . . because such general rules create rebuttable presumptions, which narrow the discretion of family court judges, and are thus repugnant to HRS § 580-47." Id. at 480, 836 P.2d at 489 (citation omitted). The Partnership Model of marriage

[6] HRS § 580-47(a) has remained substantially unchanged since 1993. See HRS § 580-47(4) (Supp. 2011).

provides the necessary guidance to the family courts in exercising their discretion. Id. at 486, 836 P.2d at 492.

The family court, traditionally accorded wide discretion in dividing marital property, may exercise its equitable powers in coming to a just result even if there is no premarital economic partnership. See Gussin, 73 Haw. at 479, 836 P.2d at 489 (1992); see also HRS § 580-47(a) ("[T]he court shall take into consideration . . . all other circumstances of the case."). The Helbush test undermines the broad discretion that family court previously exercised in dividing marital property according to what is "just and equitable," Tougas, 76 Hawaiʻi at 26, 868 P.2d at 444, and instead the court is now constrained by a categorical determination of whether a premarital economic partnership was established.

III.

In the instant case, the family court rendered the non-clearly-erroneous finding that "[f]ar from reflecting the parties' intention to 'apply their financial resources to and for the benefit of each other's persons, assets, and liabilities,'" these facts reflected "the parties' express intention not to do so." (Citation and ellipsis omitted). See Maria v. Freitas, 73 Haw. 266, 272, 832 P.2d 259, 263 (1992) ("On the contrary, the facts demonstrate a deliberate design to keep their property separate.”).

Accordingly, I would remand to the family court to determine whether Collins’ and Wassell’s actions were substantially consistent with their intention to maintain separate financial identities.

/s/ Richard W. Pollack