

DISSENTING OPINION BY FOLEY, J.

I respectfully dissent.

Darryl contends the family court erred by denying his request for post-decree relief on the grounds that the divorce decree was unconscionable.

Family courts "must enforce all valid and enforceable postmarital and separation agreements." Balogh v. Balogh, 134 Hawai'i 29, 40, 332 P.3d 631, 642 (2014). An unconscionable agreement is not enforceable. Id.

Unconscionability encompasses two principles: one-sidedness and unfair surprise. One-sidedness (i.e., substantive unconscionability) means that the agreement "leaves a post-divorce economic situation that is unjustly disproportionate." Unfair surprise (i.e., procedural unconscionability) means that "one party did not have full and adequate knowledge of the other party's financial condition when the marital agreement was executed." A contract that is merely "inequitable" is not unenforceable. The unconscionability of an agreement regarding the division of property is evaluated at the time the agreement was executed.

Id. (internal citations, brackets, and footnote omitted) (citing and quoting Lewis v. Lewis, 69 Haw. 497, 500-07, 748 P.2d 1362, 1366-69 (1988)).

Darryl argues that the "equalization payments" in the divorce decree were so one-sided as to be unconscionable. "[A]n impermissibly one-sided agreement may be unconscionable even if there is no unfair surprise." Balogh, 134 Hawai'i at 41, 332 P.3d at 643. However, the agreement must be "outrageously oppressive as to be unconscionable in the absence of unfair surprise." Id. at 42, 332 P.3d at 644.

Patricia's income and expense statement listed her monthly net income at the time of divorce at \$3,439.99. Darryl's income and expense statement listed his monthly net income at the time of divorce at \$6,260.52. Among other assets, the couple listed three real properties in their asset statements. In the divorce decree, Patricia was awarded a property valued at \$805,000 with an outstanding debt of \$383,000. Darryl was awarded a property valued at \$325,000 with an outstanding debt of \$82,593. Patricia and Darryl agreed to jointly own the third property.

The other major assets at the time of divorce were Patricia and Darryl's retirement accounts. Patricia listed three retirement accounts with vested values at the time of divorce estimated at \$6,500, \$53,275, and \$8,000. Darryl listed two retirement accounts, with vested values of \$4,000 and \$280,495.

The divorce decree provides, "In consideration for [Patricia] waiving her claim to [Darryl's] retirement, [Darryl] agrees that he will provide [Patricia] an equalization payment of \$2400, per month, for a period of 360 months." The total amount of the equalization payment, at the end of 360 months, would total \$864,000, almost three times as much as Darryl had in his retirement accounts at the time of divorce. Assuming, for the sake of argument, that Darryl continued working for twenty years after his divorce, Darryl, who was 48 at the time of the divorce, would owe Patricia \$288,000 after he retired over the course of the remaining ten years. Enforcement of the divorce decree would likely deplete Darryl's retirement accounts, defeating the stated purpose of the "equalization payment." Under the specific facts of this case, Darryl has demonstrated that the "equalization payment of \$2400, per month, for a period of 360 months" is outrageously oppressive as to be unconscionable. See Balogh, 124 Hawai'i at 41-42, 332 P.3d at 643-44. The family court abused its discretion in denying Darryl relief under HFCR Rule 60(b)(6) because the terms of the divorce decree were based on an unconscionably one-sided and unenforceable marital agreement.

Presiding Judge