NO. 22858

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

EDWARD JOSEPH CHING, Plaintiff-Appellee, Cross-Appellee, v. TANYA LYNAE CHING, now known as Tanya Lynae Cassoni, Defendant-Appellant, Cross-Appellee, and MITCHELL J. WERTH, Former Custody Guardian Ad Litem, Party in Interest-Appellee, Cross-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D No. 97-3119)

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

This appeal stems from a custody dispute in the Family Court of the First Circuit (the family court) over the twin children (the twins or children) of Plaintiff-Appellee, Cross-Appellee Edward Joseph Ching (Father) and Defendant-Appellant, Cross-Appellee Tanya Lynae Ching, now known as Tanya Lynae Cassoni (Mother). Although Mother stipulated to the entry of a divorce decree awarding permanent legal and physical custody of the children to Father, she subsequently filed a Hawaiʻi Family Court Rules (HFCR) Rule 60(b) motion to set aside the custody award portion of the divorce decree on the basis of fraud, misrepresentation, and misconduct on the part of Father and a custody guardian ad litem (CGAL), who was appointed by the family court. Upon the family court's denial of Mother's motion, as well as Mother's subsequent motion for reconsideration, Mother appealed. We affirm.

BACKGROUND

A. The Parties

Mother and Father were married in Honolulu, Hawai‘i on November 26, 1995. The union resulted in fraternal twins, Gabriella Kay Ching and Hunter Levy Ching (Hunter), born on December 2, 1996.

The marriage was marked by difficulties from its beginning. According to Mother, Father had a history of drug and alcohol abuse and physically abused her on numerous occasions. She claims, for example, that in late August 1997, Father choked her while she was holding one of the twins. Mother's account of the choking incident is described in a police report dated August 17, 1997, which includes a statement by a police officer that he had observed "visible redness to both sides of [Mother's] neck." In order to escape the abusive environment, Mother states she left Hawai‘i on August 27, 1997 and took the twins back to her family's home in Hannibal, Missouri. Father vehemently denies physically abusing Mother and points out that he has never been convicted of abuse.

Father also complains that Mother traveled out of state twice without informing him. The first incident occurred in July 1996, when Mother traveled to Hannibal, Missouri and "prevented [him] from being present at [the] children's birth." The second incident occurred on August 23, 1997, when Mother disappeared with the twins, prompting Father to file a report of Custodial

Interference with the Honolulu Police Department (HPD) and, on September 9, 1997, a complaint for divorce.

B. The First CGAL's Recommendation as to Temporary Custody of the Twins

On September 16, 1997, Father filed a motion seeking temporary sole legal and physical custody of the children. Mother responded the following day by also filing a motion for temporary custody of the children. After a hearing on both motions on September 24, 1997, the family court entered an October 2, 1997 order that provided, in relevant part, that: (1) Mother would have temporary legal and physical custody of the children until November 14, 1997, when a hearing was scheduled to reexamine the custody issue; (2) upon Mother's return to Hawai‘i on October 1, 1997 and until the November 14, 1997 hearing, Father would have visitation with the twins as set forth in the order; and (3) the family court would appoint a CGAL to prepare a custody recommendation for the court.

The family court thereafter appointed Dr. Terri Needels (Dr. Needels) as CGAL and directed her to submit a report on or before November 7, 1997. Father was ordered to pay Dr. Needels' one-time fee of $1,000.

In a report dated November 8, 1997, Dr. Needels: (1) recommended that (a) Mother be given sole legal and physical custody of the twins, and (b) Mother and the twins be allowed to reside in Missouri; and (2) endorsed a visitation scheme that would (a) require Mother to return to Hawai‘i with the twins

every three months, three times a year, and (b) allow Father to visit the children in Missouri once a year. Dr. Needels based her custody recommendation, in part, on evidence she had uncovered that suggested that Father had a history of altercations, abusiveness towards family members, and anger control problems.

On November 20, 1997, Father, unhappy with the report, moved to disqualify Dr. Needels and disregard her report or, in the alternative, for an additional hearing on the matter. Father claimed that the report was an example of "irresponsible reporting" and was "[un]balanced[,]" "bias[ed,]" and had an "appearance of impropriety."

Following a December 10, 1997 hearing on Father's motion, the family court, Judge Paul T. Murakami (Judge Murakami) presiding, orally denied the motion and approved Dr. Needels' recommendation to award temporary custody of the children to Mother. The family court deferred ruling on the permanent custody, child support, and alimony issues until trial, "which shall be scheduled in April, 1998," and on December 15, 1997, appointed Party in Interest-Appellee, Cross-Appellant Mitchell J. Werth[1] (Werth or Mr. Werth) as the second CGAL, "to determine the issue of permanent custody" and to prepare a report with recommendations on or before February 19, 1998. The family court

[1/] Although the order appoints "Mitchell A. Werth," the substantive evidence in the record indicates that his name is Mitchell J. Werth (Werth).

ordered Mother and Father to pay Werth's fees equally, with no cap on the total fees.

On December 26, 1997, Judge Murakami entered a written order, concluding, in relevant part, as follows:

> [I]t is in the best interests of the children to return to Missouri with [Mother]. [Mother] is awarded temporary sole legal and physical custody of the parties' minor children. [Mother] is hereby authorized to leave the island on Wednesday, December 17, 1997, with the children. The [c]ourt further orders that the parties adhere to the visitation schedule as recommended by the CGAL in her report, dated November 7, 1997.
>
> Until further [o]rder of the [c]ourt, [Mother] shall bring the children back to Hawaii once every three months, three times per year and [Father] shall visit the children in Missouri once per year.

C. The Second CGAL's Recommendations as to Permanent Custody

On December 19, 1997, pursuant to the December 26, 1997 order, Mother took the children to Missouri and was expected to return to Honolulu three months later, no later than March 17, 1998.

On March 3, 1998, prior to Mother's scheduled return, Susan Orlando Liu (Liu), Mother's attorney, faxed a letter to Werth, confirming that Father was arranging for an apartment, automobile, parking, and cribs for Mother and the twins for their upcoming visit to Hawai‘i. Liu also requested that Werth contact her to discuss the possibility of postponing Mother's return trip to Hawai‘i until April, to coincide with the scheduled April trial and spare Mother and the twins the stress of having to make two long airline trips within a relatively short time period. Liu stated that this arrangement would allow Father to be with

the children for the two weeks ordered, save him some money, and hopefully allow meaningful settlement negotiations to take place. Liu also reminded Werth that she would be out of town on vacation from March 17 to April 2, 1998. Werth and Father both agreed to the changes in travel plans recommended by Liu.

However, on March 18, 1998, the day after Liu left for a vacation in Europe, Father filed a Motion and Affidavit for Pre-Decree Relief, seeking an order awarding him temporary legal and physical custody of the children. Father claimed that Mother was in violation of the December 26, 1997 order because she had not brought the children back to Hawai‘i by March 17, 1998. A hearing on the motion was initially set for April 8, 1998.

However, on March 20, 1998, Father brought an *ex parte* motion to move up the hearing date, citing Mother's refusal to bring the children back for Father's court-ordered visitation, and stating that "we have obtained Dr. Wright's opinion that these young children may be permanently physiologically damaged. As they may view [Mother's] refusal to bring the two minor children back for [Father's] court ordered visitation in a similar way that they experienced [Mother's] kidnapping them and hiding them from [Father] for a 40 day period from August 24, 1997 to October 2, 1997." Judge Kenneth E. Enright granted Father's motion the same day and advanced the hearing to April 1, 1998. No prior notice of the April 1, 1998 hearing was provided to Liu or Mother.

By a letter dated March 24, 1998, which was dictated by Liu from Europe, signed by Liu's secretary, and faxed on March 24, 1998 to Father's attorney, Sidney Michael Quintal (Quintal), a copy of which letter was also faxed to Werth, Liu informed Quintal:

> [Father] has not fulfilled his agreement which I assured was forthcoming prior to [Mother's] departure.
>
> Neither I nor the CGAL has received cashier checks for the March child support; the April child support; for one round trip airfare (approximately $1,250.00); assurances a two bedroom apartment has been secured for [Mother] and the twins; the name and address of the apartment complex; cribs or toddler beds for the twins; keys to the apartment in the CGAL's hands; and, keys to a vehicle in suitable condition with requisite insurance in the CGAL's hands.
>
> Since there are still no assurances that an apartment is available, the CGAL will have to verify that all the above agreements have been met and the apartment is in fact available.
>
> Unless or until this office has received assurances that all the above has been fulfilled, there is no agreement. Please be reminded I am out of town and will return April 2, 1998.

(Emphases in original.)

By a letter dated March 26, 1998, which was faxed and hand delivered to Liu on the same date, Werth responded to Liu's letter, stating:

> In response to your March 24 letter and incidents up through this day, I am concerned that the direction of this case is now going against the children's best interest, against our previous understandings and agreements, and against the spirit of resolution. It is incumbent for you to set things back on track immediately for the following reasons:
>
> 1. Originally, [Mother] and the twins were to be here by March 17 per prior court orders, but to help accommodate your European vacation and your absence from Hawaii March 17-April 2, as well as [Mother's] concern to avoid the cost of a second trip to Hawaii from Missouri . . . I negotiated to delay [Father's] visit with the children and rearranged the court hearing dates, including the trial week all within April 1998.

2. UNDERSTANDING THAT FLIGHTS ARE GETTING BOOKED BECAUSE OF SPRING BREAK and TIME BEING OF THE ESSENCE, I helped make arrangements with the cooperation of [Father] per my March 24 letter and fax to your client and made sure your office got that fax at 8:30 a.m. (Before you were to call your office that a.m.) to help accommodate and make things easier for [Mother] and the children by giving her two (2) options and other assurances.

3. [Mother] called and left a message at 8:15 a.m. on March 24 stating that she made her own reservations (foregoing [Father's] offer) for April 2nd and that the child's fare was $556 + tax and that she would call me later to give me the specifics of flight and arrival information.

4. At 12:29 p.m. on March 24 your letter to [Quintal] was faxed to my office. Your letter stated incorrect information and set unreasonable new conditions. For instance, you ignored the copy of [Father's] cashier's check for March child support (the necessary precondition for the flight reservation), set new preconditions and negated our agreement that you left me to work on in your absence and to which I was fully complying (plus my adding additional amenities to the benefit of [Mother] and the children).

5. I have been in contact daily with your office since March 24 (speaking with your secretary and by leaving messages) failing to get any direct contact back from you to clarify. Note: I have been making it clear since before your departure and to [Mother] ever since, that she would not have to get on the April 2nd flight unless all necessary terms were met (per my March 24th letter to [Mother]) and if such terms were not met by [Father], then I would hold him responsible for any cost outlay to [Mother] for flight cancellation. [MOTHER] IS STILL RESPONSIBLE FOR THE April 2nd FLIGHT ARRANGEMENTS.

6. If you had any questions whether these terms were in jeopardy, it was incumbent upon you to contact me directly. Instead, you sent the misinformed and inappropriate March 24th letter to [Quintal]. Remember, you left me (in your absence) the responsibility to negotiate terms for the April 2nd arrival of [Mother] and the children.

7. Today, March 26th at 8:30 a.m. (Hawaii time), two days after [Mother] was supposed to have given me the specifics of her April 2nd flight information, I called [Mother]. SHE NOW SAYS THERE ARE NO FLIGHT ARRANGEMENTS BECAUSE OF YOUR ADVICE TO HER (per your letter of March 24). I then informed [Mother] that I expect her and the children to be here on April 2nd. I also left the same message with your office immediately after my call to [Mother].

I still plan to follow through with all necessary arrangements for [Mother] and the children well before their April 2nd departure to Hawaii. I expect them to be here April 2nd.

Father, Quintal, and Werth were present at the April 1, 1998 hearing before Judge Karen Radius (Judge Radius). At the beginning of the hearing the following discussion transpired concerning Liu's absence:

> THE COURT: . . . We're here on a motion for predecree relief that was -- and a motion -- ex parte motion to shorten time filed by [Quintal] on behalf -- on behalf of [Father]. The court has received a letter from [Liu's] secretary indicating that [Liu] is not in town. It's the court's understanding that she's off island. Is it --
>
> [WERTH]: In Europe.
>
> THE COURT: In Europe. Okay. Other than that, we have no written response.
>
> Mr. Werth, you're the guardian ad litem. Do you know when -- and the letter from the secretary from [Liu] is dated March 24th saying that she'll be returning April 2 and that there's a settlement conference on April 9th and the trial for April 27th.
>
> [WERTH]: Yes, that was the understanding all the way -- or even before [Liu] had left for Europe. Just for the record, I had spoken to [Quintal] when I was informed that there was going to be an April 1st hearing, reiterated that the -- she was returning on the 2nd. He was going to try and change the date to April 3rd for when she would be back. But due to the circumstances and recent developments as per a -- the letters that I have handed to the court to review, I have asked that this matter be on for this morning because there's some court matters that we need to address regarding the children. And I'm here on the limited basis for the best interest of the children regarding them being here when they're supposed to be here and some other concerns related to that. I do have a concern that [Mother] may have absconded with the children. I can -- I can relate the specifics of that at the proper time this morning.
>
> THE COURT: All right, the court will hold the hearing this morning. Although we have notice that [Liu] is out of town, quite frankly, I believe as a solo practitioner, her -- her responsibility is to have another stand in if she's not in town.

(Emphasis added.)

Werth then questioned the effectiveness of Liu's representation in this case since Liu had failed to have someone "stand in" for her while she was away. Werth asserted that

"Liu's . . . not showing up[] is critical" to the "question of whether or not [Liu] has been acting in good faith . . . ."

The family court then heard Father's motion to change immediate custody. Father and Werth both explained that they have made several attempts to contact Mother prior to the date she was required to be in Hawai‘i, but these attempts proved fruitless. Werth also stated that the day before Mother was expected in Hawai‘i, he had spoken with Mother's stepmother, who advised him that she did not know Mother's whereabouts. In contrast, Werth said, Father has demonstrated that

> he's willing to do everything possible. He's followed my direction. He's gone to anger management. He's done everything that I've asked him to do, unlike what I've requested -- [Mother] is vilifying him. She's caught up in her personal thing with him, and she's not looked to what's best for the children.
>
> . . . .
>
> My concern is that there's indication that [Mother] may have already started fleeing. We don't know. Father is prepared, and he's made arrangements to have an investigator over there check to see if [Mother] is -- is still at locations over there where we can find out where they are. My concern is that if [Mother] has any hint of knowing that we will be doing anything -- or possibly doing anything to bring the children back that she will flee. She has a history. She has done this before. I -- what she's done is made it very difficult for Father coming and going, for him to see the children.

Judge Radius granted Father's motion and issued an order dated April 1, 1998, that: (1) ordered a change of temporary custody of the children from Mother to Father; (2) authorized Werth "to travel and bring [the children] back to the Jurisdiction of Hawaii"; and (3) authorized Werth to arrange supervised visitations between Mother and the children.

On April 3, 1998, Father and Werth departed Honolulu for Hannibal, Missouri. The same day, Mother filed a Motion for Reconsideration and Motion to Stay Order of April 1, 1998. In an affidavit attached to the motion, Liu attested, in relevant part:

> 2. I have been out of town from March 17, 1998 until April 2, 1998. Prior to my departure, [Werth] and I had several conversations in which it was agreed that [Father] would furnish [Mother] with appropriate living accommodations, transportation, the [c]ourt required child support, parking, beds for the children, and one-half of the air fare. [Werth] assured me that I would be informed of the apartment, the address of the apartment and the keys would be furnished either to my office or [Werth's] office prior to my March 17, 1998 departure. None of the accommodations were arranged prior to my departure.
>
> 3. Both [Quintal] and [Werth] knew that I would be out of town.
>
> 4. The day after I left town on March 18, 1998, knowing that I would be out of town, [Quintal] filed a motion requesting immediate custody of the parties [sic] . . . children . . . .
>
> 5. The hearing was set for April 8, 1998 at 8:00 a.m. a week after I returned.
>
> 6. On March 20, 1998, [Quintal] filed an Ex-Parte Motion for Order to Shorten Time for the Motion.
>
> 7. The Ex-Parte Motion to shorten time was granted and was set for April 1, 1998.
>
> 8. [Werth] made representation to my secretary, Shawna Kinsman, that they had not realized that I would still be out of town and that they would put it on next Wednesday calendar, April 8, 1998.
>
> 9. If I had know [sic] that a hearing would be held on April 1, 1998, contrary to the representation of [Werth], I would have had Ms. Wasson who was available on stand by [sic] to handle the emergency for me.
>
> 10. I have been working towards getting [Mother] here. However, there were no assurances or representations that she would have a place to stay.
>
> 11. On Thursday, April 2, 1998, I had a 40 minute conversation with [Werth]. At no time did he inform me that there had been a hearing on April 1, 1998 and that he was authorized to retrieve the children. I informed him that Hunter had an ear infection.
>
> 12. On Friday, April 3, 1998, I contacted the Calendar Clerk to verify that the hearing had been placed on

> the calendar for April 8, 1998. I was informed at that time that the hearing had in fact taken place[.]
>
> 13. I then contacted the Court Clerk (Servi) who informed this office that [Father] had been awarded temporary custody. Servi informed this office that he was surprised that I did not have a copy of the Order because this Honorable Court had signed the Order and [Quintal] had taken it with him following the hearing.
>
> 14. My assistant immediately went to court to retrieve a copy of the order and was informed that there was no copy of the order in the file and no record of a copy being filed.
>
> 15. When I confronted [Werth] as to why he did not inform me that there was a hearing on April 1, 1998, and why I had not received a copy of the Order, he informed me that he was afraid I would advise my client to flee with the children and that they would go into hiding.
>
> 16. As of 3:35 p.m. this day, April 3, 1998, I have not received a copy of the Order from [Quintal] or [Werth].
>
> 17. [Mother] has made airline arrangements to arrive in Honolulu on April 20, 1998, which is after Hunter finishes his medication for his ear infection.
>
> 18. When I informed [Werth] yesterday, April 2, 1998, that my client would be making arrangements to be here on April 20, 1998, he told me he need [sic] to "check on a few things and get back to me." At no time did he inform me that pursuant to court order the children's immediate presence in Hawaii was required.
>
> 19. It would be extremely detrimental to the children and not in the children's best interest to be pulled away from the security of [Mother] and taken away by [Werth].

On April 7, 1998, Liu filed a "Motion for Leave to Withdraw as Counsel for [Mother.]" She gave the following explanation for her withdrawal:

> I am unable to effectively represent [Mother] any longer since she is knowingly violating a court order against my advise [sic] and counsel. She is not following my instructions. There is an Order requiring her to return the children and I have advised her to comply, but so far she has not. My representation of [Mother] has been rendered unreasonably difficult. I can no longer represent her in good conscious [sic] as required by the Rules of Professional Conduct.

Shortly thereafter, Edward J.S.F. Smith (Smith or Mr. Smith) replaced Liu as Mother's attorney.

On April 8, 1998, Werth filed a preliminary CGAL report "in order to get to the heart of the matter as to why temporary custody was changed on April 1, 1998 by [Judge Radius] and why I am now recommending sole physical and legal custody to [Father] with only supervised visitation for [Mother]." Werth stated:

> In short, [Mother] is presently on the run, in hiding and in defiance of the April 1st [c]ourt orders. On April 7, 1998, her own attorney has now filed to withdraw as counsel because [Mother] is "knowingly violating a court order against my advice and counsel. . . ." [Mother] has demonstrated a pattern of putting her own desires over the best interest of the children, utilizing deception, perjury and false accusations and extensive manipulation for her own purposes, at times jeopardizing the health and safety of at least one of the children. She is now believed to be held up in her childhood home town of Hannibal, Missouri, where I personally conducted an extensive investigation with the assistance of a retired certified police officer and private investigator on April 4th and 5th[.]

Werth then outlined his activities and assessments and concluded that Mother had behaved contrary to the best interests of the children. Among the observations made by Werth in his report were the following:

> 1. . . . .
>
> On Thursday, December 17th I received a call that [Mother] was denying [Father] his scheduled visitation with his children because [Mother] was saying "Dr. Tenby (pediatrician) says Hunter is too sick to travel until the weekend and therefore she was not allowing [Father] to see the children". I immediately intervened and scheduled [Father's] goodbye visit for the next day, over [Mother's] objection with the help of her attorney. Unknown to me at the time, was that [Mother] already had a flight scheduled immediately after [Father's] visit, taking Hunter and his twin sister on the **12 hour cross country overnight journey while he was still sick**. Medical records show that Hunter arrived sick and was treated by Dr. Thornton in Hannibal. There was no compelling reason, other than [Mother's] whim, to leave that Friday. . . .
>
> 2. Mother has made numerous allegations and had collected various police reports representing [Father] to be a potential threat to the children and that she feared him. Apparently, Dr. Needles [sic] was impressed by these reports upon my interview with her, as she was of [Mother's] demeanor. My investigation has found [Mother] to have a

hysterical type of personality. For instance, several of those police reports were made by [Mother]. One case went to jury trial and was thrown out because [Mother's] testimony was incredible. Upon reviewing all of the police reports, I found them to be all minor incidents, such as [Father] stopping a girlfriend (years before) from getting into her car and driving drunk to which she created a scene and called the police. Other incidents where [Father] stood up for a girl, and another incident where he pulled the string of a bar hostess' bikini. Of all the incidents over a 20 year period, he was arrested twice and found not guilty twice.

3. Father in fact, upon my observations and various tests and situations over the past four (4) months, has very good anger management skills, as well as excellent parenting skills. . . . The most stress he has is caused by [Mother]. Example: I had the opportunity to view a videotape that was made after [Mother] had abducted the children for 40 days and was court ordered to return by October 1, 1997. The purpose of making the tape was to counter [Mother's] allegations that [Father] should not have an initial unsupervised visit with the children because it would be too stressful for the toddlers who would not have been bonded to [Father]. In fact, the children were following him like newly hatched ducklings imprinted to him. . . . Near the end of the tape **something very interesting occurred**. While he was feeding the children at 5:00 p.m. ([Mother] had a court order to drop the children off to [Father] and pick them up between 5:30 and 6:00) [Mother] called demanding a toaster and another appliance, to which [Father] responded "but they are not working". I could hear her screaming on the phone, to which he answered "you can have them, I just was saying they are not working . .[.] you can have anything you want". [Mother] hung up. Five minutes later [Mother] called again demanding that [Father] drop the children off to her, to which he responded "you know I have a business appointment at 6:00 p.m. and if I drop them off I'd have to bring the nanny with me, then bring the nanny back to the house, then I'd miss my appointment"[.] Again, I could hear her yelling on the phone. . . . At 5:20 p.m. while [Father] was changing diapers, HPD calls threatening to arrest [Father] unless he returns the children to [Mother], and not arguing with the police, [Father] complies. **This is an example of [Mother's] hysteria and her setting up [Father] with false allegation which I had an opportunity to witness**.

4. I read a transcript where [Mother] was being questioned on the stand about whether she ever got advice from an attorney whether she could leave Hawaii with the children (August 1997), to which she insisted she had not and that she was never advised it was a problem. . . . The next question to [Mother] was "Isn't it true you spoke to a Mr. Farrell" to which [Mother] suddenly answered "Oh, Tom", then going on to admit that the attorney advised her it was a violation of custodial rights to take the children out of state. **This is just one of many examples of [Mother's] credibility problems**. . . .

5. I interviewed witnesses that [Mother] claimed supported her allegations that [Father] was abusive to her.

These witnesses denied such abuse, saying the most they saw was a lot of yelling between these parents. Note: [Father] has followed my advise [sic] and has taken and completed an anger management course. I have witnessed him using these skills. He continues to consult with therapists to help him learn techniques to cope with various stressors caused by [Mother's] denial of his visitation with his children, her taunting, false accusations, financial demands she continually makes upon him holding the children hostage in Missouri unless he meets her numerous, unfounded demands. For instance, prior to April 1st, the existing court order obligated [Mother] to bring the children back to Hawaii by March 17th at her own expense and that [Father] was to return the children to Missouri at his own expense. Due to [Mother's] objections to having to make two (2) trips (once visitation and the other for trial), as well as [Mother's] attorney having a European vacation from March 17 to April 2nd, I came up with a plan, convincing [Father] to hold off his long anticipated visit with the children, and with the accommodation of this [c]ourt, the Settlement Conference, Calendar Call and Trial Week were all set within the month of April. This way, I would be able to monitor both parents, see what could work between them for the benefit of the children and to address those problems that the parents could not work out between themselves with a service plan. **The point here** is that [Mother] came up with various preconditions and demands that were not part of the original visitation thereby seeking concessions from [Father] that he previously was not obligated to do. Note: [Mother] made no concessions, only demands. When [Father] showed his compliance, [Mother] added new demands, basically holding him hostage if he was to see his children at the later April 2nd date. As it turns out, [Mother] apparently had no plans to comply with visitation unless he would keep meeting her rising and unreasonable demands that went way beyond his financial means ([Father] was selling all of his premarital assets at fire sales trying to meet her rising demands until he could do no more, which became the breaking point)[.]

6. Most recently, there was an April 1st hearing scheduled by [Father's] attorney which was heard in front of [Judge Radius]. . . . Judge Radius asked me if I felt that [Mother] was snubbing the [c]ourt, to which I answered "yes". I then sought and was granted permission to retrieve the children after informing the [c]ourt in the manner that I planned to carry out the retrieval in a way to have the least adverse effect on the children, which included bringing [Father] with me. At that time, the [c]ourt changed temporary custody to [Father]. As it turned out, [Mother] was going on the run.

. . . .

8. Once in Missouri, after the investigator and I discovered the depth of [Mother's] family's deception and after they were served with the Hawaii Order, we went to the Hannibal police and made an incident report #9804-6539. At that time we presented the police with the investigator's report . . . . and with the Hawaii Order which was registered in Missouri. . . . At that time we stated that we

> were not looking to have anyone arrested but merely wanted the family to bring forth the children and that it was in [Mother's] interest to comply. The police seemed to want to help, but four (4) hours later we received a call from the police that the Sheriff intervened and convinced them to stand back. Our investigation and information gave us reason to believe that the Sheriff and [Mother's] family have some sort of ties that gives [Mother] a shield of protection, thus subverting due process and our ability to retrieve the children. We understood that the Sheriff's office has a reputation for "Setting up" people and we were advised to leave town without delay. We had reason to believe that the authorities were at our hotel in Hannibal after we were at the police station and that we were being monitored. After we left town, we called someone we met who confirmed that [Mother] emerged and was back at work and that the children were seen[.] It seems clear that there is corruption in Hannibal and that [Mother] and her family believe they are beyond the law and are snubbing the Hawaii [c]ourts. As one last bit of evidence, see . . . at the bottom of the page where it is evidenced that the police deleted their records of our incident report, thereby providing [Mother] with a clear record as if nothing ever happened.

(Bolded emphases in original.) Werth recommended that the family court find Mother in violation of court orders and award "full legal and physical custody" of the children to Father. On April 24, 1998, Werth submitted a supplemental CGAL report, reiterating his recommendation that Father be given legal and physical custody of the twins.

In an April 5, 1999 letter to Judge Radius and Judge R. Mark Browning (Judge Browning), the Marion County sheriff provided a totally different account of the events that took place when Werth and Father were in Missouri:

> I have recently seen two reports entered into evidence in a case that both of you reviewed and one of you utilized in your deliberations for settlement. These reports were submitted by Mr. Marty Hodges from Hannibal, Missouri, and a Mr. Mitch Werth, a lawyer representing [Father]. They outlined a remarkable tale worthy of Mr. Twain, a once local resident. However, there is very little truth to their tale.
>
> As I recall, I was contacted on Sunday, April 5th, 1998 by [Mother's] father, David Carr, who informed me that the Hannibal Police Department at the request of Mr. Hodges and

some attorney from Hawaii was trying to serve an order to pick up children. The order had not been signed or reviewed by a local judge. I contacted the Hannibal Police Department and inquired as to why they were being asked by Mr. Hodges and Mr. Werth . . . to assist in picking up twin children subject to a Hawaiian order entered into a foreign judgement [sic] in Marion County, Missouri. We have had a few experiences in this type of filings and it has been established in our state that notification must take place and an opportunity for response must also be allowed. The officers relayed to me that the foreign judgement [sic] had been entered Friday late afternoon of April 3rd and that there was no signature from one of our Judges clearing it for enforcement on their copy.

I then met with the officers and informed them that when the order was enforceable, we, the Sheriff's Office, would accompany Mr. Werth and [Father].

I do not know [Mother] in this matter nor do I know her mother. I never met Mr. Werth nor [Father]. There was never a stakeout of their hotel as we didn't even know where they were staying nor did we care. As far as bugging their rooms, I can hardly get court approval to plant listening devices in known drug labs let alone a hotel room housing two[.]

No one in my office was looking for them until April 6th when a Temporary Restraining Order was issued by Judge Jackson to be served on [Father]. Even then we did not go out searching for [Father] as we expected him to be at the Courthouse soliciting Judge Clayton for his signature on the order. We left word with the court that we had the TRO and to call us when he arrived. That call never came to this office.

I received these reports to review, when Mr. Ronald J. Cassoni[2] and his investigator Kenneth Cloud and other Federal Investigators arrived in Hannibal to look into this matter. It was then that I learned that Mr. Werth was the [CGAL] for the children and not [Father's] lawyer as he reported to be to the Hannibal Police Officers. Additionally, Mr. Hodges and Mr. Werth's story of intrigue, corruption and deception seem better aimed at themselves than at my office.

I understand that currently, Mr. Hodges is committed to the State Mental Hospital in Fulton, Missouri. He has had mental problems for some time and has spent time in both the VA Mental Hospital in Columbia, Missouri and Fulton. Additionally, the credentials that he stated in his report are fictitious, along with his exploits.

To my knowledge Mr. Hodges is not a private investigator certified by this state. Eight years ago he applied for a position with this office. As part of that process we ran a

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[2/] Mr. Ronald J. Cassoni subsequently married Defendant-Appellant, Cross-Appellee Tanya Lynae Ching, now known as Tanya Lynae Cassoni (Mother) in March 1999.

> background investigation that uncovered that he was not what he preported [sic] to be. . . .
>
> Mr. Hodges is also currently under investigation by the State Police and the Hannibal Police Department for a crime involving a juvenile. It is indeed ironic that he was chosen to assist in this matter.

D. The Trial and the Divorce Decree

At the outset of the trial held on April 27, 1998, Quintal announced to the family court, Judge Browning presiding: "[W]e have settled all issues. I've prepared a decree granting divorce. They've requested six additional things, which we have agreed to." Under the settlement, which was read into the record, Father was awarded the care, legal and physical custody, and control of the children, subject to Mother's rights of reasonable visitation. Mother was awarded joint legal custody of the children. Additionally, Mother and Father agreed to accept the visitation recommendations made by Werth in his April 8 and 24, 1998 CGAL reports.

Werth expressed several concerns about the settlement: (1) that the children not leave the jurisdiction unless there is a written agreement between both parties or an order of court; (2) that in order to keep costs down and to serve the best interests of the children, the parties should seek alternate resolutions before employing the services of Werth or another CGAL; and (3) that both parties understand that they are responsible for Werth's fees. Regarding this last point, the following colloquy transpired:

> [WERTH]: . . . I might have missed it, but as far as my guardian ad litem fees, right now they're up to thirty

> thousand -- thirty thousand forty-five dollars, including, you know, today.
>
> I've been partially paid by [Father] and I've gotten thirteen hundred dollars from [Mother], which those things could be offset. But I wanted to be able to have something in there to recognize, you know, what the amount is.
>
> And if the [c]ourt has any questions on the amount, I have detailed logs here that I would be happy to show the [c]ourt.
>
> THE COURT: I don't have any questions, Mr. Werth. I understand what happened in this case.
>
> You both understand that you're responsible for the guardian ad litem's fees, correct?
>
> [MOTHER]: Yes.
>
> THE COURT: Correct, [Father]?
>
> [FATHER]: (Inaudible). . . .
>
> THE COURT: Okay.

The family court then addressed both Mother and Father individually, and both[3] acknowledged that they had heard

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[3/] The colloquy of the Family Court of the First Circuit (the family court) with Mother was as follows:

> THE COURT: Okay.
>
> Now, [Mother], I'm going to ask you some questions -- very short questions.
>
> You've had the opportunity to hear the agreement placed on the record this morning, correct?
>
> [MOTHER]: Yes.
>
> THE COURT: And prior to the agreement being placed on the record, you were involved in negotiations represented by [Edward J.S.F. Smith (Mr. Smith)] -- were just represented by Mr. Smith with [Plaintiff-Appellee, Cross-Appellee Edward Joseph Ching (Father)], correct?
>
> [MOTHER]: Yes.
>
> THE COURT: All right.
>
> And during the course of the negotiations, you had an opportunity to speak to Mr. Smith and seek his advice, correct?
>
> [MOTHER]: On most of it, yes.

(continued...)

[3/](...continued)

THE COURT: Okay.

Are you satisfied with his representation?

[MOTHER]: Yes.

THE COURT: And you understand the terms of the agreement that's been placed on the record this morning?

[MOTHER]: I understand most of it. I don't know if I quite understand all the tax stuff.

THE COURT: All right.

You want to ask him questions at this point to clarify what you don't understand?

[MOTHER]: (No audible response).

THE COURT: Why don't we take a couple minutes to go off the record and [Mother] can take the decree and review the decree or -- actually while you're doing that, I'm going to ask [Father] some questions. Okay.

[MOTHER]: Okay.

. . . .

THE COURT: Back on the record.

[Mother], I was asking you some questions when you indicated to the [c]ourt that you had some questions regarding the terms of the agreement specifically regarding the tax matters, correct?

[MOTHER]: Yes.

THE COURT: And I gave you an opportunity at that time to talk with Mr. Smith.

[MOTHER]: Thank you.

THE COURT: Correct?

And Mr. Smith has explained to you the details or the -- has answered your questions regarding the -- the matters that you had questions about, right?

[MOTHER]: Yes.

THE COURT: Are you satisfied with his answers?

[MOTHER]: Yes.

THE COURT: Now do you understand the terms of the agreement?

(continued...)

the agreement placed on the record, participated in the negotiations, had an opportunity to ask questions of their respective attorneys, and understood the terms of the agreement. Thereafter, the court found that "both parties have voluntarily and knowingly agreed to the terms of this agreement and understand the -- each and every single term of this -- this agreement, which is going to be made part of this decree." The Decree Granting Divorce was subsequently signed by both parties and filed on May 5, 1998. It ordered, in pertinent part, as follows:

> 4. LEGAL AND PHYSICAL CUSTODY[:] [Father] shall be awarded sole physical custody, and control of the children . . . . [Father] and [Mother] to have joint legal custody. [Mother] to have reasonable visitation rights. Each party shall keep the other party informed of his/her residence address and telephone number so long as the children are minors.
>
> . . . .
>
> 5. VISITATION: [Father] and [Mother] agree to and accept, the CGAL's Reports and Recommendations filed with [the family court] on April 8, 1998 and April 24, 1998. [Mother's] visitation to be established based on those recommendations of [Werth]. [Mother] may have weekend visits pursuant to prior written agreement of [Father]. Further a visitation schedule for [Mother] should be determined and executed with express written agreement by [Father] according to each parties [sic] availability outside of school or work.
>
> . . . .
>
> 31. CGAL: [Werth] will remain, on a standby basis only, as the Guardian ad litem for the two minor children . . . until April 2001. To help avoid disputes, both parents shall seek alternate resolution when possible such as mediation to help resolve issues that effect [sic] the

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[3/] (...continued)

> [MOTHER]: Yes.
>
> THE COURT: And do you agree to the terms of this agreement?
>
> [MOTHER]: Yes.

> children's best interest. Further to promote their co-parenting skills [Mother] shall utilize counseling, therapy, parenting programs or other recognized service to help promote the best interest of the children.
>
> a) [Father] to pay 50% and [Mother] to pay 50% of [Werth's] fees of $30,095 up to and including the 4/27/98 hearing less payments received plus any additional fees for subsequent services.

(Emphases added.)

E. The Dispute Over Payment of Werth's Fees

After the divorce decree was filed, payment of Werth's fees became an issue. On December 4, 1998, Werth filed a Motion to Withdraw as CGAL, citing the parties' failure to pay his fees as required under the divorce decree. In a declaration attached to the motion, Werth stated, in part:

> 2. He was appointed as substitute CGAL on December 15, 1997 "entitled to a fee without a cap" and which all parties signed such order on December 10, 1997, [Father] and [Mother] each agreeing to pay 50%;
>
> 3. [Father] made additional written and verbal promises to pay all CGAL fees if [Mother] failed to pay;
>
> 4. When [Father] failed to keep up with his payments during the pendency of this highly complex case, he gave the CGAL a security interest to a 1964 Thunderbird to keep the CGAL working with a continuing promise to make good on payment;
>
> 5. On April 27, 1998 [Father] and his counsel prepared a Decree, stipulated to by [Mother] and her counsel, which was read into the record in open [c]ourt before [Judge Browning] wherein the CGAL's two Reports were "agreed to and accepted" by all parties wherein it stated that over 200 hour [sic] were performed by the CGAL to that date, and the parties both agreed to the $30,095[] up to and including the 4/27/98 hearing less payments received plus any additional fees for subsequent services", such terms that were specifically incorporated into the Decree Granting Divorce filed on May 5, 1998;
>
> . . . .
>
> 8. The CGAL has not seen any good faith payments by either party for an extended period of time, though both parties continue to expect additional work by the CGAL;
>
> . . . .

> 10. Though [Father] was appreciative of the CGAL's efforts at the end of this case on 4/27/98 and reconfirmed his obligation to cover the CGAL's fees (and himself look to [Mother] for contribution thereafter), recently, in avoidance to making good on any of a pile of post-dated checks written to the CGAL and not even making a token $1[] good faith payment, [Father] is now re-creating the history of this case as a ruse, even exhibiting verbal attacks on the CGAL's past performance in an obvious attempt to avoid his responsibility to make payment.

(Emphasis in original.)

In response to Werth's motion, Father filed a declaration on December 8, 1998, stating that he did not contest Werth's withdrawal as CGAL but was withholding any contested remaining amount owed, pending a detailed, itemized bill describing the services rendered by Werth. In addition, Father stated:

> 5) On March 17, 1998 [Quintal] agreed with the CGAL to guarantee that [Mr. Werth] would be paid $10,000 towards his fees and he has. At that time [Quintal] anticipated that his fees would not exceed $20,000 and I would pay my half of the $20,000 and [Mother] would pay her half of $10,000. To this date I have personally paid [Mr. Werth] a total amount of $9000 in cash, checks and services.
>
> . . . .
>
> 10) I am very appreciative of all the time and effort this court and Mr. Werth have extended on my case and have been paying Mr. Werth $500 to $1000 per month for his past hard work and time he spent on this case in good faith hoping that he will prepare an itemized bill soon. Mr. Werth has been very persistent in being paid prior to my attorneys who both were on the case prior to him and therefore he has been receiving "more than I can afford" before everyone. . . .
>
> . . . .
>
> 12) On March 19, 1997 I wrote Mr. Werth a letter (Exhibit A) providing my 1964 Ford Thunderbird Convertible as collateral to Mr. Werth believing his total fees would be capped at $10,000 for his CGAL report. When I committed to this I had no idea that Mr. Werth would later submit a bill for $30,095 therefore I never agreed or indicated that I would "promise" to pay all CGAL fees" as stated in Mr. Werth's December 4, 1998 declaration, paragraph 3. It has been Mr. Werth's insistence that I pay the entire CGAL fees and that I try to get the money back from [Mother]. I believe Mr. Werth thinks he will never get another penny

> from [Mother]. Mr. Werth manipulated me into issuing him posted checks totaling $7000. Since Mr. Werth had been paid more than $10,000 from [Mother] and I for his CGAL fees, I believed that the 1964 Thunderbird used as collateral for the promised $10,000 was sufficiently satisfied per my letter of March 19, 1998, paragraph 3, last sentence. I have stated to Mr. Werth that no court in America would force [Mother] to pay me after I pay her court ordered 50% share of CGAL fees and felt that it was not my duty. Mr. Werth's reply was "I'm not a collection agency" meaning he did not want to go after [Mother] for her share of his fee's [sic]. I believe that he wanted to give me subrogation rights.

(Emphasis in original.) Attached to Father's declaration was a letter from Father to Werth dated March 19, 1998, which stated, in part:

> [Quintal] informed me that you have received $2000 from me and $1800 from [Mother] totaling $4800 thus far towards your CGAL report. Although we do not have a statement from you of your time and services and have not completed your report [Quintal] informs me that you want an additional $5000 prior to completing your report. The $5000 should be split equally between [Mother] and I plus I am ahead of [Mother] by $200.
>
> [Quintal] stated that he wishes to cap your CGAL fees to $10,000 throughout the trial therefore in addition to the $5000 you will be requiring $1200 more bring [sic] your total fees to a $10,000 cap. As you know I am currently without funds to pay the balance of my half in the amount of $3000 and do not want you to have to chase [Mother] for the balance of her half of $3200.
>
> Are you willing to take as collateral a promissory note in the amount of $6200 from me secured by my 1964 Ford Thunderbird Convertible. Although you would continue trying to get [Mother] to pay her half of the money I will stand good for your fees up to $10,000 and will endeavor to offset [Mother's] share during the divorce settlement if she will not pay. I am willing to transfer lien holder [sic] of my 1964 Ford Thunderbird convertible to both your name and my name. I should leave my name as the registered owner because of insurance coverage purposes. In addition I will be willing to park the vehicle within your garage until the vehicle is sold or I am able to pay a maximum of $6,200 more ([Mother's] half $3,200 & [Father's] half $3,000).
>
> I would be willing to sign such a promissory note with the 1964 T-Bird as a collateral for the completion of your CGAL report which was due on February 17, 1998 and is now due on April 2, 1998. I further will agree that if [Mother] and or I do not pay you in full within 2 months of the completion of the trial date then you will be allowed to sell the 1964 T-Bird for no less than $9,000 and pay yourself the $6200. The T-Bird is currently listed in the Buy and Sell for $12,500.

On December 16, 1998, the family court granted Werth's Motion to Withdraw as CGAL.

On March 22, 1999, Werth filed a Motion to Compel Payment to CGAL, which stated, in pertinent part, as follows:

> COMES NOW [WERTH], as CGAL pursuant to the Decree Granting Divorce heard before [Judge Browning] on April 27, 1998 and cited in paragraphs 5 and 31 of said Decree filed on May 5, 1998, as well as other promises of [Father] to the CGAL to stand good for **all** fees that [Mother] cannot or will not pay the CGAL upon which the CGAL relied when accepting appointment of this case, and moves this Honorable Court to Compel Payment to the CGAL forthwith on the ground of the parties [sic] failure to pay the CGAL fees as agreed in said stipulated Decree under paragraph 31(a)[], as well as [Father's] failure to honor additional obligations made to the CGAL.

(Bolded emphasis in original.) In a supporting affidavit, Werth claimed that Father "made verbal promises to keep payments current before CGAL services were commenced upon which the CGAL relied, as well as additional promises, **to pay all CGAL fees if [Mother] failed to pay**, some of which were in writing, in order to keep me working on this case[.]" Additionally, when Father failed to keep up with his payments, Werth stated, "he **gave the CGAL a security interest to a 1964 Thunderbird** to keep the CGAL working with a continuing promise to make good on full payment[.]" (Bolded emphases in original.) The affidavit further stated, in relevant part:

> 5. On April 27, 1998 **[Father] and his counsel prepared a Decree**, stipulated to by [Mother] and her counsel, which was **read into the record** in open [c]ourt before [Judge Browning] wherein the CGAL's two Reports were "agreed to and accepted" by all parties wherein it stated that over 200 hours were performed by the CGAL to that date, and **the parties both agreed to** the **$30,095**[] up to and including the 4/27/98 hearing less payments received **plus** any additional fees for subsequent services", such terms that were specifically incorporated into the Decree Granting Divorce filed on May 5, 1998; . . . Note: Though [Father's] primary

> responsibility to CGAL for **all** fees continued, [Father] stated he wanted the Decree to cite [Mother] for 50% in order that she not be excused to reimburse him for her share.
>
> 6. That since 4/27/98 the CGAL was **called upon to perform services in excess** of an additional twenty (20) hours . . . ;
>
> 7. On May 21, 1998 [Father] cited appreciation for my continued efforts, citing his intent to make a payment plan since the T-Bird (my security interest) had no buyers yet . . . ;
>
> 8. On June 15, 1998 [Father] gave the first set of 8 post-dated checks with a written promise to make "additional payments between these post dated checks in hopes to complete what I owe you sooner" . . . , but since October 1998 <u>when [Father] no longer needed my services</u>, not only had he not made any 'additional payments', the checks (5) have not been good;
>
> 9. In November 1998 [Father] wrote an additional 7 checks, which would have brought up his total payment to $21,500, **if the checks were good** . . . . <u>Note</u>: It turns out those 7 monthly $1,000 checks were misdated starting from March "1998" instead of 1999 raising further questions of bad faith since checks are good for only 6 months, thus already expired.
>
> 10. That the CGAL has received to date less than 1/3 of the fees that were due on 4/27/98, was expected to keep working without receiving additional payments, checks were bouncing, and the **T-Bird security interest that was promised to the CGAL was sold without CGAL's knowledge or consent, the money from which went to [Father's] attorney [Quintal] months ago, informing the CGAL after the fact**;
>
> . . . .
>
> 12. On December 10, 1998 this [c]ourt granted my Motion to Withdraw as CGAL. In the hallway following that hearing, [Father's] attorney Quintal proposed that I hold off depositing any checks until February 1, 1999 by which time they would have a full settlement of my CGAL fees;
>
> . . . .
>
> 14. On February 2, 1999 I deposited [Father's] 5 checks (Oct 98-Feb 99 totalling $4,500) having heard no word to do otherwise, all of which were returned to me citing "insufficient funds";
>
> 15. Thereafter, [Father] made it clear to me that he would not act in good faith to make good on any payment, and it being clear to me that Father had been perpetrating a fraud regarding his checks, I turned the bad check matter over to HPD on February 18, 1999[.]

(Bolded and underscored emphases in original.)

Attached to Werth's affidavit were several letters written by Father to Werth. In a letter dated March 29, 1998, Father stated "I continue to stand good for all of your fees as a responsible parent even if [Mother] can not [sic] or will not pay you."

On March 24, 1999, Father, *pro se*, filed a Motion for Post-Decree Relief from CGAL Collecting Unsubstantiated CGAL Fees and Compel CGAL to Provide Written Verification of His Verbal Request for $30,095. Father requested that the family court determine if Werth was "required to abide by [Hawaii Revised Statutes §§] 587-34 [(1993)[4]] and 571-87 [(1993)[5]] and/or

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[4/] Hawaii Revised Statutes (HRS) § 587-34 (1993), which is part of the Child Protective Act, sets forth the process for appointing and compensating a guardian ad litem for a child involved in a child protective proceeding. It also describes the duties of a court-appointed guardian ad litem (GAL) in a child protective proceeding.

[5/] HRS § 571-87 (1993) provides as follows:

> **Appointment of counsel and guardian ad litem; compensation.** (a) When it appears to a judge that a person requesting the appointment of counsel satisfies the requirements of chapter 802 for determination of indigency, or the court in its discretion appoints counsel under chapters 587 and 346, part X, or that a person requires appointment of a guardian ad litem, the judge shall appoint counsel or a guardian ad litem to represent the person at all stages of the proceedings, including appeal, if any. Appointed counsel and the guardian ad litem shall receive reasonable compensation for necessary expenses, including travel, the amount of which shall be determined by the court, and fees pursuant to subsection (b). All of these expenses shall be certified by the court and paid upon vouchers approved by the judiciary and warrants drawn by the comptroller.
>
> (b) The court shall determine the amount of reasonable compensation to appointed counsel and guardian ad litem, based on the rate of $40 an hour for out-of-court services, and $60 an hour for in-court services with a maximum fee in accordance with the following schedule:

(continued...)

provide a detailed billing depicting the dates, activities, time and charges to [Father] to verify that his alleged charges of $30,095 include his discounted fees of $100 per hour from April 2, 1998 in Werth's request for $30,095 that was allowed to be placed in the Decree Granting Divorce . . . on his verbal representation dated April 27, 1998 and filed on May 5, 1998 in order to finalize the Decree."

On April 26, 1999, Mother, now represented by attorneys Charles T. Kleintop, Steven L. Hartley, and Durell Douthit, filed a memorandum in response to Werth's motion to compel payment of CGAL fees. In her memorandum, Mother noted that Werth's motion only sought payment from Father. Additionally, Mother indicated that she had "uncovered considerable evidence of fraud, misrepresentation, and other misconduct on the part of [Werth] and [Father]" and intended to file a motion, pursuant to HFCR Rule 60(b), to set aside various provisions in the divorce

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[5/](...continued)

(1) Cases arising under chapters 587 and 346, part X:

(A) Predisposition $1,500;

(B) Postdisposition review hearing ... $500;

(2) Cases arising under chapters 560, 571, 580, and 584 ..... $1,500.

Payments in excess of any maximum provided for under paragraphs (1) and (2) may be made whenever the court in which the representation was rendered certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the administrative judge of such court.

The statutes governing divorce and child custody issues are set forth in HRS chapters 571 and 580.

decree, including the CGAL fees. Accordingly, she requested that the family court defer from deciding her liability for Werth's fees until the court decided the merits of her HFCR Rule 60(b) motion.

On May 7, 1999, the family court, Judge Browning presiding, conducted a hearing on Werth's motion to compel payment of CGAL's Fees and Father's Motion for Post-Decree Relief from CGAL Collecting Unsubstantiated CGAL Fees. Because Father withdrew his motion at the beginning of the hearing, the family court was left to decide only Werth's motion. After hearing arguments from the parties, the family court concluded that the divorce decree was enforceable and, therefore, "[Father] is only responsible for half of the [CGAL] fees, and he will pay that."

Regarding Mother's liability, the family court stayed the order pending resolution of Mother's HFCR Rule 60(b) motion. The family court then discussed with the attorneys the appropriate manner to proceed with Mother's HFCR Rule 60(b) motion. Judge Browning remarked, "What I would like to know from counsel and what is not clear in my mind is does there have to be a trial on this matter . . . . And that's what I need some guidance from you guys on. . . . I don't know off the top of my head." Mother requested a trial to deal with the questions of fact that were likely to arise. Father agreed, suggesting that a one-day trial be held in about six months' time. Werth, on the other hand, voiced his concern that a trial would mean a delay in

his getting paid for his CGAL services. Judge Browning then set a one-day evidentiary hearing for the week of November 1, 1999. Quintal thereafter orally moved to withdraw as counsel for Father.

On May 10, 1999, the family court entered a written order granting Werth's motion to compel payment. The order required Father to pay Werth $6,547 by cashier's check by May 10, 1999 "in exchange for all outstanding post-dated checks contained/referred to in [Werth's motion] to compel payment." Additionally, it: (1) ordered Father to pay the balance of $1,643 to Werth on or before July 2, 1999; (2) granted Quintal's motion to withdraw as Father's counsel; (3) directed Mother "to pay [Werth] her 50% share of the fees pursuant to the May 5, 1998 Decree"; but (4) stayed payment by Mother of her share of Werth's fees "pending further order of the [c]ourt."

F. Mother's Motion for Relief from the Divorce Decree

On May 5, 1999, Mother filed a motion for relief from the May 5, 1998 divorce decree, requesting

> the [c]ourt to set aside the provisions in the parties' May 5, 1998 Divorce Decree addressing legal and physical custody, visitation, child support, and the [CGAL] for the following reasons:
>
> A. Actual Fraud Upon [Mother] And The Court.
>
> 1. [Mr. Werth] and [Father] perpetrated a fraud upon [Mother] and the [c]ourt by orchestrating and participating in a scheme wherein [Father] agreed to pay (and promised to pay) all of Mr. Werth's CGAL fees in exchange for findings, conclusions, and recommendations favorable to [Father] in Mr. Werth's CGAL report(s). The specifics are as follows:
>
> a. On March 22, 1999, Mr. Werth filed a Motion To Compel Payment to the CGAL seeking to collect his alleged outstanding CGAL fees from

[Father] (in excess of $30,000.00). In support of that Motion, Mr. Werth admitted "[Father] made verbal promises to keep payments current before CGAL services were commenced upon which the CGAL relied, as well as additional promises, to pay all CGAL fees if [Mother] failed to pay, some of which were in writing, in order to keep me working on this case". (Emphasis added.)

b. In further support of his request for payment from [Father], Mr. Werth referenced several conversations, oral agreements, and other assorted deals he made with [Father] regarding the payment of his CGAL fees.

c. One of the "side deals" entered into by Mr. Werth and [Father] was that [Father] would give Mr. Werth his 1964 Thunderbird automobile as security for the payment of Mr. Werth's outstanding CGAL fees.

d. The collusion between [Father] and Mr. Werth (unbeknownst to anyone but Mr. Werth and [Father]) was violative of the December 15, 1997 Order requiring an equal sharing of the CGAL fees and resulted in two (2) totally biased and unbalanced CGAL reports in [Father's] favor (dated April 8, 1998 and April 24, 1998) that contained false, inaccurate, and unsubstantiated information.

e. The CGAL reports were read, considered, and relied upon by the [c]ourt and [Mother's] attorneys and directly influenced an unfair result as reflected in the May 5, 1998 Divorce Decree.

2. Mr. Werth and [Father] perpetuated a fraud upon [Mother] and the [c]ourt by making false statements at the April 1, 1998 hearing on [Mother's] March 18, 1998 Motion for Pre-Decree Relief (hereinafter "April 1, 1998 hearing") and in Mr. Werth's April 8 and 24, 1998 CGAL reports, all of which influenced the child-related provisions of the May 5, 1998 Divorce Decree. Examples of these false statements are the following:

a. Mr. Werth made the following false statements at the April 1, 1998 hearing: "[M]y concern is that there's indication that [Mother] may have already started fleeing. My concern is that if [Mother] has any hint of knowledge that we will be doing anything -- or possibly doing anything to bring the children back that she will flee. She has a history. She has done this before. I -- what she's done is made it very difficult for [Father] coming and going, for him to see the children." Mr. Werth had absolutely no basis or support to make any of these false statements.

b. [Father] (through his attorney [Quintal]) falsely represented at the April 1, 1998 hearing that "[Mother] cut off communications with [Father] and the CGAL. And I think she is heading south." [Father] had absolutely no basis or support to make any of these false statements.

c. [Father] (through [Quintal]) falsely represented at the April 1, 1998 hearing that he had "fired" the prior CGAL, [Dr. Needels]. [Father] had absolutely no basis or support to make this false statement.

d. Mr. Werth falsely represented in his April 8, 1998 report that [Mother] was "presently on the run, in hiding, and in defiance of the April 1st [c]ourt [o]rders." Mr. Werth had absolutely no basis or support to make this false statement.

e. Mr. Werth falsely represented in his April 24, 1998 report that "[Father] and I were being stalked by Sheriff Dan Campbell during our stay in Hannibal". Mr. Werth had absolutely no basis or support to make this false statement.

f. Both of Mr. Werth's CGAL reports falsely represented that he faced deception and corruption from [Mother's] family and the Hannibal Police Department when he attempted to retrieve the children on April 5, 1998. Mr. Werth had absolutely no basis or support to make this false statement.

B. Constructive Fraud Upon [Mother] And The Court. In addition to the actual fraud by Mr. Werth and [Father], Mr. Werth perpetuated a constructive fraud upon [Mother] and the [c]ourt by breaching his duty as CGAL to act as an independent and unbiased fact finder in behalf of the children's interest. These breaches influenced the child-related provisions of the May 5, 1998 Divorce Decree. Examples of these breaches are the following:

1. Mr. Werth failed to investigate the serious allegations regarding [Father's] physical abuse of [Mother].

2. Mr. Werth failed to investigate the serious allegations regarding [Father's] alcohol and drug abuse problems.

3. Mr. Werth failed to perform (or have performed) any home study with [Mother] and the children.

4. Mr. Werth failed to record the interviews, if any, he conducted and documents, if any, he relied upon to support his findings and recommendations, thus leaving virtually no record to trace or review.

> 5. Instead of focusing on the children, Mr. Werth made unsupported personal attacks on [Mother], her family, her friends, and the Hannibal Police Department, and thereby abandoned all pretence [sic] of impartiality and became an advocate for [Father].
>
> C. Misconduct Toward [Mother]. In addition to the actual fraud by Mr. Werth and [Father], and the constructive fraud by Mr. Werth, Mr. Werth and [Father] engaged in misconduct directed against [Mother]. This misconduct influenced the child-related provisions of the May 5, 1998 Divorce Decree. Examples of this misconduct are the following:
>
> 1. Mr. Werth and [Father] entered into improper, secret financial arrangements which influenced the findings, conclusions, and recommendations of Mr. Werth. By doing this, Mr. Werth placed his own monetary gain above his duty to the [c]ourt, [Mother], and the children.
>
> 2. As the CGAL, Mr. Werth intentionally:
>
> a. failed to investigate and properly consider the allegations (and proven incidents) of family violence by [Father] against [Mother].
>
> b. failed to investigate and properly consider the allegations (and proof) of [Father's] drug and alcohol abuse.
>
> c. failed to conduct a home study evaluation of the children and [Mother].
>
> d. failed to properly evaluate the case as a neutral and unbiased fact finder.
>
> 3. As an attorney, Mr. Werth violated his duty under Rule 3.3, Hawai'i Rules of Professional Conduct to:
>
> a. not "make a false statement[s] of material fact or law to a tribunal".
>
> b. not "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client".
>
> c. not "offer evidence that the lawyer knows to be false".

(Internal brackets, ellipsis, and capitalizations omitted; emphases in original.) Mother's motion for relief sought to set aside those provisions of the May 5, 1998 divorce decree dealing with custody and to award her sole legal and physical custody of

the children, subject to Father's right to reasonable visitation. Mother also sought child support from Father and an order: (1) requiring Father to pay for all of Werth's fees, and (2) awarding her all of her attorney fees and costs incurred in connection with her motion. Attached to Mother's motion was a thirty-seven-page Memorandum in Support of Motion, in which Mother claimed that

> shortly after his appointment, Mr. Werth began to look after his own interests, instead of the children's. Initially, Mr. Werth demanded payment for his services from both [Father] and [Mother] as prescribed under the December 15, 1997 Order Appointing Custody Guardian Ad Litem. However, at some point early on in his appointment, Mr. Werth made a secret deal with [Father] wherein [Father] promised to "keep payments current before CGAL services were commenced". Mr. Werth admittedly relied on this promise from [Father], as well as on additional promises from [Father] to pay all his CGAL fees if [Mother] failed to pay (some of which were in writing). According to Mr. Werth, all of this was done "in order to keep [Mr. Werth] working in this case". In addition, on March 17, 1998, [Father] agreed to "guarantee" that he would pay $10,000.00 of Mr. Werth's fees. Then, on or about March 19, 1998, [Father] gave Mr. Werth a security interest in [Father's] 1964 Thunderbird to keep [Mr. Werth] working as the CGAL "with a continuing promise to make good on payment". Meanwhile, [Father] also paid Mr. Werth $500.00 to $1,000.00 per month for his "past hard work and time he spent on th[e] case".

(Emphases in original.) Also attached to the motion was an affidavit signed by Mother, in which she averred: "I hereby affirm that I provided all of the factual information contained in the Memorandum in Support of Motion" and "I further affirm that all of the factual information contained in the Memorandum in Support of Motion . . . is true, correct, and accurate to the best of my knowledge and belief, and I adopt it all as my testimony under oath."

On May 6, 1999, Werth filed his response to Mother's motion. Werth argued that Mother's motion should be denied because: (1) the parties made a clear, informed and voluntary stipulation to each of the terms of the divorce decree; (2) the motion was a "continuing sham based on false allegations"; (3) the assertion that he was "paid off is another example of distortions and false allegations"; and (4) the stipulated divorce decree was not the type of judgment for which relief under HFCR Rule 60(b) could be sought.

On June 1, 1999, Werth filed an HFCR Rule 41(b)[6] "Motion to Dismiss [Mother's] Motion for Relief from the May 5, 1998 Divorce Decree, Filed May 5, 1999, or Alternatively, to Remove from Trial Calendar." Werth urged the family court to dismiss the motion on grounds that it failed to state a claim upon which relief could be granted and violated HFCR Rule 7(b)(2) because it was not supported by "an affidavit signed by a person having knowledge of the facts and competent to testify[.]" Alternatively, Werth argued that the hearing should be removed

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[6/] Hawai‘i Family Court Rules (HFCR) Rule 41(b) provides, in pertinent part:

> **(b) Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the claimant has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff or may decline to render any decree until the close of all the evidence.

from the trial calendar because HFCR Rule 60(b) neither provides for a trial nor requires a hearing. Additionally, Werth asserted that Mother was not entitled to maintain an independent action where she has "an adequate remedy at law and is simultaneously pursuing that remedy."

On June 9, 1999, Mother filed a memorandum opposing this motion. She argued that: (1) her affidavit complied with HFCR Rule 7(b)(2) and her motion for relief clearly stated a claim upon which relief could be granted; (2) Judge Browning was acting within his discretion in scheduling a one-day evidentiary hearing; and (3) HFCR Rule 60(b) did not preclude her from pursuing an independent action against Werth and Father under the umbrella of remedies in HFCR Rule 60(b).

On June 14, 1999, Werth's June 1, 1999 motion to dismiss Mother's May 5, 1999 motion for relief from the divorce decree was heard by Judge Diana L. Warrington (Judge Warrington). On July 1, 1999, Judge Warrington issued a decision and order regarding Werth's and Mother's motions, which concluded, in relevant part, as follows:

> 2. While [Mother's] affidavit in support of her Motion for Relief does raise a serious question as to whether her affidavit is sufficient pursuant to HFCR [Rule] 7(b)(2), the [c]ourt denies [Werth's] Motion to Dismiss.
>
> 3. In [Mother]'s Motion for Relief filed May 5, 1999, [Mother] requests the [c]ourt to set aside all of the provisions in the May 5, 1998, Divorce Decree addressing legal and physical custody, visitation, child support, and the CGAL fees. [Mother] requests that the [c]ourt award her sole legal and physical custody of the minor children of the parties subject to [Father's] rights of reasonable visitation, order child support, order [Father] to pay all

of the CGAL's fees and award her all of her attorney fees and costs incurred in connection with her motion.

4. HFCR [Rule] 60(b) provides that on motion or upon such terms as are just, the [c]ourt may relieve a party or legal representative from any or all of the provisions of a final decree, order, or proceeding.

5. [Mother] concedes that nothing in the rule requires the [c]ourt to follow a prescribed course in determining whether or not to provide the relief requested and the [c]ourt has complete discretion to decide how to proceed in each case.

6. Further, the [c]ourt may deny relief under Rule 60(b) without holding a hearing and may decide the issues on the basis of the papers submitted. Hayashi v. Hayashi, 4 Haw[.] App[.] 286 (1983).

7. The [c]ourt herein exercises its discretion and reaches the merits of [Mother's] Motion for Relief on the basis of the papers submitted.

8. In [Mother's] Motion for Relief, [Mother] alleges actual fraud upon the [c]ourt and [Mother] wherein [Father] agreed to pay all of the CGAL fees in exchange for findings, conclusions and recommendations favorable to [Father] in the CGAL's report. Further, that the CGAL committed fraud upon the [c]ourt and [Mother] by making false statements at the April 1, 1998 hearing, and in his CGAL reports dated April 8 and 24, 1998.

9. [Mother] also alleges that the CGAL committed constructive fraud upon the [c]ourt and [Mother] by breaching his duty to act as an independent and unbiased fact finder on behalf of the children's interest' [sic] when he failed to investigate family violence; drug and alcohol allegations against [Father]; failed to conduct a home study of [Mother]; failed to properly evaluate the case as a neutral and unbiased fact finder; and, as an attorney, [Werth] violated his ethical duties by making false statements, failing to disclose material fact, and offered evidence known to be false.

10. The record and transcript of the proceeding on April 27, 1998 are clear that the parties entered into an oral agreement on the record which was approved by the trial judge.

11. [Mother's] counsel, [Smith], read the terms of the agreement onto the record, stating specifically that "[Father] and [Mother] agree to and accept the CGAL reports and recommendations filed with the Family Court on April 8th and April 24th." Said exact terms were incorporated into the Divorce Decree which was signed by [Mother] three (3) days later on April 30, 1998.

12. Moreover, upon questioning by the [c]ourt, [Mother] testified that she understood and agreed with the terms of the agreement. Accordingly, the [c]ourt found that both parties had voluntarily and knowingly agreed to the

terms of the agreement and understood each and every single term of the agreement which was made part of the decree and approved by the [c]ourt.

13. Based upon the record and the papers submitted in support of and in opposition to [Mother's] Motion for Relief, including the transcript of the April 27, 1998, proceeding, this [c]ourt finds that all of the terms of the Divorce Decree were entered into and agreed to and accepted by both parties knowingly and voluntarily.

14. The [c]ourt has carefully considered the records, files and pleadings in this matter.

15. With respect to [Mother's] allegations of actual fraud, the [c]ourt finds these allegations insufficient and not supported by the record.

16. With respect to [Mother's] allegations of constructive fraud, the [c]ourt finds allegations insufficient and not supported by the record. In fact, [Mother] knew of and did not object, at the time of the entering into the agreement on the record, to many of the facts she now alleges to constitute constructive fraud.

17. In addition, with respect to [Mother's] allegations of misconduct, the [c]ourt finds these allegations insufficient and not supported by the record.

18. Wherefore, the [c]ourt finds that the record is devoid of substantial and relevant evidence in support of [Mother's] allegations of fraud, misrepresentation, and other misconduct in the procuring of the legal and physical custody, visitation, and child support provisions of the parties' Divorce Decree and denies [Mother's] Motion for Relief in all respects.

Based on the foregoing, IT IS HEREBY ORDERED,

1. [Werth's] Motion to Dismiss is denied;

2. The trial week of 11/1/99, calendar call of 10/22/99 and settlement conference of 10/14/99 at 1:30 are hereby set aside;

3. [Mother's] Motion for Relief filed 5/5/99 is denied in all respects;

4. Pursuant to the Divorce Decree, [Father] and [Mother] are equally responsible for 1/2 of the total CGAL fees and the [c]ourt hereby enforces the Decree.

5. Each party shall bear their own attorney fees and costs.

On July 12, 1999, Mother filed a Motion and Affidavit for Post-decree Relief, seeking: (1) a modification of legal

custody, physical custody and/or visitation; (2) an order for parenting counseling; (3) the appointment of a limited CGAL to study Mother's requests for temporary relief and to report back with recommendations; (4) a special Friday setting following the receipt of the limited CGAL's report; and (5) the nomination of a CGAL to perform the social study if parenting counseling fails to result in an agreement.[7] Mother sought a temporary relief time-sharing order that would provide for: (1) larger blocks of time for the children to be with each parent (Father was insisting that the children be exchanged almost daily), (2) a return to the amount of time the children spent with Mother before Father learned that she had retained counsel, (3) children to be with Mother when Father was not available to care for them, and (4) Mother to be allowed to take the children to her new home in Texas for a summer visit.

Additionally, on July 20, 1999, Mother filed a motion for reconsideration of Judge Warrington's July 1, 1999 decision and order. In this motion, Mother argued that the family court

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[7/] A hearing was held on Mother's July 12, 1999 motion for post-decree relief on August 4 and 5, 1999 before the family court, Judge Diana L. Warrington (Judge Warrington) presiding. Thereafter, in an order filed on September 13, 1999, Judge Warrington granted Mother's motion and ordered that: (1) Stephanie A. Rezents be appointed as custody GAL and submit a report by December 2, 1999; (2) each party undergo a psychological evaluation, drug screen, and drug assessment; (3) Mother be allowed to take the children "to the Mainland for an appropriate period of time"; (4) permitted the temporary time-sharing schedule to remain, in which Father and Mother alternate custody of their twin children (the children) every other night.

The ordered tests were subsequently administered by Dr. Jerry Brennan, who reported that Mother passed the drug tests and Father failed the initial urine tests and refused to take the subsequent hair follicle test. On December 13, 1999, Mother filed a motion to suspend the time-sharing schedule based on the drug tests.

erred in: (1) denying her motion without holding an evidentiary hearing because her motion for relief "contained numerous and specific allegations of fraud, misrepresentation, and misconduct"; and (2) violated the law of the case doctrine because "Judge Warrington's decision to deny [Mother's] Motion for Relief and set aside the evidentiary hearing directly contradicted Judge Browning's decision to set [Mother's] Motion for Relief for a one-day evidentiary hearing." (Internal capitalizations omitted).

On September 22, 1999, without hearing, pursuant to HFCR Rule 59(j), Judge Warrington entered an order denying Mother's July 20, 1999 Motion for Reconsideration. Mother timely filed a Notice of Appeal on September 30, 1999. On October 22, 1999, Werth filed a Notice of Cross Appeal from the July 1, 1999 "Decision and Order Re: Former CGAL's June 1, 1999 Motion to Dismiss [Mother's] Motion for Relief form [sic] the May 5, 1998 Divorce Decree Filed May 5, 1999, or Alternatively, to Remove from Trial Calendar and [Mother's] May 5, 1999 Motion for Relief from the May 5, 1998 Divorce Decree . . . to the extent that the Decision and Order denied the Former CGAL's June 1, 1999 Motion to Dismiss [Mother's] Motion for Relief from the May 5, 1998 Divorce Decree Filed May 5, 1999, or Alternatively, to Remove from Trial Calendar."[8]

[8/] Werth subsequently withdrew his Notice of Appeal.

On December 23, 1999, Judge Warrington filed Findings of Fact and Conclusions of Law, in which she found and concluded, in relevant part, as follows:

FINDINGS OF FACT

> The [c]ourt hereby incorporates the [c]ourt's Decision and Order filed July 1, 1999 as the [c]ourt's findings of fact numbers 1-18 herein.
>
> In addition, the [c]ourt makes the following two additional findings of fact.
>
> 19. In [Mother's] moving papers, [Mother] neither attached nor referred to any exhibits and cited to the record in support only once.
>
> 20. In [Mother's] moving papers, including her affidavit, [Mother] failed to attest to personal knowledge with respect to many of her allegations of fraud and/or deceit.
>
> 21. To the extent that the Findings of Fact herein are deemed to include Conclusions of Law, they shall be incorporated in the Conclusions of Law.

CONCLUSIONS OF LAW

> . . . .
>
> 2. The [c]ourt has determined that [Mother's] affidavit raised a serious question as to whether her affidavit constituted a failure to comply with [HFCR] Rule 7(b)(2). Nevertheless, despite the infirmity of [Mother's] affidavit, the [c]ourt denied [Werth's] Motion to Dismiss and concluded upon the facts and law that [Mother] had shown no right to relief and denied her [HFCR] Rule 60(b) motion on the merits. To the extent that the [c]ourt incorrectly reached the merits of the [HFCR] Rule 60(b) motion, this [c]ourt concludes, in the alternative, that [Mother's] affidavit constitutes a failure to comply with [HFCR] Rule 7(b)(2).
>
> 3. It is well-established in this jurisdiction that "[g]enerally, the broad power granted by Rule 60(b), HFCR, is not for the purpose of relieving a party from free, calculated and deliberate choices he, she, or it has made." Nakata v. Nakata, 3 Haw. App. 51, 56, 641 P.2d 333, 336 (1982) (citations omitted). See also Hayashi v. Hayashi, 4 Haw. App. 286, 291, 666 P.2d 171, 175 (1983).
>
> 4. A judgment entered pursuant to the prior stipulation of the parties may not be modified or set aside by the [c]ourt, absent a showing that the stipulation itself is open to attack on grounds of fraud, mistake, or misrepresentations. Ainamalu Corp. v. Honolulu Transp. & Whse. Corp., 56 Haw. 362, 363, 537 P.2d 17 (1975). A decree entered by consent of the parties is in the nature of a

contract approved by the [c]ourt and cannot be set aside except on grounds adequate to justify the rescission of the contract. Joaquin v. Joaquin, 5 Haw. App. 435, 444, 698 P.2d 298, 304 (1985).

5. [Mother's HFCR] Rule 60(b) motion seeks relief from a Decree entered pursuant to the prior stipulation of parties. Accordingly, the [c]ourt concludes that to be entitled to relief, [Mother] must show that rescission of the May 5, 1998 Decree is justified on grounds of fraud; in other words, that she was fraudulently induced to stipulate to the Decree.

6. To constitute fraudulent inducement adequate to justify rescission of a contract, there must be: (1) a representation of material fact; (2) made for the purpose of inducing the other party to act; (3) known to be false but reasonably believed to be true by the other party; and (4) upon which the other party relies and acts to his or her detriment. Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Haw. 300, 312, 944 P.2d 97, 109 (Haw. App. 1997) (citations omitted). Moreover, a written contract will be canceled only in a clear case of fraud supported by clear and convincing evidence. Honolulu Fed. Sav. & Loan v. Murphy, 7 Haw. App. [196], 202, 753 P.2d 807, 812 (1988).

7. Even if the [c]ourt were to adopt the standard urged by [Mother] -- that an evidentiary hearing should be granted if the motion contains allegations of operative fact which would warrant relief under [HFCR] Rule 60(b) -- the [c]ourt finds that [Mother] would not be entitled to discovery and a trial because her allegations, as presented to the [c]ourt in her moving papers and affidavit, are insufficient to state a claim that she was fraudulently induced to enter the stipulated Decree.

8. [Mother] has not alleged that the purported misrepresentations in [Werth's] reports, for example that [Mother] was "presently on the run, in hiding and in defiance of the April 1st court orders," were known by [Werth] to be false and were made for the purpose of inducing [Mother] to enter the stipulated Decree, or that [Mother] reasonably believed the statements to be true and entered the stipulated Decree in reliance on the statements.

9. Even if [Mother's HFCR] Rule 60(b) motion could somehow be construed to have alleged facts sufficient to state a claim of fraudulent inducement, the [c]ourt concludes that, given the content of the purported misrepresentations, her sworn testimony that she agreed with and accepted the CGAL reports, her representation by competent counsel throughout the negotiation of the stipulated Decree and the lack of any evidence in support of her allegations, she would not be entitled to discovery and a trial on her [HFCR] Rule 60(b) motion.

10. A trial court may sua sponte deny relief pursuant to [HFCR] Rule 60(b) motion without a hearing and on the basis of the papers submitted. Hayashi, 4 Haw. App. at 287, 294, 666 P.2d at 173, 176-177. Accordingly, a trial court may dismiss a[n HFCR] Rule 60(b) motion pursuant to

> Rule 41(b), HFCR, without taking evidence. Id. at 294, 666 P.2d at 176-177.
>
> 11. The [c]ourt concludes that, on the facts and the law as presented by [Mother] in her moving papers, [Mother] has shown no right to relief pursuant to [HFCR] Rule 60(b) because the record is devoid of substantial and relevant evidence in support of her allegations of fraud, misrepresentation, and other misconduct in the procuring of the legal and physical custody, visitation, and child support provisions of the parties['] stipulated Divorce Decree.

ISSUES ON APPEAL

Mother raises the following arguments on appeal:

(1) The family court abused its discretion by denying her motion for relief from the May 5, 1998 divorce decree without giving her an opportunity to present evidence and to make a record supporting her allegations of fraud, misrepresentation, and misconduct;

(2) The family court clearly erred when it denied her motion for relief from the May 5, 1998 divorce decree on the basis that her supporting affidavit did not comply with the requirements of HFCR Rule 7(b)(2); and

(3) Judge Warrington violated the law of the case doctrine and principles of judicial restraint by overriding Judge Browning's decision to schedule an evidentiary hearing on Mother's motion for relief from the May 5, 1998 divorce decree.

DISCUSSION

A. The Family Court Did Not Abuse Its Discretion When It Denied Mother's Motion for Relief from the May 5, 1998 Divorce Decree Without Holding an Evidentiary Hearing

Alleging that Werth and Father engaged in actual fraud, constructive fraud, and misconduct that warranted the setting

aside of the custody portions of the divorce decree, Mother filed a motion for relief from the May 5, 1998 divorce decree, pursuant to HFCR Rule 60(b), which at the time provided:

> **RELIEF FROM DECREE OR ORDER.**
>
> . . . .
>
> **(b)** ***Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud.*** On motion and upon such terms as are just, the court may relieve a party or his [or her] legal representative from any or all of the provisions of a final decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d)(2); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the decree is void; (5) the decree has been satisfied, released, or discharged, or a prior decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the decree should have prospective application; or (6) any other reason justifying relief from the operation of the decree. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the decree. For reasons (1) and (3) the averments in the motion shall be made in compliance with Rule 9(b) of these rules. A motion under this subdivision (b) does not affect the finality of a decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a decree, order, or proceeding, or to set aside a decree for fraud upon the court.

(Emphasis added.)

Mother now argues that the family court abused its discretion in ruling on the merits of her motion without first holding an evidentiary hearing. She maintains that the family court applied the wrong threshold standard in denying her an evidentiary hearing; namely, the more stringent standard of requiring the movant to show a likelihood of prevailing on a claim or defense. The correct standard, Mother argues, is that the moving party must merely show the existence of a meritorious claim or defense, not a probability of success. We disagree.

HFCR Rule 60(b) does not explicitly require the family court to hold an evidentiary hearing before deciding a motion thereunder. Moreover, in Hayashi v. Hayashi, 4 Haw. App. 286, 666 P.2d 171 (1983), this court held that "[t]he trial court may deny relief under [HFCR] Rule 60(b) without holding a hearing and may decide the issue on the basis of papers submitted." Id. at 294, 666 P.2d at 177.

The ruling in Hayashi is consistent with other jurisdictions that similarly accord great deference to a trial court's decision to dispose of a motion based on the parallel Federal Rules of Civil Procedure (FRCP) Rule 60(b)[9] without

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[9/] Federal Rules of Civil Procedure Rule 60(b) states as follows:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent

(continued...)

first holding an evidentiary hearing. In Atkinson v. Prudential Property Co., 43 F.3d 367, 374 (8th Cir. 1994), for example, the Eighth Circuit Court of Appeals held that

> [n]either the [FRCP] nor the local rules require the district court to hold a hearing or make specific findings in dealing with a Rule 60(b) motion. Rather, whether to grant a hearing or make specific findings in ruling upon a Rule 60(b) motion is left to the district court's discretion.

Id. The court further held that "[g]iven the issues the motion raised, the [district] court's first-hand familiarity with the main case, and the fact that the alleged newly-discovered evidence, a letter, was perfectly clear on its face," a hearing or express findings were not necessary to resolve the issues raised. Id.; quoted in United States v. 8136 S. Dobson Street, Chicago, Ill., 125 F.3d 1076, 1086 (7th Cir. 1997) (holding that the district court did not abuse its discretion in denying a hearing on an FRCP Rule 60(b) motion where movant was permitted "to file any documentation, supplemental evidence, or additional pleadings which he thought might bear on his motion").

The same result was reached by the Fifth Circuit Court of Appeals in Wilson v. Johns-Manville Sales Corp., 873 F.2d 869 (5th Cir. 1989). The Wilson case stemmed from a products liability case brought by fifty plaintiffs against nine manufacturers of products containing asbestos. At trial, the defendants claimed that they were not aware of the harmful effects of asbestos prior to the 1960's and the jury returned a

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[9/](...continued)
action.

"take-nothing verdict" against six of the defendants. More than two years after the entry of judgment as to these six defendants, the plaintiffs filed an FRCP Rule 60(b) motion to set aside the judgment, claiming that "the defendants fraudulently concealed and misrepresented the fact that they knew of the hazards of asbestos as far back as the 1930's." Id. at 871. On appeal, the plaintiffs asserted that the district court should have held a hearing regarding their motion. The court of appeals held:

> [A] decision to hear oral testimony on motions is within the sound discretion of the district court. Here the district court liberally allowed the plaintiffs to supplement their Rule 60(b) motion to the extent that the plaintiffs' total pleadings before the court consisted of the following: the original application with appendix and 34 exhibits, a reply of plaintiffs with 51 exhibits, and a supplemental reply with 41 exhibits. Considering the extensive pleadings and the failure of the plaintiffs to adequately indicate how a hearing would have aided the court's determination, we find that the district court did not abuse its discretion in not holding a hearing.

Id. at 872-73 (citation omitted).

In this case, Mother's moving papers and arguments before the family court clearly set forth her position that Werth and Father had made false statements, misrepresented the facts, engaged in misconduct, and committed actual and constructive fraud in casting her in an unfavorable light as a parent, thus prompting her to concede custody of the twins to Father.

The record certainly does suggest that Werth, prompted by his distrust of Mother, engaged in some deception upon Liu and the family court when he endorsed an expedited change in temporary legal and physical custody of the twins, without notice to Mother and while Mother's attorney was in Europe. The record

also raises questions about whether Werth had a conflict of interest when he looked to Father for payment of all of Werth's CGAL fees. However, Werth passionately set forth in his two CGAL reports the reasons for his distrust of Mother, his suspicions that Mother was "on the run," and his theory that the sheriff's department in Hannibal, Missouri was protecting Mother. Mother specifically adopted Werth's CGAL reports before stipulating in writing to the custody provisions of the divorce decree, instead of contesting Werth's report.

The family court held that even if it "were to adopt the standard urged by [Mother] -- that an evidentiary hearing should be granted if the motion contains allegations of operative fact which would warrant relief under [HFCR] Rule 60(b)[,]" Mother would not be entitled to a trial "because her allegations, as presented to the [c]ourt in her moving papers and affidavit, are insufficient to state a claim that she was fraudulently induced to enter the stipulated Decree." The family court also noted:

> Even if [Mother's HFCR] Rule 60(b) motion could somehow be construed to have alleged facts sufficient to state a claim of fraudulent inducement, the [c]ourt concludes that, given the content of the purported misrepresentations, her sworn testimony that she agreed with and accepted the CGAL reports, her representation by competent counsel throughout the negotiation of the stipulated Decree and the lack of any evidence in support of her allegations, she would not be entitled to discovery and a trial on her [HFCR] Rule 60(b) motion.

Based on our review of the record, we cannot conclude that the family court abused its discretion in so ruling.

B. Whether the Family Court Clearly Erred in Denying Mother's Motion for Relief From the May 5, 1998 Divorce Decree on the Basis that Mother's Supporting Affidavit Did Not Comply with the Requirements of HFCR Rule 7(b)(2)

When Mother filed her HFCR Rule 60(b) motion, HFCR Rule 7(b)(2)[10] provided, in relevant part, that "[i]f a motion requires the consideration of facts not appearing of record, it shall be supported by affidavit, signed by the person having knowledge of the facts and competent to testify." (Emphasis added.) In the present case, Mother alleged in her HFCR Rule 60(b) motion that there was a "secret deal" between Father and Werth in which Father agreed to pay all of Werth's CGAL fees in exchange for a favorable CGAL report. While there is evidence in the record that Father made assurances that he would pay all of Werth's CGAL fees, including Mother's share, and even offered a security interest in his 1964 Thunderbird until such fees were paid, there is nothing in the record to indicate that Father did so in order to secure a favorable report from Werth or that Werth favored Father in reliance on Father's assurances. Additionally, Mother did not present any evidence that she had first-hand knowledge of any "secret deal" between Father and Werth.

[10/] HFCR Rule 7(b)(2) was amended, effective January 1, 2000, to conform to Hawai'i Rules of Civil Procedure Rule 7(b)(2) and now provides as follows: "The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules." This amendment is not applicable to the present case since Mother filed her HFCR Rule 60(b) motion for relief from the divorce decree prior to the effective date of the amendment to HFCR Rule 7(b)(2).

Accordingly, the family court did not clearly err when it concluded that Mother's motion failed to comply with HFCR Rule 7(b)(2).

C. Whether Judge Warrington Violated the Law of the Case Doctrine and Principles of Judicial Restraint by Overriding Judge Browning's Decision to Schedule an Evidentiary Hearing on Mother's Motion for Relief from the May 5, 1998 Divorce Decree

Mother argues that Judge Warrington abused her discretion by overriding Judge Browning's earlier decision to schedule an evidentiary hearing on Mother's HFCR Rule 60(b) motion for relief. In support of her position, Mother relies on the "law of the case" doctrine, which refers to the general policy of a court to not disturb the prior rulings of a court of equal and concurrent jurisdiction in a particular case. For the reasons discussed below, we conclude that Judge Warrington did not abuse her discretion in deciding that an evidentiary hearing on Mother's motion was not necessary in this case.

Under the law of the case doctrine, "unless *cogent reasons* support the second court's action, any modification of a prior ruling of another court of equal and concurrent jurisdiction will be deemed an abuse of discretion." Best Place, Inc. v. Penn America Ins. Co., 82 Hawai‘i 120, 135, 920 P.2d 334, 349 (1996) (quoting Wong v. City & County of Honolulu, 66 Haw. 389, 396, 665 P.2d 157, 162 (1983) (internal brackets and quotation marks omitted; emphasis in original)). The doctrine is "a rule of practice based on considerations of efficiency,

courtesy, and comity." Id. The doctrine is not completely inflexible, however, since a judge is allowed to modify a prior decision of another judge if either cogent reasons support such a modification, or exceptional circumstances are present. Tradewinds Hotel, Inc. v. Cochran, 8 Haw. App. 256, 264, 799 P.2d 60, 66 (1990).

In Best Place, the Hawai‘i Supreme Court reviewed the transcripts of a hearing conducted by the first judge and held that, by implication, the first judge had created the circumstances under which the second judge could modify the first judge's ruling. 82 Hawai‘i at 135, 920 P.2d at 349. In that case, the first judge ruled that if the defendant did not get the discovery cut-off extended by the judge who had initially denied the motion, the defendant's naming of witnesses would be cut off. Id. at 134-35, 920 P.2d at 348-49. From this, the supreme court implied that if the discovery cut-off did get extended, the defendant would be allowed to name witnesses. Id. at 135, 920 P.2d at 349. The supreme court held, therefore, that the second judge had cogent reasons for modifying the first judge's order. Id. at 135-36, 920 P.2d at 349-50.

In the present case, there were cogent reasons to support Judge Warrington's modification of Judge Browning's prior decision to schedule an evidentiary hearing. Specifically: (1) the May 7, 1999 hearing at which Judge Browning scheduled the evidentiary hearing on Mother's HFCR Rule 60(b) motion was being

held to consider Werth's motion to compel payment of CGAL fees, not Mother's HFCR Rule 60(b) motion; (2) Judge Browning explicitly stated at the May 7, 1999 hearing that he was not going to decide Mother's HFCR Rule 60(b) motion, conceded that he did not know the proper way to proceed on Mother's motion, and sought counsels' advice on how to proceed; (3) the May 7, 1999 hearing was held prior to the filing of Werth's June 1, 1999 motion to dismiss Mother's HFCR Rule 60(b) motion for relief from the divorce decree or, alternatively, to remove Mother's motion for relief from the trial calendar, and Mother's June 9, 1999 memorandum in opposition to Werth's motion; and (4) when Judge Warrington held a June 14, 1999 hearing on Werth's June 1, 1999 motion, Judge Warrington had extensive pleadings, exhibits, and transcripts before her to permit a determination that an evidentiary hearing was not necessary to decide Mother's HFCR Rule 60(b) motion for relief from the divorce decree.

CONCLUSION

In light of the foregoing discussion, we affirm: (1) the July 1, 1999 "Decision and Order Re: Former CGAL's June 1, 1999 Motion to Dismiss [Mother's] Motion for Relief from the May 5, 1998 Divorce Decree, Filed May 5, 1999, or Alternatively to Remove from Trial Calendar" and Mother's "Motion for Relief from the May 5, 1998 Divorce Decree Filed May 5,

1999"; and (2) the September 22, 1999 "Order Denying [Mother's] Motion for Reconsideration Filed July 20, 1999[.]"

DATED: Honolulu, Hawai‘i, June 12, 2003.

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