

NOT FOR PUBLICATION

NO. 23090

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

ALLYSON LESLI ONAKA, Plaintiff-Appellee, v.
CLARENCE SHIZUO ONAKA and CLARENCE SHIZUO ONAKA, as
Trustee under the Unrecorded Clarence S. Onaka
Revocable Trust dated January 20, 1987,
Defendants-Appellants, and JOHN DOES 1-10,
JANE DOES 1-10, DOE CORPORATIONS, PARTNERSHIPS AND
OTHER ENTITIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIV. NO. 96-0696)

ORDER GRANTING PLAINTIFF-APPELLEE'S MOTION TO DISMISS APPEAL AND
DISMISSING APPEAL FOR LACK OF APPELLATE JURISDICTION

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

Defendant-Appellant Clarence Shizuo Onaka (Clarence or
Defendant) and Plaintiff-Appellee Allyson Lesli Onaka (Allyson or
Plaintiff) were married on August 1, 1986.

On August 27, 1996, at 9:34 a.m., in Onaka v. Onaka,
Civil No. 96-0696, Circuit Court of the Second Circuit, State of
Hawaii (the Civil Case), Allyson filed a complaint (Complaint)
against Clarence and Clarence Shizuo Onaka, as Trustee Under the
Unrecorded Clarence S. Onaka Revocable Trust dated January 20, 1987
(Defendants), regarding the following three Maui parcels of real
estate:

340 Hana Highway, Kahului, Maui, TMK 3-8-006-007
391 Ehilani Street, Pukalani, Maui, TMK 2-3-47-67
28 Mohala Street, Pukalani, Maui, TMK 2-3-10-009

In relevant part, the Complaint stated as follows:

COUNT I

(Declaratory Judgment)

. . . .

6. Although title to the various properties listed above was not always placed in the name of [Allyson] and [Clarence] as co-owners, (title being variously held by [Clarence], Defendant Trust, and [Clarence] and [Allyson]), [Allyson] claims an ownership interest in each of the parcels by virtue of financial contribution toward the purchase of the properties, including, but not limited to, being a named Mortgagor on mortgages affecting the properties.

7. [Allyson], who was initially on title to the Mohala St. property, quitclaimed her interest to Defendant C. Onaka Trust in early 1996 after [Clarence] threatened to kill himself. [Allyson] signed the Quitclaim Deed as a result of duress, coercion and undue force put on her by [Clarence].

. . . .

COUNT II

(Constructive Trust)

. . . .

15. [Allyson] asserts that Defendants hold the Ehilani St. property aforesaid in a constructive or implied trust for her benefit pursuant to Hawaii Revised Statutes Chapter 501-134.¹

WHEREFORE, [Allyson] prays for relief as follows:

1. That, as to the Mohala St. property, the Court set aside the Quitclaim Deed executed by [Allyson] on February 28, 1996, said deed having been procured by duress and coercion, and that the Court enter Judgment in favor of [Allyson] and against the named Defendants that [Allyson] owns a 1/2 undivided interest in and to all 3 parcels.

2. That the Court enter judgment that Defendants or anyone acting by or through them is enjoined from any further disposition of the property pending the outcome of this action.

3. That [Allyson] be awarded attorneys' fees and costs of suit.

4. That the Court enter such other and further relief as to

^{1/} The 391 Ehilani Street, Pukalani, Maui parcel is land court property. The first sentence of Hawaii Revised Statutes (HRS) § 501-134 (1993) states that "[w]hoever claims an interest in registered land by reason of any implied or constructive trust shall file or record for registration a statement thereof with the assistant registrar."

it seems just.

Also on August 27, 1996, but at 1:49 p.m., in Onaka v. Onaka, FC-D No. 96-0411, Circuit Court of the Second Circuit, State of Hawai'i (the Divorce Case), Clarence filed a complaint against Allyson for divorce.

In the Civil Case, Defendants were served on March 27, 1997. On May 21, 1997, the court clerk entered default against Defendants. On July 1, 1998, Allyson filed a Motion for Declaratory Judgment asking that

the Court find that she has a one-half ownership interest in each of the three parcels of real property that is the subject of this Declaratory Judgment action, that the Court impose a constructive trust on the properties, that the Court order that her name be added as a matter of public record as a co-owner of each of the three properties[.]

On July 6, 1998, Allyson filed her affidavit in support of the Motion for Declaratory Judgment stating, in relevant part, as follows:

12. I believe that Clarence Onaka will continue to attempt to deprive me of an interest in the properties or continue in his course of wasting these assets. If I am not added to title to the properties, I may well lose the opportunity to preserve these assets until such time as the Family Court is able and willing to hear the trial.

On August 12, 1998, Allyson filed an Amended Notice of Pendency of Action stating, in relevant part, that "[t]his Amended Notice of Pendency of Action constitutes notice to all persons claiming or acquiring any interest in the subject properties that the Court has found that [Allyson] is an owner of the property from and before this action was filed in August, 1996."

On August 26, 1998, after a hearing conducted by Judge Shackley F. Raffetto on July 24, 1998, Judge Douglas H. Ige, for Judge Raffetto, entered an "Order Granting [Allyson's] Motion for Declaratory Judgment" stating that Allyson "has a one-half ownership interest in each of the . . . three parcels of land" and that Defendants "currently hold the ownership interest of [Allyson] as stated above in a constructive trust for her benefit[,]" and ordering the execution of "appropriate conveyance documents in recordable form to reflect [Allyson's] one-half ownership interest in each of the three parcels within 5 working days of said documents being presented to [Clarence's] attorney for Defendants' signature(s)."

On September 8, 1998, Allyson's attorney filed a memorandum in which she argued, in relevant part, as follows:

A constructive trust is an appropriate way to protect a property interest. Whether the parties are in the process of divorce or not, the law permits the wronged part [sic] to invoke equitable relief. Defendants cite no law that [Allyson] is limited only to the Family Court as a legal forum, although this appears to be one of their arguments in support of all three motions. As pointed out previously by [Allyson] in response to the same argument made at the time of the Motion for Declaratory Judgment, [Allyson] is not seeking to divide the property, only to protect her interest in the property until the Family Court can make its division of the marital assets. A Declaratory Judgment action is the correct vehicle for achieving this result.

HRS § 632-1 (1993) states as follows:

In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for; **provided that declaratory relief may not be obtained** in any district court, or in any controversy with respect to taxes, or **in any case where a divorce or annulment of marriage is sought.** Controversies involving the interpretation

of deeds, wills, other instruments of writing, statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding. **Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed;** but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, a remedy equitable in nature, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment in any case where the other essentials to such relief are present.

(Emphases added.)

At the hearing on September 16, 1998, the following was stated, in relevant part:

[COUNSEL FOR ALLYSON]: Yes, I considered [HRS § 632-1]. But it's very unclear what it means. But my reading of it is that you cannot use a declaratory judgment proceeding to obtain a divorce; that you must go through . . . the family court statutes to get a divorce.

. . . .

. . . To obtain a divorce, annulment. Doesn't really affect anything as far as, you know, property distribution. That would -- that would mean that you could never impose a constructive trust where a divorce was part of the proceeding between the parties.

. . . [T]here are cases where the constructive trust is imposed, and it's a separate proceeding than a family court proceeding.

It's a determination of interest in property, not a division of the property interest that will be done by the family court.

The problem here is -- that I pointed out is the family court has not addressed the issues. There's no trial date set. In the meantime . . . these defendants are wasting the assets. And I think the constructive trust is appropriate.

So by the time the family court gets around to dividing the marital interest, there's nothing to be divided. . . .

. . . .

[COUNSEL FOR DEFENDANTS]: One more thing, your Honor, one of the problems, I guess, one of the reasons we're so violently fighting the declaratory judgment is that their motion itself is asking that this Court determine that [Allyson] is the one-half owner in the property.

Now, that is inconsistent with asking that a constructive trust be imposed and that's interest --

THE COURT: No, the only thing imposed here is [a] constructive trust.

. . . .

. . . The only thing that's imposed is constructive trust, and as I said at the last hearing, I'm doing that with the understanding that the final disposition of the interest of these people in these properties will be in family court.

. . . .

[COUNSEL FOR ALLYSON]: The orders [have] been entered, and the Court did order at the previous hearing that conveyance documents be prepared, and that he be required to sign off conveying the interest in the property as a viable remedy offered under the doctrine of constructive trust. . . . All it does . . . is give my client the ability to save that interest in the property.

On November 5, 1998, as a result of the hearing on September 16, 1998, Judge Raffetto entered an order denying Defendants' motions (1) to set aside the entry of default, (2) for reconsideration, and (3) to dismiss.

On December 23, 1999, Judge Raffetto entered an

AMENDED ORDER GRANTING DEFENDANTS' MOTION FOR FINAL JUDGMENT UNDER RULE 58 AND/OR RULE 54(b) CERTIFICATION OF ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT FILED AUGUST 26, 1998 AND ORDER DENYING DEFENDANTS' MOTIONS: 1) MOTION TO SET ASIDE DEFAULT BY CLERK AGAINST CLARENCE SHIZUO ONAKA AND CLARENCE SHIZUO ONAKA AS TRUSTEE UNDER THE UNRECORDED CLARENCE S. ONAKA REVOCABLE TRUST DATED JANUARY [20], 1987; 2) MOTION FOR RECONSIDERATION OF CASE AND TO SET ASIDE ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT; AND 3) MOTION TO DISMISS FILED NOVEMBER 5, 1998[.]

Also on December 23, 1999, Judge Raffetto entered an Amended Judgment consistent with the amended order.

On January 11, 2000, Clarence filed a notice of appeal of Judge Raffetto's December 23, 1999 Amended Judgment and thereby commenced this appeal No. 23090.

On December 30, 1999, in the Divorce Case, Judge Douglas S. McNish entered an order granting Clarence's motion for bifurcation of the divorce issue from the property division issues.

On February 17, 18, 22, 23, and 24, 2000, Judge Eric G. Romanchak conducted the trial of the property issues. On June 8, 2000, Judge Romanchak decided the property division issues in the Divorce Case by entering findings of fact and conclusions of law and a Property Division Order.

On August 3, 2001, Allyson filed a notice of appeal of the June 8, 2000 Property Division Order and thereby commenced appeal No. 24463.

On February 6, 2002, in the Civil Case, Defendants filed a motion asking the circuit court "to vacate the [December 23, 1999] Amended Judgment as moot under HRCP Rule 60(b)" and stating that "[s]ix months after the Amended Judgment was entered, . . . the Family Court awarded all real properties in the marital estate to Clarence, following trial in the parties' divorce

proceedings The Family Court also expunged the lis pendens on the three properties Allyson filed in this case[.]"²

On March 13, 2002, after a hearing on February 27, 2002, Judge Raffetto entered a certification stating, in relevant part, as follows:

IT IS HEREBY CERTIFIED, in accordance with the procedure prescribed in Life of the Land v. Ariyoshi, 57 Hawai'i 249, 553 P.2d 464, 466 (Hawai'i 1976), that this Court has determined that Defendant's [sic] Motion for Relief from Judgment Pursuant to HRCF Rule 60(B) filed February 6, 2002 should be granted.

In Life of the Land, the Hawai'i Supreme Court stated, in relevant part, as follows:

Accordingly, we consider that the procedure for motions under Rule 60(b), H.R.C.P. [Hawai'i Rules of Civil Procedure], may and should be consistent with that for motions under Rule 33, H.R.Cr.P. [Hawai'i Rules of Criminal Procedure], where an appeal is pending in this court. Jurisdiction is in this court while the appeal is pending, in both instances. Nevertheless, the motion may be made and considered in the circuit court. If that court indicates that it will grant the motion, the appellant may then move in this court for a remand of the case. During the pendency of the motion in the circuit court, the parties may move in this court for such relief from the appeal requirements as may be appropriate.

Id. at 252, 553 P.2d at 466.

On May 1, 2002, the Hawai'i Supreme Court entered an order that "this case is remanded to the Circuit Court of the Second Circuit for entry of the order on the HRCF Rule 60(b) motion for relief from judgment."

On May 30, 2002, in the Civil Case, Judge Raffetto entered an "Order Granting Defendants' Motion for Relief from

^{2/} The authority for Plaintiff-Appellee Allyson Lesli Onaka to file a notice of pendency of action was HRS § 634-51 (Supp. 2002). It states, in relevant part, that a party "may record in the bureau of conveyances a notice of the pendency of the action[.]" Query the authority of the family court to expunge the notice.

Judgment Pursuant to HRCP Rule 60(B)." This order stated that "the Amended Judgment entered December 23, 1999 is vacated as moot."³ This order did not finally decide or dismiss Allyson's Complaint in the Civil Case.

On April 21, 2003, in this appeal No. 23090 of the December 23, 1999 Amended Judgment, the order entered on June 17, 2002, motivated Allyson to file "Plaintiff-Appellee's Motion to Dismiss Appeal" "in view of the fact this Appeal is moot as the Judgment on which it was brought has been vacated."

DECISION

The prayer of the Complaint is not consistent with the two counts stated in the Complaint. The case was further confused

^{3/} The Hawai'i Supreme Court has defined "moot" as follows:

As mentioned, the parties and children are no longer in this jurisdiction and the parties have stipulated to both subject matter and personal jurisdiction in the New Mexico court. A decision by this court will have no effect on the custody status of the children and/or will be subject to further orders of the New Mexico court. Under such circumstances, this court would be rendering an advisory opinion. See Wong v. Board of Regents, 62 Haw. 391, 394-95, 616 P.2d 201, 204 (1980) ("The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (Citing Anderson v. W.G. Rawley Co., 27 Haw. 150, 152 (1923); Territory by Choy v. Damon, 44 Haw. 557, 562, 356 P.2d 386, 390 (1960), cert. denied, 368 U.S. 838 (1961).)). Inasmuch as the parties have removed themselves and the children to another state and stipulated to jurisdiction in another court, and all issues on appeal, including unfitness, are subject to further order of the New Mexico court, it is not likely that the issue raised on certiorari will likely recur insofar as this court is concerned. See In re Thomas, 73 Haw. 223, 228, 832 P.2d 253, 255 (1992) ("[T]he circumstances under which this situation may recur are too conjectural for appellate review."). Accordingly, the matter is moot[.]

Hoffman v. Hoffman, No. 23247 (Hawai'i Supreme Court filed November 15, 2002).

when Allyson subsequently orally amended her prayer and when the language of the December 23, 1999 Amended Judgment exceeded the court's stated purpose for the December 23, 1999 Amended Judgment. Allyson sought (a) a declaratory judgment that she is an owner of each of the three parcels, (b) a constructive trust of the Ehilani Street parcel, (c) an order setting aside her deed of the Mohala Street parcel, (d) an injunction prohibiting "any further disposition of the property pending the outcome of this [civil] action[,]" and (e) the award of attorney fees and costs. The court's order decided that Allyson owned one-half of each of the three parcels, that Defendants "currently" held her half interests "in a constructive trust for her benefit[,]" and ordered Defendants to convey her half interests to her. This language indicated that the constructive trust lasted only until Defendants conveyed her half interests to her. Subsequently, however, Allyson's attorney confirmed that all Allyson wanted was "to protect her interest in the property until the Family Court can make its division of the marital assets" and the court confirmed that "[t]he only thing that's imposed is [a] constructive trust . . . with the understanding that the final disposition of the interest of these people in these properties will be in family court."

The decision by the circuit court to grant the request by Defendants "to vacate the [December 23, 1999] Amended Judgment as moot under HRCP Rule 60(b)[,]" and the decision by the Hawai'i

Supreme Court to allow the circuit court to accomplish that result further confirms that the sole purpose of the December 23, 1999 Amended Judgment was to create a constructive trust for the preservation of the relevant assets pending the decision by the family court in the divorce case. That being the situation, query whether the circuit court had jurisdiction to enter the December 23, 1999 Amended Judgment. HRS § 580-1 (1993) states, in relevant part, that the family court has "[e]xclusive original jurisdiction in matters of . . . divorce[.]"

In any event, the December 23, 1999 Amended Judgment has been vacated. At this time, no appealable judgment has been entered in this case.

THEREFORE, IT IS HEREBY ORDERED that Plaintiff-Appellee's Motion to Dismiss Appeal is granted and this appeal from the vacated December 23, 1999 Amended Judgment is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, July 31, 2003.

On the motion:

Mary Blaine Johnston,
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge