

NO. 23778

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

DIANE L. BUENO, now known as Diane L. Cattani,
Plaintiff-Appellee, v.
FRANCIS P. BUENO, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 88-1193)

MEMORANDUM OPINION

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

Defendant-Appellant Francis P. Bueno (Francis or Defendant or Father) appeals from the "Order Re: Payment of Plaintiff's Attorney's Fees and Judgment," entered on August 31, 2000 (August 31, 2000 Order Re: Payment), by District Family Judge Allene R. Suemori. We affirm.

BACKGROUND

Francis and Plaintiff-Appellee Diane L. Bueno, now known as Diane L. Cattani (Diane or Plaintiff or Mother) were married on May 7, 1977, in the State of Hawai'i. Their daughter (Daughter) was born on February 9, 1981, and their son (Son) was born on July 4, 1984. Diane commenced this case when she filed a Complaint for Divorce in 1988.

The Divorce Decree entered on May 30, 1989, awarded custody of the children to Diane subject to the rights of reasonable visitation awarded to Francis. It ordered Francis to pay child support of \$860 per month to the Child Support

Enforcement Agency (CSEA). It further ordered, in relevant part, as follows:

6. Child Support. . . . Child support for each child shall further continue uninterrupted so long as said child continues his or her education post high school on a full-time basis at an accredited college or university, or in a vocational or trade school, or until said child attains the age of 23 years, whichever occurs first.

. . . .

7. Private School Costs. Beginning June 1, 1989 Plaintiff shall pay 50% and Defendant shall pay 50% of the elementary and high school educational expenses of the children. Educational expenses shall be defined to include tuition fees, the cost of necessary books and other course materials and other expenses required as a [sic] condition of attendance.

The parties assume that each child will attend private school through high school.

8. Higher Education Expenses. In the event the minor children continue their education post high school, Defendant and Plaintiff shall each assume and pay one-half of all the post high school higher education expenses including but not limited to tuition, fees, book expense, room and board, transportation and a reasonable allowance. Defendant and Plaintiff shall each continue to pay one-half of the higher education expenses for the minor child(ren) until his or her graduation or attainment of age 23 years, whichever shall first occur.

Pursuant to the CSEA's Administrative Findings and Order entered on January 20, 1998, the child support obligation of Francis was increased to \$1,430 per month commencing December 1, 1997.

Thereafter, Diane moved with the children to Illinois. However, in August 1999, Daughter moved back to Hawai'i to attend Hawaii Pacific University while living with Francis.

On November 24, 1999, Diane filed a Motion and Affidavit for Post-Decree Relief. In it, Diane asked for a

recalculation of the obligations of the parties to pay child support, educational expenses, and other sundry relief.

On May 15, 2000, Francis filed a Motion and Affidavit for Post-Decree Relief. In it, Francis stated, in relevant part, as follows: "I HAVE OVERPAID CHILD SUPPORT BY \$5005. I BORROWED \$2000 FROM MY BROTHER MARTIN TO PAY PLAINTIFF TUITION. I WANT CREDIT FOR ALL OF MY PAYMENTS TO PLAINTIFF IN HER ACTION TO OBTAIN TUITION PAYMENTS FROM ME." He also sought an order directing Diane to reimburse him all of his legal expenses.

On August 17, 2000, the court entered an Order Following Final Settlement Conference¹ stating, in relevant part, as follows:

Plaintiff's *Motion and Affidavit for Post-Decree Relief* filed on November 24, 1999, ("Mother's motion") came on for hearing in the above-entitled Court on December 15, 1999 and also on January 26, March 8, March 29, April 27, May 18, July 6 and on July 13, 2000. Defendant's *Motion and Affidavit for Post-Decree Relief* filed on May 15, 2000 ("Father's motion") was *sua sponte* consolidated by the Court for all subsequent hearings and for trial. The parties were ordered to return for a final settlement conference on July 13, 2000 prior to trial, which was set for July 21, 2000 at 8:30 a.m.

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Following discussions between the Court and the parties through counsel, and being fully advised in the premises, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** as follows:

- 1. **No Off-Set Due Father:** In spite of Father's claims that he had over-paid child support which he wanted to off-set against the delinquencies he owes Mother for his share of the children's private education expenses for the 1997-98 and 1998-99 school-years, the Court finds that since January, 2000, Father was reimbursed three (3) checks in the amount of \$715.00 each by CSEA

¹ Nothing in the record indicates that the parties agreed to the content of the August 17, 2000 Order Following Final Settlement Conference. On the contrary, the order indicates that the parties did not agree to its content.

and that a final CSEA reimbursement check for \$715.00 shall be sent to Father on or about August 1, 2000. The Court further finds that Father failed to disclose his receipt of these reimbursements when he filed his own pre-decree motion on May 15, 2000 seeking, *inter alia*, attorney's fees against Mother.

Father's total reimbursement from CSEA is therefore \$2,860.00, and the Court further finds that Mother did not receive any of the excess sums inadvertently withheld from Father's pay by his employer.

Father's *Motion and Affidavit for Post-Decree Relief* is hereby dismissed and shall be one factor considered in ruling upon Mother's request for attorney's fees.

2. Past-Due Private Education Expenses: The Court hereby GRANTS that part of Mother's motion which requests an order requiring Father to reimburse Mother for Father's share of both children's 1997-1998 and 1998-1999 private school expenses that Mother paid on Father's behalf, and Father is hereby **ORDERED** to pay to Mother on or before by August 1, 2000, the sum of \$3,247.50 for his share of said educational expenses that he failed to pay and which Mother paid for him.

3. Denial of Mother's Request For A Hearing Re: Re-Allocation of the Parties' Responsibility to Pay for the Children's Post-High School Educational Expenses: *Sua sponte* and over Mother's strenuous objection, the Court refuses to hold a hearing, take testimony, receive evidence, or to permit trial on Mother's request contained in paragraph 4 of her November 24, 1999 motion, to modify the parties' 1989 *Divorce Decree* to re-allocate the parties' responsibility for contributing to their children's post-high school educational expenses, in spite of the fact that Mother's motion demonstrated and/or alleged that the parties' respective financial circumstances have changed dramatically since entry of the 1989 decree and that the costs associated with [Daughter's] independent decision to attend Hawaii Pacific University ("HPU") are but two of the factors that make it impossible for Mother to financially contribute fifty per cent (50%) of adult daughter's post-high school educational expenses at HPU.

As a result of the Court's refusal to grant Mother a hearing on this issue raised in her November 24, 1999 motion, Father, in effect, retains the right to seek enforcement of the post-high school payment provisions of the decree which allocate post-high school educational expenses between Mother and Father, fifty percent (50%) each, **except that**, the Court hereby specifically ORDERS that Mother shall not owe Father any reimbursement for fees, books, supplies, tuition, costs, room and board, transportation or any other expenses associated with or incurred in connection with [Daughter's] enrollment and attendance at Hawaii Pacific University for the period August 1, 1999 up to and including July 21, 2000.

Accordingly, the trial scheduled for July 21, 2000 is hereby *sua sponte* set aside by the Court.

4. **Current Child Support for Both Children:** Father shall continue to pay to Mother as and for the support and maintenance of [Son] who continues to reside with Mother in Illinois and who will soon be entering his sophomore year at Boylan Catholic High School, the sum of \$715.00 per month, payable in two (2) equal installments of \$357.50. This "pay-out" of \$715.00 per month from Father to Mother takes into consideration Mother's calculated child support obligation for [Daughter] who currently resides with Father while attending HPU in Honolulu, and said sum of \$715.00 per month from Father to Mother is the result of deducting Mother's child support obligation for [Daughter] from Father's child support obligation for [Son] and dividing the difference by twelve (12) to arrive at the monthly "pay-out" from one parent to the other.

Payments of child support shall continue for [Son] until he attains the age of 18, or graduates or discontinues high school, whichever occurs last.

Child support for each child shall further continue uninterrupted (including during regular school vacation periods) for so long as a child continues his or her education post high school on a full-time basis at an accredited college or university, or in a vocational or trades school, or until each child's graduation or until he or she attains the age of 23 years, whichever occurs first.

All payments of child support shall be payable to and made through the Child Support Enforcement Agency ("CSEA"), P. O. Box 1860, Honolulu, Hawaii, 96805-1860, and shall continue to be made pursuant to the Amended Order for Income Withholding that was filed herein on February 4, 2000.

All of the foregoing shall be subject to further order of the Court. CSEA is hereby continued as a party to this action for the limited issue of child support.

5. **Bond:** Mother's request (paragraph 5e of her November 24, 1999 post-decree motion), that Father post a bond in the amount of \$5,000.00 to secure payment of the remainder of Father's share of [Son's] private school tuition through his anticipated graduation in 2003 is hereby taken under advisement pending the Court's receipt from Father of an explicit "direct deposit" or "automatic" payment plan between Father and Boylan Catholic High School, Rockford, Illinois. If Father fails to provide sufficient details (to include bank routing numbers and a contract between himself and Boylan Catholic High School) by no later than September 15, 2000, to secure future private educational expense payments and eliminate all future payment problems, then the bond which Mother has requested shall be ORDERED forthwith and Father shall immediately provide proof of same to Mother via her counsel.

6. **Attorney's Fees and Costs:** Mother's request that Father be ordered to pay her attorney's fees and costs is hereby taken under advisement pending the submission of an Affidavit from Mother's counsel and any other documents which the Court may require. Mother's counsel shall also present to the Court

simultaneously with her Affidavit a form of *Order Re: Payment of Plaintiff's Attorney's Fees and Judgment*.

7. All other provisions of the parties' May 30, 1989 *Divorce Decree* and all other orders subsequently filed herein that are not inconsistent with the provisions hereof, shall remain in full force and effect and unaffected by the provisions hereof.

(Emphases in original.)

Without explanation, the family court entered an identical order on August 31, 2000.

Also, the family court entered its August 31, 2000 *Order Re: Payment* requiring Francis "to pay directly to Plaintiff's counsel within 45 day (sic) of entry of this order the sum of \$5931.93 as and for Defendant's contribution towards Plaintiff's attorney's fees & costs incurred herein, and Judgment in the amount of \$5931.93 is hereby entered against Defendant . . . and in favor of [Plaintiff's attorney]."

On September 29, 2000, Francis filed a notice of appeal of the August 31, 2000 *Order re Payment*.

On October 3, 2000, Francis filed a *Motion to Stay Proceedings Pending Appeal*. On October 12, 2000, the court entered an order stating, in relevant part, as follows: "Defendant is ordered to place \$3000.00 in [Defendant's attorney's] clients [trust account] to be disbursed only by order of Judge Suemori. . . (illegible). *Motion to stay collection of attorneys fees pending appeal granted over objection of [Plaintiff]*."

DISCUSSION

A.

Although Francis did not appeal the August 17, 2000 Order Following Final Settlement Conference or the identical August 31, 2000 Order Following Final Settlement Conference, he challenges the latter in his opening brief.

In his "**STATEMENT OF POINTS ON APPEAL**" Francis states:

A. To the extent that the family court's August 31, 2000 "ORDER FOLLOWING FINAL SETTLEMENT CONFERENCE" was used as grounds to support an award of attorney's fees, it is not fully supported by the record.

. . . .

1. **Paragraph 1** is incomplete, misleading and unsupported by the record. Francis claimed in his motion for relief filed May 15, 2000 that monies for [Daughter's] child support were still being withdrawn from his earnings, and provided copies of his earning statements to support that claim. Whether or not Diane received those monies, Francis claimed that they should not have been continued to be automatically withdrawn.

At the time of the hearing on July 13, 2000 Francis may have already received reimbursement from CSEA for three "excess sums inadvertently withheld" but there is no support for the court's implication that Francis had received or knew he had received those reimbursements by May 15, 2000.

The court failed to address Francis' claim for credit for the \$2000 loan from his brother Martin for the children's school expenses, which Diane had been requesting the [sic] Francis repay to her. (The court, apparently, used the \$2000 to offset the reimbursement sum in ¶ 2, but made no statement that that was what it was doing.)

2. **Paragraph 2** is incomplete and misleading. **See**, point A.1. above.

3. **Paragraph 3** is incomplete and misleading. The court erred in failing to modify the decree to reflect [Francis'] right to enforcement of Diane's 50% post high school expenses for [Daughter]. Further, the court erred in ordering that Diane need not reimburse Francis for her share of [Daughter's] post high school expenses he had already incurred. **See**, HF CR Rule 68 point and argument below.

4. The re-calculation of the parties' reciprocal child support obligations in **Paragraph 4** appears to be unsupported.

5. **Paragraph 5** does not reflect the parties' actual circumstances. Francis filed with the court an "automatic Tuition Payment Schedule" on September 15, 2000.

6. By August 31, 2000, Diane's attorney had submitted to the court an affidavit regarding fees and costs. Therefore, **Paragraph 6** is misleading.

To summarize, [Francis] challenges the foregoing paragraphs of the Order Following insofar as they were made to give support to the court's simultaneous award to Diane of attorney fees and costs, the court's dismissal of the reciprocal claim Francis made in his May 15, 2000 motion for relief.

(Emphases in original; record citation omitted.)

We conclude that we lack appellate jurisdiction to address these challenges to the August 31, 2000 Order Following Final Settlement Conference. The August 17, 2000 Order Following Final Settlement Conference is the effective order and the Notice of Appeal filed by Francis (a) did not purport to appeal it and (b) was filed too late to validly appeal it. The August 31, 2000 Order Following Final Settlement Conference is not the effective order. Even if it was the effective order, Francis did not appeal it. Francis appealed only the August 31, 2000 Order Re: Payment. Therefore, the August 17, 2000 Order Following Final Settlement Conference is a final order not to be disturbed by our opinion deciding the valid appeal of the August 31, 2000 Order Re: Payment.

B.

Francis contends that the August 31, 2000 Order Re: Payment was not authorized by statute, agreement, stipulation, or precedent. To the extent he is arguing that the family court had no discretion under any circumstances to award fees, he admits

his error when he states in his opening brief that "HRS [§] 580-47(e) provides that the family court '**may**' award fees and costs." (Emphasis in the original.) To the extent he is arguing that the family court abused its discretion, we disagree.

C.

Francis contends that in letters dated May 15, 2000, and July 12, 2000, he made a Hawai'i Family Court Rules (HFCR) Rule 68 offer to Diane and that, based on his offer, "**If any fees or costs were to be awarded Rule 68 HFCR entitled [Francis] to his attorney's fees.**" (Emphasis in the original.) Although the two alleged letters are not a part of the record on appeal and, therefore, are not authorized to be appended or referred to in an appellate brief, Orso v. City & County of Honolulu, 55 Haw. 37, 514 P.2d 859 (1973), copies of them are attached to the opening brief. Francis did not move in the family court for an award of fees pursuant to HFCR Rule 68, and the family court did not decide his alleged entitlement thereto. Motions pursuant to HFCR Rule 68 must be made in, and decided by, the family court. The appellate courts decide valid appeals from the family court's decision. No applicable rule or precedent authorizes a HFCR Rule 68 motion to be initiated in the appellate courts. Therefore, this appeal does not involve the question whether Francis should be awarded attorney fees pursuant to HFCR Rule 68.

CONCLUSION

Accordingly, we affirm the family court's "Order Re: Payment of Plaintiff's Attorney's Fees and Judgment," filed herein on August 31, 2000.

DATED: Honolulu, Hawai'i, February 11, 2002.

On the briefs:

Richard Hacker
for Defendant-Appellant.

Chief Judge

Diane L. Bueno, now known
as Diane L. Cattani,
Plaintiff-Appellee, *pro se*.

Associate Judge

Associate Judge