

NOT FOR PUBLICATION

NO. 24717

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

YOUNG AE CHO, Plaintiff-Appellant, v.
TOBE SWEENEY, JR., Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(FC-DIVORCE NO. 84-0043)

ORDER DISMISSING APPEAL

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

Young Ae Cho (Cho) appeals the October 30, 2001 order of the family court of the first circuit, the Honorable Darryl Y.C. Choy, judge presiding, that denied Cho's January 10, 2001 motion for reconsideration of the December 20, 2000 order denying her November 15, 2000 motion for post-decree relief. Cho's motion for post-decree relief sought "a fair portion" of her ex-husband's military retirement benefits, which she had "knowingly waived" in an October 26, 1984 divorce decree.¹

Cho's appeal is not timely as to the December 20, 2000 order denying her motion for post-decree relief because her November 27, 2001 notice of appeal was not filed within thirty days after entry of the order, as required by Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(a)(1) (2001). Cho's January 10, 2001 motion for reconsideration of the December 20, 2000

¹ The Honorable Richard Y.S. Lee, judge presiding.

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order did not extend the time period for filing a notice of appeal of the order, because the motion for reconsideration was not filed within ten days after entry of the order, as required by HRAP Rule 4(a)(3) (2001). Hence, insofar as Cho appeals the December 20, 2000 order, her appeal must be dismissed for want of appellate jurisdiction. Cf. Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai'i 422, 430, 16 P.3d 827, 835 (App. 2000).

It follows, then, that to the extent Cho's January 10, 2001 motion for reconsideration presented the same grounds as her November 15, 2000 motion for post-decree relief -- and for the most part it did -- we will not consider as well her appeal of the October 30, 2001 order denying her motion for reconsideration:

The June 2, 1982 order denying [appellant's] original motion was final and appealable. Since it was not appealed within the time limit . . . it became the final and binding law of the case prior to the filing of [appellant's] second motion on December 6, 1982, and as such, it bars consideration of a subsequent motion under Rule 60(b), [Hawai'i Family Court Rules (HFCR)], which is based on the same grounds.

Dosland v. Dosland, 5 Haw. App. 87, 89, 678 P.2d 1093, 1095 (1984) (citations omitted). Of more comprehensive effect is the circumstance that Cho's January 10, 2001 motion for reconsideration was not filed within ten days after entry of the December 20, 2000 order denying her motion for post-decree relief, as required by HFCR Rule 59(e) ("a motion to reconsider, alter or amend the judgment or order shall be filed not later than 10 days after entry of the judgment or order"). Under the foregoing authorities, either singly or in combination, we will

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not consider Cho's appeal of the October 30, 2001 order denying her motion for reconsideration, at least insofar as the motion for reconsideration presented the same grounds as her motion for post-decree relief. See, e.g., Cuerva & Associates v. Wong, 1 Haw. App. 194, 199, 616 P.2d 1017, 1021 (1980):

The [Hawai'i Rules of Civil Procedure (HRCP)] Rule 60(b)(6) motion contained nothing that [appellant] had not already argued before the court at the trial. It was merely [appellant's] method of asking the court to reconsider its directed verdict [upon which the appellant had previously but untimely moved for reconsideration]. In our view, it was a misuse of [HRCP] Rule 60(b)(6).[.]

The only colorably new issue raised by Cho in her motion for reconsideration and on appeal is her allegation that the family court denied her request for an interpreter at the hearing on her motion for post-decree relief, even though she had brought a Korean language interpreter with her to court. In order for us to consider this issue, a transcript of the hearing is necessary. But Cho failed to include a transcript in the record on appeal.

According to HRAP Rule 10(a)(4) (2001), "The record on appeal shall consist of the following: the transcript of any proceedings prepared pursuant to the provisions of [HRAP] Rule 10(b)[.]" (Format modified.) HRAP Rule 10(b)(1)(A) (2001) places on the appellant the affirmative burden of providing necessary transcripts:

When an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court or agency appealed from, the appellant shall file with the clerk of the court appealed from, within 10 days after filing the notice of appeal, a request or requests to prepare a reporter's transcript

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of such parts of the proceedings as the appellant deems necessary that are not already on file.

Hence, it is well settled that, "'The burden is upon appellant in an appeal to show error by reference to matters in the record, and he or she has the responsibility of providing an adequate transcript.'" Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) (brackets omitted) (quoting Union Bldg. Materials Corp. v. The Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984)). See also State v. Hoang, 93 Hawai'i 333, 334, 3 P.3d 499, 500 (2000); Lepere v. United Pub. Workers, Local 646, AFL-CIO, 77 Hawai'i 471, 474, 887 P.2d 1029, 1032 (1995); State v. Goers, 61 Haw. 198, 202-3, 600 P.2d 1142, 1144-45 (1979); State v. Hawaiian Dredging Co., 48 Haw. 152, 158, 397 P.2d 593, 598 (1964); Marn v. Reynolds, 44 Haw. 655, 663, 361 P.2d 383, 388 (1961); Ling v. Yokoyama, 91 Hawai'i 131, 135, 980 P.2d 1005, 1009 (App. 1999); Costa v. Sunn, 5 Haw. App. 419, 430, 697 P.2d 43, 50 (1985); Johnson ex rel. Galdeira v. Robert's Hawaii Tour, Inc., 4 Haw. App. 175, 178, 664 P.2d 262, 265 (1983); Hawaiian Trust Co., Ltd. v. Cowan, 4 Haw. App. 166, 168, 663 P.2d 634, 636 (1983).

Furthermore, HRAP Rule 11(a) (2001) provides that, "After the filing of the notice of appeal, the appellant . . . shall comply with the provisions of [HRAP] Rule 10(b) and shall take any other action necessary to enable the clerk of the court to assemble and transmit the record." See also Bettencourt, 80 Hawai'i at 231, 909 P.2d at 559 ("it is counsel's responsibility

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to review the record once it is docketed and if anything material to counsel's client's case is omitted or misstated, to take steps to have the record corrected" (brackets, citation and internal quotation marks omitted)).

An appellant's failure to include necessary transcripts in the record on appeal may result in dismissal of the appeal. See Marn, 44 Haw. at 664, 361 P.2d at 389; Johnson, 4 Haw. App. at 178-79, 664 P.2d at 265-66; Hawaiian Trust Co., Ltd., 4 Haw. App. at 168, 663 P.2d at 636.

Therefore,

IT IS HEREBY ORDERED that this appeal is dismissed.

DATED: Honolulu, Hawai'i, May 19, 2004.

On the briefs:

Andre' S. Wooten, for
plaintiff-appellant.

Adrienne S. King and
Samuel P. King, Jr. (King & King),
for defendant-appellee.

Chief Judge

Associate Judge

Associate Judge