

NOT FOR PUBLICATION

NO. 25476

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

KRISTINA KEMENY, Plaintiff-Appellant, v.
MATTHIAS KEMENY, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 02-1-2798)

MEMORANDUM OPINION

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

Plaintiff-Appellant Kristina Kemeny (Kristina) appeals from the family court's October 16, 2002 order denying Kristina's motion for pre-decree relief, granting the motion filed by Defendant-Appellee Matthias Kemeny (Matthias) for an order dismissing this divorce case, and stating that the divorce case filed by Matthias in Washington State "shall go forward." We affirm.

BACKGROUND

March 4, 1998	In Honolulu, Kristina gave birth to Daniel Andrew Mullen Kemeny (Daniel). Matthias is Daniel's father.
August 12, 2000	Kristina and Matthias were married in Washington State.
August 17, 2001	Kristina prematurely terminated her summer visit with Matthias in Washington State and returned to Hawai'i with her daughter and Daniel.
August 29, 2001	In Washington State, Matthias filed a complaint for divorce.
September 5, 2001	Kristina was served in Hawai'i.

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September 20, 2001 In Hawai'i, Kristina filed a complaint for divorce (FC-D No. 01-1-3198).

October 21, 2001 Matthias was served in Washington State.

November 7, 2001 In Kristina's divorce case in Hawai'i, Matthias filed Defendant's Motion to Dismiss Complaint for Divorce Filed September 20, 2001. In his affidavit, signed on November 6, 2001, Matthias stated, in relevant part, as follows:

2. . . . I have been a resident of the State of Washington since 1996. . . .

. . . .

5. . . . [I]n August or September 1997, I was informed by [Kristina] that she was returning to Hawai'i

6. I traveled to Hawai'i a week before our son ("Daniel") was born on March 4, 1998. The sole purpose of my trip was the birth of our child. I stayed for approximately two weeks. . . . Believing that I might be forced to come to Hawai'i in order to visit my son and realizing the cost of such stays, I decided it would be financially advantageous to purchase a house in Hawai'i for such purpose. I purchased a residence at 968 Kanakou Place, Honolulu. The house is owned solely by me.

7. In my effort to stay in touch with my child, I also had contact with [Kristina's] daughter. In May 1998, I learned . . . that [Kristina] was drinking heavily. While I was concerned for [Daughter], I had particular concern for the well being of my young son. As a result, I offered to rent the Hawai'i house to [Kristina] for a relatively low rent. She agreed and she, her daughter and Daniel moved into the Hawai'i house in late June 1998. Thereafter, I remodeled my Vancouver house so that our son would have a home here in Washington. It was my desire and plan that he would permanently live with me in Washington. In fact, Daniel came to live with me in Vancouver from December 1998 to January 1999, during the Christmas and New Year holiday period. I took care of him solely by myself.

8. [Kristina], her daughter and our son returned to Vancouver during the first week of March 1999 in order to celebrate our son's first birthday at my home in Vancouver. Shortly thereafter, from June to August 1999, Daniel lived with me in Vancouver. I cared for him throughout this period while [Kristina] stayed with her brother in Portland, Oregon. At the end of the summer 1999, [Kristina] and Daniel returned to Hawai'i. . . . To ensure that she would have a safe car for transporting our son, I agreed to let her use my Acura. I had it shipped from Washington to Hawai'i.

9. In October 1999, I visited Hawai'i to see my son. . . .

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10. A few months thereafter, in December 1999, [Kristina], her daughter and Daniel returned to Vancouver and stayed with me until January 2000. In March 2000, I again visited Hawai'i to see my son. While in Honolulu, [Kristina] and I talked about getting married and permanently residing in Washington. We agreed that she and the two children would delay the permanent move until her daughter graduated from school in Hawai'i, approximately summer 2001. In June 2000, she, her daughter and Daniel came to Vancouver in preparation for our marriage. We were married on August 12, 2000, in Vancouver. After spending the summer with me in Washington, [Kristina], her daughter and our son returned to Hawai'i in September 2000 in order that her daughter could finish her senior year. I visited them in December 2000. For the tax year 2000, [Kristina] and I filed joint federal and non-resident Oregon income tax returns that showed our residence as Vancouver, Washington.

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12. . . . [I]n June 2001, [Kristina], her daughter and our son arrived in Vancouver to resume permanent residence. . . .

13. For the next few months, we continued to live as a family in Vancouver. On approximately August 11, 2001, [Kristina] became upset. . . . At some point thereafter, she apparently returned to Hawai'i. Unable to sufficiently communicate with her, and concerned about the welfare of my son, I filed a Petition for Dissolution of the Marriage in Washington on August 29, 2001.

January 8, 2002 Judge William J. Nagle, III entered an Order Granting Defendant's Motion to Dismiss Complaint for Divorce Filed September 20, 2001 stating, in relevant part, as follows:

On November 7, 2001, [Matthias] entered a special appearance and filed Defendant's Motion to Dismiss Complaint for Divorce Filed September 20, 2001. A hearing was held on November 14, 2001. . . . The Court having reviewed the memoranda and affidavits submitted, heard the argument of counsel, and being otherwise fully advised in the premises, it is

HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss Complaint for Divorce Filed September 20, 2001, which was filed herein on November 7, 2001, is and the same shall be GRANTED, as follows:

1. The Court finds:

 (a) [Matthias] is a domiciliary of the State of Washington.

 (b) The Hawai'i Family Court lacks *in personam* jurisdiction over [Matthias] or *in rem* jurisdiction for purposes of marital property division.

 (c) The Hawai'i Family Court lacks *in personam* jurisdiction over [Matthias] or *in rem* jurisdiction to adjudicate issues of spousal support and child support.

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(d) [Matthias] commenced a divorce action in Vancouver, Washington, on August 29, 2001, and [Kristina] was personally served in the State of Hawai'i with said divorce Petition and Summons on September 5, 2001. Thereafter, on September 20, 2001, [Kristina] filed her Hawai'i Complaint for Divorce. [Matthias] was not served with the Hawai'i divorce complaint until October 21, 2001.

(e) [Kristina] has not effectively challenged the *in personam* jurisdiction of the State of Washington over [Kristina] to determine marital property issues or the jurisdiction of the State of Washington to determine issues of child custody, child support or spousal support.

(f) This Court declines to exercise jurisdiction regarding issues of child custody and defers to the proceeding for divorce previously initiated in the State of Washington.

2. Accordingly, [Kristina's] Complaint for Divorce filed September 20, 2001 is dismissed in its entirety.

Kristina did not appeal this order.

August 26, 2002	In Hawai'i, Kristina commenced action in the instant case by filing a complaint for divorce.
September 13, 2002	Kristina filed a motion for pre-decree relief seeking temporary sole legal and physical custody of Daniel, child support in accordance with the guidelines, \$7,000 per month alimony, \$15,000 for legal expenses, and various other orders.
October 9, 2002	Matthias appeared specially and filed (1) Defendant's Motion to Dismiss Complaint for Divorce Filed August 26, 2002, and (2) a motion to shorten time asking that the motion to dismiss be scheduled for hearing on October 16, 2002, the day Kristina's September 13, 2002 motion was scheduled to be heard. Counsel for Matthias noted that the Washington State divorce case was set for trial on December 12, 2002. The motion to shorten time was granted.
October 16, 2002	After a hearing, Judge Allene R. Suemori entered an order denying the motion for pre-decree relief, granting the October 9, 2002 motion to dismiss, and stating that the divorce case in Washington State "shall go forward."

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November 15, 2002 Kristina filed a notice of appeal from the October 16, 2002 order.

December 17, 2002 After a hearing in Washington on December 12 and 13, 2002, attended by both Matthias and Kristina, the Superior Court of Washington, County of Clark, entered findings and conclusions deciding, in relevant part, that: the written settlement agreement and the pre-marital agreement were not legally binding or enforceable; spousal support should not be ordered; "[a]ll courts in the child's alleged home state (Hawaii) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child"; the parenting plan resulting from the agreement of the parties was approved; "child support should be set pursuant to the Washington State Child Support Schedule"; Kristina "has been intransigent & engaged in frivolous proceedings in [Washington State] and Hawaii"; and "[t]he parties should be granted a decree." We presume that the decree was granted.

July 17, 2003 In Washington, the Court of Appeals of the State of Washington, Division II, dismissed Kristina's appeal.

July 23, 2003 The instant appeal was assigned to this court.

August 10, 2003 Kristina advised this court that the correct case number of her Washington State appeal is No. 29886-4-II and that she had filed for its reconsideration. She has not advised this court of the status of her request for reconsideration.

DISCUSSION

Kristina filed an opening brief on March 25, 2003. Without authorization, she filed a "Supplemental Brief of Appellant" on April 28, 2003. In both briefs, her dispositive point on appeal is that the court reversibly erred when it

entered its October 16, 2002 order denying her motion for pre-decree relief and granting Matthias' motion to dismiss.

Judge Nagle's January 8, 2002 Order Granting Defendant's Motion to Dismiss Complaint for Divorce Filed September 20, 2001 (January 8, 2002 Order), informed Kristina that her divorce and all related issues (spousal support, child support, custody and visitation, and division and distribution of property and debts) would be decided in the Washington State divorce case and not in Hawai'i. In other words, it decided that the relief Kristina sought and might subsequently seek, such as, the relief she sought in her August 26, 2002 Complaint for Divorce and in her September 13, 2002 motion for pre-decree relief, could not be sought in Hawai'i and would have to be sought in the Washington State divorce case.

It is clear that Judge Nagle's January 8, 2002 Order was right that "[Matthias] is a domiciliary of the State of Washington," "[t]he Hawai'i Family Court lacks *in personam* jurisdiction over [Matthias] or *in rem* jurisdiction for purposes of marital property division," and "[t]he Hawai'i Family Court lacks *in personam* jurisdiction over [Matthias] or *in rem* jurisdiction to adjudicate issues of spousal support[.]" It is not clear that Judge Nagle's January 8, 2002 Order was right

regarding the issues of child custody and child support.^{1/}

However, Kristina did not appeal this order. Therefore, she and the courts of Hawai'i, including this court, are bound by it. Judge Nagle's order applies as much to Kristina's August 26, 2002 complaint for divorce in the instant case as it did to Kristina's September 20, 2001 complaint for divorce in FC-D No. 01-1-3198. The fact that Judge Nagle's order does not state that it is "with prejudice" does not permit Kristina to file another complaint for divorce, child custody and child support. This is because Judge Nagle's order expressly "declines to exercise jurisdiction regarding issues of child custody and defers to the proceeding for divorce previously initiated in the State of Washington." Moreover, after Judge Nagle's ruling, Kristina participated in the Washington State court's trial, and, at the conclusion of that trial, the Washington State court decided all four parts of the divorce case and noted that the parenting plan resulted from the agreement of Kristina and Matthias. As long as the Washington State decree deciding all four parts of the divorce case remains in effect, Kristina is limited to post-Washington State divorce decree relief and the applicable limitations, restrictions, and burdens of proof.

^{1/} Effective January 1, 2002, Hawaii Revised Statutes (HRS) Chapter 583, the Uniform Child Custody Jurisdiction Act, was replaced by HRS Chapter 583A, the Uniform Child-Custody Jurisdiction and Enforcement Act.

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CONCLUSION

Accordingly, we affirm the family court's October 16, 2002 order denying Plaintiff-Appellant Kristina Kemeny's September 13, 2002 motion for pre-decree relief, granting Defendant-Appellee Matthias Kemeny's October 9, 2002 Defendant's Motion to Dismiss Complaint for Divorce Filed August 26, 2002, and stating that the divorce case in Washington State "shall go forward."

DATED: Honolulu, Hawai'i, July 16, 2004.

On the briefs:

Kristina Mullen Kemeny,
Plaintiff-Appellant Pro Se.

Chief Judge

Robert M. Harris and
Edward R. Lebb
for Defendant-Appellee.

Associate Judge

Associate Judge