NOS. 26890, 26927, 26958, 26986, and 27157

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

DONNA EDWARDS MIZUKAMI, now known as
DONNA EDWARDS, Plaintiff-Appellee, v.
GLENN KIYOHIKO MIZUKAMI, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 90-4214)

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

These appeals are brought by Defendant-Appellant Glenn Kiyohiko Mizukami (Glenn or Defendant) from post-decree orders entered in a divorce case.

The son (Son) of Glenn and Plaintiff-Appellee Donna Edwards Mizukami, now known as Donna Edwards (Donna or Plaintiff), was born on June 30, 1986. The "Decree Granting Divorce and Awarding Child Custody" entered by Judge Victoria S. Marks on August 2, 1991 (Divorce Decree) awarded legal and physical custody of Son to Donna and ordered Glenn to pay child support of $350 per month commencing August 5, 1991.

SOME PRIOR APPEALS

On July 11, 2003, in appeal nos. 24864, 24962 and 24964, this court affirmed the family court's (a) January 30, 2002 "Order Granting Motion for Reconsideration of Pretrial Order No. 2 Filed on 12/20/01, Under Rule 59, [Hawai'i Family Court Rules (HFCR)] (Thomas Collins Movant)," (b) January 14,

2002 "Order Granting in Part and Denying in Part Plaintiff's Motion[s] and Affidavit for Post-Decree Relief Filed on April 30, 2001 and July 16, 2001, and Denying Defendant's Motions and Affidavit for Post-Decree Relief Filed on June 1, 2001 and July 19, 2001," (the January 14, 2002 Order) and (c) February 6, 2002 "Order Denying Defendant's Non-Hearing Motion for Reconsideration of Unfiled Order Denying Motion for Appointment of Guardian Ad Litem for [Son] Filed January 14, 2002."

CURRENT APPEAL NO. 26927

On January 7, 2002, Judge Bode A. Uale presided over a trial. On January 14, 2002, at 11:47 a.m., before Judge Uale entered a written order, Glenn filed a motion for a new trial which stated, in relevant part, "For the reasons and good cause stated herein, the Defendant requests this Court's order for stay of judgment from Trial January 7, 2002, and requests this Honorable Court's order for a New Trial." Hawai‘i Rules of Appellate Procedure (HRAP) Rule 4(a)(3) (2006) specifies that this HFCR Rule 59(a) motion extends the time for appeal until 30 days after the motion is decided or 90 days after the motion was filed, whichever comes first. In this case, the 90 days after the motion was filed came first.

Judge Uale entered the January 14, 2002 Order at 3:57 p.m. On January 22, 2002, Glenn filed a notice of appeal from the January 14, 2002 Order and thereby commenced appeal no. 24864.

At a family court hearing on January 30, 2002, counsel for Donna erroneously advised Judge Uale that "[Glenn] filed the notice of appeal first, so I think the Court has lost jurisdiction at that point over the motion for a new trial." Judge Uale erroneously responded, "Yeah, I think that's the case," and entered an order stating: "Based upon the representations/record made, IT IS HEREBY ORDERED that the above motion is denied without prejudice to Defendant re-filing after appeal. Plaintiff's oral request to amend writ of execution to order for sequestration is denied." This order was wrong. Glenn's HFCR Rule 59(a) motion for a new trial was timely filed. Therefore, the January 14, 2002 Order was not final until Glenn's motion was finally decided.[1/] Pursuant to HRAP Rule 4(a)(3) (2006), Glenn's January 14, 2002 motion for a new trial was deemed to have been denied 90 days after the motion was filed. Pursuant to HRAP Rule 4(a)(2), when that occurred, the January 14, 2002 Order became final and this court acquired appellate jurisdiction to decide appeal no. 24864.

As noted above, on July 11, 2003, this court decided appeal nos. 24864, 24962, and 24964 and affirmed the family court's (a) January 30, 2002 "Order Granting Motion for Reconsideration of Pretrial Order No. 2 Filed on 12/20/01, Under Rule 59, HFCR (Thomas Collins Movant)," (b) January 14, 2002

[1/] If Defendant-Appellant Glenn Mizukami did not timely file his motion for a new trial, the family court would not have been authorized to deny the motion "without prejudice to Defendant re-filing after appeal."

Order, and (c) February 6, 2002 "Order Denying Defendant's Non-Hearing Motion for Reconsideration of Unfiled Order Denying Motion for Appointment of Guardian Ad Litem for [Son] Filed January 14, 2002." As noted in Finding of Fact no. 1, entered on January 26, 2005 by Judge Christine E. Kuriyama, the January 14, 2002 Order denied Glenn's "Motions for Change of Custody, set Defendant's child support at $320.00 per month, refused to allow Defendant credits against his child support, ordered Defendant to pay $29,237.51 for Plaintiff's attorney fees and costs and issued a Writ of Execution against Defendant's real and personal property."

On July 8, 2004, Glenn filed a motion requesting "this Honorable Court's Order For New Trial pursuant to Order dated January 30, 2002, and Hawai'i Family Court Rules (HFCR) 59(a)(b)& (c); or Relief From Judgment pursuant to HFCR 60(b)(5) & (6)." This July 8, 2004 motion for a new trial was untimely because it was not filed "not later than 10 days after the entry of the" January 14, 2002 Order. HFCR Rule 59(b). Therefore, it was a motion filed only pursuant to HFCR Rule 60(b)(5) and (6). It was denied by Judge Kuriyama on August 19, 2004. On August 30, 2004, Glenn filed a motion for reconsideration which Judge Kuriyama denied on September 30, 2004. On November 1, 2004, Glenn filed a notice of appeal. This appeal was assigned to this court on June 7, 2005.

Upon a review of the record, we conclude that this appeal from the August 19, 2004 denial of Glenn's July 8, 2004 motion for relief from the January 14, 2002 Order has no merit.

OTHER PRIOR APPEALS

On January 4, 2005, in appeal no. 25928, this court affirmed (1) the May 2, 2003 Order Denying Motion for Stay and Relief from Orders Filed April 9, 2003 and (2) the May 29, 2003 Order Denying Defendant's Motion for Reconsideration and Findings by the Court for Denial of Defendant's Motion for Stay and Relief from Orders Filed 9/20/00, amended 5/14/01, 5/15/01 and 5/16/01 Filed May 7, 2003.

On January 4, 2005, in appeal no. 26382, this court affirmed "the family court's November 19, 2003 order denying [Glenn's] motion for relief from order filed on October 22, 2003, and the January 9, 2004 Order Denying Defendant's Motion for Reconsideration of Order Denying Motion for Relief from Order, Filed 10/22/03, Filed 11/19/03 Filed on November 28, 2003."

CURRENT APPEAL NO. 27157

On January 20, 2004, Glenn filed Defendant's Motion for Leave for Discovery seeking the court's permission to depose thirteen individuals and legal entities and "[o]ther deponents with relevant information, who may become apparent during discovery process." This motion stated that the requested discovery was "for the purposes of perpetuating testimony, documents & things, and for other evidentiary purposes[.]" One

of the individuals Glenn sought to depose was Anthony Mark Albert (Anthony). Anthony was Donna's husband from May 6, 1995 to June 23, 2003. On February 19, 2004, Judge Nancy Ryan entered an order that stated, in relevant part, that the "Court denies Defendant's motion to conduct discovery at this time." Notwithstanding this order, on November 18, 2004, Glenn filed a "Notice of Taking Deposition Upon Written Interrogatories of Anthony Mark Albert." On December 8, 2004, the deposition of Anthony occurred as scheduled. On December 10, 2004, apparently unaware that Anthony's deposition had already occurred on December 8, 2004, Donna filed a Motion for Protective Order to preclude Glenn from deposing Anthony. On December 13, 2004, Glenn filed the deposition of Anthony. On December 21, 2004, Glenn filed a motion to strike Donna's December 10, 2004 motion, and for an award of his expenses, and for sanctions against Donna and her counsel. In this motion, Glenn contended that Judge Ryan's February 19, 2004 order "denied Glenn's Motion without prejudice to such discovery after Mediation." (Emphasis in original.) On December 21, 2004, Donna filed a "Dismissal of Motion for Protective Order Filed on December 10, 2004." On December 23, 2004, after a hearing, Judge Kuriyama entered an order stating, in relevant part:

> Court finds Plaintiff's Motion For Protective Order in good faith and allows Plaintiff to withdraw motion[2/], thereby rending **[sic]** Defendant's Motion To Strike as moot.

[2/] On December 23, 2004, Judge Kuriyama entered a separate order granting Donna's motion to withdraw her December 10, 2004 Motion for Protective Order.

> In addition,
> Court therefore denies Defendant's Motion; and denies Defendant's request for Award of Expenses; and denies Defendant's request for sanctions against Plaintiff Respondent and it's [sic] counsel.

(Footnote added.) On January 3, 2005 Glenn filed a motion for reconsideration of this order. Judge Kuriyama denied this motion on February 1, 2005. On March 2, 2005, Glenn filed a notice of appeal. This appeal was assigned to this court on September 26, 2005.

We observe and/or rule as follows:

1. In light of Judge Ryan's February 19, 2004 order, Glenn, on November 18, 2004, should not have noticed the deposition of Anthony on December 8, 2004 without the prior permission of the family court.

2. Notwithstanding the fact that Anthony's deposition was scheduled to occur on December 8, 2004, it was not until December 10, 2004 that Donna filed her Motion for Protective Order precluding Glenn from deposing Anthony. The explanations by counsel for Donna that "[a]gainst my instructions, Mr. Albert did attend the deposition, which made my motion overcome by events, essentially" and "I wasn't able to get Mr. Albert to comply with my instructions not to go because I was filing the protective order" indicate a disregard of court rules and procedures. Counsel for Donna is not authorized to advise third-parties not to attend depositions noticed by Glenn or to wait until after the scheduled deposition to file a motion for a protective order precluding the deposition.

3. On December 20, 2004, counsel for Donna asked Glenn to stipulate to the withdrawal of Donna's December 10, 2004 motion to preclude Glenn from deposing Anthony. Glenn refused. Had Glenn agreed, the December 23, 2004 hearing would have been cancelled. Instead, on December 21, 2004, Glenn filed two documents: (1) "Acknowledgment of Improper Service; Memorandum in Opposition to Motion for Protective Order, Memorandum in Support, Declaration of Thomas D. Collins III Filed December 10, 2004; Filed December 20, 2004" and (2) "Motion to Strike Plaintiff's Motion for Protective Order Filed December 10, 2004; and for Award of Defendant's Expenses; and for Sanctions Against Plaintiff and Counsel; Filed December 20, 2004". For document (1), Glenn requested compensation or reimbursement for the following:

a.	Review, research & write-up:	12 hrs @ $75/hr =	$900.00
b.	Type, edit, final publication, file six sets with Certificate of Service	lot @	$95.00
		total =	$995.00

For document (2), Glenn requested compensation or reimbursement for the following:

a.	Review, research & write-up:	9 hrs @ $75/hr =	$675.00
b.	Type, edit, final publication, file six sets with Certificate of Service	lot @	$105.00
c.	Service Process:	lot @	$10.00
			$790.00

For the motions hearing on December 23, 2004, Glenn requested compensation for the following:

a.	Preparation & attendance:	2 hrs @ $75/hr =	$150.00
b.	Post-hearing process:		(open)

In sum, excluding the post-hearing process, Glenn requested an award of $1,935.00.

We conclude that Glenn does not have a right to be paid for his personal time and effort. As far as his costs and out-of-pocket expenses are concerned, it appears that Glenn would not have incurred any expenses had he agreed to stipulate to the withdrawal of Donna's December 10, 2004 Motion for Protective Order. Consequently, we affirm the family court's December 23, 2004 order except that we vacate the following parts in bold print:

> Court **finds Plaintiff's Motion For Protective Order in good faith and** allows Plaintiff to withdraw motion, thereby rending [sic] Defendant's Motion To Strike as moot.
>
> In addition,
> Court therefore **denies Defendant's Motion; and** denies Defendant's request for Award of Expenses; and denies Defendant's request for sanctions against Plaintiff Respondent and it's [sic] counsel.

APPEAL NO. 26890

On April 2, 2004, Glenn filed a motion alleging that Son "requires extensive remediation of [Son's] education with parental participation and guidance by [Glenn]"; seeking legal and physical custody of Son retroactive to September 18, 2000; seeking "reimbursement of credits due & payable by [Donna] to [Glenn]"; alleging that Donna "has failed to provide any Home-Schooling documents, and failed to attend the Scheduled & confirmed Mediation Case No. 2004-0261 on March 22, 2004 at 10:00 a.m."; and seeking "[a]n order referring the question of criminal contempt to the appropriate agency" and "[a]n order finding [Donna] to be in civil contempt." Glenn supported his

motion with various documents and affidavits. One of the affidavits was Son's dated May 30, 2003.

On July 30, 2004, Glenn's motion was heard by Judge Gregg Young. On August 2, 2004, Judge Young entered an order stating as follows:

> (1) [Son] shall have opportunity to obtain high school diploma or equivelent [sic].
>
> In addition,
> (2) If [Son] does pursue high school diploma or equivelent [sic], parties shall each pay 1/2 of all costs including tuition, fees, books, and room and board, so long as [Son] is a full time student taking the equivelent [sic] of 12 units, or age 23, whichever occurs first [sic].

On August 4, 2004, Glenn filed a motion for reconsideration in which he stated, in relevant part, as follows:

> D. [Donna] was at all times [Son's] sole legal and physical "custodial parent", and seriously failed to provide care, support and [Son's] rightful education. Instead [Donna] and its [sic] counsel's conduct throughout has been a colluded stratagem of perpetrating ruses, concealments, and misconducts pursuant to their avarice and enrichments at great harm to [Son] and Movant Glenn.
>
> E. Law at [sic] equity and this Court's implicit authority and mandate under Rule 60(b) require substantial remedy and relief of all harmful effects underlaid by misconducts of any party. [Donna] and its [sic] counsel should be held accountable for their egregious deprivations of [Son], and their concealments and wrongdoings.

On September 13, 2004, Judge Young entered an order denying Glenn's motion for reconsideration. On September 22, 2004, Glenn requested findings of fact and conclusions of law. Judge Young denied this motion on October 6, 2004. Glenn filed a notice of appeal on October 12, 2004. This case was assigned to this court on May 25, 2005.

In the opening brief in this appeal, Glenn contends, in relevant part:

A. The Court simply overlooked the substantive premises of Glenn's Motion @ filings and the documentary evidences entered therein:

1. Glenn's requests & filings substantively presented to [sic] remedies sought under HFCR Rule 60(b)(3) to rectify Donna's & counsel's complicit and wrongful harms to [Son] and Glenn by prolonged fraudulent concealments of [Son's] hardships and deprivations, and by improper and abusive actions in pursuit of undue enrichment facilitated by such concealment of [Son's] true condition & whereabouts:

. . . .

b. Even though Judge Young in-effect acknowledged that [Son] had been abandoned by Donna for more than 4 years and [Son] had not received regular schooling or home schooling for more than 8 years since age 10, his ruling disregards the Rule 60(b) principle of considered remedy of and relief from the harmful effects of fraud toward the substantial justice requested.

. . . .

2. The Court's rulings fail to consider the just recovery of substantial child support paid by Glenn for [Son], instead converted by Donna & counsel, after [Son's] abandonment in April 2000.

3. The rulings fail to consider Glenn's uncontroverted and to-date unadjudicated long-standing claim for refund from Donna of $14,843 paid out-of-pocket expenses.

4. The rulings fail to consider that the Family Court while unaware of Donna's & counsel's underlying concealments & fraud, had repeatedly awarded counsel enormous exorbitant attorney fees for actions now known to be fraudulent.

The basis for Glenn's April 2, 2004 motion is fraud.

HFCR Rule 60(b) (2006) states, in relevant part:

(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 a party's legal representative from any or all of the provisions of 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 proceedings was entered or taken.** 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 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 set aside a judgment for fraud upon the court.

(Emphasis added.) We conclude that Glenn's April 2, 2004 motion was untimely and, therefore, that this appeal has no merit.

APPEAL NO. 26986

On September 7, 2004, Glenn filed a motion for "leave to perpetuate testimony and for discovery" for the purpose of "expected litigation to be brought in a Court of the United States" on alleged welfare fraud and child support fraud by Donna. On September 29, 2004, Judge Kuriyama denied this motion. On October 11, 2004, Glenn filed a motion for reconsideration. Judge Kuriyama denied this motion on November 5, 2004. Glenn filed a notice of appeal on December 6, 2004. This case was assigned to this court on June 7, 2005. Judge Kuriyama entered Findings of Fact and Conclusions of Law on January 26, 2005. The conclusions of law state, in relevant part, that "[i]t is premature for Defendant to conduct discovery into custody, visitation, child support and alleged fraud until the present appeals are completed."

We observe that if and when Glenn commences litigation in a court of the United States, he can proceed pursuant to the rules of that court to seek such discovery. Therefore, this appeal has no merit.

The January 14, 2002 Order entered by Judge Uale states, in relevant part:

> 7. JUDGMENT AGAINST [GLENN]. The Court hereby enters Judgment against [Glenn] and in favor of [Donna] in the following amounts for the additional child support owed from June 1, 2001 to December 31, 2001 in the amount of $280.00 (. . .); and $29,337.51 for [Donna's] attorney fees.
>
> 8. WRIT OF EXECUTION. a WRIT OF EXECUTION SHALL ENTER AGAINST [Glenn] for all Judgment amounts contained herein.

On June 18, 2004, counsel for Donna filed a copy of the January 14, 2002 Order in the Bureau of Conveyances.

On July 7, 2004, at Glenn's request, Judge Kuriyama entered (1) an order staying the January 14, 2002 Order "Pending Final Disposition and Judgment on Appeal S.C. No. 26382," and (2) an order staying the May 14, 15, and 16, 2001 orders "Pending Final Disposition and Judgment on Appeal S.C. No. 25928."

On September 9, 2004, Glenn filed a petition seeking expungement of the document filed on June 18, 2004 in the Bureau of Conveyances. In essence, Glenn contended that the filed document in the Bureau of Conveyances violated the orders staying the orders/judgments. On September 21, 2004, after a hearing on September 16, 2004, Judge Kuriyama denied this petition. On September 24, 2004, Glenn filed a motion for reconsideration. On October 13, 2004, Judge Kuriyama denied this motion. Glenn filed a notice of appeal on November 10, 2004. This appeal was assigned to this court on June 7, 2005.

We conclude that this appeal has no merit. On January 4, 2005, appeal nos. 26382 and 25928 were finally decided in favor of Donna so the July 7, 2004 stay orders terminated on January 4, 2005. With respect to the time prior to January 4, 2005, the fact that Donna was temporarily prohibited from enforcing the orders/judgments did not prohibit her from filing it/them in the Bureau of Conveyances.

CONCLUSION

Accordingly, in appeal no. 26927, we affirm the order denying the motion for a new trial entered on August 19, 2004 and the September 30, 2004 order denying the motion for reconsideration.

In appeal no. 27157, we affirm the family court's December 23, 2004 order except that we vacate the following parts in bold print:

> Court **finds Plaintiff's Motion For Protective Order in good faith and** allows Plaintiff to withdraw motion, thereby rending [sic] Defendant's Motion To Strike as moot.
>
> In addition,
> Court therefore **denies Defendant's Motion; and** denies Defendant's request for Award of Expenses; and denies Defendant's request for sanctions against Plaintiff Respondent and it's [sic] counsel.

We also affirm the February 1, 2005 order denying the motion for reconsideration.

In appeal no. 26890, we order the following amendments of the August 2, 2004 order (bold print parts to be deleted and replaced with underlined parts):

> (1) [Son] shall have opportunity to obtain high school diploma or **equivelent** <u>equivalent</u>.

> In addition,
> (2) If [Son] does pursue high school diploma or **equivelent** equivalent, parties shall each pay 1/2 of all costs including tuition, fees, books, and room and board, so long as [Son] is a full time student taking the **equivelent** equivalent of 12 units, **or** but not after [Son] is age 23, **whichever occurs first.**

As so amended, we affirm the order and the September 13, 2004 order denying the motion for reconsideration.

In appeal no. 26986, we affirm the September 29, 2004 order on the motion for leave to perpetuate testimony and for discovery and the November 5, 2004 order denying the motion for reconsideration.

In appeal no. 26958, we affirm the September 21, 2004 order denying the petition for expungement and the October 13, 2004 order denying the motion for reconsideration.

DATED: Honolulu, Hawai'i, May 31, 2006.

On the briefs:

Glenn Kiyohiko Mizukami
Defendant-Appellant.

Thomas D. Collins, III
for Plaintiff-Appellee.

James S. Burns
Chief Judge

Corinne K.A. Watanabe
Associate Judge

Daniel R. Foley
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