

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28032

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

STEVEN H. FOX, Plaintiff-Appellee, v.
MARION G. FOX, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 01-1-1367)

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

ORDER DENYING OCTOBER 16, 2006 MOTION TO
DISMISS APPEAL, AND ORDER TO SHOW CAUSE
(By: Burns, C.J., Lim and Foley, JJ.)

Upon our review of (1) Defendant-Appellee Steven H. Fox's (Appellee Steven Fox) October 16, 2006 motion to dismiss Defendant-Appellant Marion G. Fox's (Appellant Marion Fox) appeal and (2) the record, it appears that Appellee Steven Fox asserts three arguments as to why we should dismiss Appellant Marion Fox's appeal:

- (1) Appellee Steven Fox asserts that the intermediate court of appeals lacks jurisdiction over Appellant Marion Fox's appeal;
- (2) Appellant Marion Fox failed to file and serve a Civil Appeal Docketing Statement (CADS) in violation of Rule 3.1 of the Hawai'i Rules of Appellate Procedure (HRAP); and
- (3) Appellant Marion Fox failed to either order transcripts of all oral proceedings or file and serve a statement of the points of error that she intends to present on appeal in violation of HRAP Rule 10(b)(4).

As explained below, none of these three arguments warrants dismissal of Appellant Marion Fox's appeal at this time.

With respect to Appellee Steven Fox's argument regarding appellate jurisdiction, in family court cases "[a]n interested party aggrieved by any order or decree of the court may appeal to the intermediate appellate court for review of questions of law and fact upon the same terms and conditions as in other cases in the circuit court[.]" HRS § 571-54 (Supp. 2005). In circuit court cases, aggrieved parties may appeal from "final judgments, orders or decrees[.]" HRS § 641-1(a) (Supp. 2005). "A post-judgment order is an appealable final order under HRS § 641-1(a) if the order finally determines the post-judgment proceeding." Hall v. Hall, 96 Hawai'i 105, 111 n.4, 26 P.3d 594, 600 n.4 (App. 2001) (citation omitted), affirmed in part, and vacated in part on other grounds, Hall v. Hall, 95 Hawai'i 318, 22 P.3d 965 (2001).

The family court has already entered a July 30, 2003 divorce decree and numerous post-decree orders in this case. The post-decree order that finally determined the post-decree proceeding for Appellee Steven Fox's September 30, 2004 post-decree motion to enforce the July 30, 2003 divorce decree and a February 24, 2004 enforcement order was the July 12, 2006 "Findings of Fact, Conclusions of Law and Order Enforcing Divorce Decree and Awarding Attorney's Fees, Costs and Expenses to Plaintiff." Although the family court amended this post-decree order on July 21, 2006, in order to correct typographic errors, it is the July 12, 2006 post-decree order that triggered the

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thirty-day time period for filing a notice of appeal under HRAP Rule 4(a)(1). See Poe v. Hawaii Labor Relations Board, 98 Hawai'i 416, 418, 49 P.3d 382, 284 (2002) (where an amendment corrects only a clerical error, the amendment does not affect the time allowed for appeal).

It appears that HRAP Rule 4(a)(2) (as amended June 20, 2006) does not authorize Appellant Marion Fox's premature July 11, 2006 notice of appeal, which is, therefore, a nullity. However, where an appellant's initial notice of appeal is a nullity, "[t]he appeal taken by the [appellant's] filing of [an] amended notice of appeal is the effective appeal." Madden v. Madden, 43 Haw. 148, 151 (1959); Nakato v. Macharg III, 89 Hawai'i 79, 86, 969 P.2d 824, 831 (App. 1998); Bank of Honolulu, v. Davids, 6 Haw. App. 25, 27, 709 P.2d 613, 616 (1985). Therefore, although Appellant Marion Fox's premature July 11, 2006 notice of appeal is a nullity, Appellant Marion Fox effectively appealed from the July 12, 2006 post-decree order by filing her July 19, 2006 amended notice of appeal within thirty days after entry of the July 12, 2006 post-decree order, as HRAP Rule 4(a)(1) required. Therefore, Appellant Marion Fox's appeal from the July 12, 2006 post-decree order is timely, and we have jurisdiction over Appellant Marion Fox's appeal from the July 12, 2006 post-decree order pursuant to HRS § 571-54 (Supp. 2005).

"An appeal from a final judgment brings up for review all interlocutory orders not appealable directly as of right

which deal with issues in the case." Ueoka v Szymanski, 107 Hawai'i 386, 396, 114 P.3d 892, 902 (2005) (citation and internal quotation marks omitted). Under these analogous circumstances involving an appealable final post-decree order, Appellant Marion Fox's appeal from the July 12, 2006 post-decree order brings up for review all of the preceding interlocutory orders that dealt directly with the issues in Appellee Steven Fox's September 30, 2004 post-decree motion to enforce the July 30, 2003 divorce decree and the February 24, 2004 enforcement order. This group of reviewable orders also includes the subsequently entered July 21, 2006 amended version of the July 12, 2006 post-decree order, because Rule 60(a) of the Hawai'i Family Court Rules (HFCR) provides that, "[d]uring the pendency of an appeal, [clerical] mistakes [in a judgment] may be . . . corrected before the appeal is docketed[.]" HFCR Rule 60(a).

Conversely, however, we do not have appellate jurisdiction to review any order or decree (such as the July 30, 2003 divorce decree) that the family court entered prior to the filing of Appellee Steven Fox's September 30, 2004 post-decree motion to enforce the July 30, 2003 divorce decree and the February 24, 2004 enforcement order. The time period for appealing any order or decree that the family court entered prior to the filing of Appellee Steven Fox's September 30, 2004 post-decree motion has already expired under HRAP Rule 4(a). Nevertheless, we retain jurisdiction over this case to review

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Appellant Marion Fox's appeal from the July 12, 2006 post-decree order and the related interlocutory orders.

With respect to Appellee Steven Fox's second and third arguments in support of dismissing Appellant Marion Fox's appeal, it appears that Appellee Steven Fox is correct in asserting that (2) Appellant Marion Fox failed to file and serve a Civil Appeal Docketing Statement (CADS) in violation of HRAP Rule 3.1 and (3) Appellant Marion Fox failed to either order transcripts of all oral proceedings or file and serve a statement of the points of error that she intends to present on appeal in violation of HRAP Rule 10(b)(4). Nevertheless, it does not appear that these rule violations warrant the dismissal of Appellant Marion Fox's appeal. Therefore,

IT IS HEREBY ORDERED that Appellee Steven Fox's October 16, 2006 motion to dismiss Appellant Marion Fox's appeal is denied.

It further appears that the supreme court previously sanctioned Appellant Marion Fox's attorney, Steven J. Kim (attorney number 4790), in the amount of \$25.00 for violating HRAP Rule 10(b)(4) in supreme court case number 23792, and, thus, gave him notice that he must comply with the Hawai'i Rules of Appellate Procedure. Therefore,

IT IS HEREBY ORDERED that attorney Steven J. Kim (attorney number 4790) shall, within ten (10) days after the date of this order, show cause why the intermediate court of appeals

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should not sanction him pursuant to HRAP Rule 3.1(f) and HRAP Rule 51 based on his failure to comply with HRAP Rule 3.1 and HRAP Rule 10(b)(4).

Failure to comply with this order or show good cause will result in sanctions.

DATED: Honolulu, Hawai'i, October 25, 2006.


Chief Judge


Associate Judge


Associate Judge