NO. 28066

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

DEBBIE MARIE PORTER, nka DEBBIE MARIE EGUIRES,
Plaintiff-Appellee,
v.
WAYNE FLOYD PORTER,
Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 97-0873)

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

Upon review of the record, it appears that we do not

have jurisdiction over Defendant-Appellant Wayne Floyd Porter's

(Appellant Porter) appeal from the family court's May 30, 2006

post-decree order granting in part and denying in part Plaintiff-

Appellee Debbie Marie Porter, nka Debbie Marie Eguires's, May 8,

2006 motion for post-decree relief. The May 30, 2006 post-decree

order was a final and appealable post-decree order under HRS

§ 571-54 (Supp. 2005). Hall v. Hall, 96 Hawai'i 105, 111 n.4, 26

P.3d 594, 600 n.4 (App. 2001), affirmed in part, and vacated in

part on other grounds, Hall v. Hall, 95 Hawai'i 318, 22 P.3d 965

(2001). However, Appellant Porter did not file his July 28, 2006

notice of appeal within thirty days after entry of the May 30,

2006 post-decree order, as Rule 4(a)(1) of the Hawai'i Rules of

Appellate Procedure (HRAP) required.

Following the expiration of the thirty-day time period

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for filing a notice of appeal under HRAP Rule 4(a)(1), Appellant

Porter could obtain an extension of time to file a notice of

appeal only upon a showing of "excusable neglect" pursuant to

HRAP Rule 4(a)(4)(B). "[A]s a matter of law, only plausible

misconstruction, but not mere ignorance, of the law or rules

rises to the level of excusable neglect." Hall v. Hall, 95

Hawai'i 318, 320, 22 P.3d 965, 967 (2001) (citation and internal

quotation marks omitted). Thus, for example, the supreme court

held that a "trial court abused its discretion by granting [a]

motion to extend time for filing a notice of appeal because the

failure to timely file the appeal was caused by counsel's failure

to read and comply with the plain language of the applicable

procedural rules, which cannot constitute 'excusable neglect.'"

Enos v. Pacific Transfer & Warehouse, Inc., 80 Hawai'i 345, 355,

910 P.2d 116, 126 (1996).

The record shows that Appellant Porter failed to file

his notice of appeal within the thirty-day period under

HRAP Rule 4(a)(1) because the vacation schedules of Appellant

Porter and his attorney conflicted with the thirty-day time

period under HRAP Rule 4(a)(4)(B), and, thus, Appellant Porter's

need for an extension of time to file a notice of appeal resulted

from Appellant Porter and his attorney's "failure to follow the

plain language of the rule rather than plausible

misconstruction." Hall v. Hall, 95 Hawai'i at 320, 22 P.3d at

967 (citation and internal quotation marks omitted). For the

purpose of obtaining an extension of time to file a notice of appeal pursuant to HRAP Rule 4(a)(4)(B), Appellant Porter's neglect was "not excusable." Hall v. Hall, 95 Hawai'i at 320, 22 P.3d at 967 (citation and internal quotation marks omitted). Therefore, the family court, the Honorable Linda S. Martell presiding, abused its discretion by granting Appellant Porter's motion for an extension of time to file a notice of appeal, and Appellant Porter's July 28, 2006 notice of appeal is untimely.

The failure of an appellant to file a timely notice of appeal in a civil matter is a jurisdictional defect that the parties cannot waive and an appellate court cannot disregard in the exercise of judicial discretion. Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986); HRAP Rule 26(b) ("[N]o court or judge or justice thereof is authorized to change the jurisdictional requirements contained in Rule 4 of [the HRAP]."). Therefore, we lack jurisdiction over this appeal. Accordingly,

IT IS HEREBY ORDERED that this appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, October 13, 2006.

James A. Burns
Chief Judge

[signature]
Associate Judge

Daniel R. Foley
Associate Judge

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