

NO. 28982

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

VIRGINIA CHO, Petitioner-Appellee, v.  
THOMAS FRANK SCHMIDT, Respondent-Appellant

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT  
(FC-DA NO. 02-1-0141K)

NORMA I. YARA  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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FILED

ORDER GRANTING PETITIONER-APPELLEE VIRGINIA CHO'S  
APRIL 9, 2008 MOTION TO DISMISS APPEAL AS UNTIMELY  
(By: Chief Judge Recktenwald, C.J., Watanabe and Nakamura, JJ.)

Upon review of (1) the April 9, 2008 motion by Plaintiff-Appellee Virginia Cho (Appellee Cho) to dismiss this appeal as untimely and (2) the record, it appears that we lack jurisdiction over the appeal by Defendant-Appellant Thomas Frank Schmidt (Appellant Schmidt) from the Honorable Aley K. Auna, Jr.'s, (a) December 13, 2007 order denying Appellant Schmidt's motion to modify an August 26, 2002 order of protection pursuant to Rule 60(b) of the Hawai'i Family Court Rules (HFCR) (the December 13, 2007 order) and (b) December 27, 2007 order denying Appellant Schmidt's HFCR Rule 59 motion to reconsider the December 13, 2007 order, because Appellant Schmidt's appeal is untimely.

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 (2006). In circuit court cases, aggrieved parties may appeal from "final judgments, orders or decrees[.]" HRS § 641-1(a) (1993 & Supp. 2007). Appellant Schmidt is appealing from post-judgment orders. "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). For example, "[a]n order denying a motion for post-judgment relief under HRCP [Rule] 60(b) is an appealable final order under HRS § 641-1(a)." Ditto v. McCurdy, 103 Hawai'i 153, 160, 80 P.3d 974, 981 (2003) (citation omitted). Similarly, an order denying a motion for post-judgment relief under HFCR Rule 60(b) is an appealable final order.

The December 13, 2007 order finally determined the post-judgment proceeding for Appellant Schmidt's July 30, 2007 HFCR Rule 60(b) motion to modify the August 26, 2002 order of protection by denying the relief sought by Appellant Schmidt, leaving nothing further to be adjudicated. Therefore, the December 13, 2007 order is an appealable post-judgment order pursuant to HRS § 571-54 (2006).

Pursuant to Rule 4(a)(3) of the Hawai'i Rules of Appellate Procedure (HRAP), a timely appeal from the December 13, 2007 order would entitle Appellant Schmidt to obtain appellate review of the December 27, 2007 order denying Schmidt's HFCR Rule 59 motion to reconsider the December 13, 2007 order, because a timely notice of appeal is "deemed to appeal the disposition of all post-judgment motions that are timely filed after entry of the judgment or order." HRAP Rule 4(a)(3).

Pursuant to HRAP Rule 4(b)(3), Appellant Schmidt extended the thirty-day time period under HRAP Rule 4(a)(1) for filing a notice of appeal when Appellant Schmidt timely<sup>1</sup> filed his Rule 59 motion to reconsider the December 13, 2007 order denying Appellant Schmidt's July 30, 2007 HFCR Rule 60(b) motion

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<sup>1</sup> Appellant Schmidt's motion for reconsideration of the December 13, 2007 order was within the ten-day time limit under Rule 59 of the Hawai'i Family Court Rules (HFCR), even though Appellant Schmidt filed that motion prior to the family court's entry of the December 13, 2007 order. Cf. Saranillio v. Silva, 78 Hawai'i 1, 7, 889 P.2d 685, 691 (1995) ("HRCP [Rule] 59 does not require that a motion be served after the entry of judgment; it imposes only an outer [ten-day] time limit on the service of a motion to alter or amend the judgment[.]").

to modify the August 26, 2002 order of protection. HRAP Rule 4(a)(3) required Schmidt to file his notice of appeal within thirty days after entry of the order that disposed of Appellant Schmidt's HFCR Rule 59 motion to reconsider. However, Appellant Schmidt did not file his January 29, 2008 notice of appeal within thirty days after entry of the December 27, 2007 order denying Appellant Schmidt's HFCR Rule 59 motion to reconsider, as HRAP 4(a)(3) required. Therefore, Appellant Schmidt's appeal is untimely.

The failure to file a timely notice of appeal in a civil matter is a jurisdictional defect that the parties cannot waive and the appellate courts cannot disregard in the exercise of judicial discretion. Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1128 (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]."). Accordingly,

IT IS HEREBY ORDERED that Appellee Cho's April 9, 2008 motion to dismiss Appellant Schmidt's appeal is granted, and this appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, April 24, 2008.

*Manuel A. Richterwald*

Chief Judge

*Bernieka Watahala*

Associate Judge

*Abdullah S. Khan*

Associate Judge