

NO. 29448

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

IN RE MARN FAMILY LITIGATION

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(MASTER FILE NO. 001-MRL)
(Civ. Nos. 98-5371-12 VSM and 98-4706-12 VSM)

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS-APPELLEES'
DECEMBER 23, 2008 MOTION FOR DISMISSAL OF APPEALS
(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

On December 23, 2008, Appellees James K. M. Dunn as Successor Trustee of the Annabelle Y. Dunn Trust, Dated June 18, 1991 (AYD Trust), and James Y. Marn, Jr. filed a motion to dismiss (Motion to Dismiss) two appeals filed in Appellate No. 29448 on the grounds that there is no appellate court jurisdiction at this time. The notices of appeal were filed on October 17, 2008 (First Appeal) and November 24, 2008 (Second Appeal), by Appellant Y. Alexander Marn (Alexander Marn). The First Appeal is from the Order Awarding Fees and Costs Re: James K. M. Dunn as Successor Trustee of the Annabelle Y. Dunn Trust, Dated June 18, 1991, Amended Motion to Strike Alexander Y. Marn and Eric Y. Marn's¹ Supplement to Memorandum in Support of Motion for Reconsideration and/or New Trial Filed May 12, 2008, Filed May 20, 2008, and Request for HRCF Rule 11 Sanctions, filed in the First Circuit Court (Circuit Court) on September 22, 2008 (Order Granting Sanctions). The Second Appeal is from the Order Granting James K. M. Dunn's Successor Trustee of the Annabelle Y. Dunn Trust, Dated June 18, 1991, Motion for Second Award of Interim Attorneys' Fees and Costs for the Period April 1, 2007 to September 30, 2008 and for an Order Authorizing Payment of the Approved Fees and Costs Filed October 27, 2008, filed in the Circuit Court on December 22, 2008 (Order Awarding Fees and

¹ Appellant Alexander Y. Marn and Appellee Eric Y. Marn will be referred to herein, collectively, as the Marn Brothers.

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Costs).

Upon careful review of the memoranda in support and in opposition to the Motion to Dismiss and the attached exhibits, and having given due consideration to the issues raised, the arguments presented, and the applicable authorities, we conclude that we have jurisdiction to consider the First Appeal, but that we are without jurisdiction to consider the Second Appeal.

In the Order Granting Sanctions, the Circuit Court ordered the Marn Brothers to pay attorneys' fees and costs in the amount of \$5,109.60 to AYD Trust as a sanction and further ordered that the payment be made within thirty days from the date of the filing of the Order Granting Sanctions. As the Order Granting Sanctions specified the amount to be paid and set a specific deadline for payment, the order placed the Marn Brothers in jeopardy of being found in contempt if they did not comply with the Order Granting Sanctions within the thirty-day period. Therefore, under the facts of this case, the Order Granting Sanctions is properly before us under the collateral order doctrine. See Harada v. Ellis, 60 Haw. 467, 480, 591 P.2d 1060, 1070 (1979) (an interlocutory sanctions order "involved a right not directly related to" the merits of the action, "directed payment of [an] assessed sum and was immediately enforceable through contempt proceedings[;]" therefore appellant was placed in "immediate jeopardy of being found in contempt of court if he did not comply," and thus, the collateral order doctrine was applicable); see also Siangco v. Kasadate, 77 Hawai'i 157, 161-22, 883 P.2d 78, 82-83 (1994) (recognizing Harada v. Ellis, but distinguishing that case from cases in which sanctions orders against parties that either did not specify amount to be paid or did not require immediate payment and therefore would have to be revisited before sanctioned parties would be at risk of contempt, with no right of immediate appeal).

In the Order Awarding Fees and Costs, however, the Circuit Court ordered the payment to AYD Trust of attorneys' fees and costs, as a "prevailing party at trial," to be paid by the Liquidating Receiver, Thomas E. Hayes (Receiver) within 30 days, and charged against the Marn Brothers' interests in the

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receivership property. Generally, an award of attorneys' fees and costs is not immediately appealable as such an award relates to the merits of a case and, therefore, become reviewable upon the entry of a final judgment on the merits. In other words, absent entry of an appealable final judgment on the claims to which the attorneys' fees and costs relate, the award of attorneys' fees and costs is not appealable. See Fujimoto v. Au, 95 Hawai'i 116, 19 P.3d 699 (2001); CRSC, Inc. v. Sage Diamond Co., Inc., 95 Hawai'i 301, 306, 22 P.3d 97, 102 (App. 2001). The Order Awarding Fees and Costs expressly relates to AYD Trust prevailing at trial. It does not appear that an appealable final judgment has been entered. Also, unlike the Order Granting Sanctions, the Order Awarding Fees and Costs ordered payment by the Receiver, not the Marn Brothers. Thus, there is no risk of contempt related to the non-payment of the attorneys' fees and costs. We reject Alexander Marn's argument that the payment of AYD Trust's attorneys' fees creates a "litigation disadvantage" that requires the expansion of the collateral order doctrine under the facts of this case.

For these reasons, IT IS HEREBY ORDERED that AYD Trust's Motion for Dismissal of Appeals filed on December 23, 2008 is granted in part and denied in part. The motion is granted as to the Second Appeal from the Order Awarding Fees and Costs. The appeal from the Order Awarding Fees and Costs is hereby dismissed. The motion is denied as to the First Appeal from the Order Awarding Sanctions.

DATED: Honolulu, Hawai'i, January 27, 2009.


Daniel R. Foley
Presiding Judge


Associate Judge

Associate Judge