IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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GERALDINE CVITANOVICH-DUBIE, now known as GERALDINE CVITANOVICH, Petitioner/Plaintiff-Appellant

vs.

NANCY DUBIE, Personal Representative of the Estate of George Patrick Dubie, Respondent/Defendant-Appellee

NO. 28928

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(FC-D NO. 03-1-3588)

JUNE 22, 2011

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I believe that jurisdiction over the divorce complaint filed by Petitioner/Plaintiff-Appellant Geraldine Cvitanovich-Dubie (Geraldine) existed in the family court of the first circuit (the court or the family court) for the reasons stated herein, but I respectfully dissent to the majority's holding that Geraldine's Hawaiʻi Family Court Rules (HFCR) Rule 60(b) (2010) claims sounding in fraud on the court and undue influence are

barred under HFCR Rule 60(b)(3) because she failed to bring them within one year from the entry of judgment. In my view, her claims of fraud on the court and undue influence are both cognizable under HFCR Rule 60(b)(6). Accordingly, I would vacate the May 3, 2010 judgment of the Intermediate Court of Appeals (ICA) and the December 18, 2007 order of the family court that held to the contrary, and remand to the court for a hearing on both claims.

I.

On October 2, 1989, George Patrick Dubie (George) and Sylvie Bertin (Sylvie) were legally married in Honolulu. Upon Sylvie's application for divorce, in February 1995, a court in the Dominican Republic held a hearing and granted the divorce on the ground of incompatibility. The divorce decree listed Sylvie as being a domiciliary and resident of the West Indies, and Dubie as being a domiciliary and resident of California.

Neither party appealed from the divorce decree.

Four months later, in Canada, Sylvie and George entered into a separation agreement in which they referred to themselves as husband and wife.

In March 1996, Geraldine met George, and on April 30, 1996, they completed a marriage license application, in which George swore that his previous marriage had ended in divorce. George also indicated that his marriage to Geraldine was his twenty-third, and that his previous marriage had ended in

September 1995 in the Dominican Republic.[1] On May 1, 1996, Geraldine and George were married in Hawaiʻi.

Five months after Geraldine's marriage to George, in October 1996, George and Sylvie amended their separation agreement by filing a "Variation of Separation Agreement" (amended separation agreement) in the Supreme Court of British Columbia, providing that their child's principal place of residence was "with the Husband in Hawaii."

In 2002, George began to spend time in Thailand, where, according to Geraldine, George used her money to invest in property. George allegedly told her that the property he had bought "belonged equally to both" of them. Geraldine stated that, in 2003, George suggested that they obtain a "temporary" divorce for business reasons, but keep the divorce secret and continue to live as though they were married.

On November 6, 2003, Geraldine filed a complaint for divorce. George received the complaint and summons, and submitted himself to the court's jurisdiction by signing an appearance and waiver form and filing it with the court. In furtherance of the divorce, George and Geraldine entered into marital agreements involving property.

The court granted the divorce on November 28, 2003. Pursuant to the divorce decree, each party was to retain his or her separate property and an equal portion of the joint property,

[1] The Dominican decree states that George and Sylvie were divorced in February 1995.

except as provided in their marital agreements. The decree incorporated George and Geraldine's marital agreements.

On July 2, 2006, George died. According to Geraldine, only after George's death did she realize that he had "manipulated [her] through false statements, false promises, and other devices and techniques to transfer property (real and personal) and things of value to him in the course of [the] divorce proceedings."

II.

In June 2007, Geraldine filed a motion for relief pursuant to HFCR Rule 60(b) (60(b) motion).[2] On June 19, 2007, she filed a motion to substitute Nancy Dubie, as personal representative of George's estate, for George in the instant case. In the 60(b) motion, Geraldine sought a judgment holding that the Geraldine-George 2003 divorce decree was void under HFCR Rule 60(b)(4) or, in the alternative, that the property division be set aside pursuant to HFCR Rule 60(b)(6). Allegedly, George

[2] HFCR Rule 60(b) provides in pertinent 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: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reason[] . . . (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . 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.

(Emphases added.)

had committed a fraud on the court, and Geraldine had been under the undue influence of George.

The 60(b) motion was based in part on the declarations attached thereto, "and evidence as may be submitted in supplementation of this Motion or at the hearing on this Motion[.]" In the memorandum accompanying the motion, Geraldine stated, "Space does not permit a detailed, fact-intensive showing in this Memorandum of all the particular ways in which the division was so inequitable, but this will be shown in detail at the evidentiary hearing." (Emphasis added.) In opposition, Nancy[3] argued that "it is clear that [Geraldine's] allegations of 'undue influence' and 'transfer of property' amount to a claim for relief based on 'fraud.'" In Reply, Geraldine requested that "the court bifurcate the 60(b)(4) and 60(b)(6) [issues] and that evidence on [] 60(b)(4) be heard first."[4]

On October 8, 2008, the court held a hearing on the motion for substitution and on the 60(b) motion. Geraldine's counsel contended that substitution must be granted "whether [the court] ultimately grant[ed] the Rule 60 motion or not[,]" since the divorce created property rights that were not abated due to George's death. Nancy's counsel responded that the court did not have to substitute any parties because the judgment was not void,

[3] Although Nancy was substituted for George, Geraldine alleges that George, not Nancy, engaged in undue influence and fraud on the court. Thus, this opinion primarily refers to George, not Nancy, as the opposing party.

[4] The majority asserts that Geraldine did not specifically request an evidentiary hearing. Majority opinion at 12. Given that evidence was to be submitted "at the hearing", and the "inequitable" nature of the property division was to "be shown in detail at the evidentiary hearing[,]" Geraldine "requested" and sought an evidentiary hearing on her HFCR Rule 60(b)(6) claims.

Geraldine's claim "for fraud [was] time barred" and "Rule [60(b)(6) was] not a valid option[.]" According to Nancy's counsel, the court was not required to hold a hearing and could decide the motion based on the papers; only if the court decided that a claim had merit should substitution occur. (Citing Hayashi v. Hayashi, 4 Haw. App. 286, 293, 666 P.2d 171, 176 (1983)).

At the hearing in connection with the 60(b) motion, Geraldine argued that the court should bifurcate the proceedings, ruling on the 60(b)(4) ground first, and reserving the 60(b)(6) ground for an evidentiary hearing:

> I think that the 60B.4 [sic] part of this case is amenable to summary judgment[.] . . .
>
> And I think we can get rid of this whole thing when you grant summary judgment to us on that part of it. Bifurcate the 60(b)(6) part which is the labor intensive evidentiary part that you would rather not have to do because it's going to take a long time, and that's what we're gonna do in the circuit court is that case. Bifurcate the 60B.4, 60B.6 [sic].

(Emphasis added.) Based on the foregoing, it was presumed that if the court ruled that the judgment was not void under HFCR Rule 60(b)(4) and that HFCR Rule 60(b)(6) was a valid option for the fraud on the court and undue influence claims, then the court would hold an evidentiary hearing on those claims.

On December 18, 2007, the court entered an order denying the 60(b) motion. In February 2008, the court filed findings of fact and conclusions of law. The court concluded, inter alia, that Geraldine's marriage to George was not void, Geraldine was estopped from asserting that the marriage was void, and her claims to set aside the divorce decree were, in essence, based on fraud or other intentional misconduct, and barred by the

one-year statute of limitations pursuant to HFCR Rule 60(b)(3). Geraldine appealed to the ICA, which affirmed the court. Geraldine filed an application for writ of certiorari (Application), arguing that the ICA erred in holding that she was estopped[5] from attacking the validity of the Dominican Decree, and that her claims sounding in fraud on the court and undue influence were barred.

III.

In her Application, Geraldine first argues that the Hawaiʻi divorce decree is void under HFCR Rule 60(b)(4), which, as noted supra, provides in pertinent part that "[o]n 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" because the judgment is void[.]" (Emphasis added.) HFCR Rule 60(b)(4) is nearly identical to Hawaiʻi Rules of Civil Procedure (HRCP) Rule 60(b)(4). Because the language is nearly identical, cases construing HRCP Rule 60(b)(4) are instructive in the analysis of HFCR Rule 60(b)(4). Under HRCP Rule 60(b)(4), "a judgment is void only if the court lacked subject matter jurisdiction, jurisdiction over the person, or violated due process[.]" Bank of Hawaii v. Shinn, 120 Hawaiʻi 1, 12, 200 P.3d 370, 381 (2008).

[5] The ICA erred in holding that Geraldine was estopped from challenging whether the judgment was void inasmuch as "estoppel cannot be used to prevent a party from challenging an illegal act." Alvarez Family Trust v. Ass'n of Apartment Owners of Kaanapali Alii, 121 Hawaiʻi 474, 510, 221 P.3d 452, 488 (2009) (Acoba, J., dissenting in part, joined by Duffy, J.). Because estoppel cannot "'legalize or vitalize that which the law declares unlawful and void,'" Geraldine cannot be estopped from challenging whether the underlying judgment was void. Id. at 511, 221 P.3d at 489 (quoting Godoy v. Hawaiʻi County, 44 Haw. 312, 324, 354 P.2d 78, 84 (1960)).

A.

Geraldine is not contending the court lacked personal jurisdiction over the parties or violated due process. However, she maintains the Hawaiʻi divorce decree is void (1) because the Dominican court lacked jurisdiction to enter a divorce decree for the two non-residents, George and Sylvie; (2) inasmuch as the Dominican court lacked jurisdiction, the Dominican divorce decree was void; (3) since the divorce was void, George and Sylvie were still married when George married Geraldine; (4) the George-Geraldine marriage was thus void ab initio inasmuch as Hawaiʻi law prohibits bigamy and George was still married to Sylvie; and (5) because the marriage was void in the first place, the court lacked jurisdiction to enter a divorce decree between Geraldine and George.

To the contrary, the court had subject matter jurisdiction because whether Geraldine and George were legally married was not a precondition to jurisdiction over the divorce complaint. Subject matter jurisdiction is defined as "[j]urisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." Black's Law Dictionary 931 (9th ed. 2009); see also County of Hawaiʻi v. C&J Coupe Family Ltd. P'ship, 119 Hawaiʻi 352, 368, 198 P.3d 615, 631 (2008) (defining subject matter jurisdiction by quoting Black's Law Dictionary).

The family court has jurisdiction, in pertinent part, over "all proceedings under chapter 580[.]" Hawaiʻi Revised

Statutes (HRS) § 571-14(a)(3) (Supp. 2003). As set forth in HRS § 580-1[6] (2006 Repl.), the court has subject matter jurisdiction over the "matters" of divorce.

> Exclusive original jurisdiction in matters of annulment, divorce, and separation, . . . is conferred upon the family court of the circuit in which the applicant has been domiciled or has been physically present for a continuous period for at least three months next preceding the application therefor. No absolute divorce from the bond of matrimony shall be granted for any cause unless either party to the marriage has been domiciled or has been physically present in the State for a continuous period of at least six months next preceding the application therefor.

(Emphases added.) Subject matter jurisdiction and "access to courts for divorce [are] governed by the first sentence of § 580-1[.]" Whitehead v. Whitehead, 53 Haw. 302, 315, 492 P.2d 939, 946 (1972). Thus, the family court has jurisdiction over a divorce complaint when "the applicant has been domiciled or has been physically present for a continuous period of [] three months" before the filing of the complaint.[7] HRS § 580-1.

The second sentence provides a "substantive requirement" for divorce, that "satisfaction of the [domicile or] residential requirement [for six months] is a condition to the granting of divorce by the court which has heard the case, not a condition which deprives a divorce applicant of a forum in which

[6] It is noted that HRS § 580-1 was amended in February 2011 and, in addition to the quoted language, states that "[t]he family court of each circuit shall have jurisdiction over all proceedings relating to the annulment, divorce, and separation of civil unions entered into in this State in the same manner as marriages." Act 1 (Feb. 24, 2011).

[7] It need not be addressed whether the three-month period applies to domicile and continuous presence, or continuous presence alone. Puckett v. Puckett, 95 Hawaiʻi 474, 16 P.3d 876 (App. 2000), suggests that the three-month period of continuous presence does not apply for purposes of jurisdiction. With respect to proving domicile or continuous presence for six months, "[i]t is clear then that the durational six-month period applies to both domicile and physical presence." Id. at 482 n.12, 16 P.3d at 887 n.12; see also Whitehead, 53 Haw. at 304, 492 P.2d at 941 (noting that the "first sentence of § 580-1 contains a durational requirement involving domicile or physical presence").

his case may be heard." Whitehead, 53 Haw. at 315, 492 P.2d at 947 (emphasis added).

Thus, "as long as [the applicant] was domiciled in Hawaiʻi [in the circuit embracing the family court] at the time she filed for divorce, i.e., she was physically present in Hawaiʻi with the intention of remaining indefinitely, the family court ha[s] subject matter jurisdiction to entertain the action." Puckett, 94 Hawaiʻi at 483, 16 P.2d at 888. Geraldine was domiciled in Hawaiʻi, on Oahu, at the time she filed the complaint. Accordingly, the family court had subject matter jurisdiction over her divorce complaint against George.

B.

Subject matter jurisdiction over the complaint itself must not be confused with the elements of a successful complaint for divorce. Whitehead explains that a party alleging a Hawaiʻi domicile or continuous presence for three months who files a divorce complaint establishes the family court's subject matter jurisdiction; to succeed on that complaint, however, a party must show the existence of domicile or continuous presence in Hawaiʻi for the necessary six-month period of time, the marriage relationship, and a ground for divorce:

> An applicant for divorce who fails to prove a ground for divorce will not be granted a divorce because of failure to satisfy a substantive requirement for divorce. Similarly, an applicant who fails to prove that he has been domiciled or has been physically present in this State for [six months as set forth by statute] will not be able to obtain a divorce because of failure to satisfy a substnative [sic] requirement, not because he is denied access to court.

Whitehead, 53 Haw. at 315-16, 492 P.2d at 947.

Based on the foregoing, then, to be "granted" a divorce, the applicant must show (1) the parties were married; (2) domicile or continuous presence for six months in Hawaiʻi; and (3) one of four situations outlined by HRS § 580-41 (2006 Repl.) applied. Geraldine's divorce complaint alleged that the marriage was irretrievably broken, one of four grounds under HRS § 580-41 that may support a complaint for divorce. Upon proof of one of the four grounds, the court "shall decree a divorce from the bond of matrimony upon the application of either party[.]" Id.

Here, a marriage is an element that must be proven to successfully obtain a divorce; it is not a jurisdictional prerequisite for the family court to entertain a divorce complaint under HRS §§ 580-1 and -41.[8] Thus, whether a marriage

[8] Geraldine relies on Tagupa v. Tagupa, 108 Hawaiʻi 459, 465, 121 P.3d 924, 930 (App. 2005), for the proposition that the family court lacks subject matter jurisdiction over a divorce complaint when one party was allegedly involved in simultaneous marriages. Tagupa involved competing actions for divorce and annulment, the latter based on the assertion that the spouse had been married to two men at the same time. Although the family court granted the divorce, the ICA vacated the divorce decree and remanded for a partial new trial to determine whether the annulment claim was viable. Id. at 466-67, 121 P.3d at 931-32. Since the ICA remanded to the family court for further proceedings, the allegation of bigamy did not divest the family court of jurisdiction, contrary to Geraldine's assertion.

Geraldine also relies on State v. Alagao, 77 Hawaiʻi 260, 883 P.2d 682 (App. 1994), and State v. Miyahara, 98 Hawaiʻi 287, 47 P.3d 754 (App. 2002). Alagao involved a statute providing the family court with jurisdiction to "try any offense committed against a child by . . . any other person having the child's legal or physical custody[,]" 77 Hawaiʻi at 263, 883 P.3d at 685 (emphases added), and Miyahara involved a statute providing the family court with jurisdiction to "try any adult charged with an offense, . . . against the person of the defendant's husband or wife[,]" 98 Hawaiʻi at 291, 473 P.3d at 758 (emphasis added). Determining, respectively, whether the defendant had legal or physical custody of the child, or whether the defendant was married at the time of the offense, were subject matter jurisdictional questions of fact because they were requirements that had to be met under those statutes before the court exercised its jurisdiction. Alagao, 77 Hawaiʻi at 264, 883 P.2d at 686; Miyahira, 98 Hawaiʻi at 293, 47 P.3d at 760. Insofar as Alagao and Miyahara may be correct as to "jurisdictional questions of fact" regarding the respective statutes, the statutes at issue here, HRS § 580-1 and HRS § 580-41, contain no requirement that a valid marriage is a jurisdictional prerequisite.

was validly formed would be an issue to be decided in an action for a divorce. The validity of a marriage, however, is not a ground for divesting the court of jurisdiction to entertain the complaint.

IV.

If the judgment is not void under HFCR Rule 60(b)(4), Geraldine argues that the court should have set aside the property division portion of the divorce decree under HFCR Rule 60(b)(6) because George (1) had committed fraud on the court, and/or (2) had exercised undue influence in obtaining the property division via the marital agreements. See supra note 2. To be successful in bringing a HFCR Rule 60(b)(6) motion, the movant must show that "(1) the motion is based on some reason other than those specifically stated in clauses 60(b)(1) through (5); (2) the reason urged is such as to justify the relief; and (3) the motion is made within a reasonable time."[9] Hayashi, 4 Haw. App. at 290, 666 P.2d at 174. HFCR Rule 60(b)(6) permits the court in its sound discretion to relieve a party from a final judgment.

V.

Geraldine argued that George committed fraud on the court "by concealing the fact that he had never divorced Sylvie [], thereby claiming a status and identity (i.e., a married man) to gain access to [the] court so he could use it as a device to

[9] Nancy did not argue, in her Answering Brief or in her Response to the Application, that even if HFCR Rule 60(b)(6) applied, the motion was not brought within a reasonable time. Accordingly, the issue of whether Geraldine's motion was brought within a reasonable time was waived. See Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 28(b)(7) ("Points not argued may be deemed waived.").

improperly obtain [Geraldine's] assets." The court determined that Geraldine's claim "sound[s] in fraud or other intentional misconduct," and therefore was barred by the one year limitation under HFCR Rule 60(b)(3). Similarly, the ICA concluded that Geraldine's assertion of fraud on the court fell within the general category of "fraud" under HFCR Rule 60(b)(3), Cvitanovich-Dubie v. Dubie, 123 Hawaiʻi 266, 282, 231 P.3d 983, 999 (App. 2010), because HFCR Rule 60(b)(3) does not specify "upon whom the adverse party must have committed the fraud, misrepresentation, or other misconduct[,]" id. Respectfully, for the reasons that follow, the court and the ICA were wrong.

A.

This court has not definitively addressed the issue of whether fraud on the court is a category of "fraud" under HFCR Rule 60(b)(3), or whether it is distinct from that subsection and falls under "any other reason" justifying relief and therefore may be brought by motion under Rule 60(b)(6). Rule 60(b)(3) has been cited with respect to claims that were brought by a party pursuant to Rule 60(b)(3) and not contested under that subsection. See Kawamata Farms, Inc., v. United Agri Prods., 86 Hawaiʻi 214, 257, 948 P.2d 1055, 1098 (1997) (concluding that an "unusual, unique example of unprecedented discovery fraud [was] perpetrated against the court[,]" (emphasis added), and addressing the claim under HRCP Rule 60(b)(3)); see also Moyle v. Y & Y Hyup Shin, Corp., 118 Hawaiʻi 385, 402 n.13 & 403, 191 P.3d 1062, 1079 n.13 & 1080 (2008) (noting that the plaintiff's allegations, brought under HRCP Rule 60(b)(3), that the appellees

committed perjury and fraud on the court while giving testimony, failed to establish such fraud under HRCP Rule 60(b)(3)). In Kawamata Farms and Moyle, the motions claiming fraud on the court were timely brought under subsection 3. Accordingly, this court did not address whether a Rule 60(b)(3) or a Rule 60(b)(6) motion was the proper vehicle. Kawamata Farms, 86 Hawaiʻi at 229, 948 P.2d at 1070 (HRCP Rule 60(b)(3) motion was filed seven months after the jury verdict); Moyle, 118 Hawaiʻi at 390 & 402 n.13, 191 P.3d at 1067 & 1079 n.13 (HRCP Rule 60(b)(3) motion to set aside the judgment based on fraud on the court was filed ten days after judgment was entered). Cf. 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2864, at 355 (1995) [hereinafter Wright, Miller & Kane] (noting that in cases where the motion is made within a year of judgment, "it is not important to decide whether the motion in fact comes under clause (6) or under one of the earlier clauses[,]" because "[t]hese prompt motions for relief are granted if the court thinks that justice requires it and denied if the court feels otherwise").

It should also be noted that this court has held, in Child Support Enforcement Agency v. Doe, 98 Hawaiʻi 499, 51 P.3d 366 (2002) [hereinafter CSEA],[10] that a Rule 60(b)(3) motion

[10] In CSEA, in a family court proceeding to establish paternity of a child whose father (Father) had died before the child's birth, pursuant to an agreement by all parties, including Grandmother, the special administrator of Father's estate, the family court ordered genetic testing. 98 Hawaiʻi at 500, 51 P.3d at 367. Subsequently, Father was identified as the child's biological father, and Grandmother no longer contested paternity. Id. at 501, 51 P.3d at 368. The family court entered judgment in December 1997, stating that Father was the child's biological father. Id.

In October 1999, Grandmother moved to set aside the judgment under HFCR 60(b)(2) and (3) on the ground that there was "newly discovered evidence" (continued...)

alleging fraud cannot be construed as a Rule 60(b)(6) motion also alleging fraud. CSEA only stands for the proposition that a motion alleging fraud and styled as 60(b)(3) cannot be construed by the court as one under 60(b)(6) because the subsections are mutually exclusive. Therefore, CSEA does not shed light on the issue.

B.

Inasmuch as HFCR Rule 60(b) and Federal Rules of Civil Procedure (FRCP) Rule 60(b) "are almost identically worded, interpretations of FRCP Rule 60(b) are helpful in this case."[11] Schefke v. Reliable Collection Agency, Ltd., 96 Hawaiʻi 408, 431, 32 P.3d 52, 75 (2001). A few jurisdictions have noted the term fraud, found in subsection 3, is general enough to encompass

[10](...continued)
showing that no genetic testing of Father existed, and that "CSEA had lied" to induce her "to agree to the judgment of paternity." Id. at 502, 51 P.3d at 369. The family court denied the motion, and on appeal, the ICA construed Grandmother's motion as one brought under 60(b)(6) and reached the merits of her claims. Id. This court held that the ICA erred in construing the motion as one brought under subsection 6, concluding that because "Grandmother's asserted grounds for relief unmistakably were based on circumstances specified in one or more of clauses (1) through (5) of HFCR Rule 60(b), Grandmother's motion cannot, as a matter of law, be construed as a HFCR Rule 60(b)(6) motion." Id. at 504, 51 P.3d at 371.

[11] It must be noted that FRCP Rule 60(b) was amended in 2007 and the language in 60(b)(6) that relief could be sought by motion or independent action was deleted and relocated to section 60(d). The Commentary to the amendment explains that "the final sentence of the rule said that the procedure for obtaining any relief from a judgment by motion as prescribed in the Civil Rules or by an independent action[ was] deleted as unnecessary." 2007 Commentary to FRCP Rule 60(b). Relief "continues to be available only as provided in the Civil Rules or by Independent Action." Id. The amendment added FRCP Rule 60(d), which provides, in pertinent part, that "[t]his rule does not limit a court's power to (1) entertain an independent action to relieve a party from a judgment, order, or proceeding; . . . [or] (3) set aside a judgment for fraud on the court." FRCP Rule 60(d)(1) and (3). The commentary states that the "changes are intended to be stylistic only." 2007 Commentary to FRCP Rule 60(b). Therefore, Rule 60(d)(3) "contains the 'fraud on the court' provision that was part of the penultimate sentence of Rule 60(b) before its 2007 revision. The change was stylistic only, . . . and thus, interpretations of the prior 'fraud upon the court' language apply equally to the new Rule 60(d)(3)." Williams v. Dormire, No. 4:10-CV-1660-CAS, 2010 WL 3733862, at *2 n.3 (E.D. Mo. Sept. 20, 2010).

fraud on the court. United States v. Buck, 281 F.3d 1336, 1341 (10th Cir. 2002) ("We hold that a claim of fraud, including fraud upon the court, cannot be brought under clause (b)(6)."); see Rease v. AT&T Corp., 358 Fed. Appx. 73, 76 (11th Cir. 2009) (noting that the plaintiff "cannot rely on Rule 60(b)(6) to obtain relief on grounds that [the defendant] and its attorneys perpetrated a fraud on the court . . . , because a court considers claims premised on fraud . . . under Rule 60(b)(3)"). It appears that these courts hold the view that "the Rule suggests that equitable considerations prevail in such cases [of fraud] for one year, and that the interest in finality of judgments prevails thereafter." Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters, 675 F.2d 1349, 1355 (4th Cir. 1982).

C.

On the other hand, many courts hold that fraud on the court can be brought by motion under subsection 6. "A [FRCP] Rule 60(b)(6) motion is an appropriate vehicle to bring forward a claim for fraud on the court[.]" Carter v. Anderson, 585 F.3d 1007, 1011 (6th Cir. 2009); see United States v. 6 Fox St., 480 F.3d 38, 46 (1st Cir. 2007) (recognizing that subsection 6 "embraces what is called 'fraud on the court'"); see also Latshaw v. Trainer Wortham & Co., 452 F.3d 1097, 1104 (9th Cir. 2006) (noting that, "[a]cts of 'fraud on the court' can sometimes constitute extraordinary circumstances meriting relief under Rule 60(b)(6)[]"); Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 832 (7th Cir. 1985) ("Unless the false testimony can be traced to the adverse party, the case must be decided under the residual

category of 60(b)(6), which permits review only when the violation created a substantial danger of an unjust result."); R.C. v. Nachman, 969 F. Supp. 682, 690 (M.D. Ala. 1997), aff'd, 145 F.3d 363 (11th Cir. 1998) (determining that fraud on the court can be a reason justifying relief under 60(b)(6)); Trim v. Trim, 33 So. 3d 471, 475 (Miss. 2010) ("Rule 60(b)(6) provides a 'catch-all' provision under which relief may be granted in exceptional and compelling circumstances, such as for fraud upon the court."); Coulson v. Coulson, 448 N.E.2d 809, 811-12 (Ohio 1983) (concluding that the contention that fraud on the court falls under subsection 3 is "without merit[]").

Under these cases, fraud on the court is not "mere" fraud. These courts appear to reason that because fraud on the court affects the judicial process itself, such a claim should be brought to the attention of the court by motion under 60(b)(6), and not be subject to a one-year limitation. See Trim, 33 So. 3d at 478 (concluding that a party's intentional filing of a substantially false statement providing inaccurate financial information in a divorce proceeding constitutes fraud on the court, which could be addressed under subsection 6).

VI.

Fraud on the court should fall under HFCR Rule 60(b)(6) as "any other reason" justifying relief, and not be subject to a one-year limitation of subsection 3 because (1) Rule 60(b) itself suggests that conclusion; (2) our policies of reaching the merits and according justice would be promoted; and (3) statements in our case law support such an outcome.

A.

HFCR Rule 60(b)(3) states that "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party" justifies relief. (Emphasis added.) Thus, HFCR Rule 60(b)(3) "concerns misconduct by an opposing party only." Chang v. Rockridge Manor Condominium, No. C-07-4005 EMC, 2010 WL 3063185, at *3 (N.D. Cal. Aug. 3, 2010); see Sherman v. Verizon Va., Inc., 220 F.R.D. 260, 262 (E.D. Va. 2002) (deciding that to bring a subsection 3 motion, the alleged wrongful action must be committed by an opposing party, not by the plaintiff's attorney); see also CSEA, 98 Hawaiʻi at 504, 51 P.3d at 371 (noting that alleged fraud committed by the adverse party's counsel fell under subsection 3).

The considerations underlying fraud on the court, however, are not restricted to the conduct of an opposing party as expressly qualified under HFCR Rule 60(b)(3) and, therefore, should not fall under that subsection. Fraud on the court may be committed by a party, but also may be committed by the party's counsel.[12] It constitutes "a wrong against the institutions set

[12] Schefke, 96 Hawaiʻi at 431, 32 P.3d at 75 ("Courts have required more than nondisclosure by a party or the party's attorney to find fraud on the court.") (Emphasis added.); McMunn v. Mem'l Sloan-Kettering Cancer Ctr., 191 F. Supp. 2d 440, 445 (S.D.N.Y. 2002) (noting that fraud on the court occurs when a "party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action[]"). Fraud on the court would also include fraud committed by a judge or by counsel. See Herring v. United States, 424 F.3d 384, 386 (3d Cir. 2005) (stating that intentional fraud by an officer of the court can amount to fraud on the court); Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1130 (9th Cir. 1995) ("One species of fraud upon the court occurs when an 'officer of the court' perpetrates fraud affecting the ability of the court or jury to impartially judge a case."); Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993) (concluding that intentional fraud by an officer of the court amounts to fraud on the court); McKinney v. Boyle, 404 F.2d 632, 633-34 (9th (continued...)

up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." Kawamata Farms, 86 Hawaiʻi at 256, 948 P.2d at 1097 (internal quotation marks and citation omitted) (observing that discovery fraud by one party was perpetuated against the court and abused the judicial process). It is a "direct assault on the integrity of the judicial process." Schefke, 96 Hawaiʻi at 431, 32 P.3d at 75 (internal quotation marks and citation omitted); see In re Genesys Data Techs., 204 F.3d 124, 130 (4th Cir. 2000) (noting, in the context of an assertion that the submission of a false affidavit constituted a fraud on the court, that a fraud on the court "seriously affects the integrity of the normal processes of adjudication") (internal quotation marks and citation omitted). Since fraud on the court affects the judicial process itself, the ability to bring it to a court's attention should not be restricted by the one-year limitation in HFCR Rule 60(b)(3).

If a party in a divorce or marriage proceeding misrepresents to the court the status of his or her marriage to obtain a favorable decree, a fraud on the court may be committed. See Batrouny v. Batrouny, 412 S.E.2d 721, 723 (Va. Ct. App. 1991) (noting that a wife committed fraud on the court when, in a divorce proceeding, she represented to the court that one child

[12](...continued)
Cir. 1968) (holding that the plaintiff's motion fell under subsection 6 when the plaintiff alleged that his lawyer and his former wife, neither a party to the case, committed fraud); Chewning v. Ford Motor Co., 579 S.E.2d 605, 611 (S.C. 2003) (noting that when an attorney--an officer of the court--suborns perjury or intentionally conceals documents, he or she has been held to commit fraud on the court); cf. Mt. Ivy Press, LP v. Defonseca, 937 N.E.2d 501, 509-10 (Mass. Ct. App. 2010) (pro se litigants, generally required to comply with the same rules as attorneys, can be held to commit fraud on the court).

was one of two children born out of the parties' marriage, and the court relied on that representation in ordering the husband to make child support payments; sixteen months after the divorce, the husband moved to vacate the decree and, upon an evidentiary hearing, the evidence showed, and the wife admitted, that the husband was not the father). In her declaration, Geraldine stated that George intentionally misrepresented his marital status in order to obtain a divorce decree and property settlement agreements favorable to him. The property settlement agreements were allegedly agreed to by Geraldine on the understanding that George was married only to her. Therefore, in issuing its decree, the court fundamentally relied on George's representation that he was married to one woman.

This was not a case where the fraud occurred between the parties and had little effect on the judicial proceedings. See Maranda v. Maranda, 449 N.W.2d 158, 165 (Minn. 1989) (noting that the court in a stipulated divorce dissolution sits as a third party to the agreement). George's alleged representations resulted in an abuse of the judicial process because the fraud affected an integral part of the court's decision to grant the George-Geraldine divorce. Such "fraud," then, would fall within the category of "any other reason" that justifies relief under HFCR Rule 60(b)(6).

B.

Our policies of reaching the merits and according justice also support the conclusion that fraud on the court falls under HFCR Rule 60(b)(6). While other courts conclude that the

policy favoring finality of judgments prevails over equitable considerations a year after judgment, Great Coastal Express, 675 F.2d at 1355, this court has expressed a policy "preference for judgments on the merits over the finality of judgments, especially when such judgments are procured through fraud[,]" Matsuura v. E.I. DuPont de Nemours & Co., 102 Hawaiʻi 149, 158, 73 P.3d 687, 696 (2003). Indeed, "a judgment or final order should reflect the true merits of the case." Id. at 157, 73 P.3d at 695 (internal quotation marks and citation omitted). Hence, "the injurious effect of fraud" on the ability to ascertain the truth weighs in favor of reaching the merits of a fraud on the court claim. Id. at 162, 73 P.3d at 700.

In Magoon v. Magoon, 70 Haw. 605, 609, 780 P.2d 80, 82 (1989), the family court entered an order on April 15, 1988, dividing the property between a couple who had divorced on March 4, 1987. After an appeal was filed, a document explaining an agreement between the parties regarding the distribution of property was discovered. A motion to vacate the order distributing the property was filed in the family court, as the late discovery of the document and the commission of fraud by the ex-wife furnished grounds for relief under HFCR Rule 60(b). Id. at 610, 780 P.2d at 83.

The family court noted "there were sufficient questions raised by the discovery of this document to have required or conducted a further fact finding hearing to determine the validity of the document[,]" but concluded, based on its

interpretation of HRS § 580-56(d) (1976)[13] and case law, that it lacked jurisdiction to entertain the motion because more than a year had elapsed since the decree of divorce was entered. Id. (internal quotation marks omitted). In explaining that the family court had jurisdiction, this court noted, "Our concern that a judgment or final order should reflect the true merits of the case, which is expressed in HFCR 60(a) and (b), militates against a literal application of the one-year limitation here." Id. at 616, 780 P.2d at 86. As the family court had jurisdiction over the "Rule 60(b) motion seeking relief from the order dividing the property despite the elapse of a year[,]" this court vacated the order denying the motion and remanded to the court with instructions, inter alia, to hold a hearing to determine the validity of the agreement. Id. at 616, 780 P.2d at 87.

C.

Finally, our cases have suggested that fraud on the court is not barred by a one-year limitation under HFCR Rule 60(b)(3). It has been stated that other "courts place no time limit on setting aside a judgment on th[e] ground" of fraud on the court, supporting the view that fraud on the court can be brought under subsection 6, as there is no specific time

[13] HRS § 580-56(d) (1993) is the same as the 1976 version, and provides:

> Following the entry of a decree of divorce, or the entry of a decree or order finally dividing the property of the parties to a matrimonial action if the same is reserved in the decree of divorce, or the elapse of one year after entry of a decree or order reserving the final division of property of the party, a divorced spouse shall not be entitled to dower or curtesy in the former spouse's real estate, or any part thereof, nor to any share of the former spouse's personal estate.

limitation under that subsection. Schefke, 96 Hawaiʻi at 431 n.42, 32 P.3d at 75 n.42 ("A court's power to vacate a judgment for fraud on the court is great, and has few procedural limitations. . . . For example, courts place no time limit on setting aside a judgment on this ground[.]"); see Magoon, 70 Haw. at 616, 780 P.2d at 86 (noting that the court had "inherent power to investigate whether a judgment was obtained by fraud[,]" which supported the conclusion that the trial court had jurisdiction to entertain a 60(b) motion alleging fraud) (internal quotation marks, citations, and ellipsis omitted); Farrow v. Dynasty Metal Sys., Inc., 89 Hawaiʻi 310, 313, 972 P.2d 725, 728 (App. 1999) ("A judgment may be set aside at any time for after-discovered fraud upon the court."); Southwest Slopes, Inc. v. Lum, 81 Hawaiʻi 501, 511, 918 P.2d 1157, 1167 (App. 1996) (noting that "[f]raud, misrepresentation, and circumvention used to obtain a judgment are generally regarded as sufficient cause for the opening or vacating of the judgment[,]" without stating that a motion seeking such relief must be brought within a certain time) (internal quotation marks and citation omitted); see also In re Genesys Data Techs., 204 F.3d at 130 (noting that "under Hawaiʻi law, as under federal law, a judgment may be attacked for 'fraud upon the court' at any time") (citation omitted).

D.

Accordingly, based on the language of HFCR Rule 60(b), our policy of reaching the merits of claims and rendering justice, and case law indicating that fraud on the court can be

brought at any time, Geraldine's claim of fraud on the court should be remanded for decision under HFCR Rule 60(b)(6).

VII.

Geraldine also sought relief from the judgment under HFCR Rule 60(b)(6) on the ground that George exercised undue influence over her and caused her to transfer property to him that became incorporated in the divorce decree. She argued that the property division under the divorce decree was inequitable and that George was an "exceptionally effective manipulator[.]"

A.

According to Geraldine, undue influence is not "specifically stated" in subsections 1 through 5, and, therefore, that claim falls under HFCR Rule 60(b)(6). George countered that "it is abundantly clear that the nature of [Geraldine's] claim, as determined from the allegations set forth in her Motion, are in the nature of a fraud claim." The ICA determined that "a plain reading of HFCR Rule 60(b) reveals that 'undue influence' falls within Rule 60(b)(3) as 'other misconduct.'" Dubie, 123 Hawaiʻi at 282, 231 P.3d at 999.

With all due respect, a "plain reading" of HFCR Rule 60(b)(3) does not provide such an indication. "[O]ther misconduct" is not defined in HFCR Rule 60(b). It does not follow, then, that undue influence, mentioned nowhere in 60(b)(3), indisputably falls under "other misconduct" by one party against the other.[14] In my view, the construction of the

[14] Some courts have held that undue influence falls under 60(b)(6). Espie v. Catholic Soc. Servs., 528 So. 2d 863, 864 (Ala. 1988) (concluding that the plaintiff failed to show she was under undue influence to entitle her (continued...)

words "other misconduct" is subject to the rule of ejusdem generis. "The doctrine of ejusdem generis states that where general words follow specific words in a statute, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Singleton v Liquor Comm'n, 111 Hawaiʻi 234, 243 n.14, 140 P.3d 1014, 1023 n.14 (2006) (internal quotation marks and citations omitted).[15] Here, "other misconduct" is a general term, following the specific terms of fraud and misrepresentation. "Other misconduct," then, only embraces types of misconduct similar to fraud and misrepresentation.

1.

A plaintiff alleging fraud must establish the following elements:

> (1) false representations were made by defendants, (2) with knowledge of their falsity (or without knowledge of their truth or falsity), (3) in contemplation of plaintiff's reliance upon these false representations, and (4) plaintiff did rely upon them.

Shoppe v. Gucci Am., Inc., 94 Hawaiʻi 368, 386, 14 P.3d 1049, 1067 (2000) (emphasis added) (internal quotation marks and citations omitted). The false representation must concern a "past or existing material fact" but cannot be based on promises

[14](...continued)
to relief under Alabama Rules of Civil Procedure Rule 60(b)(6)); see Adams v. Marshall, No. 4:05-cv-62, 2007 WL 3102099, at *1 (W.D. Mich. Oct. 22, 2007) (construing the claim that undue influence was exerted to procure a settlement was a claim seeking relief under subsections 3 and 6).

[15] HFCR 60(b) has the same force and effect as a statute, thus rules of statutory construction apply to it. "When interpreting rules promulgated by the court, principles of statutory construction apply." State v. Lau, 78 Hawaiʻi 54, 58, 890 P.2d 291, 295 (1995) (citation omitted).

or "statements which are promissory in their nature." Id.

Misrepresentation has been defined as:

> Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists.

Kim v. Contractors License Bd., 88 Hawaiʻi 264, 268, 965 P.2d 806, 810 (1998) (emphasis added) (brackets and citation omitted); see Blair v. Ing, 95 Hawaiʻi 247, 269, 21 P.3d 452, 474 (2001) (noting that negligent misrepresentation requires "false information be supplied"); see also Black's Law Dictionary at 1091 (defining misrepresentation as "[t]he act of making a false or misleading assertion about something, usually with the intent to deceive" or "an assertion that does not accord with the facts"). Consequently, one element of misrepresentation is that false representations were made. See Ass'n of Apartment Owners of Newton Meadows v. Venture 15, 115 Hawaiʻi 232, 263, 167 P.3d 225, 256 (2007) (requiring that "false information be supplied") (internal quotations marks and citation omitted). Thus, fraud and misrepresentation have in common, false representations. Under the foregoing, then, "other misconduct" would involve a false representation.

2.

Contrastingly, undue influence is premised upon the victim's will being overborne, which can be accomplished without any false representation. It is stated generally that the elements of undue influence are "(1) a susceptible party, (2) another's opportunity to influence the susceptible party,

(3) the actual or attempted imposition of improper influence, and (4) a result showing the effect of the improper influence." DiPietro v. DiPietro, 460 N.E.2d 657, 662 (Ohio Ct. App. 1983); see also Pickman v. Pickman, 505 A.2d 4, 7 (Conn. Ct. App. 1986) (explaining the four elements as "(1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence").

Undue influence is defined as "[t]he improper use of power or trust in a way that deprives a person of free will and substitutes another's objective." Black's Law Dictionary at 1665. The ICA has defined it as "the misuse of a position of confidence or the taking advantage of a person's weakness, infirmity or distress to change improperly that person's actions or decisions." In re Adoption of Male Minor Child, 1 Haw. App. 364, 370, 619 P.2d 1092, 1097 (1980) (internal quotation marks and citation omitted). While "[i]t is impossible to define or describe with precision and exactness what is undue influence[,]" it matters that "the quality and the extent of the power of one mind over another must be to make it undue[.]" In re Notley's Will, 15 Haw. 435, 472 (Haw. Terr. 1904) (Galbraith, J., dissenting); see Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533, 539 (Cal. Ct. App. 1966) (explaining that undue influence is "coercive in nature, persuasion which overcomes the will without convincing the judgment"). Thus, false representations, or "[m]isrepresentations of law or fact[,] are not essential" to a

showing of undue influence, for a person's will may be overborne without false representation. Id.

Hence, while undue influence involves domination of a person and "overcoming a person's free agency or free will so that the person is unable to keep from doing what he or she would not otherwise have done[,]" fraud and misrepresentation involve an inducement of "a person to exercise his or her free will mistakenly based on false information." Rawlings v. John Hancock Mut. Life Ins., 78 S.W.3d 291, 301 (Tenn. Ct. App. 2001); see In re Vick, 557 So. 2d 760, 767 (Miss. 1989) (noting that the "basic ingredient" of fraud is that the victim is "deceived through the use of false information, so that his free will or free agency, of which he is not deprived, is exercised upon the basis of false information"). Though "the similarity between fraud and undue influence has often been pointed out, there is a very clear cut difference between the two concepts":

> Undue influence consists in exerting sufficient pressure or influence upon the testator to break down his will power and overcome his free agency or free will so that he is unable to keep from doing that which he would not otherwise do. Such undue influence need not involve the use of false and fraudulent representations or untrue statements. Unrelenting importunity that employs the use of perfectly true and accurate information may become so overbearing as to constitute undue influence, though such could not by any means constitute fraud.

Id. (emphasis added) (citation omitted). Thus, "[t]here need be no pressure in fraud such as is necessary to constitute undue influence." In re Hayes, 658 S.W.2d 956, 959 (Mo. Ct. App. 1983).

These distinctions support the conclusion that undue influence does not fall under "any other misconduct" in HFCR Rule 60(b)(3) because undue influence is based on conduct that is

different from fraud and misrepresentation. As noted before, fraud or misrepresentation exists when a person relies on a false belief, whereas undue influence exists when a person's will is overborne and the person does something he or she would not do otherwise. Because of the differences between fraud and misrepresentation on one hand, and undue influence on the other, undue influence cannot be a type of "other misconduct" under HFCR Rule 60(b)(3) and, therefore, must fall under HFCR Rule 60(b)(6).

B.

Geraldine sought to set aside the property division of the divorce decree due to George's exertion of undue influence over her from the date of marriage until the date of his death. The four elements of undue influence--a susceptible party, another's opportunity to influence, the actual imposition, and the resulting showing of improper influence--were alleged in the motion and supported by evidence in this case. See Pickman, 505 A.2d at 7 (listing the elements); DiPietro, 460 N.E.2d at 662.

As to the first element, susceptibility, a court considers whether the person alleged to be the object of undue influence was susceptible to such influence. Dr. Bennett Blum (Dr. Blum), a forensic psychiatrist who has "extensive experience as a forensic psychiatrist in evaluating situations in which one person may have exerted undue influence on another[,]" declared that Geraldine "was susceptible to manipulation and undue influence" at the time she met George. According to Dr. Blum, she was "made to believe that certain actions were critical to [George's] health" and their "happiness as a couple[,]"

considerations that "overwhelmed" her. Therefore, there was evidence that Geraldine was susceptible to undue influence.

As to the second element, when a "confidential relationship exists where the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust," an opportunity to influence exists. Mente Chevrolet Oldsmobile Inc. v. GMAC, 728 F. Supp. 2d 662, 672 n.25 (E.D. Pa. 2010) (internal quotation marks and citation omitted); see Francois v. Francois, 599 F.2d 1286, 1292 (3d. Cir. 1979) (noting that a confidential relationship "arises when one party places confidence in the other with a resulting superiority and influence on the other side"). Such a relationship typically includes that of "husband a[nd] wife[.]" GMAC, 728 F. Supp. 2d at 672 n.25.

In this case, Geraldine put her confidence and trust in George, declaring that she "believed[,]" "relied" on, and "trust[ed]" him, and obtained a "temporary" divorce based on his representations that the divorce was for business reasons and that they would soon remarry. Dr. Blum expressed to a reasonable degree of medical probability as a psychiatrist, that George "introduced a new element for [Geraldine's] consideration in her behaviors - the supposed spiritual and associated physical impact of her decisions upon the health and well-being of people she loved, her friends, and herself." George had the opportunity to "misuse" his "position of confidence" and take advantage of Geraldine. In re Adoption of Male Minor Child, 1 Haw. App. at 370-71, 619 P.2d at 1097. Based on their marital ties and

Geraldine's "trust" in him, GMAC, 728 F. Supp. 2d at 672 n.25, George was allegedly able to exploit their relationship in order to obtain her assets, according to Geraldine. Under George's influence, as related by Dr. Blum, Geraldine ignored and disregarded "input from legal advisors or accountants," thus raising questions as to "whether [she] had independent or disinterested advice in the transaction[s,]" a consideration as to whether undue influence was exerted. Pickman, 505 A.2d at 7.

As to the third element, a disposition to exert undue influence, Geraldine stated in her 60(b) motion that "[u]nbeknownst to [her], from the beginning of [her relationship with George], [George] intended to obtain her property and money[.]" She declared that he had spent more time in Thailand allegedly investing in property that he represented "belonged equally to both of [them]" and that she had an "ownership interest" in the property. He supposedly told Geraldine that a divorce would be temporary, and was for business reasons, so they should "continue to live as [they] had throughout [the] marriage." It can be "inferred" from the circumstances that George was disposed to seek a divorce and marital settlements for his ultimate "plan to obtain [Geraldine's] assets."

Finally, as to the fourth element, a result indicating undue influence, the result was a "temporary" divorce and the transfer of money and property to George which were incorporated in the allegedly temporary divorce. As to the transfer of money and property, when one party turns over "the management of [her] finances to [the other] who subsequently used [his] position to

gain control incrementally over most of [her] assets[,]" evidence of undue influence may exist. Francois, 599 F.2d at 1292. In her declaration, Geraldine stated that George caused her to transfer "real property, personal property and other things of value" to him. She explained that, "[b]ut for [George's] manipulations of [her], . . . and other tactics employed by [George], . . . [she] would not have agreed to these transfers [of money and property]."

Furthermore, Dr. Blum stated that, "in order to benefit himself[,]" George had engaged in tactics "commonly employed by cult leaders, scam artists, and perpetrators of undue influence." Such matters would support the allegations that Geraldine's complaint for divorce and transfer of money and property to George was the direct result of George's imposition of undue influence. In sum, based on the declarations in the record, it appears that George allegedly substituted his objectives for Geraldine's, "taking advantage of" her, In re Adoption of Male Minor Child, 1 Haw. App. at 370, 619 P.2d at 1097, and making her "do something other than [what she] would do under normal control[,]" Pickman, 505 A.2d at 7, to wit, obtaining a sham divorce and transferring property to him under the divorce decree.

VIII.

The declarations of Dr. Juan Suero (Dr. Suero), see infra, Dr. Blum, and Geraldine, and documents submitted, are sufficient bases to convene an evidentiary hearing as to whether the fraud on the court and undue influence claims were cognizable

under HFCR Rule 60(b)(6). They raise issues of fact for decision. The characterization by the court, the ICA, and the majority of the "nature" or character of Geraldine's fraud on the court and undue influence claims as "fraud" and other misconduct under HFCR Rule 60(b)(3), in the face of these declarations and documents, is wrong as a matter of law. See Allen v. Allen, 64 Haw. 553, 562, 645 P.2d 300, 307 (1982) (stating that "some of the[ family court's] findings and conclusions were probably unfounded because no evidentiary hearing was conducted"). A conclusion of law that all of Geraldine's claims amount to fraud and "misconduct" under HFCR Rule 60(b)(3), without consideration of the evidence to the contrary at a hearing therefor, does not comport with fundamental fairness. Cf. Sousaris v. Miller, 92 Hawaiʻi 534, 542, 993 P.2d 568, 576 (App. 1998) (stating that where there are no "material facts in dispute[,]" no evidentiary hearing is required). Thus, Geraldine's claims should be remanded to the court for an evidentiary hearing.

IX.

Accordingly, I would vacate the May 3, 2010 ICA judgment and the December 18, 2007 order of the court, and remand for an evidentiary hearing and determination regarding the fraud on the court and undue influence claims, which were properly before the court under HFCR Rule 60(b)(6).

X.

I respectfully disagree with the majority's arguments that (1) Geraldine's allegations of fraud on the court constitute only fraud under HFCR Rule 60(b)(3), (2) her claim of undue

influence falls under HFCR Rule 60(b)(3), and (3) Geraldine did not request an evidentiary hearing.

A.

The majority states that Geraldine's fraud on the court claim is unsuccessful because "the record does not establish that George knew the Dominican Decree was invalid, or that he deliberately misrepresented his marital status to the family court." Majority opinion at 36, see id. at 36 n.18. However, there are facts in the record to establish that George knew the decree was invalid and, thus, that he misrepresented his status to the court.

Geraldine's declaration indicates that George had knowledge of the invalidity of the Dominican divorce decree. Geraldine declared that George "made factual representations" to her, including that "he was divorced from his previous wife[.]" According to her, she realized, after George's death, that George "had not been validly divorced" from Sylvie at the time Geraldine married George, and she stated that she "would not have consented to marry" George, "had [she] known the truth" that his previous divorce was invalid.

Dr. Suero, an "attorney licensed to practice in the Dominican Republic," stated in a declaration and opinion that, within a "reasonable degree of probability within [his] sphere of [his] expertise," the Dominican divorce decree was void. Sylvie filed for divorce in the Dominican Republic on the ground of incompatibility of characters. However, Dr. Suero declared that, such divorce proceedings must be filed in the court embracing

"the defendant's residence, [or] . . . the plaintiff's residence." According to his declaration and opinion, Sylvie's residence of the West Indies and George's residence of California, were "not within the territorial jurisdiction" of the Dominican court, and therefore that court lacked personal and subject matter jurisdiction "to hear a divorce proceeding involving th[o]se parties[.]" Additionally, in his view, Dominican law was violated when the divorce hearing was held before the end of a mandatory fifteen-day period given to the opposing party, in this case, George, to respond to the summons. Dr. Suero recounted that the divorce decree "shall not be considered as a valid divorce by any third party" because "it is a product of violations of Dominican public policies and the Dominican Republic constitution."

Additionally, attached to Geraldine's 60(b) motion was a copy of the amended separation agreement indicating that a separation agreement was formed by Sylvie and George four months after their divorce, which referred to themselves as "Wife" and "Husband." When two individuals refer to themselves as husband and wife, the fair "import" is that they are married.[16] Thus,

[16] The majority contends it is "not uncommon" for the terms, husband and wife, to describe a divorced couple, citing a Hawaiʻi appellate decision. See majority opinion at 36 n.18 (citing Weinberg v. Dickson-Weinberg, 121 Hawaiʻi 401, 403, 220 P.3d 264, 266 (App. 2009), vacated in non-relevant part by Weinberg v. Dickson-Weinberg, 123 Hawaiʻi 68, 229 P.3d (2010). However, it is axiomatic that the terms husband and wife, in ordinary usage, designate a couple as married, not as divorced. See Merriam-Webster's Collegiate Dictionary 566, 1353 (10th ed. 1993) (defining husband as a "male partner in a marriage"; and a wife as a "female partner in a marriage"). Nothing in the record supports extending nomenclature in Weinberg to the specific Canadian amended separation agreement of Sylvie and George. Furthermore, the ICA in Weinberg referred to the parties, a divorced couple, as "Wife or Defendant" and "Husband or Plaintiff", 121 Hawaiʻi at 403, 220 P.3d at 266, not because it is "common" for divorced parties to refer to themselves in that manner, but because doing so provided continuity and ease of reference for that particular (continued...)

there is evidence that George entered into an agreement in which he referred to himself as the husband of Sylvie only months after their alleged divorce. Accordingly, the record was sufficient to establish for purposes of an evidentiary hearing that George knew his divorce was invalid.

There are also facts in the record to establish that George deliberately misrepresented his marital status to the court. George filed an appearance and waiver form in which he submitted himself to the court's jurisdiction and stated that he was "permitting the [c]ourt without opposition from me to proceed with the . . . matter[.]" (Emphasis added.) By agreeing to the divorce, George represented that he and Geraldine were "lawfully married to each other," as stated in the divorce complaint.[17] Since George had also "agreed with [Geraldine] on the matters set forth in a signed agreement incident to divorce[,]" he held himself out as being married to Geraldine. The divorce decree stated that, "[a]fter full consideration of the evidence, the [c]ourt f[ound] the material allegations of the Complaint for Divorce to be true, [and Geraldine was] entitled to a divorce from the bonds of matrimony on the grounds that the marriage [was] irretrievably broken[.]" Thus, the court relied on George's acknowledgment that he was married lawfully to Geraldine (and thus validly divorced from Sylvie) and that there was an

[16](...continued)
opinion.

[17] The majority states that "none of George's responsive submissions to the [] court aver to the legality of his marriage to Geraldine[,]" and therefore it is unlikely that George committed a fraud on the court. Majority opinion at 36 n.18. Respectfully, this statement is wrong in light of the appearance and waiver form signed by George.

agreement with Geraldine incident to "divorce," in deciding that the marriage was to be dissolved.

Therefore, based on the foregoing matters, the record was sufficient to establish for purposes of an evidentiary hearing that George knew the Dominican decree was invalid or that he "deliberately misrepresented" his marital status to the court.[18]

B.

The majority contends that because it was Geraldine, not George, who filed the divorce complaint, George could not have committed a fraud on the court. Majority opinion at 36 n.18. This contention is belied by the appearance and waiver form filed by George with the court, as described supra. Also, Geraldine asserted, in the divorce complaint, that the parties were lawfully married to each other because according to her declaration, she had no reason to conclude otherwise. Geraldine "believed" George's "representations" that George and she had been "legally married" and that he had been previously "validly divorced." Furthermore, Dr. Blum stated in his declaration that George engaged in the "willful presentation of false information ('lying')"; and "[b]ecause of [George's] lies, [Geraldine] based decisions about him and his requests upon misleading, inadequate, and/or inaccurate information." Thus, there are facts in the record establishing that Geraldine's actions were a result of George's conduct in misleading her and the court that his divorce

[18] Contrary to the majority's view, then, majority opinion at 36 n.18, the record, including declarations of Geraldine and Dr. Suero, does "address" George's knowledge.

to Sylvie was valid. Hence, the record amply supports the convening of an evidentiary hearing.

C.

The majority also contends that George's "conceal[ment]" of the fact that he had never divorced Sylvie is "non-disclosure" or perjury that, standing alone, is insufficient to establish a fraud on the court. Majority opinion at 37; see id. at 35 (citing 12 James Wm. Moore et al., Moore's Federal Practice ¶ 60.21[4][c] (3d ed. 2010)). Of course, we have stated that non-disclosure, without more, does not constitute fraud on the court. Schefke, 96 Hawaiʻi at 431, 32 P.3d at 75 ("Courts have required more than nondisclosure by a party or the party's attorney to find fraud on the court."). However, the majority fails to note that fraud on the court occurs when, in addition to the non-disclosure, there was no reason to question the party that failed to disclose information and the court relied on the non-disclosure:

> Ordinarily, perjury or nondisclosure does not constitute a fraud on the court because the adverse party has an opportunity to challenge the perjured testimony or nondisclosure. However, if neither the adverse party nor the court has any reason to question the veracity of the witness or party offering false testimony, and if the court relies on that testimony in entering judgment, then the fraud constitutes a fraud on the court.

Moore's Federal Practice ¶ 60.21[4][c] (emphasis added). The reason for this distinction is quite clear. Usually, in cases where non-disclosure did not amount to fraud on the court, the plaintiff or the party had "the opportunity to challenge the alleged perjured testimony or non-disclosure because the issue was already before the court." In re Levander, 180 F.3d 1114, 1120 (9th Cir. 1999).

For example, if a party claims, after trial, that a witness failed to disclose information or committed perjury while testifying, courts have held that such a claim is insufficient as fraud on the court because the party had the opportunity to cross examine or impeach the witness, or otherwise bring the perjury to light during trial. Id. On the other hand, when the non-disclosure was not, and could not have been, an issue at trial, and a court relied on the non-disclosure when issuing its order, opinion, or judgment, then the non-disclosure "harms the integrity of the judicial process." Id. (internal quotation marks and citation omitted). Thus, non-disclosure and perjury constitute fraud on the court when the parties lack knowledge of it and the court relied on the non-disclosure.

Kawamata Farms and Southwest Slopes are consistent with the foregoing principle. Kawamata Farms involved DuPont's failure to timely disclose information to the plaintiffs in response to discovery requests. 86 Hawaiʻi at 229, 948 P.2d at 1070. There, DuPont invoked the work-product privilege regarding "Alta" results relating to soils other than of the plaintiff's land. Id. at 225, 948 P.2d at 1066. The circuit court ordered DuPont to produce all results, but after the verdict was entered, DuPont produced "Alta" documents that were supposed to have been produced under the court order, but had not been disclosed. Id. at 229, 948 P.2d at 1070. The Kawamata Farms plaintiffs filed a Rule 60(b)(3) motion to alter or amend the judgment because DuPont's assertion of the work product privilege had prejudiced them at trial. Id. at 230, 948 P.2d at 1070. This court noted

that DuPont's untimely disclosure constituted "fraud upon the circuit court and the other parties."[19] Id. at 256, 948 P.2d at 1097 (emphasis added.) Obviously, DuPont's non-disclosure was relied on by the court for purposes of proceeding to judgment. Because it was brought within one year, the court did not consider whether Rule 60(b)(6) was the proper vehicle for the claim. See 11 Wright, Miller & Kane, supra § 2864, at 355 (stating that, in cases where the motion is made within a year of judgment, "it is not important to decide whether the motion in fact comes under clause (6) or under one of the earlier clauses[,]" because "[t]hese prompt motions for relief are granted if the court thinks that justice requires it and denied if the court feels otherwise.").

In Southwest Slopes, the defendant, Lum, contracted with the plaintiffs, Southwest Slopes, Inc. and Robert Rice (Rice), to buy the plaintiffs' property conditioned on a due diligence period. 81 Hawaiʻi at 503, 918 P.2d at 1159. After the period passed, Lum attempted to terminate the contract because the plaintiffs had failed to disclose the existence of archaeological remains on the property. Robert Smith (Smith), the attorney for Southwest Slopes, responded that there had never been any archeological survey performed and Lum's right to cancel had therefore expired with the due diligence period. Id. at 505, 918 P.2d at 1161. The plaintiffs filed suit asserting that Lum

[19] The majority states that Kawamata Farms does not stand for the proposition that non-disclosure can amount to fraud on the court, but that fraudulent misrepresentations were involved. Majority opinion at 37 n.19. Plainly, non-disclosure was involved, analogous to this case, inasmuch as DuPont failed to provide information ordered disclosed by the court.

was legally obligated to perform the contract, and the circuit court entered judgment for the plaintiffs. Id. at 506, 918 P.2d at 1162. Apparently in connection with the summary judgment motion, Rice submitted an affidavit stating that he was not aware of any archeological sites on the property, and Smith indicated that he had never performed any archeological surveys of the property. Id. at 511, 918 P.2d at 1167. On appeal, the ICA noted that the plaintiffs had in fact received a report stating that there were archaeological features on the land before contracting with Lum. Id. at 509, 918 P.2d at 1165.

In light of Smith's and Rice's failure to disclose the archeological features to Lum, the ICA "refer[red] this possible fraud upon the court to the circuit court for appropriate investigation and action." Id. at 511, 918 P.2d at 1167 (emphasis added). "The possibility that [the p]laintiffs used fraud upon the court when obtaining [] summary judgment in their favor motivate[d the ICA] to vacate and remand." Id. Thus, in Southwest Slopes, the plaintiffs' non-disclosure of the archeological findings to Lum and to the circuit court constituted fraud on that court because the circuit court apparently relied on the plaintiffs' representations when issuing its decision.[20] Based on Kawamata Farms and Southwest Slopes, it

[20] The majority attempts to distinguish Southwest Slopes by stating that "the asserted fraud [in Southwest Slopes] involved a potentially false affidavit by a party, as well as an apparently false affidavit and letter by the party's attorney." Majority opinion at 37 n.19 (emphases added). In the majority's view, because "fraud perpetuated by an officer of the court can constitute fraud on the court[,]" Southwest Slopes recognized the "possibility" that the plaintiffs used fraud on the court to obtain summary judgment. Id. The distinction that the majority attempts to make appears contrary to these cases.

First, the majority seems to state that Southwest Slopes involved

(continued...)

is apparent that non-disclosure can amount to fraud on the court when the party and the trial court have no reason to question the representation, and the court relies on the representation when issuing its decision.[21]

George's "non-disclosure" here, as in Kawamata Farms and Southwest Slopes, appears to have constituted a "direct assault" on the integrity of the judicial process inasmuch as the court, and Geraldine, proceeded under the assumption that George had been lawfully divorced from Sylvie, and Geraldine and George

[20](...continued)
the possibility that an attorney committed fraud on the court, which required remand. If the "possibility" that fraud on the court required remand, then clearly the "possibility" that George committed a fraud on the court should also require an evidentiary hearing. Second, the majority appears to infer that fraud on the court focused on the attorney as an "officer of the court." Id. If the majority believes that to be the case, then the argument that George was not an "officer of the court" would be a stronger, and an easier, means of disposing of Geraldine's fraud on the court claim than attempting to categorize her claim as one of mere fraud. The majority cites no Hawaiʻi case for that proposition, and in any event, it would be wrong. See Farrow, 89 Hawaiʻi at 313-14, 972 P.2d at 728-29 (agreeing with the Minnesota Supreme Court that "where a party intentionally misleads or deceives the court . . . , such conduct constitutes fraud upon the court") (emphasis added); see also Schefke, 96 Hawaiʻi at 431 n.42, 32 P.3d at 75 n.42 ("Courts have required more than nondisclosure by a party or the party's attorney to find fraud on the court.").

[21] The majority also notes that cases cited by Geraldine, Kawamata Farms, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), Geo P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 48 (1st Cir. 1995), and Southwest Slopes, do not support her claim under Rule 60(b)(6). Majority opinion at 38. But Kawamata Farms, Hazel-Atlas, and Southwest Slopes indicate what is considered to constitute fraud on the court. As discussed, Kawamata Farms involved discovery abuse, which was considered to be fraud on the court. Hazel-Atlas, as discussed further infra, involved concealment and misrepresentation to obtain a patent, which constituted fraud against a party and the court. The majority posits that Southwest Slopes supports the proposition that fraud on the court is properly considered as a type of fraud because it was discovered on direct appeal. To the contrary, the fact that the fraud on the court was addressed for the first time on appeal suggests that fraud on the court is more than mere fraud and can be raised by the court or the parties without waiver. Reintjes involved an allegation that the defendant committed perjury during an arbitration proceeding that led to settlement negotiations and the payment of a monetary sum to the defendant. 71 F.3d at 45. The plaintiff brought a complaint alleging unfair and deceptive acts and fraud. The First Circuit Court of Appeals concluded that fraud cognizable to bring an independent action must be more than common law fraud under the law of that circuit. Id. Inasmuch as Reintjes involved the requirements for bringing an independent action in the First Circuit, it did not bear on Rule 60(b)(6).

were lawfully married. In order to grant the divorce, the court had to rely on the representations incorporated into George's appearance and waiver form filed with the court. George's representations would amount to fraud on the court because the court and Geraldine had no reason to question the validity of George's appearance and waiver form, and the court had to find the existence of a lawful marriage relationship between George and Geraldine in order to render a divorce decree. See Southwest Slopes, 81 Hawaiʻi at 505-06, 511, 918 P.2d at 1161-62, 1167 (noting that the mere possibility that fraud was used to obtain a judgment required the judgment to be vacated). Consequently, it would seem indisputable that the substance of Geraldine's claim is not just fraud, but that the integrity of the judicial proceedings was violated because the court relied on George's alleged fraud in issuing its divorce decree.[22]

XI.

Second, the majority maintains Geraldine's undue influence allegations fall under HFCR Rule 60(b)(3) because (a) "other misconduct of an adverse party" includes undue influence, (b) the history of the analogous federal rule supports that conclusion, and (c) other states treat undue influence as other misconduct under subsection 3. Majority opinion at 39-44.

[22] Concluding that the "substance," majority opinion at 37, of Geraldine's claim is fraud that falls under HFCR Rule 60(b)(3), the majority purports "not [to] resolve whether fraud on the court properly falls under Rule 60(b)(3) or Rule 60(b)(6)[,]" id. at 37 n.20, and believes any discussion about the proper subsection would be dicta, id. However, if the majority believed a claim of fraud on the court fell under HFCR Rule 60(b)(3), then it would have dispensed with that claim by stating that the claim was barred by the one-year limitation of HFCR Rule 60(b)(3), without having to reach the "substance" of Geraldine's claim. By avoiding the question of whether subsection (3) or (6) applies, the majority calls into question the status of a fraud on the court claim.

A.

In the majority's view, HFCR Rule 60(b)(6), which allows relief for "any other reason," can only be invoked when someone other than the adverse party acted improperly, irrespective of the "type" of misconduct or action committed by the opposing party. As discussed supra, following established rules of construction, "other misconduct" only embraces types of conduct similar to fraud and misrepresentation. Because undue influence is not similar to fraud and misrepresentation, it does not fall under subsection 3. See discussion supra.

The majority cites Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir. 1988), for the proposition that "other misconduct" in subsection 3 must be given an expansive definition. Majority opinion at 40-41. In fact, Anderson did not define "other misconduct," but only focused on whether "other misconduct" should include unintentional acts, as opposed to only intentional acts such as fraud and misrepresentation. 862 F.2d at 923-24.[23] In the instant case, the issue is not whether undue influence is an intentional or unintentional act, but whether it is similar to fraud or misrepresentation. For the reasons set forth supra, it is not. Nevertheless, the majority maintains

[23] According to that court,

> "Misconduct" does not demand proof of nefarious intent or purpose as a prerequisite to redress. For the term to have meaning in the Rule 60(b)(3) context, it must differ from both "fraud" and "misrepresentation." Definition of this difference requires us to take an expansive view of "misconduct." The term can cover even accidental omissions-elsewise it would be pleonastic, because "fraud" and "misrepresentation" would likely subsume it.

862 F.2d at 923 (emphasis added).

that "[i]f relief under Rule 60(b)(3) were limited to conduct involving false representations, as the dissent asserts, the phrase 'other misconduct' would be rendered surplusage." Majority opinion at 40 n.22.

To the contrary, by abandoning established statutory construction rules, the majority leaves the term "other misconduct" without any manageable limits. This approach would swallow up the "any other reason to justify relief" language in 60(b)(6).[24] Moreover, other causes of action aside from fraud and misrepresentation contain a false representation element and, therefore, would fall under "other misconduct." See, e.g., Gold v. Harrison, 88 Hawaiʻi 94, 100, 962 P.2d 353, 359 (1998) (holding that defamation requires a false statement); Rodriguez v. Nishiki, 65 Haw. 430, 437, 653 P.2d 1145, 1150 (1982) (suggesting that both libel and slander include a false statement); Russell v. Am. Guild of Variety Artists, 53 Haw. 456, 459 n.2, 497 P.2d 40, 43 n.2 (1972) (explaining that libel involves one who falsely publishes defamatory matter); Hawaiian Ins. & Guar. Co. v. Blair, Ltd., 6 Haw. App. 447, 454 n.10, 726 P.2d 1310, 1315 n.10 (1986) (noting that disparagement involves publication of an injurious falsehood). It is obvious there is no "surplusage." Thus, despite the majority's statement to the contrary, see majority opinion at 40 n.22, these causes of action can be "other misconduct" under HFCR Rule 60(b)(3).

[24] The majority responds that its interpretation of HFCR Rule 60(b)(3) is manageable because the conduct must be performed by an adverse party. Majority opinion at 40 n.22. The fact that the conduct must be "of an adverse party[,]" id., simply reflects the plain language of the rule. It is the majority's application of "other misconduct" that is untethered to any governing principle.

B.

Contrary to the majority's position, the history of the federal rule does not govern the placement of "undue influence" at all. Prior to the 1937 adoption of FRCP Rule 60, the substantive and procedural law dealing with relief from judgment was complex. See United States v. Mayer, 235 U.S. 55, 67-69 (1914) (noting the general principle is that a court could not set aside or alter its final judgment after expiration of the term during which it was entered, subject to a few certain exceptions). The purpose of the federal rules was to clarify the practice.[25] The change in 1946 thus was intended to eliminate the procedural complexities of the former practice, while preserving two avenues for obtaining relief from judgment, a motion or an independent action. FRCP 60(b) 1946 advisory committee note.

The majority contends that because a claim of relief for undue influence was cognizable previously as a suit in equity, it is cognizable under Rule 60(b)(3), not Rule 60(b)(6), inasmuch as Rule 60(b)(6) extended remedies beyond the previous

[25] The Advisory Committee explained:

> Since the rules had been in force [since 1937], decisions have been rendered that the use of bills of review, coram nobis, or audita querela, to obtain relief from final judgments is still proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments.

FRCP 60(b) 1946 advisory committee note (emphasis added).

procedures for relief.[26] Majority opinion at 42-43. However, as the majority observes, the 1948 advisory committee note explains that Rule 60(b) itself "superceded" equitable remedies. Id. at 42. Thus, it does not follow that Rule 60(b)(3) was intended to be the appropriate vehicle for a claim of undue influence simply because undue influence could be brought previously in equity. Indeed, in response to an argument that subsection 60(b)(6) should only provide relief that had been authorized under the common law remedies, the Supreme Court explained that "[o]ne thing wrong with this contention is that few courts ever have agreed as to what circumstances would justify relief under these old remedies." Klapprott v. United States, 335 U.S. 601, 614 (1949) (emphasis added).

As the Committee noted, "Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief." FRCP 60(b) 1948 advisory committee note (emphases added). The question of whether undue influence falls under "other misconduct" is one of substantive law that must be answered by this court; it is plain that the Committee did not intend to categorize unenumerated claims under particular

[26] Of course, this court can and has deviated from FRCP Rule 60(b). "[N]otwithstanding their persuasiveness, interpretations of the FRCP by federal courts are by no means conclusive with respect to our interpretation of any rule within the [HFCR]." Kawamata Farms, 86 Hawaiʻi at 256, 948 P.2d at 1097. Indeed, Kawamata Farms, by allowing affirmative relief under HRCP Rule 60(b)(3), "depart[ed] from federal case law and set[] a new precedent[,] id. at 257, 948 P.2d at 1098, because the fraud was egregious and "[a]s a matter of equity, it would be unfair to allow DuPont to escape accountability[,]" id. Similarly, "as a matter of equity[,]" undue influence should not be barred by the one-year limitation under subsection 3 because it would be "unfair" to allow George, assuming the alleged exertion of undue influence over Geraldine, to reap the monetary benefits of his actions.

subsections. In other words, there is nothing in the history of the rule to suggest that undue influence falls under subsection 3.

Rather, Rule 60(b)(6) "broadens the grounds for relief from a judgment set out in the five preceding clauses[,]" and was intended to give "the courts ample power to vacate judgments whenever that action is appropriate to accomplish justice." 11 Wright, Miller & Kane, supra § 2864, at 355.[27] The case law in fact supports the conclusion that undue influence should fall under subsection 6. The Supreme Court noted that,

> [i]t is contended that the "other reason" clause should be interpreted so as to deny relief except under circumstances sufficient to have authorized relief under the common law writs of coram nobis and audita querela, and that the facts shown here would not have justified relief under these common law proceedings. . . . To accept this contention would therefore introduce needless confusion in the administration of 60(b) and would also circumscribe it within needless and uncertain boundaries. Furthermore 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools.

Klapprott, 335 U.S. at 614 (emphases added). Indeed, "[i]n simple English, the language of the 'other reason' clause [of subsection 6], for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." Id. at 614-15.

[27] The majority cites to the Note, Federal Rule 60(B): Relief From Civil Judgments, 61 Yale L.J. 76, 81 & n.25 (1952), for support that undue influence falls under Rule 60(b)(3) and is constrained by the one year limitation. However, that note does not mention undue influence, or state that that cause of action falls under subsection 3. Indeed, the note urged abolishment of the one year time limitation.

C.

1.

The majority contends that some federal cases have stated that

> "Rule 60(b)(3) is the lineal descendant of the equity rule that a court may alter or annul, because of fraud or undue influence, a written instrument (such as a contract or patent-but also a court's own judgment), see [Hazel-Atlas], 322 U.S. [at] 244-45 [], only if the fraud or undue influence is proved by clear and convincing evidence."

Majority opinion at 42 (quoting Ty Inc. v. Softbelly's, Inc., 517 F.3d 494, 498 (7th Cir. 2008)) (citation added); Massi v. Walgreen Co., No. 3:05-cv-425, 2008 WL 2066453, at *3 (E.D. Tenn. May 13, 2008)). However, those cases erroneously rely on Hazel-Atlas, which did not discuss undue influence, but only fraud on the court.

In Hazel-Atlas, the defendant, Hartford Empire (Hartford), had obtained a patent supported in part by a trade journal article allegedly written by an expert, Clarke, who favorably commented on Hartford's device. 322 U.S. at 240. Hartford sued Hazel-Atlas Glass Company (Hazel), claiming Hazel's patent infringement, and the D.C. Circuit Court of Appeals, quoting copiously from the trade journal article, concluded that Hazel infringed on the patent and directed the circuit court to enter judgment accordingly. Id. at 241. Upon information that Hartford's lawyer was the article's true author, Hazel's representatives interviewed Clarke, who swore that he was the true author of the article. Hartford's representative also met with Clarke and Hartford was "quite indebted to Mr. Clarke" who "might easily have caused [Hartford] a lot of trouble." Id. at

242-43. After Hazel settled, Hartford's attorney paid Clarke $7500 in cash. Id. at 243.

Thirteen years after the settlement, these facts were revealed and Hazel sought a bill of review. Id. The Third Circuit Court of Appeals refused to grant relief. The Supreme Court reversed, stating that there was a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." Id. at 245.

> [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Id. at 246 (emphasis added). Obviously, Hazel-Atlas involved only fraud on the court. Thus, it cannot be cited properly for the proposition that undue influence falls under subsection 3. The two cases referred to by the majority that cited Hazel-Atlas for that proposition are therefore inaccurate and themselves did not involve claims of under influence.[28] See, e.g., In re Intermagnetics Am., Inc., 926 F.2d 912, 916-17 (9th Cir. 1991) (stating that Hazel-Atlas involved fraud upon the court).

[28] The majority cites In re Leisure Corp., No. C-03-03012 RMW, 2007 WL 607696, at *5 (N.D. Cal. Feb. 23, 2007), and Interactive Edge, Inc. v. Martise, No. 97 Civ. 3354(RO), 1998 WL 35131, at *3 (S.D.N.Y. Jan. 30, 1998). Because both cases involved allegations of duress and threats, and not undue influence, and were timely brought within a year, they are inapplicable. Leisure Corp. involved a complaint in connection with a "FRCP 60(b)(3)[] Motion to Set Aside Orders[,]" 2007 WL 607696, at *3 (emphasis added), and indicated relief was "being sought on the grounds of [a party's] alleged fraud, misrepresentation and misconduct[,]" id. at *5.

2.

The majority also cites four state cases it maintains "appear to treat allegations of undue influence as 'other misconduct of an adverse party'" under similar provisions. Majority opinion at 43-44. The majority states that these cases are not "inapposite" because these courts actually "determined" that undue influence could be brought under provisions similar to HFCR Rule 60(b)(3). Id. at 44 n.25. However, these cases are inapposite because the courts did not "determine" that proposition inasmuch as either the claim was brought within six months of the court's order or decision and therefore was timely under subsection 3, thus the court did not need to decide whether it could be brought under that section, Rothschild v. Devos, 757 N.E.2d 219, 223 (Ind. App. 2001),[29] Coppley v. Coppley, 496 S.E.2d 611, 613-14 (N.C. App. 1998), Knutson v. Knutson, 639 N.W.2d 495, 495 (N.D. 2002)[30]; or it was unclear under what subsection the motion was brought and the court discussed all relevant subsections, Self v. Maynor, 421 So. 2d 1279, 1280 (Ala.

[29] Devos, 757 N.E.2d at 221, 224, involved the plaintiff's timely Rule 60(b) motion to set aside a dissolution of the marriage decree on the grounds of fraud, undue influence, duress and "fraud perpetrated by [the plaintiff's wife] on [the plaintiff] and/or the court." The trial court denied the plaintiff's motion. Id. The appellate court decided the trial court failed to address all of the plaintiff's claims in the motion and remanded for another hearing. Id. at 223. In a footnote that court stated that undue influence and duress could "presumably" be grounds for relief under subsection 3 as other misconduct of an adverse party. Id. at 224 n.9. However, since the motion was timely brought under subsection 3, and the trial court failed to reach the issue of undue influence at all, that language was dicta and Devos has no bearing on whether undue influence can be brought under subsection 6.

[30] Coppley, 496 S.E.2d at 616-18, and Knutson, 639 N.W.2d at 495, are irrelevant because they involved allegations of undue influence brought within one year of the decrees that were challenged. Therefore, those courts were not faced with the question of whether the motions should have been brought pursuant to subsection 6.

Civ. App. 1982).[31] See 11 Wright, Miller & Kane, supra § 2864, at 355 (noting that, in cases where the motion is made within a year of judgment, "it is not important to decide whether the motion in fact comes under clause (6) or under one of the earlier clauses[,]" because "[t]hese prompt motions for relief are granted if the court thinks that justice requires it and denied if the court feels otherwise").

XII.

Finally, the majority contends Geraldine did not request an evidentiary hearing and Geraldine did not raise the lack of an evidentiary hearing in her Application. Majority opinion at 45. To reiterate, Geraldine made it explicit that an evidentiary hearing was necessary in order to determine the 60(b)(6) issues. Geraldine's motion indicated that "[s]pace does not permit a detailed, fact-intensive showing[,]" but how the division was inequitable "will be shown in detail at the evidentiary hearing." (Emphasis added.) The motion for post-decree relief to vacate the divorce decree was based in part on "evidence as may be submitted in supplementation of this Motion or at the hearing on this Motion[.]" (Emphases added.) In her reply, Geraldine requested that the court address the HFCR

[31] Maynor, 421 So. 2d at 1280, involved a motion seeking relief pursuant to Rule 60(b) on the grounds of fraud and/or undue influence. Because the motion was not brought pursuant to a particular subsection of 60(b), the appellate court considered the allegations under subsections 1, 2, 3, and 6. Although noting that "the relief sought falls clearly within the purview of either 60(b)(1) or (2) or (3)[,]" and "rule 60(b)(6) would not be available[,]" the appellate court proceeded to discuss whether the facts merited relief under Rule 60(b)(6), and concluded that there was "evidence to support the trial court's conclusion of no such undue influence or fraud that required the judgment to be set aside." Id. at 1281. Inasmuch as there was no evidence of undue influence, there was no reason to grant relief under subsection 6. Id. In contrast, in the instant case, there is evidence of undue influence proffered by declarations.

Rule 60(b)(4) issue first, and, if the divorce decree was not void, to hold an evidentiary hearing on the HFCR Rule 60(b)(6) issues. Indeed, George's counsel appears to have taken a similar position, stating that the October 8, 2007 hearing was a "threshold hearing" involving a preliminary inquiry with, possibly, an evidentiary hearing to be held in the future. Thus, it is abundantly clear that Geraldine sought an evidentiary hearing on 60(b)(6). There was no opportunity to present evidence at a hearing because it was foreclosed by the court's ruling.

Respectfully, there is no merit to the contention that Geraldine failed to raise the issue of the evidentiary hearing in her Application. Again, the ICA concluded that the "court did not abuse its discretion by failing to provide Geraldine relief or a hearing regarding them." Dubie, 123 Hawaiʻi at 282, 231 P.3d at 999 (emphasis added). In her Application, Geraldine argued that the ICA committed "grave error when it held that undue influence and fraud on the court f[e]ll under HFCR Rule 60(b)(3), rather than HFCR Rule 60(b)(6)," and that the "alternative relief sought" was time barred. Geraldine sought "remand for consideration on the merits." Inasmuch as remand for "consideration on the merits" would of necessity include the evidentiary hearing requested from the family court with respect to HFCR Rule 60(b)(6), Geraldine obviously preserved her claim for an evidentiary hearing. See Application at 2 (lamenting the fact that at a "non-evidentiary hearing" the court granted

substitution, and "without conducting an evidentiary hearing," the court denied Geraldine's motion for post-decree relief).

XIII.

Based on the foregoing reasons, I would vacate the May 3, 2010 judgment of the ICA and remand to the court for further proceedings.

/s/ Simeon R. Acoba, Jr.