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NO. CAAP-12-0000394

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LESLIE S. KAWAMOTO, formerly known as LESLIE S. MASUDA,
Plaintiff-Appellee, v. WESLEY T. MASUDA, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-D NO. 09-1-282)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Fujise and Ginoza, JJ.)

I.

Defendant-Appellant Wesley T. Masuda (Husband) appeals from the March 19, 2012 "Order Re Plaintiff's Motion to Amend Decree Granting Absolute Divorce, Filed Herein on April 11, 2011, and Motion to Finalize Sale of Real Property, Filed November 16, 2011" (Amendment Order) entered by the Family Court of the Third Circuit (Family Court).¹

On appeal, Husband argues that the Family Court erred when it entered the Amendment Order and the subsequent May 24, 2012 "Findings of Fact, Conclusions of Law; Order Re Plaintiff's Motion to Amend Decree Granting Absolute Divorce, Filed Herein on April 11, 2011, and Motion to Finalize Sale of Real Property, Filed November 16, 2011" (FOF/COL) and resultant May 29, 2012 "Amended Decree Granting Absolute Divorce" (Amended Decree) because (1) the Family Court did not have jurisdiction more than thirty days after the entry of the Divorce Decree finally dividing the property of the parties; (2) the conclusions of law

¹ The Honorable Melvin H. Fujino presided.

do not support amendment of the decree under Hawai'i Family Court Rules (HFRCR) Rule 60; (3) conclusions of law 4 and 5 are erroneous in describing the intent of the parties; (4) conclusions of law 6 is erroneous in that it incorrectly calculates the amount owed to Husband; (5) insufficient findings were made to support the amendment; and (6) the Amended Decree was inconsistent with prior orders.

II.

On October 19, 2009, Leslie S. Kawamoto, formerly known as Leslie S. Masuda (Wife) initiated the instant divorce case. The parties eventually reached agreement as to certain terms of the divorce and on February 18, 2011, the agreement was read into the record by Wife's attorney, Brian J. De Lima (Wife's Counsel). Pertinent to this appeal, Wife's Counsel stated:

Now, this is where it's gonna get a little complicated, the real property. What's going to happen is we're gonna submit proposed appraisers to the Court. We want the Court to select one of the appraisers. We couldn't come to an agreement regarding the appraiser. That's why we're gonna submit, uh, two names each within ten days to the Court to select the appraiser. The appraiser is gonna determine the fair market value of the real property.

From there we're gonna -- wife has 60 days to decide whether she wants to buy Mr. Masuda out of his share of the equity or to list the property for sale. If she's gonna refinance and buy him out we're gonna deduct from the appraised price 6 percent of the appraised price. We're gonna deduct the balance that was owed on the equity loan at the time of the complaint being filed, approximately 22,000, and we're gonna deduct 50,000, uh, which represents, uh, one-half of the value of the boat, the Camaro and the business. And the balance then would be divided by two, and then she would have 120 days from the time that she decides that she wants to buy him out to refinance him for that amount.

Now, um, there's gonna be a couple other reconciliations from that amount. For example, uh, she's paid for the college expenses for this year. One-half of his obligation will be deducted from whatever she owes him. Whatever is not -- any other, uh, expenses that we have to reconcile may also be deducted, but that won't amount whatever that is.

On April 11, 2011, the Family Court entered a Decree Granting Absolute Divorce (Divorce Decree), stating, in relevant part:

7. PROPERTY DIVISION

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b. Wife is awarded the 2003 Honda Pilot and the 2006 Toyota Tacoma as her sole and separate property and responsibility. Husband shall be awarded the 2005 Ford F-350, and the 1968 Chevy Camaro as his sole and separate property and responsibility. Husband is also awarded the boat, with no liens or encumbrances, as his sole and separate property and responsibility.

c. The parties' real properties [sic] shall be disposed of as follows:

1. Property shall be appraised. The parties were unable to agree on an appraiser and, as such, Counsel for each party shall submit two appraisers to the Court within 10 days and the Court shall then select an appraiser. The appraiser shall determine the fair market value of the property. [Wife] will then have the option of either purchasing [Husband's] equity or to sell the property. [Wife] shall have sixty days to determine whether to exercise her option to purchase the property. If [Wife] decides to purchase [Husband's] equity, the sale price shall be appraised price minus 6% deduction for commissions if property would have been sold. From that balance, deduct the amount of the existing mortgage. From that balance, deduct \$50,000 which represents Husband's share of boat/camaro/business [sic]. The balance shall be divided by two and that is the amount which [Wife] may purchase [Husbands'] interest in the home. Wife shall have 120 days to refinance from the date in which she exercises her option to purchase. If Wife fails to refinance, the property shall be listed within one year from the filing of the decree.

2. The costs of the appraisal shall be divided equally.

3. If the property is sold, the costs of sale and mortgage is deducted from the sale price and from Husband's share, \$50,000 shall be provided to Wife for her interest in boat/camaro/business [sic].

4. Other reconciliations for expenses are as follows: from Husband's share his one-half share for the oldest child's college expenses to attend the University of Nevada at Las Vegas.

Apparently neither party appealed from this Divorce Decree.

On November 16, 2011, Wife filed "Plaintiff's Motion to Amend Decree Granting Absolute Divorce, Filed April 11, 2011, and Motion to Finalize Sale of Real Property" (Motion to Amend). The Motion to Amend alleged that certain paragraphs of the April 11, 2011 Divorce Decree "did not properly recite the correct agreement of the parties." In relevant part, Wife sought amendment of the Divorce Decree to reflect that, in the event Wife opted to buy Husband's interest in the marital residence, a six percent real estate commission fee and the balance of the

mortgage on the property would also be deducted from the appraised value.

On December 14, 2011, the Family Court heard Wife's Motion to Amend. Wife's Counsel immediately attempted to explain that he had made a mistake in his Motion to Amend to the extent that the \$50,000, representing Wife's one-half interest in the Boat/Camaro/Business was erroneously included as a deduction from the appraised value of the marital residence. The practical effect of this computation was to set off or credit only \$25,000 instead of \$50,000 against Husband's share of the net value of the residence.

Husband's counsel argued Wife's motion was untimely because (1) the Divorce Decree gave Wife sixty days to exercise her option and the Motion to Amend, as orally amended, was about six months later; and (2) the motion was made beyond the deadline prescribed by the rules.

Wife's Counsel summarized her position as follows:

You know, the -- I think the mistake was basically that - look, there's no dispute there was 100,000. Fifty grand is half and half. We're -- we -- if you look at the decree it says if it's sold she gets 50 grand from his share. The mistake was we -- it -- when -- when -- if she buys him out we didn't have the -- we didn't -- we didn't maybe articulate clearly that the 50 grand comes out from his share after dividing. We eliminated one step.

Now, maybe it was on the tape and it didn't get caught or -- or maybe we -- we forgot to make it clear, but obviously we're a court of equity. She shouldn't have to finance her own deal.

THE COURT: The point is the 50,000 is supposed to go to her.

[Wife's Counsel]: Right.

THE COURT: Okay. Anything further?

[Husband's Counsel]: Um, just -- just to reiterate, um, our objection with respect to timing of the motion to clarify, modify or amend the, uh, decree. Believe -- we believe it's in contravention of the rule.

The Family Court rejected both of Husband's arguments and granted the revised Motion to Amend:

Court will find that under Rule 60 of the Hawaii Family Court Rules that this court has jurisdiction. The decree in this case was entered or filed on . . . April 11, 2011. Court will also find that based on the intent of the parties for the agreement in this case that the 50,000 was supposed to be credited to the plaintiff in this case. Also the Court will find that the agreement was that there was

supposed to be a less 6 percent commission to be deducted from the appraisal price as well as a home equity of 22,000 that was supposed to be deducted as well.

The Court will rule as follows: The appraisal price of 280,000, less the 6 percent of 16,800 to be 268,200 [sic], less the home equity of 22,000, which comes out to 241,200 divided by two is 120,600. The Court will subtract this, uh, six -- 50,000 from the 120,600, which comes out to, uh, 70,600, less the 9,500. The plaintiff shall buy out the defendant at \$61,100.

[Wife's Counsel], you prepare the order. . . . And also prepare an amended decree.

On March 19, 2012, the Family Court entered the Amendment Order. The Amendment Order provided the following computation:

Appraisal	\$280,000
Less 6% realtor commission	(\$ 16,800)
Less home equity loan	<u>(\$ 22,000)</u>
	\$241,200
 Divided by two; party's share	 \$120,600
 Less ½ Boat/Camaro/Business	 (\$ 50,000)
Less reconciliation for tuition	<u>(\$ 9,500)</u>
Balance/Buy out Price	\$ 61,100

On April 17, 2012, Husband timely filed a Notice of Appeal from the March 19, 2012 Amendment Order.

Based on Husband's notice of appeal and HFCR Rule 52,²

² At all times relevant to this appeal, HFCR Rule 52 provided,

RULE 52. FINDINGS BY THE COURT

(a) **Effect.** In all actions tried in the family court, the court may find the facts and state its conclusions of law thereon or may announce or write and file its decision and direct the entry of the appropriate judgment; except upon notice of appeal filed with the court, the court shall enter its findings of fact and conclusions of law where none have been entered, unless the written decision of the court contains findings of fact and conclusions of law. To aid the court, the court may order the parties or either of them to submit proposed findings of fact and conclusions of law, where the written decision of the court does not contain the findings of fact and conclusions of law, within 10 days after the filing of the notice of appeal, unless such time is extended by the court. Requests for findings are not necessary for purposes of review. Findings of fact if entered shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If a decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

(continued...)

on April 25, 2012, the Family Court ordered the parties to submit proposed findings of fact and conclusions of law by May 10, 2012. Wife submitted her proposal on May 10, 2012 and on May 24, 2012, the Family Court entered the FOF/COL.

On May 29, 2012, the Family Court entered the Amended Decree.

III.

Husband challenges the Family Court's Amendment Order and Amended Divorce Decree. Relevant to this point, he argues that the Family Court's conclusions of law 1 through 6 as contained in the May 24, 2012 FOF/COL are in error.

A.

The Family Court retained jurisdiction under HFCR Rule 60. Husband concedes Wife's motion was timely under HFCR Rule 60,³ but disagrees that the motion should have been granted pursuant to HFCR Rule 60.

Although Wife filed the November 16, 2011 Motion to Amend pursuant to HFCR Rule 7, the Family Court did not err in construing the motion, as amended, on its substance as a motion under HFCR Rule 60. See Anderson v. Oceanic Props., Inc., 3 Haw.

²(...continued)

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made by the court, the question of sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the family court an objection to such findings or has made a motion to amend them or a motion for judgment.

(c) **Submission of Draft of a Decision.** At the conclusion of a hearing or trial, or at such later date as matters taken under advisement have been decided, the judge for convenience may designate the attorney for one of the parties to prepare and submit a draft of a decision, containing such provisions as shall have been informally outlined to such attorney by the judge. The attorney requested to prepare the proposed decision shall within 10 days, unless such time is extended by the court, deliver a draft of the decision to the division clerk. Upon review and finalization of form by the judge, the decision shall be entered.

³ Husband argues that the Family Court lacked jurisdiction to consider Wife's Motion to Amend under Hawaii Revised Statutes (HRS) § 580-47. As we conclude the Family Court had jurisdiction under HFCR Rule 60, we need not reach this issue.

App. 350, 355, 650 P.2d 612, 617 (1982) ("[I]t is the substance of the pleading that controls, not its nomenclature."). Wife argued in her motion that the Divorce Decree incorporated a mistake because Wife never intended to include her one-half interest in the boat/Camaro/business in the calculation of equity in the marital residence.

The Family Court had jurisdiction over Wife's November 16, 2011 Motion to Amend.

B.

The standard for reviewing the grant or denial under Rule 60 is whether there has been an abuse of discretion. Garamendi v. Henin, 683 F.3d 1069, 1077 (9th Cir. 2012) ("The standard of review for [a] Rule 60(a) claim is abuse of discretion.") (alteration in original, citation and internal quotation marks omitted);⁴ Cvitanovich-Dubie v. Dubie, 123 Hawai'i 266, 272, 231 P.3d 983, 989 (App. 2010), aff'd, 125 Hawai'i 128, 254 P.3d 439 (2011) ("In general, the standard of review for the grant or denial of an HFCR Rule 60(b) motion is 'whether there has been an abuse of discretion.'" (citation omitted)).

The Family Court determined that the Motion to Amend was brought within one year of the Divorce Decree and the court had jurisdiction under HFCR Rule 60. The Family Court determined that the \$50,000--representing Wife's share of the boat, Camaro automobile, and automobile repair business as stated in the Divorce Decree--was supposed to be credited to her. The Family Court concluded the treatment of this \$50,000 in the Divorce Decree was a mistake.

Husband argues that there was no mistake, the parties agreed to the terms as reflected in the oral statement of their agreement presented to the Family Court, and the Divorce Decree was an accurate statement of that agreement. Yet, Husband offers no reason for the disparate treatment of the \$50,000.

⁴ "Where, as with HFCR Rule 60(b), an HFCR is patterned after an equivalent rule within the [Federal Rules of Civil Procedure], interpretations of the rule by the federal courts are deemed to be persuasive by Hawai'i appellate courts." Child Support Enf't Agency v. Doe, 98 Hawai'i 499, 503 n.7, 51 P.3d 366, 370 n.7 (2002) (citing Hayashi v. Hayashi, 4 Haw. App. 286, 290 n.6, 666 P.2d 171, 174 n.6 (1983)).

In our view, the record reveals no abuse of discretion by the Family Court in amending the Divorce Decree. There is no dispute that the parties agreed the boat, Camaro automobile, and Husband's business were worth a total of \$100,000. Rather than selling these assets and splitting the proceeds, it was agreed that Husband would retain possession of these assets and Wife would receive her one-half share of the value, \$50,000. There is also no dispute that, in the event of a sale of the marital residence, this \$50,000 would be deducted from Husband's share of the net sale proceeds. It is also undisputed that, in the event of a buy-out, the Divorce Decree provided a computation that deducted the \$50,000 from the appraisal value of the marital residence, and not from Husband's share of the net appraised value, i.e., after the realtor commission and mortgage had been deducted and the remaining value divided in half. As the \$50,000 represented an amount Husband owed to Wife, it was a mistake to give Husband a credit against the entire value of the marital residence rather than his share of that value; it effectively gave Husband a credit against moneys that were not solely his, but shared with Wife, thereby reducing his payment to Wife.

HFRC Rule 60(a) allows for the correction of clerical mistakes at any time, whether by motion or sua sponte. Husband argues that HFRC Rule 60 does not apply because the Family Court's amendment substantively changed the Divorce decree. However,

The relevant inquiry under Rule 60(a) is not whether making the correction will have any effect on the parties' rights and obligations under the judgment. Most of the time, it will.[] Rather, the question is whether granting the motion would require the district court either to adjudicate an issue it has not previously reached or to make a substantive modification to a prior adjudication. Where the record makes it clear that an issue was actually litigated and decided but was incorrectly recorded in or inadvertently omitted from the judgment, the district court can correct the judgment under Rule 60(a), even where doing so materially changes the parties' positions and leaves one party to the judgment in a less advantageous position.

Rivera v. PNS Stores, Inc., 647 F.3d 188, 199 (5th Cir. 2011) (emphasis added). Here, it is clear that the parties decided to equally split the value of the boat, car, and business prior to the entry of the Divorce Decree. It is equally clear that the

computation of the final buy-out figure in the Divorce Decree did not accomplish this.

On the record before us, we are not convinced the Family Court abused its discretion in granting Wife's Motion to Amend.

C.

Finally, Husband argues that the Family Court erred in its Amended Decree as it contains ambiguities and could be interpreted as requiring Husband to repay Wife for their son's college expenses twice. Husband's arguments amount to speculation, based on future events, and therefore any decision regarding these arguments would be premature. See Kapuwai v. City & County of Honolulu, 121 Hawai'i 33, 40, 211 P.3d 750, 757 (2009) ("[I]n 'the absence of ripeness,' appellate courts are 'without jurisdiction to consider [the] appeal.'" (second alteration in original, citation omitted)).

III.

Based on the foregoing, the March 19, 2012 "Order Re Plaintiff's Motion to Amend Decree Granting Absolute Divorce, Filed Herein on April 11, 2011, and Motion to Finalize Sale of Real Property, Filed November 16, 2011" entered by the Family Court of the Third Circuit, is affirmed.

DATED: Honolulu, Hawai'i, April 28, 2016.

On the briefs:

Lissa D. Shults,
Bradley R. Tamm, and
Edwin A. Ebisui, Jr.,
for Defendant-Appellant.

William B. Heflin and
Brian J. De Lima,
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge