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Intermediate Court of Appeals
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NO. CAAP-15-0000362

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

JAN MICHAEL WEINBERG, Plaintiff-Appellee,
v.
BRENDA IRENE DICKSON-WEINBERG, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D. NO. 04-1-3936)

MEMORANDUM OPINION

(By: Leonard, Presiding Judge, Reifurth and Ginoza, JJ.)

Defendant-Appellant Brenda Irene Dickson-Weinberg (Wife) appeals from (1) the "Order Re Defendant's Motion for Post-Decree Relief Filed September 10, 2014," (Order Re Post-Decree Relief) filed on December 5, 2014 and (2) the "Order Denying Defendant's Motion for Reconsideration Filed December 15, 2014," (Order Denying Motion for Reconsideration) filed on March 25, 2015 in the Family Court of the First Circuit (family court).¹

On appeal, Wife contends: (1) the family court denied Wife's right to due process of law under Article I, section 5 of the Hawai'i Constitution; (2) the family court erred when it denied Wife's "Motion and Declaration for Post-Decree Relief" (Motion for Post-Decree Relief); (3) the family court erred when

¹ The Honorable Linda S. Martell presided except where indicated.

it denied "Defendant's Non-Hearing Motion for Reconsideration" (Motion for Reconsideration); and (4) the family court erred when it did not submit Findings of Fact and Conclusions of Law (FOFs/COLs) prior to Wife submitting her opening brief.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as relevant statutory and case law, we resolve Wife's points of error as follows and affirm.

I. Background

This case involves a divorce proceeding that began in 2004 and has previously been appealed to this court and the Supreme Court of Hawai'i on other issues.

On December 22, 2004, Jan Michael Weinberg (Husband) filed a Complaint for Divorce against Wife. On May 18, 2006, the family court filed a Divorce Decree, which, *inter alia*, (1) dissolved the marriage; (2) denied alimony² to either spouse; and (3) divided and distributed the parties' real property, personal property, and debts.

On June 16, 2006, Wife filed a notice of appeal from the Divorce Decree. This court in Weinberg v. Dickson-Weinberg, 121 Hawai'i 401, 220 P.3d 264 (App. 2009), affirmed in part, reversed in part, vacated in part and remanded the case with instructions on how to proceed. Id. at 450, 220 P.3d 264, 313. Husband appealed this court's decision to the Supreme Court of Hawai'i.

On April 7, 2010, the supreme court affirmed in part, vacated in part, and remanded the case back to the family court. Weinberg v. Dickson Weinberg, 123 Hawai'i 68, 80, 229 P.3d 1133, 1145 (2010).

On March 23, 2011, after a trial was held on remand, the family court entered a Decision and Order, which, *inter alia*, (1) divided the marital real property, personal property, and

² The terms alimony and spousal support are used interchangeably.

debts and (2) found that transitional alimony was appropriate for a period of thirty-six months at the rate of \$12,000 per month, beginning April 1, 2011.³ On June 30, 2011, the family court filed the Judgment. Wife did not seek reconsideration on the Decision and Order or appeal the Judgment.

On December 9, 2011, Husband filed "Plaintiff's Motion and Declaration for Post-Decree Relief" requesting a reduction in alimony payments to no more than \$2,000 per month. On June 4, 2012, the family court filed an "Order Granting in Part and Denying in Part Plaintiff's Motion and Declaration for Post-Decree Relief Filed December 9, 2011" (6/4/12 Order).⁴ The court, *inter alia*, reduced Husband's alimony payment to \$5,000 per month effective January 2012. Wife did not file a motion for reconsideration or appeal the 6/4/12 Order.

On April 15, 2014, Husband filed "Plaintiff's Motion for Entry of Full Satisfaction of Judgment Filed June 30, 2011 and Order Filed June 4, 2012." On August 28, 2014, the family court filed an "Order Granting Plaintiff's Motion for Entry of Full Satisfaction of Judgment Filed June 30, 2011 and Order filed June 4, 2012, Filed April 15, 2014" (Order Re Satisfaction of Judgment).⁵ The Order Re Satisfaction of Judgment states, *inter alia*, (1) Husband "fully and completely satisfied the alimony award issued by the Judgment, as modified by the Order, and [Husband] does not owe [Wife] any additional sums as and for alimony"; (2) Wife's "oral motion for an award of immediate temporary alimony is denied"; and (3) "[t]he Court accepts [Wife's] request to reserve her rights, if any, regarding the alimony awarded by the Judgment and modified by the Order." The Court makes no findings or determination as to whether any such rights exist." (Emphasis added.) Wife did not appeal the Order

³ The Honorable Paul T. Murakami entered the Order.

⁴ The Honorable Bode A. Uale entered the Order.

⁵ The Honorable Christine Kuriyama entered the Order.

Re Satisfaction of Judgment.

A few weeks later, on September 10, 2014, Wife filed her Motion for Post-Decree Relief. Wife requested that the family court reinstate her alimony award of \$12,000 per month because the court reduced the alimony based on Husband's disability and inability to work and the disability had resolved itself. On October 15, 2014, a hearing was held regarding Wife's Motion for Post-Decree Relief.

On December 5, 2014, the family court filed the Order Re Post-Decree Relief, in which the court found that "no material change of circumstance [existed] to re-open the issue of a thirty-six month award of transitional alimony, which terminated seven months ago and was finalized by an Order Re Satisfaction of Judgment."

On December 15, 2014, Wife filed her Motion for Reconsideration. On March 25, 2015, the family court filed an "Order Denying Defendant's Motion for Reconsideration Filed December 15, 2014." On April 23, 2015, Wife timely filed her Notice of Appeal.

On August 28, 2015, Wife filed her opening brief. On September 1, 2015, the family court filed its Findings of Fact and Conclusions of Law. On September 29, 2015, the family court filed its Amended Findings of Fact and Conclusions of Law (Amended FOFs/COLs).

II. Standard of Review

Generally, the family court possesses wide discretion in making its decisions and those decision[s] will not be set aside unless there is a manifest abuse of discretion. Thus, we will not disturb the family court's decisions on appeal unless the family court disregarded rules or principles of law or practice to the substantial detriment of a party litigant and its decision clearly exceeded the bounds of reason.

Fisher v. Fisher, 111 Hawai'i 41, 46, 137 P.3d 355, 360 (2006) (citation omitted).

III. Discussion

A. Motion for Post-Decree Relief.

1. The family court's jurisdiction.

As an initial matter, in Husband's answering brief, he contends that the family court did not have subject matter jurisdiction over Wife's Motion for Post-Decree Relief because once the period for alimony has run and the fixed alimony was fully paid, the family court did not have authority to order additional alimony. Thus, Husband contends that the family court lost jurisdiction when the alimony was satisfied as of March 1, 2014.

Hawaii Revised Statutes (HRS) § 580-47 (2006, Supp. 2015) confers jurisdiction on the family court:

§580-47 Support orders; division of property. (a) Upon granting a divorce, or thereafter if, in addition to the powers granted in subsections (c) and (d), jurisdiction of those matters is reserved under the decree by agreement of both parties or by order of court after finding that good cause exists, the court may make any further orders as shall appear just and equitable(2) compelling either party to provide for the support and maintenance of the other party;

. (d) Upon the motion of either party supported by an affidavit setting forth in particular a material change in the physical or financial circumstances of either party, or upon a showing of other good cause, the moving party, in the discretion of the court, and upon adequate notice to the other party, may be granted a hearing The court, upon such hearing, for good cause shown may amend or revise any order and shall consider all proper circumstances in determining the amount of the allowance, if any, which shall thereafter be ordered.

HRS § 580-47(a) provides the family court with jurisdiction to compel either party to provide for support and maintenance of the other party. In addition, HRS § 580-47(d) grants the court discretion to "amend or revise any order" if it determines that a material change in circumstances exists. This court concluded "the family court's spousal support order is always subject to the further order of the family court upon a material change in the relevant circumstances of either party even when the order explicitly states otherwise." Vorfeld v. Vorfeld, 8 Haw. App. 391, 401, 804 P.2d 891, 897 (1991); see Amii

v. Amii, 5 Haw. App. 385, 391, 695 P.2d 1194, 1198 (1985) ("Spousal support, however, is always subject to revision upon a substantial and material change in the relevant circumstances."). Thus, the family court is granted broad authority under HRS § 580-47 in its ability to address alimony issues.

In its August 28, 2014 Order Re Satisfaction of Judgment, the family court stated: "The Court accepts [Wife's] request to reserve her rights, if any, regarding the alimony awarded by the Judgment and modified by the Order. The Court makes no findings or determination as to whether any such rights exist." (Emphasis added.) Thus, the family court expressly reserved and limited its jurisdiction to the thirty-six-month period of the original alimony award.

When Wife filed her Motion for Post-Decree Relief, the family court had the authority and discretion under HRS § 580-47(d) to address Wife's Motion, but only as it pertained to the thirty-six month time frame of the original alimony award.

2. The family court did not abuse its discretion when it determined there was no material change in circumstances.

Wife contends that the family court erred when it denied her Motion for Post-Decree Relief because Husband's health and financial ability to pay alimony had improved. Wife contends that if Husband's physical and/or financial situation has improved, Wife is entitled to seek reinstatement of her alimony to the former amount of \$12,000 per month. Further, in her reply brief, Wife clarifies that "[Wife] was not trying to add on any additional amounts to what was originally ordered, she was merely trying to reverse the reduction of those amounts."

In her Motion for Post-Decree relief, wife stated that the previous award of alimony should be "reinstated to the amount of \$12,000.00 per month effective immediately and until further order of the Court. The Court to determine if support arrearages are owed based on Plaintiff's representations regarding his financial status in the event that such representations were not

truthful." Wife also stated the change in alimony was appropriate because the reduction in alimony was based on "1) [Husband's] disability and inability to work which has apparently resolved itself, and 2) [Wife's] financial need and alleged inequity of property division in divorce."

Wife based her Motion for Post-Decree Relief on the fact that Husband's ability to pay had changed after the Order Re Satisfaction of Judgment was filed. For example, at the hearing on Wife's Motion for Post-Decree Relief, Wife argued that a material change in circumstances existed because Husband is no longer disabled and is working.

Further, Wife stated that:

[t]here's been a material change of circumstances, which now is [Husband] is working again and is making income and is putting himself out there as - you know, taking on new cases There's been a material change in circumstances, again, where he's back to the position where he was in the first point. And at the very least we deserve a short trial on that issue, because there's a lot of factual issues.

In addition, Wife argued that it is not relevant that Wife did not appeal the Order that reduced the alimony payment from \$12,000 per month to \$5,000 per month "because the material change of circumstances has happened now." (Emphasis added.)

The court also stated: "I think my only question is whether there was a material change of circumstances that occurred between June of 2012 [when the alimony was reduced from \$12,000 to \$5,000] and March of 2014," when the thirty-six month time period for alimony expired. Wife responded by saying that if Husband "had complied with the court's scheduling order requiring that he file income and expense/asset and debt statements, you might have had the information you would need to make that determination."

The scheduling order, filed September 10, 2014, required Husband to submit (1) a copy of Husband's two most recent pay statements; (2) his last W-2 statement; (3) his last federal individual income tax return; and (4) his current Income and Expense and Asset and Debt Statements. These documents

further indicate that Wife was interested in receiving information about Husband's current financial situation and not contesting Husband's financial situation during the thirty-six month award of alimony.

Thus, based on Wife's Motion for Post-Decree Relief and Wife's assertions at the hearing on her Motion, Wife believed that the change in Husband's financial status occurred after the thirty-six month period of the alimony award and was not challenging Husband's financial circumstances during the original thirty-six month period.

This court stated in Vorfeld, that "[a] material change in the relevant circumstances has occurred when a party's relevant circumstances that are proven to exist at the time of the modification hearing are materially different from the party's relevant circumstances that were proven to exist when the family court entered its spousal support order." Vorfeld, 8 Haw. App. at 402, 804 P.2d at 897. The standard set forth in Vorfeld is in reference to a spousal support award that has not yet terminated. For example, in Vorfeld, the alimony award in dispute in that case originally was to "continue until Husband retires or Wife remarries, whichever shall first occur." Id. at 394, 804 P.2d at 893. When the motion to modify the spousal support was filed, none of the conditions for termination of the spousal support had occurred. Id. at 397, 804 P.2d at 895. Thus, this court applied a three-part analysis⁶ to determine if

⁶ The three-part analysis from Vorfeld provides:

1. Have any of the relevant circumstances materially changed?

A material change in the relevant circumstances has occurred when a party's relevant circumstances that are proven to exist at the time of the modification hearing are materially different from the party's relevant circumstances that were proven to exist when the family court entered its spousal support order.

As outlined in Cassiday v. Cassiday, 6 Haw. App. 207, 215-16, 716 P.2d 1145, 1151 (1985), *aff'd in part, rev'd in part*, 68 Haw. 383, 716 P.2d 1133 (1986), the relevant circumstances are as follows. The first relevant circumstance is the payee's need. What amount of money does he or she need to maintain the standard of living

modification to the spousal support was appropriate.

By contrast, in this case, Wife is not trying to modify a current spousal support order. In fact Wife stated at the hearing on the Motion for Post-Decree Relief that there was "no dispute the amounts that were supposed to be paid were paid." (Emphasis added.) Thus, Wife misapplies the standard for a material change of circumstances by contending Husband's current income should be used to retroactively change the spousal support award that was satisfied in full, as confirmed by the Order Re Satisfaction of Judgment entered on August 28, 2014.

Therefore, the family court did not abuse its discretion when it denied Wife's Motion for Post-Decree Relief.

B. Due Process.

Wife contends that the family court denied her constitutional right to due process of law when it did not: enforce the Scheduling Order requiring Husband to provide documents to Wife; require Husband to comply with Wife's discovery requests; and denied Wife a contested hearing.

The Hawai'i Constitution provides: "No person shall be deprived of life, liberty or property without due process of law[.]" Haw. Const. art. I, § 5. "At its core, procedural due

established during the marriage? The second relevant circumstance is the payee's ability to meet his or her need without spousal support. Taking into account the payee's income, or what it should be, including the net income producing capability of his or her property, what is his or her reasonable ability to meet his or her need without spousal support? The third relevant circumstance is the payor's need. What amount of money does he or she need to maintain the standard of living established during the marriage? The fourth relevant circumstance is the payor's ability to pay spousal support. Taking into account the payor's income, or what it should be, including the income producing capability of his or her property, what is his or her reasonable ability to meet his or her need and to pay spousal support?

2. If the answer to question 1 is yes, should there be a modification?

3. If the answer to question 2 is yes, what should the modification be?

Vorfeld v. Vorfeld, 8 Haw. App. 391, 402-03, 804 P.2d 891, 897-98 (1991) (emphasis added).

process of law requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant liberty interest." Doe v. Doe, 120 Hawai'i 149, 168, 202 P.3d 610, 629 (App. 2009) (citation and internal quotation marks omitted).

[D]ue process is not a fixed concept requiring a specific procedural course in every situation. Rather, due process is flexible and calls for such procedural protections as the particular situation demands. The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner.

Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan, 87 Hawai'i 217, 243, 953 P.2d 1315, 1341 (1998) (citations omitted).

Questions of constitutional law are reviewed under the right/wrong standard. Hollaway v. Hollaway, 133 Hawai'i 415, 420, 329 P.3d 320, 325 (App. 2014).

In this case, it is undisputed that Husband did not timely respond to a discovery request by Wife or provide documents set forth in the Scheduling Order.

HFRC Rule 37(a)(2) provides in pertinent part:

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(2) Motion if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling . . . inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.

Thus, a party that seeks a court order compelling discovery may submit a motion and must include a certification that the party conferred with the other side before taking court action.

In this case, Wife contends that she submitted a motion to compel discovery because her Motion for Post-Decree Relief included a request for "[a]n Order requiring [Husband's] compliance with outstanding discovery requests in the event he

does not timely comply." However, this request does not fulfill the requirements under HFCR Rule 37(a)(2) because Wife did not attach a certification that she had in good faith conferred with Husband in an effort to secure the discovery.

Moreover, given Wife's contention that her Motion for Post-Decree Relief was based on a change in circumstance after the thirty-six month alimony period, the family court did not abuse its discretion in not requiring further discovery from Husband.

Wife also contends that her due process rights were violated because the family court did not grant her request for a contested hearing. Although a full trial was not held regarding Wife's Motion for Post-Decree Relief, there was a hearing on October 15, 2014. At the hearing, both Husband and Wife were sworn in. In addition, Wife was given an opportunity to testify.

Based on the information before the family court, the court was not wrong to decide the case without a trial. Therefore, the family court did not violate Wife's right to due process when it did not grant Wife a trial regarding her Motion for Post-Decree Relief.

C. Motion for Reconsideration.

Wife contends the family court abused its discretion when it denied her Motion for Reconsideration. Wife's appeal in this regard is based on HFCR Rule 60(b)(1).

HFCR Rule 60(b)(1) provides:

(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:
(1) mistake, inadvertence, surprise, or excusable neglect[.]

In the Memorandum in Support of Wife's Motion for Reconsideration, Wife asserted the family court was mistaken in its Order for Post-Decree Relief when it stated: "[Husband] testified that his disability continues."

After a review of "Plaintiff's Memorandum in Opposition to Defendant's Motion and Declaration for Post-Decree Relief Filed September 10, 2014" and the transcripts from the hearing on Wife's Motion for Post-Decree Relief, it does not appear that Husband testified that his disability continues. However, to the extent that the family court erred in this regard, whether Husband's disability continues is not relevant to whether there was a material change in circumstances to affect the alimony during the thirty-six month period. As stated above, Husband's current financial status does not effect the thirty-six month time period of the alimony award. Thus, any mistake was harmless and did not justify relief from the family court's Order Re Post-Decree Relief. Therefore, the family court did not abuse its discretion when it denied Wife's Motion for Reconsideration.

D. Findings of Facts and Conclusions of Law.

Wife contends that the family court abused its discretion when it did not timely submit its FOFs/COLs.

HFCR Rule 52(a) provides:

(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.

Although Wife requested that the family court submit FOFs/COLs in accordance with Hawai'i Rules of Appellate Procedure (HRAP) Rule 10(f),⁷ nothing in the record indicates that prior to

⁷ HRAP Rule 10(f) provides:

(f) Request for Findings of Fact and Conclusions of Law. In all actions where the court appealed from is not required to enter findings of fact and conclusions of law prior to the entry of an order, judgment, or decree, but is required to do so once a notice of appeal is filed, the appellant shall, no later than 10 days after filing the notice of appeal, file in the court appealed from a request for entry of findings of fact and conclusions of law, naming the judge who tried the action and entered the order, judgment, or decree being appealed. The appellant shall attach a filed copy of the notice of appeal to the request. The named judge shall enter the requested findings of fact and conclusions

Wife submitting her opening brief, Wife asked the family court to comply with HFCR Rule 52(a). See In re Doe Children, 108 Hawai'i 134, 141, 117 P.3d 866, 873 (App. 2005). In addition, Wife did not file a request under HRAP Rule 29⁸ for an extension of time to submit her opening brief. See Id.

Wife does not articulate how the untimely filing of the FOFs/COLs prejudiced her case on appeal. Further, Wife was able to and did challenge certain FOFs/COLs in her reply brief. Therefore, we cannot conclude that Wife was prejudiced by the timing of the family court's FOFs/COLs.

Therefore,

IT IS HEREBY ORDERED that the "Order Re Defendant's Motion and Declaration For Post-Decree Relief Filed September 10, 2014" filed on December 5, 2014, and the "Order Denying Defendant's Motion for Reconsideration Filed December 15, 2014"

of law within 28 days after the request has been filed. To aid the court, the court may order the parties or either of them to submit proposed findings of fact and conclusions of law after the filing of the request.

⁸ HRAP Rule 29 provides:

(a) By the Appellate Clerk. Upon timely (1) oral request, or (2) written motion, or (3) letter request by a party, the appellate clerk shall grant one extension of time for no more than 30 days for the filing of an opening or answering brief and no more than 10 days for the filing of a reply brief. The appellate clerk shall note on the record that the extension was granted and the date the brief is due. The requesting party shall notify all other parties that the extension was granted and shall file a copy of the notice in the record. A request is timely only if it is received by the appellate clerk within the original time for filing of the brief.

(b) By the Appellate Court. Motions for further extensions of time to file briefs will be approved by a judge or justice only upon good cause shown. The submission of a request or motion for extension does not toll the time for filing a brief.


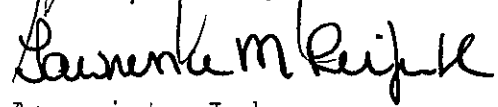
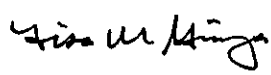
filed on March 25, 2015, in the Family Court of the First Circuit, are affirmed.

DATED: Honolulu, Hawai'i, May 31, 2016.

On the briefs:

Leslie C. Maharaj,
for Defendant-Appellant.

Earle A. Partington,
(Law Office of Earle A. Partington)
Greg Ryan,
(Greg Ryan and Associates),
for Plaintiff-Appellee.


Presiding Judge

Associate Judge

Associate Judge