

NO. 23634

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

RICHARD A. MOODY, Plaintiff-Appellee, v.
DOROTHY S. LAM, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT COURT
(FC-DOMESTIC ABUSE NO. 00-1-0077)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe, and Lim, JJ.)

Defendant-Appellant Dorothy S. Lam (Lam), appearing *pro se*, appeals the July 10, 2000 order entered by the Honorable Darryl Y.C. Choy (Judge Choy) of the family court of the first circuit, denying Lam's two motions for reconsideration, both brought under Hawaii Family Court Rules (HFCR) Rule 59(g) (1999)¹ and Rule 60(b) (2000), of (1) an April 13, 2000 order denying her motion for recusal of Judge Choy; and (2) a three-year order for protection of Plaintiff-Appellee Richard A. Moody (Moody), also appearing *pro se* on appeal, entered against her on April 13, 2000 pursuant to Hawaii Revised Statutes (HRS) § 586-5.5 (Supp. 2000); respectively. On appeal and in defense

^{1/} Defendant-Appellant Dorothy S. Lam based her two motions for reconsideration, in part, upon Hawaii Family Court Rules (HFCR) Rule 59(g) (1999). At the time of the filings, however, HFCR Rule 59(g) had been replaced by HFCR Rule 59(e) (2000). Hence, we will hereinafter refer to the rule in effect, HFCR Rule 59(e).

of her motions for reconsideration, Lam argues that because Moody lied in support of his petition for an order for protection, the order should not have been entered and hence her motion for reconsideration of that order should have been granted. Lam also argues that Judge Choy had a personal bias against her, and therefore her motion for reconsideration of the court's denial of her motion for recusal should have been granted. We conclude that the court's July 10, 2000 order, denying both of Lam's motions for reconsideration, was not an abuse of discretion. We therefore affirm the order.

I. Background.

Moody and Lam divorced in 1995. During the numerous, bitter disputes following the divorce, Judge Choy apparently presided over two separate matters involving the couple. The first matter was related to the 1995 divorce decree, and the second matter, the present case, involved an order for protection granted to Moody against Lam.

In the first dispute, Lam challenged the 1995 divorce decree. Apparently² believing the decree was inequitable and unfair, Lam filed a HFCR Rule 60(b) motion to set it aside. During a June 24, 1996 hearing on the motion, Judge Choy denied Lam's motion, granted Moody's cross-motion and awarded Moody

^{2/} The pertinent documents are not part of the record on appeal. Only the transcripts of the corresponding hearings are filed therein.

attorneys fees. Lam filed a motion for reconsideration, which Judge Choy heard on August 8, 1996. Again, Judge Choy denied Lam's motion, and awarded Moody attorneys fees.

After the divorce, Moody and Lam interacted frequently to arrange for the care, custody and visitation of their two children, and to litigate financial disputes resulting from the divorce. On January 27, 2000, Moody, by then *pro se*, appeared before Judge Choy seeking an order for protection against Lam pursuant to HRS § 586-5.5.³ Lam, by then also *pro se*, appeared for the hearing. However, when the hearing started, Lam was away from the courtroom making copies of exhibits for her defense, purportedly at the instruction of a court officer. As a result, she did not hear the three calls for the hearing.

^{3/} Hawaii Revised Statutes § 586-5.5(a) (Supp. 2000) provides, in relevant part:

Protective order; additional orders. a) If after hearing all relevant evidence, the court finds that the respondent has failed to show cause why the order should not be continued and that a protective order is necessary to prevent domestic abuse or a recurrence of abuse, the court may order that a protective order be issued for such further period as the court deems appropriate, not to exceed three years from the date the protective order is granted.

The protective order may include all orders stated in the temporary restraining order [granted upon filing of the petition] and may provide for further relief as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation and custody with regard to minor children of the parties and orders to either or both parties to participate in domestic violence intervention services.

With the court proceeding on a default basis, Moody testified about the incidents he had previously described in his January 13, 2000 *ex parte* petition. Moody explained that he and Lam have two minor children (it appears they have three children in all), and that he has the sole legal and physical custody of them. Moody testified that in December 1999, Lam threatened to hurt him by saying, in his words, I want to see you dead. You don't belong to be my -- the father of my children. According to Moody, Lam has [a] tremendous amount of anger over the divorce. Moody also told the court that Lam threw shoes at him, and that she physically attacked him on two occasions. He testified that in November 1999, she slapped, punched, or hit him. That same month, she hit him with a thrown shoe. In December 1999, I was asking her to leave, and she physically attacked me in my front door. According to Moody, the altercations took place at his home [q]uite regularly. He explained, There's altercations weekly, but not physical but mostly verbal. He estimated that physical run-ins took place once a month, and that he had to call the police three or four times. Finally, Moody testified that Lam would arrive at his home unannounced, angry and abusive, three or four times a week, and he believed he was in immediate danger.

The court found Moody's allegations to be proven, and granted the order for protection with a provision for limited

contact between Lam and Moody to facilitate visitation and mediation of divorce matters.

After the January order for protection was granted, Lam filed two motions. On February 7, 2000, she filed a motion to set aside the default judgment (the order for protection) against her. On March 17, 2000, she filed a motion to recuse Judge Choy.

During an April 13, 2000 hearing on Lam's two motions, Judge Choy set aside the January order for protection because Lam's default was entered while she was outside of the courthouse xeroxing documents for the hearing. However, Judge Choy denied Lam's motion for his recusal because her request was based on insufficient grounds.

On the issue of recusal, Lam testified that Judge Choy demonstrated his personal bias in entering a default judgment against her during the January 27, 2000 hearing. Also, Lam believed Judge Choy was biased based on my past experience personally, not only in the recent hearing in January 27; also based on the previous three years ago in '96 in the family court motions [to set aside the divorce decree]. In denying Lam's motion, Judge Choy explained, I understand the parties are never satisfied with the judge when they lose their case and I don't believe they are grounds for recusal and I would deny the request. An order denying Lam's motion for recusal was entered the same day.

After disposing of Lam's motion for recusal, Judge Choy heard testimony anew regarding Moody's request for an order for protection. Moody provided testimony similar to that he rendered during the January hearing. Moody testified about two incidents, one on December 19, 1999, and another on December 22, 1999. According to Moody, in the December 19, 1999 incident, Lam stood at his front door and threw shoes at him. One shoe struck him in the groin. Three days later, Lam physically attacked him and threatened to kill him. Moody also testified that the majority of Lam's unannounced visits, and frequent phone calls, had stopped since the January order for protection was issued. In response to Moody's testimony, Lam referred to, among numerous other things, a written statement by her twelve-year-old daughter which stated that Lam never hurt her children. Her daughter also stated that Lam neither threatened nor hurt Moody. Lam directly denied threatening or hurting Moody. She averred that Moody sought the order for protection to intimidate me, to limit me, to put me in jail[,] all in aid of advantage in the various disputes between them.

After hearing the evidence, Judge Choy granted Moody's request for a three-year order for protection. Like the January order for protection, the April 13, 2000 order for protection allowed for limited contact between Moody and Lam to facilitate visitation and to appear in court.

On May 3, 2000, Lam filed two HFCR Rules 59(e) and 60(b) motions for reconsideration, the first for reconsideration of the April order for protection and the second for reconsideration of Judge Choy's denial of her motion for recusal. On July 10, 2000, Judge Choy denied both motions for reconsideration. On August 7, 2000, Lam filed a notice of appeal of the July 10, 2000 order.

II. Standard of Review.

In interpreting the HFCR, the cases and treatises interpreting cognate rules of civil procedure are persuasive authority in parsing the HFCR. Hayashi v. Hayashi, 4 Haw. App. 286, 290 n.6, 666 P.2d 171, 174 n.6 (1983) (Rule 60(b), HFCR, is similar to Rule 60(b), Hawai[]i Rules of Civil Procedure (HRCP) and Rule 60(b), Federal Rules of Civil Procedure (FRCP), except for some minor variations which do not affect the provisions concerned here. Therefore, the treatises and cases interpreting HRCP, Rule 60(b) and FRCP, Rule 60(b) provide persuasive reasoning for the interpretation of HFCR, Rule 60(b).).

Hence, we review the July 10, 2000 order denying both of Lam's motions for reconsideration under the abuse of discretion standard. See Paxton v. State, 2 Haw. App. 46, 48, 625 P.2d 1052, 1054 (1981) (It is well-settled that the trial court has a very large measure of discretion in passing upon motions under [HRCP] Rule 60(b) and its order will not be set

aside unless we are persuaded that under the circumstances of the particular case, the court's refusal to set aside its order was an abuse of discretion. (Citing 11 Wright & Miller, Federal Practice and Procedure, § 2872 (1973).); Gossinger v. Ass'n of Apt. Owners of Regency of Ala Wai, 73 Haw. 412, 425, 835 P.2d 627, 634 (1992) (the trial court's disposition of a HRCF Rule 59 motion is also reviewed under the abuse of discretion standard).

An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party-litigant. Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai i 422, 428, 16 P.3d 827, 833 (App. 2000) (citing State v. Jackson, 81 Hawai i 39, 47, 912 P.2d 71, 79 (1996)).

III. Discussion.

A. Jurisdiction.

Lam appeals the court's July 10, 2000 order denying her motion for reconsideration of its April 13, 2000 denial of her motion for recusal. Lam also appeals the same order's denial of her motion for reconsideration of the court's April 13, 2000 order for protection. However, the substance of Lam's appeal is a direct attack upon the propriety of the underlying April 13, 2000 orders. But because Lam's August 7, 2000 notice of appeal was filed more than thirty days after the underlying April 13, 2000 orders, it could not bring up on appeal the merits of those

orders. Hawaii Rules of Appellate Procedure (HRAP) Rule 4(a)(1) (2000) (When a civil appeal is permitted by law, the notice of appeal shall be filed within 30 days after entry of the judgment or appealable order.). Lam s motions for reconsideration did not toll the thirty-day deadline for filing a notice of appeal of the April 13, 2000 orders, HRAP Rule 4(a)(3) (If, not later than 10 days after entry of judgment, any party files a motion that seeks to reconsider, vacate, or alter the judgment, . . . the time for filing the notice of appeal is extended until 30 days after entry of an order disposing of the motion[.]), because they were filed on May 3, 2000 - more than ten days after the April 13, 2000 orders. Thus, the April 13, 2000 orders cannot be directly attacked in this appeal.

Hence, the question on appeal is whether the court abused its discretion when it denied Lam s motions for reconsideration.

Lam styled her motions for reconsideration as HFCR Rules 59(e) and 60(b) motions. HFCR Rule 59(e) provides:

Motion to Reconsider, Alter or Amend a Judgment or Order. Except as otherwise provided by HRS section 571-54, a motion to reconsider, alter or amend the judgment or order shall be filed not later than 10 days after entry of the judgment or order. Excepting motions for reconsideration from proceedings based upon HRS sections 571-11(1), (2), (6) and (9), all motions for reconsideration shall be non-hearing motions. At its discretion, the court may set the matter for a hearing. Responsive pleadings to a motion for reconsideration shall be filed no later than 10 days after filing of the motion to reconsider, alter or amend the judgment or order.

HFCR Rule 60(b) provides:

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; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceedings was entered or taken. For reasons (1) and (3) the averments in the motion shall be made in compliance with Rule 9(b) of these rules. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. 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.

Because Lam filed her May 3, 2000 motions for reconsideration more than ten days after the underlying April 13, 2000 orders, the motions for reconsideration, denominated as such, were tardy under HFCR Rule 59(e) (a motion to reconsider, alter or amend the judgment or order shall be filed not later than 10 days after entry of the judgment or order). However, courts are willing to entertain, under Rule 60(b), motions that would otherwise be untimely under Rule 59(e):

This case illustrates the dangers of filing a self-styled "motion to reconsider." The Federal Rules of Civil Procedure do not recognize a "motion to reconsider." Instead, the rules allow a litigant subject to an adverse judgment to file either a motion to alter or amend the judgment pursuant to [FRCP Rule]

59(e) or a motion seeking relief from the judgment pursuant to [FRCP Rule] 60(b). These two rules are distinct; they serve different purposes and produce different consequences. Which rule applies to a motion depends essentially on the time a motion is served. If a motion is served within ten days of the rendition of judgment, the motion ordinarily will fall under [FRCP] Rule 59(e). See Dalton v. First Interstate Bank of Denver, 863 F.2d 702, 703-04 (10th Cir. 1988) ("post-judgment motions filed within ten days of the final judgment should, where possible, be construed as Rule 59(e) motions"). If the motion is served after that time it falls under [FRCP] Rule 60(b). See Wilson v. Al McCord, Inc., 858 F.2d 1469, 1478 (10th Cir. 1988) ("Because more than ten days had elapsed before the filing of the motion to reconsider, we construe it as a motion pursuant to [FRCP Rule] 60(b)(6)") (citation omitted).

In this case, plaintiffs motion to reconsider was not served within ten days of the district court s judgment. Therefore, the motion must be construed as one pursuant to [FRCP] Rule 60(b). Plaintiffs appeal from the denial of the motion raises for review only the district court s order of denial and not the underlying judgment itself. United States v. 31.63 Acres of Land, 840 F.2d 760, 761 (10th Cir. 1988); V.T.A., Inc. v. Airco, Inc., 597 F.2d 220, 224 (10th Cir. 1979).

Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991) (footnotes omitted) (the case also involved *pro se* plaintiffs).

We therefore review, under HFCR Rule 60(b), the court s July 10, 2000 order denying Lam s motions for reconsideration, but not the underlying April 13, 2000 orders.

B. Motion for Reconsideration of the Court s Denial of Lam s Motion For Recusal.

Lam offers on appeal no cognizable support for her contention that the court abused its discretion in denying her motion for reconsideration of its refusal to recuse Judge Choy.

With respect to motions for reconsideration, [t]he purpose of a motion for reconsideration is to allow the parties

to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion. Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding. Sousaris v. Miller, 92 Hawaii 505, 513, 993 P.2d 539, 547 (2000) (citations, internal quotation marks and footnote omitted). Considering the motion for reconsideration as a HFCR Rule 60(b) motion does not change the foregoing principle. Cuerva & Associates v. Wong, 1 Haw. App. 194, 199, 616 P.2d 1017, 1021 (1980) (a HRCP Rule 60(b)(6) motion containing nothing more than what was presented at trial was a misuse of HRCP Rule 60(b)(6), and was appropriately denied). Contrary to the purpose of motions for reconsideration, Lam asserted in her motion for reconsideration the same allegations and arguments regarding Judge Choy's personal bias that she asserted in her original motion for recusal.

At any rate, Lam's original motion for recusal of Judge Choy was groundless. According to Lam, Judge Choy showed his personal bias against her race, sex[,], national origin, age, political, [and] socioeconomic status by entering a default judgment against her during the January 27, 2000 hearing. However, when apprised of the reason for Lam's absence from the hearing, Judge Choy set aside the default without hesitation. Lam also argued that Judge Choy demonstrated his personal bias against her in ruling against her in the previous post-divorce

proceedings. This, however, is no ground for recusal, without more. Peters v. Jamieson, 48 Haw. 247, 264, 397 P.2d 575, 586 (1964) (We adhere to the rule that mere erroneous or adverse rulings by the trial judge do not spell bias or prejudice and cannot be made the basis for disqualification.). Lam offers no other grounds for recusing Judge Choy. Our independent review of the record reveals none.

Hence, Lam's original motion for recusal was groundless. Lam's motion for reconsideration did not offer any new evidentiary grounds. Lam did not offer any new argument in support of her motion for reconsideration. Even if Lam had presented a new argument, she would still have to demonstrate that she had no opportunity to raise the argument in connection with the underlying motion. Gossinger, 73 Haw. at 427, 835 P.2d at 635 (a motion for reconsideration is properly denied when new argument in the motion could and should have been raised before disposition of the underlying motion). Given these circumstances, we conclude that the court did not abuse its discretion in denying Lam's motion for reconsideration of its denial of her motion for recusal.

C. Motion for Reconsideration of the Order for Protection.

Lam contended in her motion for reconsideration of the order for protection that Moody testified falsely in support of his petition. As we have discussed, however, a motion for

reconsideration is not warranted unless there is new evidence or argument presented. Sousaris, 92 Hawaii at 513, 993 P.2d at 547 (Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding. (Citations and footnote omitted.)); cf. Cuerva, 1 Haw. App. at 199, 616 P.2d at 1021 (a motion for reconsideration that contained nothing that was not presented at trial was a misuse of HRCP Rule 60(b)(6), and denial of the motion was warranted). Even if new evidence or argument is adduced, reconsideration is not warranted if the evidence or argument could have been presented before the underlying disposition. Gossinger, 73 Haw. at 427, 835 P.2d at 635 (a motion for reconsideration is properly denied when new argument in the motion could and should have been raised before disposition of the underlying motion).

Lam s motion for reconsideration was nothing more than a rehash of her opposition to the underlying petition. Lam had an opportunity at the April 13, 2000 hearing on the petition to cross-examine Moody and to present evidence refuting his testimony, and she took full advantage of that opportunity. Lam presented numerous exhibits and extensive testimony to the court. By way of summary, she argued, here verbatim, that I have provide this evidence to show whereby he [(Moody)] could not show any picture, tape recorder. He could not show any witness testimony that those events actually happened. And the

children's testimony statements show that it did not happen. Because Lam's motion for reconsideration adduced nothing that she did not or could not present at the hearing on the petition, reconsideration was not appropriate and the court did not abuse its discretion in denying her motion.

Insofar as Lam, in her motion for reconsideration, criticized the court's determinations of the credibility of the witnesses and the weight of the evidence presented, such criticism has no resonance on appeal. In re Doe, 95 Hawaii 183, 190, 20 P.3d 616, 623 (2001) (issues dependent upon the credibility of witnesses and the weight of the evidence are the province of the trier of fact, not the appellate court).

IV. Conclusion.

Accordingly, we affirm the July 10, 2000 order of the family court of the first circuit, in its entirety.

DATED: Honolulu, Hawaii, September 28, 2001.

On the briefs:

Dorothy S. Lam,
defendant-appellant, pro se.

Chief Judge

Richard A. Moody,
plaintiff-appellee, pro se.

Associate Judge

Associate Judge