

NOT FOR PUBLICATION

NO. 25830

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

MATTHIAS DAVID KEMENY, Plaintiff-Appellee, v.
KRISTINA K.I. KEMENY, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-M NO. 03-1-0220)

MEMORANDUM OPINION

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

Defendant-Appellant Kristina Mullen Kemeny^{1/} (Kristina or Defendant Appellant) appeals from the family court's (1) April 3, 2003 Order Granting Motion to Enforce Compliance With Decree of Dissolution and (2) May 6, 2003 order denying Kristina's April 11, 2003 Motion for Reconsideration. We affirm.

BACKGROUND

On March 4, 1998, in Honolulu, Kristina gave birth to a son (Son). Plaintiff-Respondent Matthias David Kemeny (Matthias) is Son's father.

On August 12, 2000, Kristina and Matthias were married in Washington State.

On August 29, 2001, in Washington State, Matthias filed a complaint for divorce. On September 5, 2001, Kristina was served in Hawai'i where she lives with Son.

^{1/} Throughout these proceedings, Defendant-Appellant has been referred to by several variations of her name, including Kristina K.I. Kemeny, Kristina I.M. Kemeny, Krstina Mullen Kemeny, and Kristina Ingrid Mullen.

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On September 20, 2001, in Hawai'i, Kristina filed a complaint for divorce (FC-D No. 01-1-3198). On October 21, 2001, Matthias was served in Washington State.

On November 7, 2001, in Kristina's Hawai'i divorce case, Matthias filed "Defendant's Motion to Dismiss Complaint for Divorce Filed September 20, 2001". At the time, Hawaii Revised Statutes (HRS) Chapter 583 (1993), Hawai'i's Uniform Child Custody Jurisdiction Act, was the law in Hawai'i. It stated, in relevant part, as follows:

Simultaneous proceedings in other states. (a) A court of this State shall not exercise its jurisdiction under this chapter if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this chapter, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

. . . .

(c) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 583-19 through 583-22.

On January 8, 2002, Judge William J. Nagle, III entered an "Order Granting Defendant's Motion to Dismiss Complaint for Divorce Filed September 20, 2001" stating, in relevant part, as follows:

On November 7, 2001, [Matthias] entered a special appearance and filed Defendant's Motion to Dismiss Complaint for Divorce Filed September 20, 2001. A hearing was held on November 14, 2001. . . . The Court having reviewed the memoranda and affidavits submitted, heard the argument of counsel, and being otherwise fully advised in the premises, it is

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HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss Complaint for Divorce Filed September 20, 2001, which was filed herein on November 7, 2001, is and the same shall be GRANTED, as follows:

1. The Court finds:

(a) [Matthias] is a domiciliary of the State of Washington.

(b) The Hawai'i Family Court lacks *in personam* jurisdiction over [Matthias] or *in rem* jurisdiction for purposes of marital property division.

(c) The Hawai'i Family Court lacks *in personam* jurisdiction over [Matthias] or *in rem* jurisdiction to adjudicate issues of spousal support and child support.

(d) [Matthias] commenced a divorce action in Vancouver, Washington, on August 29, 2001, and [Kristina] was personally served in the State of Hawai'i with said divorce Petition and Summons on September 5, 2001. Thereafter, on September 20, 2001, [Kristina] filed her Hawai'i Complaint for Divorce. [Matthias] was not served with the Hawai'i divorce complaint until October 21, 2001.

(e) [Kristina] has not effectively challenged the *in personam* jurisdiction of the State of Washington over [Kristina] to determine marital property issues or the jurisdiction of the State of Washington to determine issues of child custody, child support or spousal support.

(f) This Court declines to exercise jurisdiction regarding issues of child custody and defers to the proceeding for divorce previously initiated in the State of Washington.

2. Accordingly, [Kristina's] Complaint for Divorce filed September 20, 2001 is dismissed in its entirety.

Kristina did not appeal this order.

Pursuant to Act 124 (2002), effective January 1, 2003, HRS Chapter 583 (1993), Hawai'i's Uniform Child Custody Jurisdiction Act, was repealed and replaced by HRS Chapter 583A, Hawai'i's Uniform Child-Custody Jurisdiction and Enforcement Act. Prior to this change, on December 17, 2002, the Superior Court of Washington, County of Clark, filed a Decree of Dissolution in Case no. 013014371 (Washington Decree). This Washington Decree states, in relevant part, as follows:

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II BASIS

Findings of Fact and Conclusions of Law have been entered in this case.

III DECREE

IT IS DECREED that

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3.2 PROPERTY TO BE AWARDED [MATTHIAS]

[Matthias] is awarded as his separate property the property set forth in Exhibit A. This exhibit is attached or filed and incorporated by reference as part of this decree.

3.3 PROPERTY TO BE AWARDED TO [KRISTINA]

[Kristina] is awarded as her separate property the property set forth in Exhibit A.

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3.10 PARENTING PLAN

The parties shall comply with the Parenting Plan signed by the court on this date. The Parenting Plan signed by the court is approved and incorporated as part of this decree.

3.11 CHILD SUPPORT

Child support shall be paid in accordance with the order of child support signed by the court on this date. This order is incorporated as part of this decree.

3.13 NAME CHANGES

[Kristina's] retention of her maiden name of Mullen is hereby confirmed.

EXHIBIT A - PROPERTY

Property to be awarded to [Matthias]:

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5. All right, title and interest of the parties in and to the residence and real property located at 968 Kanakou Place, Honolulu, Hawaii, which property was owned by [Matthias] prior to the marriage. [Kristina] is hereby ordered to vacate said property not later than February 11, 2003.

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Property to be awarded to [Kristina]:

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2. All personal property presently in her possession, including the wedding gifts and household goods and furnishings located at 968 Kanakou Place, Honolulu, Hawaii, with the exception of the following items which shall remain at the residence and are awarded to [Matthias][:] the bed and other furnishings in the basement apartment, any major appliances (refrigerators, stoves, washer, dryer), any fixtures with the exception of the chandelier, [Matthias'] clothing, and the vase from China.

Hawai'i's Uniform Enforcement of Foreign Judgments Act, HRS Chapter 636C (1993), states, in relevant part, as follows:

§ 636C-1 Short title. This chapter may be cited as the Uniform Enforcement of Foreign Judgments Act.

§ 636C-2 Definition. In this chapter "foreign judgment" means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this State.

§ 636C-3 Filing and status of foreign judgments. A copy of any exemplified foreign judgment may be filed in the office of the clerk of the appropriate court of this State. The clerk shall treat the foreign judgment in the same manner as a judgment of a court of this State. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of this State, including establishing a lien, and may be enforced or satisfied in like manner.

§ 636C-4 Notice of filing. (a) At the time of the filing of the foreign judgment, the judgment creditor or the judgment creditor's lawyer shall make and file with the clerk of court an affidavit setting forth the name and last known post office address of the judgment debtor and the judgment creditor.

(b) Promptly upon the filing of the foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's lawyer, if any, in this State. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the clerk. The failure by the clerk to mail notice of filing shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

§ 636C-5 Stay. (a) If the judgment debtor shows the court that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has

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furnished the security for the satisfaction of the judgment required by the state in which it was rendered.^{2/}

(b) If the judgment debtor shows the court any ground upon which enforcement of a judgment of any court of this State would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this State.

(Footnote added.)

The Findings of Fact referred to in the Washington Decree are dated December 17, 2002, and state, in relevant part, as follows:

Upon the basis of the court record, the court FINDS:

2.1 RESIDENCY OF [MATTHIAS].

[Matthias] is a resident of the State of Washington.

2.2 NOTICE TO [KRISTINA].

[Kristina] appeared and responded to the petition.

.

2.3 BASIS OF PERSONAL JURISDICTION OVER [KRISTINA]:

The facts below establish personal jurisdiction over [Kristina].

The parties lived in Washington during their marriage and [Matthias] continues to reside in this state.

Other: [Kristina] constructively consented to personal and jurisdiction [sic] by her pleadings in this matter.

2.4 DATE AND PLACE OF MARRIAGE.

The parties were married on August 12, 2000 at Vancouver, Washington.

^{2/} Defendant-Appellant did not satisfy the following requirements of Hawaii Revised Statutes § 636C-5 (1993):

Stay. (a) If the judgment debtor shows the court that an appeal from the foreign judgment is pending . . . , the court shall stay enforcement of the foreign judgment until the appeal is concluded, . . . upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

. . . .

2.7 SEPARATION CONTRACT OR PRENUPTIAL AGREEMENT.

A written settlement agreement and a pre-marital agreement were executed by the parties, copies of which have been filed herein and submitted to the court as trial exhibits.

The court finds that neither of these purported agreements is legally binding on the parties or the court, and that neither is sufficient under the law to be enforceable. The court cannot find from the testimony that either purported agreement was fair when executed, and believes the documents to have been executed in stressful circumstances which raise questions about the intent of the parties and the voluntariness of execution. In addition, the court is unable to determine whether the numerous interlineations and annotations on the copies of said documents provided to the court were made to the documents before or after execution, ultimately rendering interpretation of the content of said documents impossible. The court further notes the absence of notarization to the settlement agreement.

. . . .

2.12 MAINTENANCE.

Maintenance should not be ordered. At the time of separation, this was a short-term marriage of only one year, following which [Matthias] has continued for over a year to provide housing and related expenses for [Kristina], her daughter and their son at a cost of approximately \$3,000 per month. In addition, [Matthias] has proposed that the court award to [Kristina] almost all of the community property, as well as a various items [sic] of his separate personal property. . . .

2.13 CONTINUING RESTRAINING ORDER.

A continuing restraining order in this proceeding is not necessary because [Kristina] already has an Order of Protection entered against [Matthias] in Hawaii.

2.14 FEES AND COSTS.

The judgment previously entered by this court against [Kristina] for [Matthias'] attorney fees in the amount of \$1,0000 [sic] is hereby preserved. There is no further award of fees or costs because [Kristina's] attorney fees have been comparatively negligible and [Matthias] has agreed to pay his own fees and costs herein.

. . . .

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2.16 DEPENDENT CHILDREN.

The children listed below are dependent upon either or both spouses.

<u>Name of Child</u>	<u>Age</u>
[Son]	4

2.17 JURISDICTION OVER THE CHILDREN.

This court has jurisdiction over the child for the reasons set forth below.

The child and the parents or the child and at least one parent or person acting as a parent, have significant connection with the state other than mere physical presence; and substantial evidence is available in this state concerning the children's care, protection, training and personal relationships; and the child's alleged home state (Hawaii) has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under RCW 26.27.261 or .271.

All courts in the child's alleged home state (Hawaii) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under RCW 26.261 or .271.

More specifically, the Family Court of the First Circuit, State of Hawaii, has twice during the pendency of this proceeding, in cause numbers FC-D No. 01-1-3198, and FC-D No. 02-1-2798, declined to exercise jurisdiction as to the child and deferred to the jurisdiction of this court. This court accepts jurisdiction over the child.

2.18 PARENTING PLAN.

The parenting plan signed by the court on this date is approved and incorporated as part of these findings. This parenting plan is the result of an agreement of the parties reached at trial. The courts [sic] finds no credible basis for inclusion in the plan of statements of bases for restriction, and notes that no findings were made in the Hawaii proceedings regarding abuse such as would warrant restrictions in the plan.

2.19 CHILD SUPPORT.

. . . .

Support is set from the maximum advisory level of the support economic table, and the court finds no basis for awarding support beyond this amount. . . . The court also finds that [Kristina], at age 40, in apparent good health,

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and with alleged marketable skills, could be working and is therefore voluntarily unemployed. Although [Matthias] has proposed that no income be imputed to [Kristina] for calculation of the basic child support, the court recognizes her obligation to also contribute to the support of the child.

III. CONCLUSIONS OF LAW

. . . .

3.5 ATTORNEY'S FEES AND COSTS.

The previous judgment against [Kristina] for [Matthias'] [attorney] fees should be preserved. No further award should be made, although the court does find that [Kristina] has been intransigent & engaged in frivolous proceedings in this jurisdiction [and] Hawaii.

The Washington court's December 17, 2002 Order of Child Support ordered Matthias to pay \$986 per month child support. It further ordered, in relevant part, as follows:

3.9 STARTING DATE AND DAY TO BE PAID.

Starting Date: January 2003. Provided, however, that until [Kristina] vacates the residence at 968 Kanakou Place, Honolulu, Hawaii, [Matthias'] payment of the monthly mortgage on that residence shall be deemed payment in satisfaction of this support obligation.

Day(s) of the month support is due: 5th

. . . .

3.18 MEDICAL INSURANCE FOR [Son].

[Matthias] shall continue to maintain and provide health insurance coverage for the child. [Kristina] is not obligated to provide health insurance coverage. . . .

3.19 EXTRAORDINARY HEALTH CARE EXPENSES.

[Matthias] shall pay 100% of all reasonable and necessary health care expenses for the child. . . .

In the instant case, on March 5, 2003, pursuant to HRS § 636C-3, Matthias filed the Washington Decree in the Family Court of the First Circuit. On March 7, 2003, Matthias filed a Motion to Enforce Compliance with Decree of Dissolution seeking

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"an Order directing the removal and/or ejectment of Defendant KRISTINA INGRID MULLEN KEMENY from the property located at 968 Kanakou Place, Honolulu, Hawaii[.]"

On April 1, 2003, Kristina responded with an affidavit stating, in relevant part, as follows:

36. In the best interest of the child, [Kristina] Moves the Court with a Motion to modify the child support order, or in the alternative issue an interim Order for child support in accordance with our State guidelines. Award Attorney's fees and costs to [Kristina] for [Matthias'] jurisdiction fraud, [Matthias'] Foreign order should not be enforced for the issuing Court did not have jurisdiction over the child, [Kristina], the promise to render support, or the property in Hawaii Kai. For the above reasons and pursuant to [Kristina's] Appeal and in the interest of justice [Kristina] preys [sic] that this Honorable Family Court Deny Enforcement of this Foreign Order. [Kristina's] Motion is in the best interest of [Son], who has been neglected by his father and dismissed by the Courts. [Son] is becoming weak from the stress, is sick more often, and is daily becoming more depressed by the constant battle [Matthias] is putting us through.

This order is improper for it violates juri[s]diction principles, full faith and credit for existing orders, due process, and the principle of a just and equitable award, and as such shall not be entitled to Full faith and credit in this state.

On April 2, 2003, Kristina filed the following, which states, in relevant part:

RESPON[S]E TO MOTION TO ENFORCE COMPLIANCE
WITH [DECREE OF DISSOLUTION]; AFFFIDAVIT [sic] OF [KRISTINA]

.

the Judgement should not be enforced based on the following:

1. An Appeal has been filed in this Washington case, which Appeal has been accepted into the Washington Court of Appeals. Exhibit "2"
2. [Kristina] has filed a Washington Motion To Stay pending the Appeal, response is to be filed by April 15, 2003, and then a decision on [Kristina's] Motion to Stay. Exhibit "B"

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The judgment was based on [Matthias'] fraud, fraud in the procurement of Jurisdiction, and intrinsic as well as extrinsic fraud in the bar case record.

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Washington does not have subject matter jurisdiction over child custody and support does not have personal jurisdiction over [Kristina], [Kristina] and child are both Hawaii residents and have not conceded to Washington's exercise of Jurisdiction.

On April 3, 2003, after a hearing on April 2, 2003, Judge William K. Wallace III (Judge Wallace) entered an "Order Granting Motion to Enforce Compliance with Decree of Dissolution."

On April 11, 2003, Kristina filed a Motion for Reconsideration. On April 21, 2003, Matthias filed a Memorandum in Opposition to [Kristina's] Motion for Reconsideration. On May 6, 2003, Judge Wallace entered an order denying Kristina's motion. On May 13, 2003, Kristina filed a notice of appeal of the April 3, 2003 order and thereby commenced this appeal.

On July 17, 2003, the Court of Appeals of the State of Washington, Division II, dismissed Kristina's appeal of the Washington Decree. On August 10, 2003, Kristina advised this court that the correct case number of her Washington State appeal is No. 29886-4-II and that she had filed for reconsideration of its dismissal. She has not advised this court of the status of her request for reconsideration. We assume it was denied.

On January 22, 2004, the instant appeal was assigned to this court.

In the amended opening brief, Kristina contends that (1) jurisdiction existed in Hawai'i and not in Washington, (2) the Washington court's exercise of jurisdiction over Kristina and

the child did not satisfy due process requirements, (3) the Washington court was an inconvenient forum, (4) the Decree of Dissolution was not in Son's best interest, and (5) an appeal of the Decree of Dissolution had been taken, thus requiring a stay of its enforcement until the conclusion of the appeal.

In the answering brief, Matthias responds that

[t]he issue before the Family Court in regard to [Matthias'] Motion to Enforce was whether the provision in the Washington Decree which awarded [Matthias] the Kanakou Residence, and which ordered [Kristina] to vacate that property, should be enforced. The validity of that property division order was not dependent on any determination as to whether the Washington Court properly exercised jurisdiction with respect to [Son's] custody and visitation.

. . . [T]he validity of the Washington Court's property division order which required [Kristina] to vacate the Kanakou Residence is not dependent on a determination as to whether the Washington Court properly exercised jurisdiction with respect to its order for child support.

In July of 2004, in appeal no. 25476, this court affirmed the family court's October 16, 2002 order dismissing Kristina's First Circuit Court divorce case, FC-D No. 02-1-2798, and stating that the divorce case filed by Matthias in Washington State "shall go forward." In the Memorandum Opinion filed on July 16, 2004, this court stated, in relevant part, at pages 6 and 7:

Judge Nagle's January 8, 2002 Order Granting Defendant's Motion to Dismiss Complaint for Divorce Filed September 20, 2001 (January 8, 2002 Order), informed Kristina that her divorce and all related issues (spousal support, child support, custody and visitation, and division and distribution of property and debts) would be decided in the Washington State divorce case and not in Hawai'i. In other words, it decided that the relief Kristina sought and might subsequently seek, such as, the relief she sought in her August 26, 2002 Complaint for Divorce and in her September 13, 2002 motion for pre-decree relief, could not be sought in Hawai'i and would have to be sought in the Washington State divorce case.

It is clear that Judge Nagle's January 8, 2002 Order was right that "[Matthias] is a domiciliary of the State of Washington," "[t]he Hawai'i Family Court lacks *in personam* jurisdiction over [Matthias] or *in rem* jurisdiction for purposes of marital property division," and "[t]he Hawaii Family Court lacks *in personam* jurisdiction over [Matthias] or *in rem* jurisdiction to adjudicate issues of spousal support[.]" It is not clear that Judge Nagle's January 8, 2002 Order was right regarding the issues of child custody and child support. However, Kristina did not appeal this order. Therefore, she and the courts of Hawai'i, including this court, are bound by it. Judge Nagle's order applies as much to Kristina's August 26, 2002 complaint for divorce in the instant case as it did to Kristina's September 20, 2001 complaint for divorce in FC-D No. 01-1-3198. The fact that Judge Nagle's order does not state that it is "with prejudice" does not permit Kristina to file another complaint for divorce, child custody and child support. This is because Judge Nagle's order expressly "declines to exercise jurisdiction regarding issues of child custody and defers to the proceeding for divorce previously initiated in the State of Washington." Moreover, after Judge Nagle's ruling, Kristina participated in the Washington State court's trial, and, at the conclusion of that trial, the Washington State court decided all four parts of the divorce case and noted that the parenting plan resulted from the agreement of Kristina and Matthias. As long as the Washington State decree deciding all four parts of the divorce case remains in effect, Kristina is limited to post-Washington State divorce decree relief and the applicable limitations, restrictions, and burdens of proof.

(Footnote omitted.)

DISCUSSION

It appears that the Hawai'i family court deferred to the Washington court because the Hawai'i court did not have *in personam* jurisdiction over Matthias and the Hawai'i court was convinced that the Washington court had not only jurisdiction to decide the child custody, support and visitation part of the divorce case, but also *in personam* jurisdiction over Matthias and Kristina so as to provide it with *in personam* jurisdiction to decide the spousal support and division and distribution of property and debts part of the divorce case. The validity of the

Washington Decree as to the three parts (spousal support, child custody, support and visitation, and division and distribution of property and debts) of the divorce case other than the divorce itself, depends upon the Washington court's *in personam* jurisdiction over Kristina and compliance with its law governing its jurisdiction to decide child custody, support and visitation.

Judge Nagle's January 8, 2002 order stated that "[Kristina] has not effectively challenged the *in personam* jurisdiction of the State of Washington over [Kristina] to determine marital property issues or the jurisdiction of the State of Washington to determine issues of child custody, child support or spousal support." Kristina did not appeal this order.

The Washington court's findings support Judge Nagle's conclusion in his January 8, 2002 order. Those findings state, in relevant part:

"[Kristina] appeared and responded to the petition."

"The parties lived in Washington during their marriage and [Matthias] continues to reside in this state."

"[Kristina] constructively consented to personal and jurisdiction [sic] by her pleadings in this matter."

"The parenting plan signed by the court on this date is approved and incorporated as part of these findings. This parenting plan is the result of an agreement of the parties reached at trial."

Although they are less definitive than might be expected in light of the issues raised by Kristina, these findings provide the required foundation for the *in personam* jurisdiction asserted by the Washington court over Kristina. Moreover, the Washington

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Decree was not disturbed on appeal. Thus, it is binding in Hawai'i. Walker v. Walker, 10 Haw. App. 361, 365-67 873 P.2d 114, 116-17 (App. 1994).

CONCLUSION

Accordingly, we affirm the family court's (1) April 3, 2003 Order Granting Motion to Enforce Compliance With Decree of Dissolution and (2) May 6, 2003 order denying defendant-appellant Kristina I.M. Kemeny's April 11, 2003 Motion for Reconsideration.

DATED: Honolulu, Hawai'i, November 22, 2004.

On the briefs:

Kristina I.M. Kemeny Pro Se Defendant-Appellant.	Chief Judge
Robert M. Harris, Edward R. Lebb, and Paula S. Nakata for Plaintiff-Appellee.	Associate Judge
	Associate Judge