NO. 26382

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

DONNA EDWARDS MIZUKAMI, nka DONNA EDWARDS,
Plaintiff-Appellee, v. GLENN KIYOHIKO MIZUKAMI,
Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 90-4214)

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

Defendant-Appellant Glenn Kiyohiko Mizukami (Glenn) appeals from the Family Court of the First Circuit's (1) November 19, 2003 order denying his October 22, 2003 motion and (2) January 9, 2004 order denying his November 28, 2003 motion for reconsideration. We affirm.

BACKGROUND

On July 11, 2003, in appeal No. 24864 (Nos. 24864, 24964, and 24962 were consolidated), this court filed its Memorandum Opinion stating, in relevant part, as follows:

> The son (Son) of Glenn and Plaintiff-Appellee Donna Edwards Mizukami, now known as Donna Edwards (Donna), was born on June 30, 1986. The "Decree Granting Divorce and Awarding Child Custody," entered by Judge Victoria S. Marks on August 2, 1991 (Divorce Decree), awarded legal and physical custody of Son to Donna and ordered Glenn to pay child support of $350 per month commencing August 5, 1991. Judge Marks noted that Glenn was $1,350 in arrears in the payment of child support at that time, entered judgment for that amount, and ordered Glenn to pay $50 per month on that judgment. Judge Marks also ordered, in relevant part, as follows: "[Glenn] shall provide medical and dental insurance for the benefit of the child. Ordinary medical and dental expenses not covered by insurance shall be paid by [Donna]. Any extraordinary medical and dental expenses not covered by insurance shall be paid 50% - 50% by the parties."

On February 10, 2000, after a contested hearing, the Office of Child Support Hearings entered its "Administrative Findings and Order" deciding that Glenn owed child support arrearage of $19,800 as of January 1, 2000, and ordering him to pay it at the rate of $50 per month commencing February 1, 2000.

On August 9, 2000, Donna moved for enforcement of the previous orders and for orders requiring Glenn to pay one-half of Son's orthodontic expenses, to reimburse Donna for all legal expenses she incurred, to pay statutory interest, and requiring the auction sale of Glenn's "entire sword collection . . . for security for future support."

On September 18, 2000, Glenn filed his response to Donna's August 9, 2000 motion. Glenn alleged that he paid the $50 per month on the arrearage, questioned the necessity and cost of Son's orthodontic treatment, and questioned the necessity of Donna's August 9, 2000 motion.

On September 20, 2000, Judge Paul T. Murakami entered an order: (1) deciding not to amend the February 10, 2000 order; (2) entering judgment against Glenn for child support for the period from February 1, 2000, to August 30, 2000, in the amount of $2,450; (3) awarding Donna the right to statutory interest from January to September, 2000; (4) denying Donna's request for 25% attorney fees and ordering Donna to submit an affidavit of reasonable attorney fees for the court's consideration; (5) ordering Glenn to pay "50% of orthodontic estimate"; (6) denying, without prejudice, Glenn's request for change of custody; (7) reserving for further hearing the issues of foreclosure and sequestration of Glenn's property and transfer of title to Donna; and (8) ordering Glenn to pay child support of $250 per month commencing October 1, 2000.

On September 22, 2000, Glenn sought reconsideration of the September 20, 2000 order. He supported his request with an addendum memorandum filed on October 5, 2000.

At some point in time, Donna submitted a proposed judgment for entry by the court. On January 22, 2001, Glenn filed his objection to Donna's proposed judgment. On May 14, 2001, Judge Murakami entered an "Order Granting in Part and Denying in Part Defendant's Objections and Request for Reconsideration of Plaintiff's Proposed Judgment and Order Regarding Attorney Fees" stating, in relevant part, as follows:

> [T]he Court having concluded that the instant pleadings fail to show good [cause] to warrant further hearing under Rule 59(j) Hawaii Family Court Rules;[1]
>
> IT IS HEREBY ORDERED that Defendant's Objections and Request for Reconsideration of Plaintiff's Proposed Judgment and Order Regarding Attorney Fees filed January 22, 2001 is

[1/] The order cited Hawai‘i Family Court Rules (HFCR) Rule 59(j), notwithstanding the deletion of HFCR Rule 59(j) effective January 1, 2000.

> granted in part and denied in part without hearing. Court amended it's [sic] order to delete the 10% interest on prior judgment and deleted the second paragraph of proposed judgment. Court sustained the request for attorney fees.

(Footnote added.)

Although the May 14, 2001 order "deleted the second paragraph of proposed judgment[,]" Judge Murakami did not enter any judgment. Therefore, the effective order was the September 20, 2000 order, as amended by the May 14, 2001 order. The amended order was affirmed in appeal No. 24327.

On April 30, 2001, Donna moved for the determination of the child support arrearage, the entry of a corresponding judgment, and the enforcement of the judgment.

On May 15, 2001, Judge Murakami entered an order requiring Glenn to pay Donna for her attorney fees in the sum of $3,497.25. This order was affirmed in appeal No. 24327.

On May 16, 2001, Judge Allene R. Suemori entered an order requiring that Glenn "shall pay $2007.00 for half of orthodontic expenses and shall be re-imbursed [sic] if this is more than 1/2 of final bill or be increased if it is less than 1/2 of final bill." This order was affirmed in appeal No. 24442.

On June 1, 2001, Glenn moved for a change of legal and physical custody of Son to him, for review and amendment of child support arrearages for the period from January 1, 1994, through December 31, 2000, and for credit for cash allegedly spent by Glenn for Son at Donna's request. Glenn alleged that Donna had "terminated visitation and all contact by [Son] with [Glenn], adult sister, and paternal family from March 29, 1997 to present."

On July 16, 2001, Donna moved for an order (a) enforcing Glenn's obligations to pay $24,950 past due child support and one-half of Son's orthodontic expenses, (b) finding Glenn in contempt for violating various previous court orders, and (c) directing Glenn to pay Donna's attorney fees.

On July 19, 2001, Glenn moved for a change of legal and physical custody of Son to him and for a modification of Glenn's child support obligations.

On December 20, 2001, "Pretrial Order No. 2" was filed. On December 28, 2001, Donna moved for reconsideration of "Pretrial Order No. 2" to correct mistakes her counsel made in its list of the issues in dispute.

On January 3, 2002, Glenn moved for the appointment of a guardian ad litem for Son based upon Son's alleged "readily apparent lack of educational progress" while being home-schooled by Donna.

Judge Bode A. Uale presided over a trial on January 7, 2002. Immediately prior to the trial, Glenn filed "Defendant's Memorandum of Trial Issues."

On January 30, 2002, Judge Suemori entered an order granting Donna's December 28, 2001, motion for reconsideration of "Pretrial Order No. 2". On March 1, 2002, Glenn appealed this order, thereby commencing appeal No. 24962.

At 9:58 a.m. on January 14, 2002, Glenn filed "Defendant's Motion and Affidavit for Reconsideration of Unfiled Order Denying Motion for Appointment of Guardian Ad Litem for [Son] Filed January 3, 2002." On February 6, 2002, Judge Uale entered an "Order Denying Defendant's Non-Hearing Motion for Reconsideration of Unfiled Order Denying Motion for Appointment of Guardian Ad Litem for [Son] Filed January 14, 2002." This order stated, in relevant part, as follows:

> 1. [Glenn] failed to satisfy the requirement of the Divorce Decree requiring him to provide proof of completion of an anger management program before he can have unsupervised visitation;
>
> 2. [Glenn] fails to show good cause to warrant the Court's reconsideration[.]

On March 5, 2002, Glenn appealed this order, thereby commencing appeal No. 24964.

At 3:57 p.m. on January 14, 2002, the family court filed Judge Uale's "Order Granting in Part and Denying in Part Plaintiff's Motion[s] and Affidavit for Post-Decree Relief Filed on April 30, 2001 and July 16, 2001, and Denying Defendant's Motions and Affidavit for Post-Decree Relief Filed on June 1, 2001 and July 19, 2001." This order denied Glenn's motions for change of custody and visitation; ordered Glenn to submit a certificate of completion of an anger management program to Donna prior to unsupervised visits; imputed income of $3,000 per month to Glenn and found that Donna's income was $4,408.34 per month; ordered Glenn to pay $320 per month child support; denied Glenn's request for credits against his child support debt; denied Donna's request for interest on child support arrearage; entered Judgment against Glenn in favor of Donna for (a) $280 additional child support through December 31, 2001, and (b) $29,237.51 attorney fees; ordered a writ of execution against Glenn for all judgment amounts; and ordered that all prior orders shall remain in full force and effect.

On January 22, 2002, Glenn appealed the January 14, 2002 order, thereby commencing appeal No. 24864.

On May 29, 2002, the Hawai‘i Supreme Court entered an order consolidating appeals Nos. 24864, 24962, and 24964 into appeal no. 24864.

On February 12, 2002, Judge Uale entered "Findings of Fact and Conclusions of Law" resulting from the January 7, 2002 trial. These findings of fact state, in relevant part, as follows:

FINDINGS OF FACT

. . . .

20. On July 25, 2001, the Court orally ordered that a Writ of Execution issue against [Glenn].

21. On July 26, 2001, one day after the Court orally ordered that the Writ of Execution issue against [Glenn's] real and personal property, [Glenn] paid the $19,800.00 judgment against him with a check written on the account of Ms. Henreitte Taylor.

22. Ms. Taylor's deposition was noticed on or about August 10, 2001. On August 20, 2001, the remaining balance which [Glenn] owed in the amount of $4,790.04 was paid to CSEA [Child Support Enforcement Agency].

. . . .

26. [Glenn's] evidence regarding the alleged deficiencies in the minor child's home schooling was not convincing.

27. The Court found [Donna's] testimony that the DOE [State of Hawai‘i Department of Education] had approved home schooling of the minor child to be credible. The minor child is also receiving tutoring in mathematics.

28. There is no basis for [Glenn] to allege that a change in custody and/or visitation is in the child's best interest.

29. [Glenn] testified at trial that his income in 2001 was $20,000 to $25,000.

30. [Donna's] Exhibit Five and Six demonstrates [sic] that over the past several years, [Glenn] has claimed income in excess of $6,000.00 a month and net worth in excess of $900,000.00.

31. Considering the evidence, including [Glenn's] own testimony, the Court finds that $3,000 a month is a reasonable income to impute to [Glenn].

. . . .

33. [Glenn] presented no credible evidence of his direct child support payments and/or contributions to the minor child which could reasonable [sic] be construed as being in place of child support payments.

. . . .

CONCLUSIONS OF LAW

. . . .

6. Based upon [the] respective merits of the parties, the relative abilities of the parties, the economic condition of

each party at that time of the hearing, the burdens imposed upon either party for the benefit of the child of the parties, and all other circumstances of the case it is fair and reasonable for [Glenn] to pay [Donna's] attorney fees in the amount of $29,237.51.

. . . .

7. Based upon the evidence in the record of [Glenn's] repeated disobedience of child support orders, the issuance of a writ of execution against [Glenn's] real and personal property is warranted.

DISCUSSION

1.

Glenn contends that the February 10, 2000 CSEA order was a final judgment barring change via subsequent orders. We disagree. The February 10, 2000 CSEA order was a final judgment pertaining to child support as of January 1, 2000, and not to child support for periods thereafter.

Glenn contends, in relevant part, as follows:

A. Burden on Appeal No. 24864 is met by:

1. Res Judicata bar of all 3 [Donna's] repeatedly moved executions of CSEA final judgment February 10, 2000 . . . .

a. [Donna] moved against said bar . . . August 9, 2000, and was denied September 20, 2000 . . . .

b. [Donna] again moved April 30, 2001 . . . against same bar of both same CSEA final judgment & Family Court final judgment September 20, 2000, and was again denied on June 19, 2001 Minute Order, ...

c. [Donna] moved July 16, 2001, <u>for the third time</u>, against same bar of same CSEA final judgment . . . .

. . . .

. . . [Donna's] recourse after each of said three final judgments was to appeal. Instead, [Donna] waived appeal and decided to repeatedly relitigate, said same CSEA final judgment, in the Family Court. Clearly such repeated action against res judicata was frivolous, and contrary to Principles & Practices of Law.

In other words, Glenn contends that Donna's motions filed on August 9, 2000, April 30, 2001 and July 16, 2001, were barred by the res judicata effect of prior final judgments. We disagree.

Res judicata applies when "(1) the issue decided in the prior adjudication is identical with the one presented in the action in question, (2) there was final judgment on the merits, and (3) the party against whom res judicata is asserted was a party or in privity with a party to the prior adjudication." Dorrance v. Lee, 90 Hawai'i 143, 148, 976 P.2d 904, 909 (1999) (citations and block quotation format omitted). Donna's motions filed on August 9, 2000, April 30, 2001, and July 16, 2001 presented issues not identical with the issues decided in prior final judgments. It appears that Glenn misunderstands that the law of res judicata does not bar Donna from more than once seeking enforcement of the same monetary judgment.

2.

Glenn contends that the court: (a) erred in denying his request for a change of custody and the appointment of a GAL for Son; (b) abused its discretion and failed to follow statutory guidelines when deciding Donna's income and imputing Glenn's income; (c) erred by failing to either offset Glenn's child support obligation or award Glenn an amount equivalent to the attorney fees and costs he incurred during post-divorce proceedings; (d) erred when it ordered him to pay Donna's attorney fees and costs; (e) erred in allowing Donna to introduce certain evidence; (f) erred in refusing to allow Glenn to introduce certain evidence when his allotted time at the trial expired; and (g) erred by authorizing writs of execution.

Glenn did not cause any transcripts of proceedings in the family court to be made a part of the record on appeal. In the absence of transcripts of the relevant proceedings in the family court, especially a transcript of the January 7, 2002 trial, it is not possible for us to examine the validity of Glenn's points on appeal. Therefore, Glenn has failed his burden on appeal.

3.

Glenn challenges the January 30, 2002 order granting Donna's December 28, 2001 motion for reconsideration of "Pretrial Order No. 2". "Pre-trial Order No. 2" had been filed on December 20, 2001 and pertained to the January 7, 2002 trial. Glenn argues that

> [s]aid motion filed December 28, 2002 untimely requested modification of said "Pretrial Order No. 2" Stipulated Order of Trial issues. At trial, [Donna] argued issues other than those stipulated and Court approved. On January 30, 2002 Judge Suemori granted said Motion For Reconsideration, in effect "retroactively" allowing [Donna] to argue such barred issues at Trial 23 days earlier. To wit, at Trial Donna had improperly argued said issues by unlawful surprise. Said motion was non-hearing until set for hearing at 1:30 p.m. January 23, 2002. When opposing counsel failed to appear, Judge Suemori "cancelled" said hearing and [Glenn] was thereby denied the opportunity to request dismissal of said motion. Thereafter on January 30, 2002 the motion was granted. The Family Court gave no reasons for its said order, and no Fs of F/Cs of L were filed. Therefore, a

> transcript was not available for Appeal No. 24962 which referenced each point to the Record supporting "Pretrial Order No. 2" and Hawai‘i Family Court Rules (HFCR) Rule 16, and opposing said order granting untimely filed January 30, 2002 more than 3 weeks too late.
>
> HFCR Rule 16 (2003) states, in relevant part, that a pre-trial order "limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." At the January 7, 2002 trial, "to prevent manifest injustice[,]" the court was authorized to orally grant some or all of the requests contained in Donna's December 28, 2001 motion for reconsideration of Pretrial Order No. 2 or to otherwise amend Pretrial Order No. 2. After the trial, Donna's December 28, 2001 motion was moot. The court was authorized to enter its January 30, 2002 order granting Donna's December 28, 2001 motion only if it was confirming something it had orally done at or before the January 7, 2002 trial. In other words, the January 30, 2002 order is either valid or it is moot and harmless to Glenn. In the absence of a transcript of the January 7, 2002 trial, we are unable to answer the question.
>
> CONCLUSION
>
> Accordingly, we affirm the family court's (a) January 30, 2002 "Order Granting Motion for Reconsideration of Pretrial Order No. 2 Filed on 12/20/01, Under Rule 59, HFCR (Thomas Collins Movant)", (b) January 14, 2002 "Order Granting in Part and Denying in Part Plaintiff's Motion[s] and Affidavit for Post-Decree Relief Filed on April 30, 2001 and July 16, 2001, and Denying Defendant's Motions and Affidavit for Post-Decree Relief filed on June 1, 2001 and July 19, 2001," and (c) February 6, 2002 "Order Denying Defendant's Non-Hearing Motion for Reconsideration of Unfiled Order Denying Motion for Appointment of Guardian Ad Litem for [Son] Filed January 14, 2002."

Judge Suemori's May 16, 2001 order also ordered that "[Donna] shall take [S]on to Dr. Richard Kappenberg"; and "[i]nterest shall be calculated on both judgments against [Glenn]."

On June 1, 2001, Glenn filed a notice of appeal from the May 14, 2001 order (appeal No. 24327). He thereby challenged (a) the September 20, 2000 order as amended by the May 14, 2001 order and (b) the May 15, 2001 order. On June 14, 2001, Glenn

filed Defendant's Motion for Leave to Appeal in Forma Pauperis. In an accompanying affidavit, he reported that: he works as "Glenn K. Mizukami dba TS&D Co./Technical Services Consultants"; his "Income Statement for year 2000 shows a business and personal loss of ($3,380.90)"; his "monthly EXPENSES EXCEED INCOME by {$3,042.00)"; and his "DEBTS EXCEED ASSETS by more than $100,000.00[.]" His motion was "granted as to filing fees only."

On June 27, 2003, two weeks prior to the entry of the opinion quoted above, Glenn filed (1) a notice of appeal from family court orders entered in May of 2003, thereby commencing appeal no. 25928, and (2) a motion to supplement the record on appeal with a copy (a) of his June 13, 2003, letter to orthodontist Dr. Kimi Caswell[2], and (b) of Dr. Caswell's June 14, 2003, letter to Glenn[3]. Judge Uale denied this motion on August 7, 2003.

On July 8, 2003, Judge Uale entered Findings of Fact and Conclusions of Law (FsOF and CsOL).

[2/] This letter states, in relevant part, as follows:

> My son . . . was treated by Dr. Caswell in June 2000. His bill for treatments was $4,014.
>
> I would like to promptly pay 50% or one-half of his bill. I can pay by cash or money order on Saturday 6/14/03 during your business hours of 8:00 AM -11:00 AM. The portion of bill I will be paying is $2,007.

[3/] This letter states, in relevant part, as follows:

> According to our records, [Son] has only been seen for a complimentary consultation by Dr. Kimi Caswell prior to March 2002. No fees have ever been billed on [Son's] account, therefore the status of his account is zero.

On July 11, 2003, Glenn filed a motion to supplement the family court record with "crucial adjudicative new evidences and information directly impacting this case and de novo review of the pending appeals[.]" Attached to the motion as Exhibit A is Glenn's memorandum and affidavit. Attached to the motion as Exhibit B is a copy of a Matrimonial Action Information Statement filed on April 14, 2003 in divorce case FC-D No. 03-1-1239, wherein Donna sought a divorce from Anthony Mark Albert whom she married on May 6, 1995. On August 7, 2003, Judge Uale entered an order denying Glenn's June 27, 2003 motion and July 11, 2003 motion.

On August 13, 2003, Glenn filed a Motion for Reconsideration of Order Filed August 7, 2003. Judge Uale denied this motion on September 9, 2003.

On October 22, 2003, Glenn filed, pursuant to HFCR Rule 60(b), a motion for relief from the January 14, 2002 order and the February 12, 2002 FsOf and CsOL. In this motion, Glenn alleged "New Evidences" and asked the court to or for:

> 1. Change of sole Legal & Physical Custody of [Son] from Donna to Glenn.
>
> 2. Appoint Annabel Murray of Na Keiki Law Center as Guardian Ad Litem for [Son], to review [Son's] schooling, education & related matters from 1997 to present, and report with recommendations to this Court.
>
> 3. An Order providing that the CSEA shall promptly provide full review of [Son's] Child Support Account; Glenn shall be credited with paid out-of-pocket expenses per the Record; Donna shall promptly refund, via the CSEA, to Glenn the $19,800 improperly executed, and shall refund all Child Support paid by Glenn and inappropriately sent to Donna

after [Son's] expulsion from Donna's custody in mid-year 2000 and to present.

4. Amendment of [FsOF and CsOL] filed February 12, 2002 to conform to the truth now known from New Evidences herein.

5. Amendment of Order filed January 14, 2002, including reversal of award of attorney fees and instead award to Glenn of legal & other expenses; and other amendments to conform to the amended [FsOF and CsOL] as are just.

6. Sanctions against Donna and counsel appropriate to their persistent misconduct in this case.

7. . . . Judges Suemori and Uale should be recused from proceeding herein.

8. Pursuant to HFCR Rule 62 proceedings of said Order should be stayed.

. . . .

I attest . . . that the Record & Depositions plainly show that Judges Suemori and Uale have demonstrated personal bias and prejudices against my pleadings. I certify under penalty of law that all the aforegoing are true and presented in good faith.

On November 18, 2003, "pursuant to [HRS] § 601-7(a) & (b),[4] the Record, and Points & Authorities herein[,]" Glenn filed

---

[4/] HRS § 601-7 (Supp. 2003) states as follows:

Disqualification of judge; relationship, pecuniary interest, previous judgment, bias or prejudice. (a) No person shall sit as a judge in any case in which the judge's relative by affinity or consanguinity within the third degree is counsel, or interested either as a plaintiff or defendant, or in the issue of which the judge has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which the judge has been of counsel or on an appeal from any decision or judgment rendered by the judge.

(b) Whenever a party to any suit, action, or proceeding, civil or criminal, makes and files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against the party or in favor of any opposite party to the suit, the judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. A ny judge may disqualify oneself by filing with the clerk of the court of which the judge is a judge a certificate that the judge deems oneself unable for any reason

a Motion for Recusal of Judge Bode A. Uale. On November 19, 2003, (1) Judge Uale entered an Order Granting Motion for Recusal of Judge [Uale] and (2) after a hearing, Judge Christine E. Kuriyama entered an order denying Glenn's October 22, 2003 motion.

In relevant part, the following was stated at the November 19, 2003 hearing:

> [GLENN]: The grounds for the motion is [sic] that in late May, this year, and this is sometime after the trial took place, . . . my son . . . contacted me and indicated that he had not been in [Donna's] custody since April of 2000.
>
> And immediately, that meant that all of the arguments which [Donna] had presented throughout the time period of August 9th, 2000, through the present date, your Honor, in opposition to a change of custody and also in opposition to an appointment of guardian ad litem, as well as child support issues were entirely false.
>
> The statements that were made in pleadings by [Donna] are that [Son] was at home, well-adjusted, that an appointment of a guardian ad litem was entirely unnecessary because he was being well home-schooled, he was testing regularly, had test results that were above-average, superior. He was well-adjusted and happy at home caring for the two younger babies.
>
> Now, it turns out that that is all not true. All of the objections and the arguments to the change of custody and the appointment of the guardian ad litem could not possibly be true if the subject child were not in [Donna's] custody from April, 2000.
>
> Her first motion was filed on August 9th, 2000, some months after he was expelled from her custody along with his two younger siblings. And they have been continuously out of her custody, away from her custody since that time. It's been more than three years since they were expelled and they've had to fend for themselves.
>
> [Son] has had to earn his room and board at where he has been for that period of time. He's received no benefit. We're not today going to get into the child support issue, but he has received no benefit from the child support that has been paid on his behalf for all that period of time. That's an issue that is to be addressed in a future motion.

---

to preside with absolute impartiality in the pending suit or action.

> But today's motion is simply requesting that the Court consider that if [Donna] had not provided perjured statements objecting and arguing against the change of custody and against the appointment of the guardian ad litem, if the Court for instance, your Honor, had known at the time that these arguments were presented beginning August 2000 through the trial date, if they were aware that [Son] was, had been expelled from [Donna's] custody, that is compelling change of circumstances as to considering changing the custody of the child at that point in time.
>
> But they misrepresented to the Court and said that [Son] was in [Donna's] custody, had always been in [Donna's] custody, was being properly home-schooled.
>
> . . . .
>
> THE COURT: Is this information which could have been discovered or could have been made known to you. . . .
>
> . . . .
>
> [GLENN]: Absolutely not. At no time before May of 2003 was this information in any conceivable way available to me.
>
> THE COURT: Why wasn't it available to you?
>
> [GLENN]: Because [Donna] constantly, consistently argued that [Son] was in her custody.
>
> THE COURT: And you had no contact with [Son]?
>
> [GLENN]: . . . I did file at least three motions requesting a resumption of visitation. They objected to the resumption of visitation. . . . Obviously they did not want me to discover that the boy was not in her custody.
>
> . . . .
>
> THE COURT: Okay. [Counsel for Donna].
>
> [COUNSEL FOR DONNA]: . . . .
>
> The third finding [Judge Uale] made as to the visitation, and then he goes on in his fourth finding to note that [Glenn} made no effort to enforce his visitation rights until after [Donna's] motion to enforce his visitation rights filed in 2000.[5]

[5/] The February 12, 2002 Findings of Fact state, in relevant part, as follows:

> 4. [Son] did visit with [Glenn] until sometime in or about 1997, at which time the visits were terminated. [Glenn] made no effort to enforce his visitation rights until after [Donna's] motion . . . filed in 2000.
>
> 5. There were a few telephone calls, and no visits between [Glenn] and [Son] after 1997.

So, three years go by.

. . . .

[COUNSEL FOR DONNA]: . . . .

What happened in this case is that there were two professionals on the case, both Ms. Shintani who interviewed [Son] and prepared a report and was told specifically by [Son] that yes, he isn't living at home, being home-schooled. Then there is the report of Dr. Kappenberg . . . , which was introduced into evidence at the trial, and did show . . . the adequacy of his home schooling at the time and did refer to the fact that he is at home and being home-schooled and the grade levels that he is at.

. . . .

THE COURT: [Counsel for Donna], now apparently [Son] is saying something different today . . . .

. . . .

THE COURT: . . . than what he said back at the time of trial?

. . . .

THE COURT: And you are arguing that what he is saying today is not credible?

[COUNSEL FOR DONNA]: Yes.

. . . .

[COUNSEL FOR DONNA]: Because he's saying something totally opposite, and now he does have quite a bit of contact if you read [Son's] affidavit with [Glenn] who's a very manipulative and controlling man, and I think the record very well speaks to that.

. . . .

. . . .

8. On September 18, 2000, [Glenn] filed a Motion and Affidavit for Post Decree Relief, in which he requested that legal custody be awarded to him or jointly to the parties, . . . , enforcement of visitation, ...

9. On September 20, 2000, the Court entered an Order for Post Decree Relief. The relevant provisions of this order are:

. . . .

D. The Court denied [Glenn's] request to change custody or visitation without "prejudice to ([Glenn]) re-filing motion based upon further evidence."

> THE COURT: . . . .
>
> . . . .
>
> These issues have been litigated and have been affirmed on appeal. What you're telling me today is a fraud that, what you believe was a fraud committed upon the court. I'm not persuaded by that argument, so I'm going to deny your motion, and again, I'm gonna suggest if you wish to change custody, you need to file a new motion with the court.

(Footnote added.)

On November 28, 2003, Glenn filed a motion for reconsideration of the November 19, 2003 order and therein stated, in relevant part, as follows:

> S. On November 18, 2003 Glenn moved for recusal of [Judge Uale]. At Hearing November 19, 2003 at 1:30 p.m. Judge Uale recused himself then advised that he "had arranged" for the Motion For Relief to be heard "as scheduled" promptly thereafter. Such "arrangement" was not in accordance with Court Procedure after recusal, and could not have allowed the succeeding judge to properly review the filings before Hearing.
>
> T. The same afternoon of November 19, 2003 The Motion For Relief was heard by [Judge Kuriyama] who was not aware of the specific issues nor the Affidavits and Documents exhibited. Pre-hearing, Judge Kuriyama asked a number or [sic] questions. Glenn inquired whether the Hearing should be continued. After Judge Kuriyama asked how it was that Glenn had not known [of Son's] circumstances and whether other persons had known, Glenn requested the matter be set for Discovery and Trial. Judge Kuriyama said the matter would be heard and ruled on. Thereupon, Judge Kuriyama found nothing compelling in the New Evidences, no Misconduct nor Fraud, and the Motion was denied, prompting this request for reconsideration.

On January 9, 2004, Judge Kuriyama entered an order denying Glenn's November 28, 2003 motion for reconsideration.

On February 6, 2004, Glenn filed a notice of appeal from the November 19, 2003 order denying his October 22, 2003 motion, and from the January 9, 2004 order denying his November 28, 2003 motion for reconsideration.

On April 1, 2004, Judge Kuriyama entered Findings of Fact and Conclusions of Law. The findings state the background of the case. The conclusions state as follows:

> 1. The Order Granting In Part and Denying in Part [Donna's] Motions and Affidavit for Post-Decree Relief and Denying Defendant's Motions for Post-Decree Relief, which was filed by the court on January 14, 2002, and the Findings of Fact and Conclusion of Law filed February 12, 2003 [sic], were validly entered. This Order and Findings of Fact and Conclusions of Law were affirmed on appeal, thus becoming the law of the case.
>
> 2. [Glenn] has failed to prove by clear and convincing evidence that fraud led to the entry of the Family Court's January 12 [sic], 2002, orders.
>
> 3. [Glenn] has failed to prove either that the new information he would like to introduce was secluded from him by [Donna], that it would not have been known to him prior to trial through the exercise of reasonable diligence, or that it would have made a difference in the court[']s ruling.
>
> 4. [Glenn's] Motion for Reconsideration failed to present any new evidence.

In his opening brief, Glenn contends:

> A. [Judge Kuriyama] abused judicial discretion in failing to exercise equitable review of the matters & issues herein by prejudicially and arbitrarily pre-judging the circumstances and pre-judging veracity of all the sworn Affidavits exhibits and all the substantive testimony & evidences therein.
>
> B. Judge Kuriyama . . . arbitrarily disregarding Family Court Rules, and Principles & Practices of Hawai‘i and Federal Rules & Law. . . .
>
> C. . . . [A]bsent [Donna's] responsive pleadings in any way controverting the Affidavits' testimonies & evidences or substantive averments of Glenn's Motion For Relief, Judge Kuriyama prejudicially provided comments & questions at Hearing to improperly lead & suggest opposing party's later-falsified arguments. Thereby also establishing Judge Kuriyama's profound bias & prejudice against Glenn, and disregard of the resulting egregious harm to [Son] and [Glenn].
>
> D. Judge Kuriyama further improperly required submittal of Findings of Fact/Conclusions of Law . . . in order to support her improper rulings to withstand Appellate Review; and thereafter filed clearly erroneous Findings of Fact.
>
> E. The Court also thereafter filed incorrect Conclusions of Law.

In his opening brief, Glenn further contends that:

A. The Transcript of Hearing proceedings shows:

1. Judge Kuriyama had arbitrarily pre-judged the denial of Glenn's Motion For Relief:

a. The entire slant of the conduct of the Hearing was toward denial.

b. Page 5 shows Judge Kuriyama had been prejudicially briefed by Judge Uale; otherwise in the two hour period between Judge Uale's recusal and the hearing, Judge Kuriyama could not have adequately reviewed the Record for her information basing her questions as to Trial proceedings, resulting Motions For Reconsideration, Appeals proceedings & affirmation; not while hearing those other case proceedings on her full calendar schedule. Judge Kuriyama's line of questions shows an improper slant & lead toward "Law-of-the-case" . . . .

c. Page 6 shows Judge Kuriyama . . . contravening HFCR 43 which provides testimony by sworn Affidavits, and HRS § 626 Rule 201 which provides mandatory judicial notice of adjudicative facts, requested by a party and supplied with the necessary information.

d. Page 12 shows Judge Kuriyama leading opposing counsel into arguing . . . , thereby arbitrarily prejudicing the entire Hearing.

e. Page 14 line 9 shows Judge Kuriyama supporting Judge Uale's Trial Order by improperly ruling toward "Law-of-the-Case" . . . .

2. Absent any responsive pleading pre-hearing from [Donna] denying or controverting any of Glenn's averments or any of the Affidavits, it is strikingly notable that opposing counsel did not specifically challenge Glenn's averments nor the Affidavits . . . .

. . . .

3. Any objective reading of the entire Transcript shows that Judge Kuriyama arbitrarily abused her discretion by pre-judging Glenn's Motion For Relief, pre-judging the Affidavit testimonies & evidences, and prejudicially leading opposing counsel's arguments by the distinct slant of her questions and comments. There is no equity shown in her conduct of the Hearing.

> . . . .
>
> I. Conclusions of Law No. 1 is clearly incorrect as to "law of the case", and "validly entered" incorrectly presumes the absence of fraud & misconduct of opposing party; No. 2 improperly concludes that the now known fraud & concealments were not clearly & convincingly shown to have led to the Family Court's orders; No. 3 improperly concludes that the now known truths were not concealed by [Donna] & counsel, and even though known at Trial would not have changed the rulings, which conclusions are contradicted by the Record showing repeated falsified arguments . . . stating [Son] is home, well-adjusted, doing well in Home-Schooling, ...
>
> . . . .
>
> L. It is strikingly notable that the [findings] do not even mention controvertion [sic] of now known truths, of Glenn's averments & claim, or of the substantial testimony & evidences in the 4 affidavits; It would follow as a Rule of Law that absent denial of Glenn's averments & evidences, that Glenn's Motion should have been granted.

On October 22, 2003, Glenn challenged the January 14, 2002 order by way of a motion based on HFCR Rule 60(b). It is Glenn's burden to prove the merits of his motion. He now appeals from the family court's November 19, 2003 order denying his October 22, 2003 motion, and the January 9, 2004 order denying his November 28, 2003 motion for reconsideration.

Glenn contends that (1) Judge Kuriyama committed various reversible errors at the November 19, 2003 hearing, and (2) that the record shows that the January 14, 2002 order was the result of Donna's fraud and misconduct (a) at the January 7, 2002 hearing and (b) elsewhere in the record.

Upon a review of the transcript of the November 19, 2002 hearing, we disagree with contention (1).

With respect to contention (2)(a), as noted above, in appeal No. 24864 Glenn challenged the January 14, 2002 order. On

July 11, 2003, in appeal No. 24864, this court filed its Memorandum Opinion stating, in relevant part, as follows:

> Glenn did not cause any transcripts of proceedings in the family court to be made a part of the record on appeal. In the absence of transcripts of the relevant proceedings in the family court, especially a transcript of the January 7, 2002 trial, it is not possible for us to examine the validity of Glenn's points on appeal. Therefore, Glenn has failed his burden on appeal.

Glenn has never caused a transcript of the January 7, 2002 trial to be made a part of the record on appeal. In light of that fact, the family court had, and this court has, nothing with which to compare Glenn's alleged "New Evidences" to determine that there is an HFCR Rule 60(b) reason justifying relief from the January 14, 2002 order, and Glenn has failed to sustain his burden, in the family court and in this appeal, of presenting substantial evidence that his alleged "New Evidences" are in fact "New Evidences" contradictory to "Old Evidences".

Upon a review of the record, we disagree with contention (2)(b).

CONCLUSION

Accordingly, we affirm the family court's November 19, 2003 order denying Defendant-Appellant Glenn Kiyohiko Mizukami's motion for relief from order filed on October 22, 2003, and the January 9, 2004 Order Denying Defendant's Motion for

Reconsideration of Order Denying Motion for Relief from Order, Filed 10/22/03, Filed 11/19/03 Filed on November 28, 2003.

DATED: Honolulu, Hawai‘i, January 4, 2005.

On the briefs:

Glenn Mizukami
Pro Se Defendant-Appellant.

Thomas D. Collins, III.,
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge