

NO. 26758

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

EMORY JAMES SPRINGER, Plaintiff-Appellant, v.  
MICHIYO LOO SPRINGER, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT  
(FC-D NO. 00-1-0176)

SUMMARY DISPOSITION ORDER

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

Plaintiff-Appellant Emory James Springer (Emory)

appeals from the April 12, 2004 Divorce Decree (Divorce Decree) entered in the Family Court of the Third Circuit.<sup>1</sup>

Emory and Defendant-Appellee Michiyo Loo Springer (Michiyo) were married on December 17, 1995. Emory filed a complaint for divorce on August 22, 2000. On July 3, 2001, the court ordered the sale of the marital residence. The date of the conclusion of the evidentiary part of the trial (DOCOEPOT) was September 8, 2003.

On March 30, 2004, the court filed its written decision. In it, the court stated that "[w]ith regard to the issue of spousal support, the Court apologizes for having omitted it from its earlier decision." The "earlier decision" is not a part of the record on appeal. In the opening brief, counsel for Emory states, in relevant part:

The Court issued its first ruling via memorandum on December 22, 2003. (The ruling does not appear on the Record on

<sup>1</sup>

Judge William S. Chillingworth presided.

E.M. RIMANDO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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Appeal nor First Supplemental Record on Appeal and is **attached as Appendix B**). . . The Court then issued its amended/supplemental ruling via memorandum, dated March 1, 2004, filed on March 30, 2004.

(Emphasis in the original.) It appears that counsel for Emory is unaware that on appeal, he is not permitted to refer to any documents that are not a part of the record on appeal as described in Rule 10(a) of the Hawai'i Rules of Appellate Procedure (2005).

The Divorce Decree states, in relevant part:

3. Other matters covered by this decree are as follows:

A. **Alimony:** [Michiyo] is awarded spousal support from [Emory], and [Emory] shall pay alimony of \$500.00 per month to [Michiyo] for a period of three years from the date of this decree.

B. **Division:** All of the solely and jointly held property and debts of the parties shall be fully and finally divided and distributed as follows:

a. **Escrow proceeds and payment of debts:** The net escrow proceeds held for the parties . . . in the sum of \$24,510.16 shall be divided equally between the parties, subject to the following: [Michiyo] shall be able to apply her one-half share of such net proceeds to pay down her taxes owing, and [Emory] shall apply his one-half share of such proceeds to the debt owing to Kuulei Cooper and the following specific identified credit card debts referred to at trial:

1. First USA . . .
2. Chase . . .
3. Bank One . . .

Any remaining balances owing on these credit card accounts or other credit card debt will be a joint obligation of the parties if incurred prior to the date of the trial herein.

[Michiyo] will pay her own tax debt. [Emory] will pay his own tax debt, if any.

The Divorce Decree also stated that "the parties were married for 6 1/2 years by the conclusion of the evidentiary portion of the trial" and awarded Michiyo one-half of the following fraction of Emory's future retirement benefits as and

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when he receives them:

6.5  
total length of employment

In the April 22, 2004 motion for reconsideration, Emory asked the court to:

1. Enter findings and conclusions.
2. Delete the award of alimony.
3. Allow both parties to utilize the escrow proceeds for their respective obligations and allow Emory the discretion to meet his own tax liabilities.
4. Modify Michiyo's fraction of Emory's future retirement benefits by using the DOCOEPO when computing the numerator rather than the date of the Divorce Decree.
5. Modify the order to make each party responsible for their own debts as of the date of separation.

The court denied the motion for reconsideration on August 5, 2004. Emory filed his notice of appeal on August 13, 2004. This appeal was assigned to this court on June 23, 2005.

While this case was on appeal, at Michiyo's request, the family court on October 7, 2004, entered an order amending the Divorce Decree to state (1) that the amount of the net escrow proceeds is \$24,289.21 rather than \$24,510.16, and (2) where those proceeds were being held. The court failed to note that, as a general rule, the filing of a notice of appeal removes the case to the jurisdiction of the appellate court and deprives the lower court of jurisdiction to proceed further in the case, except for some matters. MDG Supply, Inc. v. Diversified Inv.,

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Inc., 51 Haw. 375, 381, 463 P.2d 525, 529 (1969), cert. denied, 400 U.S. 868, 91 S.Ct. 99, 27 L.Ed.2d 108 (1970).

Hawai'i Family Court Rules (2006) (HFCR) Rule 52(b) states, in relevant part, that "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." HFCR Rule 59(b) states that "[a] motion for a new trial shall be filed not later than 10 days after the entry of the judgment unless otherwise provided by statute." HFCR Rule 59(d) states, in relevant part, that "[n]ot later than 10 days after entry of judgment the court of its own initiative may order a new trial, for any reason for which it might have granted a new trial on motion of a party." HFCR Rule 59(e) states, in relevant part, that "[e]xcept as otherwise provided by HRS [Hawaii Revised Statutes] 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." Hawai'i Rules of Appellate Procedure (2006) Rule 4 states, in relevant part:

**(a) Appeals in civil cases.**

(1) TIME AND PLACE OF FILING. 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.

. . . .

(2) PREMATURE FILING OF APPEAL. In any case in which a notice of appeal has been filed prematurely, such notice shall be considered as filed immediately after the time the judgment becomes final for the purpose of appeal.

(3) TIME TO APPEAL AFFECTED BY POST-JUDGMENT MOTIONS. If, not later than 10 days after entry of judgment, any party files a motion that seeks to reconsider, vacate, or alter the judgment, or seeks attorney's fees or costs, the time for filing the notice of appeal is extended until 30 days after entry of an order disposing of the

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motion; provided, that the failure to dispose of any motion by order entered upon the record within 90 days after the date the motion was filed shall constitute a denial of the motion.

The notice of appeal shall be deemed to appeal disposition of all post-judgment motions that are filed within 10 days after entry of judgment.

These rules indicate, inter alia, that the timely filing of a notice of appeal of a divorce decree after the denial of a timely filed motion for reconsideration of the divorce decree deprives the family court of jurisdiction to amend the divorce decree that is being appealed while it is being appealed. In such situations, we advise the family court to seek from the relevant appellate court a temporary remand during which the family court can accomplish its desire to amend a decree that is being appealed.

Emory contends that the court erred in awarding alimony because Michiyo "answer[ed] the complaint that she was not seeking alimony, submitted a position statement not seeking alimony, and made an opening statement that did not seek alimony." Emory fails to note that, in her closing argument, alimony was a part of one of the alternative decisions proposed to the court by Michiyo. Moreover, the family court does not need the permission of, or a request by, the party awarded alimony to award the alimony. This point has no merit.

Emory contends that the court erred in using the date of the Divorce Decree rather than the DOCOEPOT when computing the numerator of Michiyo's fraction of Emory's future retirement benefits. This contention has no basis in fact.

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Emory contends that the court erred in requiring him to use his share of the escrow proceeds to pay down the obligations of the parties while permitting her to use her share at her discretion. Emory fails to recognize the material difference between joint obligations and sole obligations. If Michiyo fails to use her share to pay her tax obligations, Emory is not prejudiced. If Emory fails to use his share to pay joint marital debts, Michiyo is prejudiced. This point has no merit.

HFCR Rule 52 states, in relevant part:

**FINDINGS BY THE COURT.**

(a) Effect. In all actions tried in the family court, the court may find the facts and state its conclusions of law thereon or may announce or write and file its decision and direct the entry of the appropriate judgment; except upon notice of appeal filed with the court, the court shall enter its findings of fact and conclusions of law where none have been entered, unless the written decision of the court contains findings of fact and conclusions of law.

Emory contends that the family court erred when it did not file findings and conclusions. Prior to filing a notice of appeal, Emory filed a motion for reconsideration in which he asked the court to enter findings and conclusions. At that time, the court was not required to enter them. After he filed the notice of appeal and prior to filing an opening brief, Emory should have but did not (1) ask the family court to comply with HFCR Rule 52(a) and/or (2) ask the Hawai'i Supreme Court to temporarily remand the case to the family court for the family court's compliance with HFCR Rule 52(a). At this stage of this case, we conclude that the family court's error is not a basis for a remand.

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Therefore, in accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

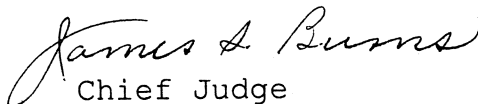
IT IS HEREBY ORDERED that the family court's April 12, 2004 Divorce Decree is affirmed.

DATED: Honolulu, Hawai'i, February 15, 2006.

On the briefs:

Brian J. De Lima  
(Crudele & De Lima)  
for Plaintiff-Appellant.

Diana L. Van De Car  
for Defendant-Appellee.

  
Chief Judge

  
Associate Judge

  
Associate Judge