

NOT FOR PUBLICATION

NO. 27000

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

DAVID MASATO YASUMURA,
Plaintiff-Appellee, Cross-Appellant,

v.

LORI SHIZUKO YASUMURA,
Defendant-Appellant, Cross-Appellee

APPEAL FROM FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 89-3174)

MEMORANDUM OPINION

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

Defendant-Appellant, Cross-Appellee Lori Shizuko

Yasumura (Lori) appeals from the following orders entered by Judge Christine E. Kuriyama in the Family Court of the First Circuit: (1) the December 8, 2004 order granting motion of plaintiff to dissolve the temporary restraining order (TRO), filed on November 22, 2004, and (2) the December 8, 2004 order granting in part and denying in part motion of defendant for post-decree relief, filed on November 9, 2004. Plaintiff-Appellee, Cross-Appellant David Masato Yasumura (David) cross-appeals from order (2) above and the following order entered by Judge Kuriyama on December 16, 2004: (3) the Order Denying Plaintiff's Request for Attorney's Fees. We affirm.

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

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BACKGROUND

A divorce decree entered on October 25, 1989 ordered David to pay Lori child support of \$320 per month for their daughter born on March 8, 1982; awarded the Kaneohe residence to David and ordered David to pay Lori \$45,000 within sixty days of October 25, 1989; and awarded the businesses to David and ordered David to pay Lori \$20,000 within 15 years from the date of the divorce.

David married Alice Yasumura (Alice), and on May 19, 1992 David conveyed the Kaneohe residence, which is Land Court property, to himself and Alice as tenants-by-the-entirety (TE).

On December 12, 2000, Lori hired attorney Thomas D. Collins (Collins) to collect delinquent child support. Collins agreed to advance all costs and Lori agreed to pay Collins "one third of the child support arrearage payments." Collins agreed that "[a]ny amount recovered for attorney fees from non-custodial parent shall be deducted from percentage fees owed by client."

Effective May of 2002, David's child support obligation was increased to \$550 per month. David appealed this increase in appeal no. 25395, Yasumura v. Child Support Enforcement Agency, 108 Hawai'i 202, 118 P.3d 1145 (App. 2005).

Effective April 1, 2004, David's child support obligation was reduced to \$50 per month.

In 2004, David and Alice sold the Kaneohe residence. On November 9, 2004, while the proceeds from the sale of the residence were in escrow, Lori filed a motion and affidavit for

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post-decree relief seeking (1) a determination of the amount of past-due child support plus interest and payment thereof; (2) a determination of the interest due on the \$20,000 and payment of the \$20,000 plus the interest; (3) an award of costs and attorney fees; and (4) a TRO and a restraining order prohibiting distribution of the proceeds from the sale of the Kaneohe residence.

On November 10, 2004, Judge Bode A. Uale entered an "Order Granting Ex Parte Motion for Temporary Restraining Order" that enjoined and restrained David "from transferring, encumbering, or in any way disposing of any funds he has received from Old Republic Title and Escrow of Hawaii."

On December 8, 2004, Judge Kuriyama entered an order dissolving the TRO and implicitly denying Lori's request for a restraining order. This order granted Lori "one week from December 8, 2004 to obtain an order from the Hawai'i Supreme Court staying this order and the companion order" entered on December 8, 2004.

On December 8, 2004, Judge Kuriyama entered a judgment (1) deciding that David owed Lori \$20,000 property settlement plus \$373 interest, and \$11,642.92 child support plus \$7,980.82 interest; (2) deciding that the court was not authorized to order the payment of the money judgment from the proceeds of the sale of the Kaneohe residence; and (3) ordering David to pay \$13,319 of Lori's attorney fees. On December 13, 2004, Lori filed a notice of appeal.

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On December 16, 2004, Judge Kuriyama entered an order denying David's request for attorney fees.

On December 22, 2004, Judge Kuriyama entered an order denying Lori's December 16, 2004 motion for a continuance of the TRO except as follows:

2. However, as to the \$53,315.74 held by escrow under prior restraining order filed 16 Dec 2004, said order shall remain in effect until the Hawaii Supreme Court rules on [Lori's] HRAP Rule 8 motion to continue restraining order pending appeal.

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4. [Lori] must file her motion with the Hawaii Supreme Court within one week by December 30, 2004.

On December 27, 2004, David filed a cross-appeal.

On December 29, 2004, Lori filed a motion in the Hawai'i Supreme Court requesting the continuation of the restraining order pending appeal.

On February 3, 2005, the family court entered its findings of fact (FsOF) and conclusions of law (CsOL). In relevant part, the FsOF state:

15. In 2001, [Lori] agreed to release the lien which CSEA had filed if \$15,000.00 of the funds obtained from the loan [David] and his wife sought to obtain was used to pay part of the child support arrearage which had accrued. The lien was released and [David] did pay \$15,000.00 toward his child support arrearage.

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25. The CSEA Certified Account Balance shows that [David] has a child support arrearage of \$11,642.92 for the period of November 1989 to November 2004. [David] did not contest this figure, other than to point out that the majority of the arrearage occurred after the increase of his child support and that this ruling is presently on appeal.

26. There is due and owing interest on the child support arrearage totaling \$7,980.82, computed at 10% per annum interest on the increasing balance.

27. The business-interest debt in the sum of \$20,000.00 from the property settlement agreement of October, 1989, is now due, plus interest thereon at \$373.00.

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28. Due to the lack of sufficient credible and reliable evidence offered by [David], [David] is not entitled to any attorney's fees herein.

29. On the basis of the credible and reliable evidence presented, [Lori's] requested attorney's fees of \$13,319.00 are reasonable under the circumstances.

In relevant part, the CsOL state:

3. [Lori] is awarded attorney's fees of \$13,319.00 for the proceeding to collect child support and the property settlement payment.

4. On the record before the Court, [David] is denied attorney's fees herein.

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6. [David's] motion to dissolve the temporary restraining order against [David] and the escrow company is granted as to the TE property because the sale proceeds of TE property retain their status as TE property per *In Re Estate of Au*, 59 Haw. [4]74 (1978).

7. The child support arrearage and property division orders and judgments are the sole and separate debt of [David] and, therefore, cannot constitute a claim against the TE house in Kaneohe. *Au*, supra; *Sawada v. Endo*, 57 Haw. at 608 (1977).

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9. [Lori's] request for enforcement of the judgment against the TE house sale proceeds must, therefore, be denied. Sawada and Au, supra.

On February 15, 2005, the Hawai'i Supreme Court entered an order denying Lori's motion to continue the restraining order pending appeal.

On May 9, 2005, in appeal no. 25395, Yasumura v. Child Support Enforcement Agency, 108 Hawai'i 202, 118 P.3d 1145 (App. 2005), this court decided that non-relevant facts had been used in June of 2001 to determine the amount of child support payable by Plaintiff-Appellee, Cross-Appellant David Masato Yasumura and remanded for a new decision based on the relevant facts.

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The instant appeal was assigned to this court on July 21, 2005.

It appears that on July 21, 2005, the CSEA decided as follows:

1. The amount of the overpayment of child support from Father to Mother as of July 1, 2005 is \$5,007.08 per the letter dated July 1, 2005 by the [CSEA] to the parties.

2. The parties have other financial issues presently before the Family Court and/or on appeal, therefore, the method of collecting the overpayment of child support will be decided after the resolution of the other financial issues between the parties.

On August 22, 2005, David filed a motion to dismiss Lori's appeal for the following reasons: her appeal is moot because (1) the Administrative Findings and Order filed July 21, 2005 pursuant to appeal No. 25395, Yasumura v. Child Support Enforcement Agency, 107 Haw. 349, 113 P.3d 800 (2005), determined that as of July 1, 2005, [David] overpaid [Lori] child support by \$5,007.08; and (2) the net sales proceeds from the TE property have been disbursed by escrow.

On September 6, 2005, Lori responded, in relevant part, as follows:

The motion to dismiss [Lori's] appeal should be denied because: a. the judgment for interest and attorney fees should still be satisfied from the proceeds of the sale of the TE property; b. [David] does not prove that the proceeds of the sale no longer exist in order to satisfy the judgment; and c. the issue of whether a deadbeat father can avoid paying his child support simply by transferring property to he [sic] and his present wife affects the public interest and a similar issue in the future would become moot before a needed determination by the appellate courts.

DISCUSSION AND DECISIONS

In her appeal, Lori challenges the family court's decision that the court was not authorized to order the payment

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of the money judgment from the proceeds of the sale of the Kaneohe residence. For the reasons stated by the family court, we affirm the family court's decision.

In the appeal and cross-appeal, David challenges the family court's award of \$13,319 attorney fees to Lori and the denial of his request for attorney fees. David contends that (a) David, not Lori, was the prevailing party; (b) the attorney fees are unreasonable; and (c) the award violated David's constitutional rights to equal protection and due process "by favoring Lori over him under the same statutes under which Lori was awarded attorney's fees." For the following reasons, we affirm the family court's award of \$13,319 attorney fees to Lori and the denial of David's request for attorney fees.

Hawaii Revised Statutes (HRS) § 571-52.7 (Supp. 2004) states as follows:

Award of costs and reasonable attorneys' fees. Whenever a party files a motion seeking to enforce a child support order, the court may award the prevailing party the party's costs and reasonable attorneys' fees incurred, except as this chapter otherwise provides. The award shall be made only when the prevailing party was represented by an attorney.

HRS § 580-47 (Supp. 2004) states, in relevant part, as follows:

Support orders; division of property. (a) Upon granting a divorce, or thereafter if, in addition to the powers granted in subsections (c) and (d), jurisdiction of those matters is reserved under the decree by agreement of both parties or by order of court after finding that good cause exists, the court may make any further orders as shall appear just and equitable (1) compelling the parties or either of them to provide for the support, maintenance, and education of the children of the parties; (2) compelling either party to provide for the support and maintenance of the other party; (3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether community, joint, or separate; and (4) allocating, as between the parties, the responsibility for the payment of the debts of the

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parties whether community, joint, or separate, and the attorney's fees, costs, and expenses incurred by each party by reason of the divorce. . . .

. . . .

(f) Attorney's fees and costs. The court hearing any motion for orders either revising an order for the custody, support, maintenance, and education of the children of the parties, or an order for the support and maintenance of one party by the other, or a motion for an order to enforce any such order or any order made under subsection (a) of this section, may make such orders requiring either party to pay or contribute to the payment of the attorney's fees, costs, and expenses of the other party relating to such motion and hearing as shall appear just and equitable after consideration of the respective merits of the parties, the relative abilities of the parties, the economic condition of each party at the time of the hearing, the burdens imposed upon either party for the benefit of the children of the parties, and all other circumstances of the case.

In this case, Lori sought to obtain and collect a judgment for the following amounts owed pursuant to the divorce decree and subsequent family court orders: (1) child support, plus interest thereon, and (2) a dollar amount of property settlement, plus interest thereon. It appears that her efforts resulted in the collection of more than all of (1) and some of (2). Therefore, she was the successful party. The fact that one of the various methods she used to force payment by David was ultimately determined not to be authorized by law does not make her the unsuccessful party. Neither does the fact that she did not collect the entire amount due and owing.

CONCLUSION

Accordingly, we affirm (1) the December 8, 2004 "Order Granting Motion of Plaintiff to Dissolve TRO Filed Nov. 22, 2004"; (2) the December 8, 2004 "Order Granting in Part and Denying in Part Motion of Defendant for Post-Decree Relief Filed

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Nov 9, 2004"; and (3) December 16, 2004 "Order Denying Plaintiff's Request for Attorney's Fees."

DATED: Honolulu, Hawai'i, February 17, 2006.

On the briefs:

Thomas D. Collins, III,
for Defendant-Appellant,
Cross-Appellee.

R. Steven Geshell,
for Plaintiff-Appellee,
Cross-Appellant.


Chief Judge


Associate Judge


Associate Judge