

NO. 28066

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

DEBBIE MARIE PORTER, nka DEBBIE MARIE EGUIRE
Plaintiff-Appellee,
v.
WAYNE FLOYD PORTER,
Defendant-Appellant

EMERSON
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2006 OCT 13 AM 10:06

FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 97-0873)

ORDER DISMISSING APPEAL

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

Upon review of the record, it appears that we do not have jurisdiction over Defendant-Appellant Wayne Floyd Porter's (Appellant Porter) appeal from the family court's May 30, 2006 post-decree order granting in part and denying in part Plaintiff-Appellee Debbie Marie Porter, nka Debbie Marie Eguire's, May 8, 2006 motion for post-decree relief. The May 30, 2006 post-decree order was a final and appealable post-decree order under HRS § 571-54 (Supp. 2005). Hall v. Hall, 96 Hawai'i 105, 111 n.4, 26 P.3d 594, 600 n.4 (App. 2001), affirmed in part, and vacated in part on other grounds, Hall v. Hall, 95 Hawai'i 318, 22 P.3d 965 (2001). However, Appellant Porter did not file his July 28, 2006 notice of appeal within thirty days after entry of the May 30, 2006 post-decree order, as Rule 4(a)(1) of the Hawai'i Rules of Appellate Procedure (HRAP) required.

Following the expiration of the thirty-day time period

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for filing a notice of appeal under HRAP Rule 4(a)(1), Appellant Porter could obtain an extension of time to file a notice of appeal only upon a showing of "excusable neglect" pursuant to HRAP Rule 4(a)(4)(B). "[A]s a matter of law, only plausible misconstruction, but not mere ignorance, of the law or rules rises to the level of excusable neglect." Hall v. Hall, 95 Hawai'i 318, 320, 22 P.3d 965, 967 (2001) (citation and internal quotation marks omitted). Thus, for example, the supreme court held that a "trial court abused its discretion by granting [a] motion to extend time for filing a notice of appeal because the failure to timely file the appeal was caused by counsel's failure to read and comply with the plain language of the applicable procedural rules, which cannot constitute 'excusable neglect.'" Enos v. Pacific Transfer & Warehouse, Inc., 80 Hawai'i 345, 355, 910 P.2d 116, 126 (1996).

The record shows that Appellant Porter failed to file his notice of appeal within the thirty-day period under HRAP Rule 4(a)(1) because the vacation schedules of Appellant Porter and his attorney conflicted with the thirty-day time period under HRAP Rule 4(a)(4)(B), and, thus, Appellant Porter's need for an extension of time to file a notice of appeal resulted from Appellant Porter and his attorney's "failure to follow the plain language of the rule rather than plausible misconstruction." Hall v. Hall, 95 Hawai'i at 320, 22 P.3d at 967 (citation and internal quotation marks omitted). For the

purpose of obtaining an extension of time to file a notice of appeal pursuant to HRAP Rule 4(a)(4)(B), Appellant Porter's neglect was "not excusable." Hall v. Hall, 95 Hawai'i at 320, 22 P.3d at 967 (citation and internal quotation marks omitted). Therefore, the family court, the Honorable Linda S. Martell presiding, abused its discretion by granting Appellant Porter's motion for an extension of time to file a notice of appeal, and Appellant Porter's July 28, 2006 notice of appeal is untimely.

The failure of an appellant to file a timely notice of appeal in a civil matter is a jurisdictional defect that the parties cannot waive and an appellate court cannot disregard in the exercise of judicial discretion. Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986); HRAP Rule 26(b) ("[N]o court or judge or justice thereof is authorized to change the jurisdictional requirements contained in Rule 4 of [the HRAP]."). Therefore, we lack jurisdiction over this appeal. Accordingly,

IT IS HEREBY ORDERED that this appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, October 13, 2006.


Chief Judge


Associate Judge


Associate Judge