IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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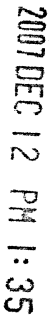

JOYE C. ROMERO, nka JOYE C. HANABUSA,
Plaintiff-Appellant,
v.
DANIEL L. ROMERO,
Defendant-Appellee.

NO. 28664

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(FCD 98-1283)

ORDER DENYING OCTOBER 23, 2007 MOTION TO DISMISS APPEAL
(By: Recktenwald, C.J., Watanabe and Nakamura, JJ.)

Upon review of (1) Defendant-Appellee Daniel L. Romero's (Daniel) October 23, 2007 motion to dismiss Plaintiff-Appellant's appeal filed on July 20, 2007 for lack of jurisdiction (Motion to Dismiss Appeal), (2) Plaintiff-Appellant Joye C. Romero's (Joye) October 25, 2007 memorandum in opposition to the Motion to Dismiss Appeal, and (3) the record, it appears that the Motion to Dismiss Appeal does not have merit.

Joye is appealing from the Honorable Nancy Ryan's June 22, 2007 post-decree "Decision Granting in Part and Denying in Part [Daniel's] Motions for Relief Filed Herein on February 27, 2007 and May 23, 2007" (the June 22, 2007 order). In family court cases "[a]n interested party, aggrieved by any order or decree of the court, may appeal to the intermediate

appellate court for review of questions of law and fact upon the same terms and conditions as in other cases in the circuit court[.]" Hawaii Revised Statutes (HRS) § 571-54 (2006). In circuit court cases, aggrieved parties may appeal from "final judgments, orders or decrees[.]" HRS § 641-1(a) (Supp. 2006). "A post-judgment order is an appealable final order under HRS § 641-1(a) if the order finally determines the post-judgment proceeding." 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, 95 Hawai'i 318, 22 P.3d 965 (2001). The June 22, 2007 order finally determined all of the substantive issues raised in Daniel's February 27, 2007 and May 23, 2007 motions for post-decree relief and left nothing further to be adjudicated.

Although the June 22, 2007 order directs Daniel to submit a proposed amended qualified domestic relations order (QDRO) to the family court, the June 22, 2007 order is an appealable post-judgment order, because, when a judgment, order or decree finally determines the rights of the parties in a proceeding and provides the means of carrying the judgment, order, or decree into effect, that judgment, order or decree is final for the purpose of an appeal. Security Pacific Mortgage Corporation v. Miller, 71 Haw. 65, 69, 783 P.2d 855, 857 (1989); see also Honolulu Athletic Park, Ltd. v. Lowry, 22 Haw. 733, 737 (1915). "In other words, if an order is a final determination on

the merits of the substantive issues, leaving only its administration and enforcement, then the order is final and appealable despite that ministerial duties incident to it remain to be performed." Security Pacific, 71 Haw. at 69, 783 P.2d at 857.

A QDRO is necessary when a divorce case involves a pension or retirement plan that is subject to the Employment Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829 (codified as amended 29 U.S.C. §§ 1001-1461 (2000)) (ERISA). However, it was not necessary for the family court to enter a QDRO for the division and distribution of Daniel's military pension. ERISA does not apply to "a governmental plan" (29 U.S.C.S. § 1003(b)(1) (2006)), which "means a plan established or maintained for its employees by the Government of the United States[.]" 29 U.S.C.S. § 1002(32) (2006). When a family court is dividing a military retirement plan between divorcing spouses, the military retirement plan is subject to the Uniformed Services Former Spouses Protection Act (the USFSPA), codified as 10 U.S.C.S. § 1408 (1998 & Supp. 2007), which "allow[s] disposable retired or retainer pay to be equitably divided in kind in divorce cases." Perez v. Perez, 107 Hawai'i 85, 88, 110 P.3d 409, 412 (App. 2005) (citation and internal quotation marks omitted).

In 1982, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408

> (2000). The USFSPA was enacted in response to the decision in McCarty v McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), in which the United States Supreme Court precluded state courts from ordering the distribution of any military retirement pay to a former spouse. . . . The USFSPA authorizes state courts to treat "disposable retired" or "retainer" pay as either the sole property of the member or former member of the armed forces or the joint property of the member and his spouse in accordance with the law of the jurisdiction.

In re Marriage of Wherrell, 274 Kan. 984, 987, 58 P.3d 734, 736 (2002) (citations omitted).

Instead of requiring a QDRO, the USFSPA requires the spouse to serve upon the agent of the secretary of the appropriate branch of military a "court order," which

> means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act (42 U.S.C. 653(p)), which –
>
> (A) is issued in accordance with the laws of the jurisdiction of that court;
>
> (B) provides for –
>
> (i) payment of child support (as defined in section 459(i)(2) of the Social Security Act (42 U.S.C. 659(i)(2)));
>
> (ii) payment of alimony (as defined in section 459(i)(3) of the Social Security Act (42 U.S.C. 659(i)(3))); or
>
> (iii) division of property (including a division of community property); and
>
> (C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

10 U.S.C.S. § 1408(a)(2) (1998) (emphases added).

The USFSPA also imposes the following requirements for the "court order":

> (b) Effective service of process. – For the purposes of this section –
>
> (1) service of a court order is effective if –
>
> (A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (i) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by facsimile or electronic transmission or by mail;
>
> (B) the court order is regular on its face;
>
> (C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and
>
> (D) the court order or other documents served with the court order certify that the rights of the member under the Servicemembers Civil Relief Act (50 U.S.C.App. 501 et seq.) were observed; and
>
> (2) a court order is regular on it face if the order –
>
> (A) is issued by a court of competent jurisdiction;
>
> (B) is legal in form; and
>
> (C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

10 U.S.C.S. § 1408(b) (1998 & Supp. 2007).

Because the USFSPA requires a "court order" rather than a QDRO, courts have "note[d] that a QDRO is not necessary to divide . . . military retirement plans." Burns v. Burns, 903 S.W.2d 648, 652 (Mo. Ct. App. 1995) (emphasis added). Nevertheless, an order that a court labels as a QDRO can serve as

a "court order" under the USFSPA as long as the order satisfies the requirements for a "court order" under 10 U.S.C.S. § 1408(a)(2). See, e.g., Wyland v. Wyland, 138 P.3d 1165, 1169 (Wyo. 2006).

In contrast to the June 22, 2007 order that finally determined the substantive issues in the post-decree proceeding stemming from Daniel's February 27, 2007 and May 23, 2007 motions for post-decree relief, the QDRO that the family court intends to enter will be merely a collateral enforcement device that will implement the substantive rulings that are already within the June 22, 2007 order. As a collateral enforcement device, the QDRO will be analogous to a writ of execution, which is not an independently appealable order. Cf. Schoening v. Miner, 22 Haw. 353, 357 (1914) ("A writ of error does not lie to review ministerial acts subsequent to judgment, such as [a writ of execution]."). Under analogous circumstances, courts have held that "no appeal lies as of right solely from the entry of a QDRO which functions to implement those portions of the judgment of divorce awarding one spouse an interest in the marital portion of the other spouse's retirement pension[.]" Gormley v. Gormley, 238 A.D.2d 545, 546, 657 N.Y.S.2d 85, 85 (N.Y. App. Div. 1997) (citation omitted); Sylvester v. Sylvester, 736 N.Y.S.2d 261, 261 (N.Y. App. Div. 2002); Lewis v. Lewis, 703 N.Y.S.2d 214, 215 (N.Y. App. Div. 2000). Regardless whether the QDRO would be an

appealable order under Hawai'i law (an issue that is not before this court), the June 22, 2007 order is an appealable final post-judgment order pursuant to HRS § 571-54. Joye filed her July 20, 2007 notice of appeal within thirty days after entry of the June 22, 2007 order, as Rule 4(a)(1) of the Hawai'i Rules of Appellate Procedure required. Therefore, Joye's appeal is timely, and we have jurisdiction over this appeal pursuant to HRS § 571-54. Accordingly,

IT IS HEREBY ORDERED that Defendant-Appellee's Motion to Dismiss Plaintiff- Appellant's Appeal filed July 20, 2007 filed on October 23, 2007 is denied.

DATED: Honolulu, Hawai'i, December 12, 2007.

Chief Judge

Associate Judge

Associate Judge