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NO. CAAP-15-00000007

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

THERESE MARIE WAHL SAKER, Plaintiff-Appellant, v.
GORDON MARK SAKER, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 10-1-6767)

SUMMARY DISPOSITION ORDER

(By: Fujise, Presiding Judge, Leonard and Reifurth, JJ.)

Plaintiff-Appellant Therese Marie Wahl Saker (Wife)

appeals from: (1) the November 20, 2014 Order Denying Motion for Fees and Costs Under Hawaii Family Court Rules (HFCR) Rule 68 (Order Denying Rule 68 Motion) and (2) the February 19, 2015 Order Denying Motion for Reconsideration of the Order Denying Rule 68 Motion (Order Denying Reconsideration), in the Family Court of the First Circuit (Family Court).¹

Wife raises two points of error on appeal, contending that the Family Court erred in denying her Rule 68 Motion, and her Motion for Reconsideration.

¹ The Honorable Sherri-Ann L. Iha presided.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Wife's points of error as follows:

(1) Wife contends that the Family Court erred in denying her Rule 68 Motion.² In particular, Wife challenges the following Findings of Fact (FOFs) in the Family Court's March 17, 2015 FOFs, Conclusion of Law and Supplemental Record on Appeal:

[FOF 5]: The Decree was arrived at by an agreement of parties and there was no contested trial in this matter.

[FOF 6]: The Decree included a standard provision that each party would be responsible for their own attorney's fees and costs, subject to Rule 68 offers and claims.

. . . .

[FOF 8]: In Nakasone v. Nakasone, 102 Hawai'i 177, 73 P.3d 715 (2003), the Hawaii Supreme Court stated that "By entering into a stipulation of partial settlement, the parties in effect resolved certain items out-of-court. Accordingly, such items were removed from the operative scope of Rule 68 and, to that extent, such matters became uncontested. Because uncontested, the provisions of Rule 68 with respect to the not more favorable decree provision of the rule would be inapplicable, along with the concomitant

² At the time Wife made her Rule 68 offer, HFCR Rule 68 (2014) provided:

At any time more than 20 days before any contested hearing held pursuant to HRS sections 571-11 to 14 (excluding law violations, criminal matters, and child protection matters) is scheduled to begin, any party may serve upon the adverse party an offer to allow a judgment to be entered to the effect specified in the offer. Such offer may be made as to all or some of the issues, such as custody and visitation. Such offer shall not be filed with the court, unless it is accepted. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, any party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall treat those issues as uncontested. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible, except in a proceeding to determine costs and attorney's fees. If the judgment in its entirety finally obtained by the offeree is patently not more favorable than the offer, the offeree must pay the costs, including reasonable attorney's fees incurred after the making of the offer, unless the court shall specifically determine that such would be inequitable in accordance with the provisions of HRS section 580-47 or other applicable statutes, as amended.

judicial authority to assess attorney's fees. Similarly, if a stipulation of settlement as to such items resulted not from Rule 68 exchanges but from an agreement outside the Rule, then the attorney's fees provision of Rule 68 likewise would be inoperative."

[FOF 9]: Parties in this matter reached a complete agreement on all issues. There was no contested hearing and H.F.C.R. Rule 68 does not apply.

Gordon Mark Saker (Husband) argues that under controlling Hawaii Supreme Court precedent, *Nakasone v. Nakasone*, "Rule 68 is unavailable as an avenue by which to obtain attorney's fees and costs if the parties to a divorce proceeding settle the disputed divorce issues prior to trial and the entry of the Divorce Decree."

In *Nakasone v. Nakasone*, the respondent disagreed with parts of the petitioner's HFCR Rule 68 offer. 102 Hawai'i 177, 178, 73 P.3d 715, 716 (2003). Ultimately, the parties stipulated to certain issues, and the remaining issues were decided by the court. Id. The Hawai'i Supreme Court recognized that "the purpose of HFCR Rule 68 is to encourage settlements prior to a contested matrimonial trial or hearing." *Owens v. Owens*, 104 Hawai'i 292, 309, 88 P.3d 664, 681 (App. 2004). It held that "matters in an offer of settlement made pursuant to [HFCR] Rule 68, which are initially rejected but later settled by agreement before trial, are not subject to an award of attorney's fees and costs under Rule 68." *Nakasone*, 102 Hawai'i at 178, 73 P.3d at 716. The supreme court explained in relevant part:

By entering into a stipulation of partial settlement, the parties in effect resolved certain items out-of-court. Accordingly, such items were removed from the operative scope of Rule 68 and, to that extent, such matters became "uncontested." Because uncontested, the provisions of Rule 68 with respect to the "not more favorable" decree provision of the Rule would be inapplicable, along with the concomitant judicial authority to assess attorney's fees. Similarly, if a stipulation of settlement as to such items

resulted not from Rule 68 exchanges but from an agreement outside the Rule, then the attorney's fees provision of Rule 68 likewise would be inoperative.

Inasmuch as the award of attorney's fees hinges on a comparison of the offer with the decree or order finally obtained by the offeree, the Rule does not contemplate an award of attorney's fees if there is no decree or order finally obtained by the offeree with respect to a subject contained within the offer. Where the issue that had been the subject matter of a Rule 68 offer has been settled pre-trial by the parties themselves, it is removed from dispute in the proceedings and is thus no longer the subject of an order "finally obtained" by the offeree.

Id. at 181-82, 73 P.3d at 719-20.

In the instant case, Wife made her HFCR Rule 68 offer on November 14, 2011. Wife requested alimony in the amount of \$800.00 per month for forty-eight months. The offer provided that "each party is responsible for his or her own attorney's fees and costs incurred herein." Husband made his HFCR Rule 68 counteroffer on December 6, 2011. Husband did not agree with Wife's request for alimony and health care costs.

On May 1, 2014, Wife and Husband reached a settlement agreement. Pursuant to the settlement agreement, Wife agreed to withdraw her request for alimony. Husband agreed to pay Wife \$40,000.00 as an "equalization payment" "to settle all outstanding property matters between the parties." Husband and Wife agreed that "[e]ach party is responsible for his or her own attorney's fees and costs incurred in this case, subject to Rule 68 offers." The Family Court granted the Divorce Decree subject to the terms of the settlement agreement.

Wife contends that the phrase "subject to Rule 68 offers" indicates that the settlement agreement, and subsequent Divorce Decree did not "resolve the issues of HFCR Rule 68 attorney's fees and costs." There is no support in the record

that the issue of attorney's fees and costs would be resolved "by way of hearing" after the May 1, 2014 settlement conference. On the contrary, FOF 3 states that "[t]he Court conducted an extensive settlement conference and the parties placed a settlement agreement as to the entire divorce on the record on May 1, 2014." (Emphasis added). Wife did not challenge FOF 3, and thus, we are bound by this finding. State v. Kiese, 126 Hawai'i 494, 502, 273 P.3d 1180, 1188 (2012). We conclude that the settlement agreement resolved all disputed issues, including the issue of attorney's fees and costs. Since the settlement agreement resolved the issue of attorney's fees and costs, this issue is "removed from the operative scope of Rule 68[.]" Nakasone, 102 Hawai'i at 181, 73 P.3d at 719.

FOFs 5, 6, and 9 are supported by evidence in the record and thus, are not "clearly erroneous." In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001). With regard to FOF 5, the Family Court determined that the "parties knowingly, intelligently, and voluntarily entered into" the settlement agreement. Since the settlement agreement resolved all disputed issues, there was no contested trial. FOF 6 accurately reflects the provision in the Divorce Decree regarding attorney's fees and costs. With regard to FOF 9, the settlement agreement resolved the issue of attorney's fees and costs. As discussed, the resolution of this issue precluded recovery under HFCR Rule 68. Nakasone, 102 Hawai'i at 181-82, 73 P.3d at 719-20. Although FOF 8 should be deemed a conclusion of law, it merely reiterates the supreme court's reasoning in Nakasone.

Accordingly, we conclude that the Family Court did not abuse its discretion when it denied Wife's Rule 68 Motion. Doe v. Doe, 118 Hawai'i 268, 278, 188 P.3d 782, 792 (App. 2008).

(2) Wife contends that the Family Court erred in denying her Motion for Reconsideration.

A motion for reconsideration is reviewed under the abuse of discretion standard. Cho v. State, 115 Hawai'i 373, 381, 168 P.3d 17, 25 (2007). An abuse of discretion occurs if the trial court has "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992). Furthermore, the appellate courts have recognized that "the purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion." Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (2002) (citation omitted).

In her Motion for Reconsideration, Wife stated that she "does not submit new evidence or allege a change in law in the past five days, but asks that the Court reconsider a finding of 'inequitable' when [Husband] submitted no actual evidence that would support a finding that it was more fair for [Wife] to pay the costs of her litigation from November 2011 to May 2014[.]" Wife failed to present any new evidence or arguments that could not have been presented during the earlier adjudicated Rule 68

Motion. Thus, the Family Court did not abuse its discretion in denying Wife's Motion for Reconsideration.

For these reasons, the Family Court's November 20, 2014 Order Denying Rule 68 Motion, and February 19, 2015 Order Denying Reconsideration are affirmed.

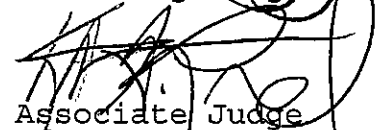
DATED: Honolulu, Hawai'i, June 14, 2016.

On the briefs:

Alethea Kyoko Rebman,
Dyan K. Mitsuyama,
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for Plaintiff-Appellant.

Rebecca A. Copeland,
for Defendant-Appellee.


Presiding Judge


Associate Judge


Associate Judge