

NO. 23588

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ARTHUR E. LEE, JR., Plaintiff-Appellant, v.
BREE NICOLE LEE, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 99-2096)

MEMORANDUM OPINION

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

Plaintiff-Appellant Arthur Lee, Jr. (Plaintiff),
appeals the family court's February 22, 2000 Decree Granting
Divorce (Divorce Decree) and April 14, 2000 Order Summarily
Denying Plaintiff's Motion to Reconsider Pursuant to Family Court
Rule 60(B)(1) Filed on February 25, 2000.

We affirm that part of the Divorce Decree granting the
divorce and authorizing Defendant-Appellee Bree Nicole Lee, now
known as Bree Nicole Evans (Defendant), to resume her maiden
name. We vacate the December 9, 1999 Order for Short Trial, the
May 11, 2000 Findings of Fact and Conclusions of Law, and a
specific part of the Divorce Decree. We remand for
reconsideration in light of this opinion.

BACKGROUND

The parties were married on March 7, 1997, in Honolulu, Hawai'i. They lived together at Plaintiff's residence in Kailua, Hawai'i. Initially, Defendant testified that she and Plaintiff separated on April 15, 1997. Subsequently, she testified, in relevant part, as follows:

Q. And then you separated April of '97?

A. No. I left him in July of '97 [when] he was accusing me of having an affair and then I came back. And when I came back, I had a confrontation with his girlfriend at the time then. I went to prison because of that issue.

I got out and he was chasing me. I got pregnant. He moved me back in. A month later a girl that was working on the streets for him that now has his baby, he kicked me out and moved her in.

Defendant further testified, in relevant part, as follows:

A.

. . . We've been going back and forth. I've been through a pregnancy. I've been kicked out when I was four and a half months pregnant.

Q. --

A. When I was four and a half months pregnant, I had come home and he had kicked all my stuff out and moved his girl friend in so I didn't --

Q. You had an abortion?

A. Uh-huh.

On July 2, 1999, Plaintiff filed a Complaint for Divorce. Plaintiff's Matrimonial Action Information sheet (MAIS) filed with his complaint states that Defendant was born on October 17, 1977; Plaintiff was born on June 12, 1966; Plaintiff lives at 1005 Lunaai Street, Kailua, Oahu; and that Plaintiff is

employed as a general agent for Ace Bail Bonds. In the space where "all children of either party from youngest to oldest," should be listed, the MAIS states "N/A." Defendant testified that it is correct that "there are no children."¹

On July 21, 1999, Defendant filed a Response to Complaint in which she agreed that the marriage was irretrievably broken, disagreed that the parties have lived separate and apart for a continuous period of two or more years immediately preceding the complaint, and requested rehabilitative alimony in the lump sum amount of \$5,000.

Plaintiff's August 30, 1999 Motion for Entry of Default Judgment was heard and orally denied on September 16, 1999. Defendant represented herself. The court instructed Plaintiff's attorney, Frank M. Fernandez (attorney Fernandez), to draft the order, but there is no such order in the record.

On October 12, 1999, Plaintiff filed a Motion to Set and Notice of Motion (October 12, 1999 Motion) prepared by attorney Fernandez. The accompanying position statement states, in relevant part, as follows:

¹ In her answering brief, Defendant-Appellee Bree Nicole Lee, now known as Bree Nicole Evans (Defendant), states that "[d]uring the marriage Defendant worked for [Plaintiff-Appellant Arthur E. Lee, Jr.] and assisted him with his children and in the household where they lived with fifteen of his family members."

POSITION AND ISSUES

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3) LEGAL/PHYSICAL CUSTODY:

The parties had no children at the time of the marriage.

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8) ALIMONY:

The parties had no children at the time of the marriage.

.

10) PROPERTY DIVISION:

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b) VEHICLES

- 1. 1997 Acura Legend with the value of \$3,800.00.
- 2. 1997 Pontiac with the value of [\$]4,000.00.

.

j) Investment assets.

Plaintiff holds jewelry with the value of \$4,000.00.

.

11) DEBT:

None

The unsigned Income and Expense Statement prepared by attorney Fernandez and accompanied by Plaintiff's October 12, 1999 Motion does not report any income. It reports (a) a payroll deduction of \$360 per pay period for "Support Payments" and (b) the following monthly expenses:

Housing, expenses per month:	
rent, mortgage, agreement of sale.	\$2,807.00
insurance if not included above	\$2,441.00
Real Property taxes (if paid separately)	\$1,754.00
Utilities, gas, water, elec., telephone, etc.	\$1,500.00
Transportation, expenses per month:	
.	
Insurance on vehicle	\$1,200.00

The unsigned Asset and Debt Statement prepared by attorney Fernandez and accompanied by Plaintiff's October 12, 1999 Motion itemizes the following:

<u>ITEM</u>	<u>TITLE (H,W,J)</u>	<u>CURRENT MARKET VALUE</u>	<u>DEBT OWED AGAINST</u>
1997 Acura	Legend [sic]	\$ 3,800	-0-
1997 Pontiac		\$ 4,000	-0-
1005 Lunaai Street	Owner	\$350,000	\$297,000
Jewelry	Owner	\$ 4,000	-0-

On December 9, 1999, District Family Court Judge Lillian Ramirez-Uy entered an Order for Short Trial stating, in relevant part, as follows:

5. The disputed issue(s) at trial shall be limited to:

(a) \$1,000.00 debt to Spa and \$2,000.00 first and last month rent for Bree Lee.

. . . .

No issues shall be presented to the Court other than as specified in this paragraph.

Although Defendant was proceeding *pro se*, this Order for Short Trial was not signed by Defendant. At the trial, Defendant testified that the "Spa" referred to in the order is the Honolulu Club.

At the trial on January 28, 2000, Defendant appeared *pro se*. Attorney Nolan Yogi of the law office of attorney Fernandez appeared for Plaintiff, but Plaintiff did not appear.

Defendant testified, in relevant part, as follows:

Q. You work at Roxa. I don't know what that is. What is Roxa?

A. It's a dance club.

. . . .

BY THE COURT:

Q. They want you to dance or just bartending?

A. No, I've been dancing off and on. I haven't been able to make over a hundred dollars a night.

District Family Court Judge Allene R. Suemori (Judge Suemori) stated in her oral decision, in relevant part, as follows:

THE COURT: He has 1997 Acura, 1997 Pontiac value 7800. The jewelry, he has is \$4,000. I think that's on his own Asset and Debt, Income and Expense.

So, what I'm going to do as and for property settlement, not for anything else, is I'm going to award her property settlement of let's see 78 -- the cars are seventy -- his car -- 7800. The jewelry is 4,000. And, this is by his own document. So that comes out to half of it \$5800.

Consistent with the court's oral decision, the Divorce Decree, prepared at the court's request by the attorney for Plaintiff, says nothing about the \$1,000.00 debt to the Honolulu Club or the \$2,000.00 first's and last month's rent for Defendant. It states, in relevant part, as follows:

4. **Vehicles/Jewelry**

The Court ruled that jointly held property, consisting of two (2) cars (\$7,800.00) and jewelry (\$4,000.00), dividing same and awarding \$5,900.00 to Defendant. Plaintiff is to pay to the Defendant in one lump sum by the end of February 2000.

5. **Bank Accounts**

There are no joint accounts.

[6.] Personal Property

Each party shall be awarded his or her own property.

On February 25, 1999, Plaintiff filed a Motion to Reconsider Pursuant to Family Court Rule 60(B)(1).² Although not labeled as such, this motion was both a motion for reconsideration under HFCR Rule 59 and a motion for relief from judgment or order under HFCR Rule 60(b)(1). The accompanying memorandum states, in relevant part, as follows:

That this Court based its decision upon the Asset and Debt Statement filed in this case. That the Asset and Debt Statement indicated that the "Owner" of the vehicles and the jewelry was Plaintiff Arthur E. Lee, Jr. (See Exhibit "A"[.]) That this Court found that this was joint property. That this was not joint property, since one vehicle is in the name of Mrs. Louise Lee and the other vehicle is in the "sole" name of Plaintiff Arthur E. Lee, Jr. Moreover, the jewelry that the Court divided is heirloom jewelry given to Plaintiff Arthur E. Lee, Jr.

In an accompanying affidavit, attorney Fernandez stated, in relevant part, as follows:

3. That your affiant was not aware that the Plaintiff was off island;

² Hawai'i Family Court Rule (HFCR) Rule 59(g)(1) (1999) states as follows: "A motion for reconsideration of the decree, order or 'decision and order' shall be filed not later than 20 days after filing of the decree or order or announcement of the 'decision and order,' whichever occurs sooner."

Effective January 1, 2000, there is no HFCR Rule 59(g), and the first sentence of HFCR Rule 59(e) states as follows: "Except as otherwise provided by [Hawai'i 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."

HFCR 60(b)(1) (1999) states as follows: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from any or all of the provisions of a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]"

A motion under HFCR Rule 60(b)(1) is not a motion for reconsideration. It is a motion for relief from decree or order. A motion for reconsideration is a motion under HFCR Rule 59(g)(1) (1999).

4. That your Declarant instructed [attorney Nolan Yogi] to appear on his behalf since he had another trial matter at the Kaneohe District Court;
5. That your Declarant instructed Mr. Yogi to go to trial assuming that Plaintiff would be present;
6. That your Declarant was not informed that the Plaintiff was off island until after the hearing[.]

In a supplemental affidavit filed on March 8, 2000, attorney Fernandez stated, in relevant part, as follows:

4. That there was a miscommunication regarding the fact trial would only be on the issues of first and last month's rent and the \$1,000.00 spa bill; (see pre-trial orders)
5. That Mr. Yogi did not have the benefit of knowing whose property the vehicles and jewelry were;
6. That a miscommunication occurred in which Mr. Yogi and myself expected the Plaintiff to be present;
7. That Mr. Yogi believed that he was to proceed to Trial without the Plaintiff being present;
8. That without the Plaintiff, Mr. Yogi was not able to respond to any inquiry regarding the vehicles and jewelry involved in this case[.]

In an accompanying affidavit dated March 6, 2000, Plaintiff stated, in relevant part, as follows:

3. That one vehicle is solely in your affiant's name and the other vehicle is in my Mother's (Mrs. Louise F. Lee) name and the jewelry was given to me before the marriage by my Father[,] Mr. Arthur Lee, Sr.;
4. That your affiant was off-island during the Trial and did not realize that this Court would enter a Divorce Decree that divided property owned by myself and my family prior the marriage[.]

An accompanying affidavit dated March 6, 2000, from his mother, Mrs. Louise F. Lee, supports the factual statements in Plaintiff's affidavit.

In a memorandum filed on March 10, 2000, attorney Fernandez noted that "[a]t the time of trial, the material fact

as to whether the assets of the parties were jointly or separately owned, and the dates the parties acquired such assets were not taken into evidence[.]"

On March 16, 2000, Plaintiff untimely filed a Motion to Reconsider Pursuant to Family Court Rule 59.³

On April 14, 2000, Judge Suemori entered the following two orders: (1) Order Summarily Denying Plaintiff's Motion to Reconsider Pursuant to Family Court Rule 60(b)(1) Filed on February 25, 2000; and (2) Order Summarily Denying Plaintiff's Motion to Reconsider Pursuant to Family Court Rule 59 Filed on March 16, 2000. Each order stated "that the instant pleadings fail to show good cause to warrant further hearing under Rule 59(j) Hawaii Family Court Rules[.]"⁴

Plaintiff filed a notice of appeal on May 2, 2000.

On May 11, 2000, the court entered its findings and conclusions, in relevant part, as follows:

The Court makes the following findings:

1. Plaintiff and Defendant were married March 7, 1997 in Honolulu.

³ As noted previously, HFCR Rule 59(e) (1999), effective January 1, 2000, states, in relevant part, that "[e]xcept as otherwise provided by [Hawai'i 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."

⁴ HFCR Rule 59(j) (1999), which stated that "[i]t is within the discretion of the court to summarily deny a motion for reconsideration filed in any action[,]" ceased to exist effective January 1, 2000. HFCR Rule 59(e) (1999), effective January 1, 2000, states, in relevant part, that "[e]xcepting motions for reconsideration from proceedings based upon HRS sections 571-11(1), (2), (6) and (9), all motions for reconsideration shall be non-hearing motions. At its discretion, the court may set the matter for a hearing."

2. The record is disputed as to when the parties separated. Plaintiff's Matrimonial Action [Information] Sheet state that they separated in April 1997, Defendant testified that it was later they kept getting back together again because of the tumultuous nature of their relationship.

3. There are no children of the marriage.

4. Defendant testified⁵ that there was a \$1000 debt that both parties had incurred at the Honolulu Club and that it was to be paid from the Plaintiff's account automatically. For an unknown reason this amount was not deducted from his account but charged to her account.

5. The Court found from the testimony of the Defendant that the relationship was one in which the Plaintiff exerted emotional, physical and financial control over the Plaintiff [sic] and that at the time of marriage Defendant was 19 and Plaintiff was 30.

6. There was no testimony on retirement funds, joint accounts or joint securities.

7. Defendant testified that Plaintiff earned \$200,000.00 a year⁶ and requested alimony of security deposit, and first months rent for an apartment, or \$1000.00.

8. Plaintiff's Income and Expense Statement noted that he was a bail bondsman with no income.

9. Plaintiff's Asset and Debt Statement noted that he had two cars bought during the year of marriage with no debt: a 1997 Acura value \$3800 and 1997 Pontiac value \$4000.00 which were grossly under valued. Plaintiff also stated that he owned real property with his parents at 1005 Lunaai Street, Kailua with equity of \$50,000.00, and jewelry of \$4000.00. There was no evidence as to the appreciated value of the real property during the marriage.

THE COURT makes the following conclusions of law:

1. The Court finds [sic] that the Honolulu Club bill is a marital debt of the parties incurred during the marriage to be divided equally.

2. Court finds [sic] that the cars and jewelry were marital property, the value to be divided equally. Plaintiff to pay to Defendant in one lump sum \$5900.00 to Defendant by February 28, 2000 interest to accrue as set forth by law.

(Footnotes added.)

⁵ A statement of a witness' testimony is not a finding of fact.

⁶ Defendant testified, in relevant part, as follows: "He has two businesses. He makes about a hundred - in bills he pays ten thousand a month. He makes about two hundred thousand a year. I worked for his company so I know. He has more than two cars. We have about five in the driveway."

QUESTIONS PRESENTED

1. Did the court err when it awarded Defendant the monetary value of a portion of property not listed as a disputed issue in the Order for Short Trial?

2. Did the court abuse its discretion when it awarded Defendant one-half of the value of Plaintiff's personal property listed on Plaintiff's Asset and Debt statement?

3. Did the court abuse its discretion when it entered its April 14, 2000 Order Summarily Denying Plaintiff's Motion to Reconsider Pursuant to Family Court Rule 60(B)(1) Filed on February 25, 2000?

DISCUSSION

In this case, although there was no agreement or stipulation resolving any of the other issues in the case, the court entered its Order for Short Trial limiting the disputed issues to a \$1,000 debt to Honolulu Club and the \$2,000 first's and last month's rent for Defendant.

Plaintiff alleges that the 1997 Acura Legend automobile is owned by his mother and that the various documents filed for Plaintiff by attorney Fernandez stating otherwise are mistaken.

Plaintiff alleges that his jewelry is his Category 1 property because it was given to him before the marriage. Plaintiff does not explain why he failed to allege this fact in his position statement.

Plaintiff contends that the court erred when it made a property distribution decision notwithstanding the fact that property distribution was not a disputed issue.

Plaintiff argues that

[p]rinciples of equity dictate that the half of the value of Plaintiff's property taken into consideration by the court should not have been given to the defendant. Both the jewelry and the car are very personal in nature. Defendant in her short marriage with Plaintiff did not have an effect of accumulating or preserving this personal property. By awarding Defendant half the value of these items, Defendant enjoys an undeserving windfall that goes against the principles of equity.

When an order for short trial is entered specifying the two disputed issues in the case and stating that "[n]o issues shall be presented to the Court other than as specified in this paragraph[,]" the Court may not violate the limitation absent consent of the parties or a revocation of the order for short trial.

When an order for short trial is entered specifying the disputed issues in the case, it should be preceded or accompanied by a stipulation of the parties resolving all other issues in the case. In the absence of such a stipulation, an agreement resolving other issues may be implied but only if those issues are non-express.⁷ These include implied agreements that the divorce should be granted, that the court may base its decisions on the most recent income and expense statements and asset and debt statements of the parties in the record, that no spousal

⁷ An "express issue" is an issue expressly raised by one or both of the parties or the court.

support should be awarded, that each party will keep all property whose title is recorded in his or her sole name and all property in his or her possession whose title is unrecorded, that neither party will be ordered to make a property division/distribution payment to the other, that if the parties are separated, the party who has custody of the children will be awarded the custody of the children and the other party will be awarded rights of reasonable visitation, that child support will be assessed in accordance with the relevant child support guidelines, and that each party will pay his or her own separate debts and costs and attorney fees.

An agreement resolving some of the non-express issues in the case may never be implied. These non-express issues include the division/distribution of property whose title is recorded in joint names, liability for joint debts and, if the parties are not separated, child custody/visitation.

Similarly, an agreement resolving an express issue in the case may never be implied. In the absence of an agreement or stipulation resolving an express issue in the case or removing it from the list of express issues, the family court's order limiting the disputed issues may not exclude any express issue.

In this case, the parties have no children and the parties agreed to the divorce and the existence of two marital debts. The parties did not resolve or withdraw the express

issues of rehabilitative alimony and the payment of the two debts, one of which was joint. The Order for Short Trial failed to include the express issue of rehabilitative alimony. Additionally, the Divorce Decree is silent on these issues. The court's decision in its conclusions of law "that the Honolulu Club bill is a marital debt of the parties incurred during the marriage to be divided equally" is not included in the Divorce Decree.

CONCLUSION

Accordingly, we affirm that part of the February 22, 2000 Divorce Decree granting the divorce and authorizing Defendant-Appellee Bree Nicole Lee, now known as Bree Nicole Evans, to resume her maiden name. We vacate the December 9, 1999 Order for Short Trial, the May 11, 2000 Findings of Fact and Conclusions of Law, and the following part of the Divorce Decree:

4. **Vehicles/Jewelry**

The Court ruled that jointly held property, consisting of two (2) cars (\$7,800.00) and jewelry (\$4,000.00), dividing same and awarding \$5,900.00 to Defendant. Plaintiff is to pay to Defendant in one lump sum by the end of February 2000.

5. **Bank Accounts**

There are no joint accounts.

[6.] **Personal Property**

Each party shall be awarded his or her own property.

We remand for reconsideration in light of this opinion. In doing so, we remind the parties and the court of the time limit specified in Hawai'i Revised Statutes § 580-56(d) (1993), as

interpreted in Todd v. Todd, 9 Haw. App. 214, 832 P.2d 280
(1992).

DATED: Honolulu, Hawai'i, June 21, 2001.

On the briefs:

Frank M. Fernandez
for Plaintiff-Appellant.

Chief Judge

Bree Nicole Lee,
Defendant-Appellee, *pro se*.

Associate Judge

Associate Judge