

NO. 23016

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

NANCY R. GRIMES, Plaintiff-Appellant, v.
ROBBIE C. GRIMES, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-D NO. 99-0030)

MEMORANDUM OPINION

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

Plaintiff-Appellant Nancy R. Grimes (Nancy) appeals the November 30, 1999 Order Denying Plaintiff's Motion for Reconsideration and Motion to Alter or Amend a Judgment Pursuant to Rules 59 and 60 of the Hawaii Family Court Rules (November 30, 1999 Order) entered by Family Court Judge Eric G. Romanchak. This was a tolling motion under Rule 59¹ of the

¹ Rule 59 of the Hawaii Family Court Rules (HFCR) was substantially amended effective January 1, 2000. Prior to its amendment, HFCR Rule 59 stated, in relevant part, as follows:

Further hearing; reconsideration of decision; new trials; reconsideration or amendment of decree, order or decision and order.

(a) *Further hearings.*

(1) Grounds. A further hearing may be granted in any cause in which a decision has been filed or announced, or in which there are matters taken under advisement by the court, for good cause to any party on any issue or issues raised at the hearing in said cause, or raised at the hearing but not resolved by such written or oral decision. Whenever a further hearing is granted, the court may take additional testimony and receive additional evidence relating to the issues on which a further hearing has been granted as defined in the order granting the same. . . .

(continued...)

Hawai i Family Court Rules (HF CR) (1999). We vacate this order and remand for further proceedings.

Nancy's appeal of the family court's October 18, 1999 Decree Granting Divorce and Awarding Child Custody (Divorce Decree) is premature.

BACKGROUND

April 1991 At trial, Nancy testified that she had been working and working towards her AA at Maui Community College when, in April 1991, she was attacked by a virus causing "an atypical mononucleosis" and "chronic fatigue syndrome and depression[.]" She is limited by fatigue and anxiety. When under stress, she "tend[s] to have a hard time communicating." She takes antidepressants, a sedative for anxiety and medication for asthma. She has severe lower back and abdominal pain from an irritable bowel syndrome.

May 15, 1993 Date of marriage.

May 26, 1996 Birth date of daughter.

¹(...continued)

(b) *Reconsideration of decision.*

(1) Grounds. The reconsideration of a written or oral decision may be granted for good cause to any party on all or part of the issues. Reconsideration of a decision shall be limited to evidence previously adduced. . . .

(c) *New trials.*

(1) Grounds. A new trial may be granted for good cause to any party on all or part of the issues. . . .

(d) *Time for motion.*

(1) A motion for further hearing or reconsideration of decision shall be filed not later than 20 days after the announcement or filing of a decision whichever occurs sooner.

(2) A motion for a new trial shall be filed not later than 20 days after the entry of the decree or "decision and order."

January 28, 1999 Nancy filed a Complaint for Divorce.

June 21, 1999 Pretrial Order No. 1 entered by District Family Court Judge Douglas S. McNish.

January 29, 1999 Nancy's motion for pre-decree relief filed.

February 17, 1999 Hearing held and oral order entered.

September 23, 1999² Written Order After Hearing ordered Defendant-Appellee Robbie C. Grimes (Robbie) to pay Nancy child support commencing February 20, 1999, calculated on the basis that Robbie's monthly income is \$6,500; ordered that "counsel are to determine whether the SSA funds received by [Nancy] and the parties['] daughter are to be considered as part of the child support calculations"; ordered Robbie to pay Nancy temporary alimony of \$500 per month commencing February 20, 1999; ordered Robbie to pay directly (a) the car insurance and the \$449 per month lease payment for the vehicle that Nancy drives, and (b) the \$372 per month debt service; restrained both parties from charging on joint credit cards; and ordered that all future credit card charges are to be paid by the charging party.

September 23, 1999 Trial held with Judge Romanchak presiding.

September 24, 1999 Trial continued.

October 4, 1999 In her written Closing Argument, Nancy presented the following allegations and arguments.

There was \$14,000 cash in the safe at the time of separation. \$7,000 was Nancy's pre-marriage money. Nancy should be credited with \$10,500 and Robbie should be credited with \$3,500.

The value of Robbie's tools was \$40,000. Robbie testified that their value was

² The attorney for Plaintiff-Appellant Nancy R. Grimes and the family court failed to cause this order to be timely filed.

\$20,000.³ The Category 1 part of that value is, at most, \$2,500.

Robbie was ordered to make debt payments of \$372 per month for the past seven months and he paid only \$140 per month. Robbie underpaid his Court-ordered debt payments by \$1,624 (\$372-140 times 7 months). Nancy overpaid the credit card debt by \$1,200 during the period February through September 1999.

The \$1,500 Robbie gave Nancy to pay for her trip to Arizona in December 1998 was a gift from him to her, not a post-separation expense of hers.

"Virtually all of" Nancy's post-separation expenses "are her normal living expenses." Nancy "needed to charge some living expenses on her credit card."

The 1998 Explorer is leased. The monthly payment for the lease plus the cost of insurance total "approximately \$600 per month made directly by [Robbie]." Nancy seeks an order requiring Robbie to make the lease payments until the end of the lease.

Nancy is disabled. Her only income is \$612 per month social security and \$306 per month child support. Robbie makes \$6,500 per month and has had \$1,000 per month expenses paid by his employer (reduced since separation). Nancy seeks "to find an economically productive activity that will accommodate her disability so that she can be at home and be able to work limited hours. She has chosen to explore computer education, with a specialty of designing web sites." Nancy requests \$1,000 per month for 48 months.

³ Defendant-Appellee Robbie C. Grimes testified that the cost of his tools was \$20,000 but that "[i]f [he] was to sell the tools at a fast pace as used tools, [he'd] be lucky to receive half the value."

Robbie and Nancy "should be required to share the long distance travel costs and the uninsured health care expenses."

October 18, 1999

The Divorce Decree ordered in essence as follows:

Robbie shall pay child support of \$780 per month commencing October 1, 1999. Robbie may claim Daughter as his dependent for tax purposes in all odd years commencing 1999. Nancy may claim her in even years. Robbie shall maintain medical and dental insurance for Daughter as available through his employer. The uninsured costs "shall be paid proportionately consistent with the support percentages as the Child Support Guidelines Worksheet." Each party is awarded his or her own accounts. The 1998 Ford Explorer shall be returned to its lessor forthwith and each shall pay one-half of the resulting deficiency. Each is awarded his or her "own household and/or personal property including tools." "There are no joint marital debts. If there is any existing marital debt, the party responsible for incurring the debt shall be solely responsible for payment of such debt." Robbie shall pay transitional alimony of \$1,000 per month for six months commencing October 1999. "The Court has determined that all money in the household safe has been depleted by the parties for marital expenses and does not exist. There shall be no payment or reimbursement of monies by one party to the other." Each party is ordered to pay his or her own attorney fees and costs.

November 10, 1999

Nancy filed Plaintiff's Motion for Reconsideration and Motion to Alter or Amend a Judgement Pursuant to Rules 59 and 60 of the Family Court Rules. In it, Nancy challenged the court's decree regarding the alimony, the existence of and allocation of liability for marital debts at the date of separation, the money in the safe on the date of separation, the value of the tools on the DOM, the return of the "van," and the

liability for payment of costs and attorney fees. She also questioned whether Robbie paid all the debts the September 23, 1999 order required him to pay. She complained that each of the parties was supposed to have three hours to present his or her case, the court only allowed each of them one and one-half hours. "Thus, [Nancy] was unable to present all of the necessary evidence to convince this court of her circumstances - financial, emotional, and physical as well as her credibility in presenting all issues." She alleged that Robbie "had improperly and fraudulently concealed the existence of a vehicle [1976 Fiat Spider] and a business [Robbie's Tile][.]"

November 19, 1999 Hearing held.

November 30, 1999 The family court entered its Order Denying Plaintiff's Motion for Reconsideration and Motion to Alter or Amend a Judgment Pursuant to Rules 59 and 60 of the Hawaii Family Court Rules.

December 8, 1999 Nancy filed a notice of appeal.

DISCUSSION

A.

Nancy contends that the family court violated HFRC Rule 52(a) (1999) when it failed to file findings of fact and conclusions of law after the notice of appeal was filed. We agree. In State v. Gonsales, 91 Hawaii 446, 448, 984 P.2d 1272, 1274 (App. 1999), this court stated: "[U]pon the filing of an appeal, the family court is mandated, where HFRC Rule 52(a) is applicable, to enter written findings and conclusions, unless they were previously set forth in a written decision or decision and order." In the instant case, there is no written decision or

decision and order. Therefore, the family court failed in its duty to enter written findings and conclusions. In light of that fact, counsel for Nancy should have requested the entry of the written findings and conclusions and for an extension of time to file her opening brief. Complaining about such a neglect in an opening brief is a waste of time and resources.

B.

Nancy contends that the family court abused its discretion when it denied Nancy's November 10, 1999 HFCR Rule 60(b) (3) (1999) motion and HFCR Rule 59 (1999) motion. She argues that the Divorce Decree must be reconsidered because of Robbie's fraudulent concealment.

In her affidavit filed with and in support of her November 10, 1999 motion, Nancy stated, in relevant part, as follows:

10. As I was gathering information following the Court's decision of October 18, 1999, I came across an automobile insurance statement from my insurance company, insuring a car that I had not previously known existed. The car was a "collectible" and "classic" 1976 Fiat Spider, registered to "Robbie's Tile". Not only was the existence of the car news to me, the existence of the business entity "Robbie's Tile" was also news to me and such information regarding these assets and [Robbie's] ownership of them was not brought up at trial, especially considering the acquisition and insurance were prior to our trial date.
11. During the trial, I sat and listened to untruth after untruth from [Robbie]. Now, more and more lies were being pushed in my face. [Robbie] did not reveal this car and this business, or the necessary car and business insurance premiums in his Asset and Debt Statement, did not testify to that effect, nor did he show any income from "Robbie's Tile".

In relevant part, the following discussion occurred during the November 19, 1999 hearing:

[COUNSEL FOR ROBBIE]: . . .

. . . .

We have an offer of proof, and I don't know if that's necessary in the post-trial matters, is that after reading this I spoke with my client and asked him about this 1976 Fiat Spider, collectible classic automobile.

THE COURT: Well, you know, we're getting into things now that are non-evidentiary in nature. I mean, I can't reconsider anything that is outside of the record.

If the argument here is that this is some type of a fraudulent concealment, violation of the rule of discovery or anything there, there's a remedy for that. And, you know, this motion doesn't address the appropriate remedy. And so, you know, to get into what may have happened, what was discovered accidentally or anything else, is inappropriate argument on the motion to reconsider.

If you want to set aside a decree because of fraud perpetrated by a party on the Court, etcetera, there is a remedy for that. But that's not the remedy being sought at this time."

It appears that the family court viewed Nancy's November 10, 1999 motion as being solely a motion for reconsideration under HFCR Rule 59(b). We conclude that notwithstanding its title, it was a motion under HFCR Rules 59(a), (b), and (c) for a further hearing, reconsideration, and/or a new trial.

Nancy's November 10, 1999 motion was received by the family court on November 8, 1999, for filing and that receipt tolled the time within which to appeal the Divorce Decree. Price v. Obayashi, 81 Hawaii 171, 179, 914 P.2d 1364, 1372 (1996);

Hawai i Rules of Appellate Procedure Rule 4(a)(4) (1999)⁴. There being no final judgment, HFCR Rule 60(b), which authorizes the family court to "relieve a party . . . from any or all of the provisions of a final judgment, order, or proceeding[,]" was not the relevant rule. At that stage of the proceedings, HFCR Rule 59 was the relevant rule. For good cause shown, HFCR Rule 59 authorized further hearing, reconsideration, or a new trial on all or part of the issues. Nancy's allegation warranted further preliminary inquiry to determine if such good cause had been shown.

C.

In the following two subsections, we mention two of the various subjects discussed in Nancy's points on appeal.

1.

As noted above, the September 23, 1999 pre-trial order ordered Robbie to pay directly the \$372 per month debt service. It also restrained both parties from charging on the four joint credit cards and ordered that all future credit card charges are to be paid by the charging party. The record shows that Robbie paid substantially less than \$372 per month. It also shows that Nancy subsequently charged on joint credit cards.

The Divorce Decree initially states that "[t]here are no joint marital debts." It subsequently states that "[i]f there

⁴ Hawai i Rules of Appellate Procedure Rule 4(a)(4) was substantially amended effective January 1, 2000.

is any marital debt, the party responsible for incurring the debt shall be solely responsible for payment of such debt." Nancy alleges that the marital debt she was ordered to pay was \$14,673 and contends that it was an abuse of discretion to make her pay all of it.

At the trial, the court and counsel had the following discussion on this subject:

[ATTORNEY FOR ROBBIE]: . . .

. . . What he paid towards the 373 - what was it - 372 debt loan is reflected in his Exhibits C and D. . . .

Other than that, there is [sic] two deposits that he made directly to - and I have a copy of that - directly deposited into [Nancy's] account.

Other than that, those are the only ones he could make because he didn't have the actual bill to maintain it.

The bills that he had do not reflect - as far as I could figure out - the City Bank Master Card balance is in our Exhibit D as of November, 1998, but that he only had one of those bills.

. . . .

So he has only one statement, and that showed a balance of \$6,832.45 and a payment he made in December of \$141. And that's all he paid on that particular card.

If called to the stand, as an offer of proof, he would say that [Nancy] told him she wasn't going to give him the statements and that she would make those . . . payments.

The American Express, all of our records are in D. And the statement shows that the American Express as of November 8th statement had a balance of 1,520.21 which I added up his payments but they're not complete.

And the Bank of Hawaii, there's only one statement in there.

Optima, there's a few statements but it's not complete.

. . . .

. . . .

THE COURT:

. . . .

So between the two of you, do you think you can cover all those statements, November, 1998, all four accounts, up and through this month, which is September of 1999?

[COUNSEL FOR ROBBIE]: I'm sure we could get together and work that.

. . . .

. . . Actually, when I went through all this he is not current.

. . . .

. . . But he has made payments but he is not current.

THE COURT: Okay. He was required until further order of the Court to make those payments and he should either make them or be charged against him. And then it's just a matter of an accounting, credit/debit, all the way down, on who's to pay. And, let's see what the -

I want to know what the balances are now and whether everybody paid what they're supposed to pay during the pendency of this action. And then it's easy for me to determine how it should be allocated.

All right. That's the information I should have had and I expect it. Okay?

. . . .

[COUNSEL FOR NANCY]: Will we have an opportunity to do some closing argument, Your Honor?

THE COURT: In writing.

. . . .

. . . On all issues.

And each of you should share that information about the accounts.

If you could come to one accounting and agree how it's to be done and stipulate that that's it, that's fine. If not, then each of you should submit your proposed accounting.

To the extent that there are no statements in evidence, then I would expect the parties to also sign a stipulation saying that those missing statements should be received in evidence by stipulation, all right, so we can get the record complete.

All right. So you should submit your proposed decree in this case, submit your arguments in writing by way of memorandum, and do the accounting on the issue of the parties['] debt load. In particular, we're talking, as far as the accounting is concerned, the four credit accounts. And then I think that should do it.

. . . .

. . . Okay. All right. Well, the two of you should be able to work that out.

If you can't get all the information by next Friday, you can contact me and ask me for an extension. But it shouldn't be that difficult.

In her November 10, 1999 motion for reconsideration, Nancy alleged that, in relevant part, the credit cards balances were as follows:

American Express Optima	11-10-98	\$ 4,196.00
American Express Gold	[11-08-98]	\$ 1,520.21
CitiBank Mastercard	11-01-98	\$ 6,832.45
Bank of Hawaii Visa	11-01-98	\$ 528.00
	[TOTAL	\$13,076.66]

Neither party submitted a proposed accounting.⁵ In the Divorce Decree, the family court did not deal with the fact that Robbie paid substantially less than the \$372 per month he had been ordered to pay or the fact that Nancy charged on joint credit cards after the September 23, 1999 pre-trial order.

2.

As noted above, there is evidence that Nancy came in to the marriage with cash and Robbie came in to the marriage with tools. Nancy contends that, at the time of divorce, she had only \$5,000 in total assets whereas Robbie had \$20,000 or more in total assets. The family court did not decide the relevant Category 1 and 5 net market values.

⁵ In these kind of situations, we recommend that the court impose deadlines and specific consequences for missing deadlines.

CONCLUSION

Accordingly, we vacate the family court's November 30, 1999 Order Denying Plaintiff's Motion for Reconsideration and Motion to Alter or Amend a Judgment Pursuant to Rules 59 and 60 of the Hawai i Family Court Rules and remand for further proceedings.

DATED: Honolulu, Hawai i, September 18, 2001.

On the briefs:

Joel Edelman for Plaintiff-Appellant.	Chief Judge
Yuklin Aluli and Amber Williams for Defendant-Appellee.	Associate Judge
	Associate Judge