

CONCURRING AND DISSENTING OPINION BY GINOZA, J.

I concur with the majority opinion in that Defendant-Appellant/Counterclaimant/Third-Party Plaintiff Dean Kaiawe (**Kaiawe**) does not apparently seek, and does not have the right, to reversion of title for the subject property (**Property**) given the 1915 deed by his great grandmother, Mikala Kaiawe (**Mikala**), which conveyed the Property to the Board of the Hawaiian Evangelical Association (**Evangelical Association**). Midkiff v. Castle & Cooke, Inc., 45 Haw. 409, 415-419, 368 P.2d 887, 891-93 (1962). However, in my view, there are genuine issues of material fact related to whether there was a common law dedication of the Property. Specifically, I believe there is an open question of fact as to whether the Property was dedicated for use as a public cemetery. Therefore, I respectfully dissent in that regard.

Dedication is defined as the "appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public." Maui Ranch Estate Owners Ass'n v. Cty. of Maui, 6 Haw. App. 414, 420-21, 724 P.2d 118, 123 (1986) (citation omitted). "Dedication of land for public use may be achieved either by statute or by common law." Id. at 421, 724 P.2d at 123.

With regard to common law dedication, the Hawai'i Supreme Court has expressed the following:

"A common law dedication may be accomplished without any statement, written or spoken, for one who invites or merely permits the public to use his or her land for a long period may be held to have made an offer of implied dedication." R.A. Cunningham, *The Law of Property* 751 (1984). The rationale behind this theory is that the owner is "estopped to deny permanent public access" where he has "admitted the public to use the land over a long time." *Id.*; see also 26 C.J.S. *Dedication* § 2 (1956). There must be an offer and acceptance of dedication. See 26 C.J.S. *Dedication* § 34 (1956). When there is no express offer, the offer may be implied under the circumstances and the acceptance may also be implied by the nature of the public use. See Annotation, *Implied Acceptance, by Public Use, of Dedication of Beach or Shoreline Adjoining Public Waters*, 24 A.L.R.4th 294 (1983); see also 26 C.J.S. *Dedication* § 37 (1956). In other words, the duration and type of public use can raise both the presumption of the owner's intent (or offer) to dedicate land to public use, as well as constitute acceptance by the public. 23 Am.Jur.2d *Dedication* §§ 36, 55 (1983).

In re Banning, 73 Haw. 297, 304-05, 832 P.2d 724, 728-29 (1992). See also Gold Coast Neighborhood Ass'n v. State, --- Hawai'i ---, --- P.3d ---, No. SCWC-14-0000472, slip op. at *10 (Haw. Aug. 25, 2017) ("The common law has historically provided for the dedication of private property for public use."); Smith v. Wilder, 6 Haw. 228, 229 (1879) ("A dedication may be made without writing; by act in pais, as well as by deed."); Maui Ranch Estate Owners Ass'n, 6 Haw. App. at 421, 724 P.2d at 123 ("Common law dedication is accomplished either expressly, as by deed, or impliedly, as by acts and conduct which manifest an intent to give the property for public use.").

It is also generally recognized that there can be common law dedication of property for use as a public cemetery.

Land may be dedicated to the public for cemetery purposes. . . . In the absence of a statute, no particular form or ceremony is required to accomplish such a dedication. The intention of the owner of the land to dedicate it for a public cemetery, together with the acceptance and use of the same by the public, or the consent and acquiescence of the owner in the long-continued use of his lands for such purpose, are sufficient.

14 Am. Jur. 2d Cemeteries § 19 (2000).

Here, Kaiawe submitted and relied on Mikala's 1915 deed (1915 Deed) in support of his opposition to Plaintiff-Appellee/Counterclaim Defendant Daniel Ibbetson's (Ibbetson) summary judgment motion. In the 1915 Deed, Mikala conveyed "all of that certain piece or parcel of ground situate in said Kaohe 5, lying on the makai side of the government road adjoining Kaohe 4" to the Evangelical Association. The 1915 Deed describes the Property and states, in relevant part, "[t]o have and to hold the same premises, with the appurtenances, so that it may be used as a cemetery, to the said Board of the Hawaiian Evangelical Association, its successors and assigns, forever." (Emphasis added.) Further, Kaiawe points to a deed executed by the Hawaii

Conference of the United Church of Christ (UCC)¹ in 1983 (1983 Deed), as further evidence of a common law dedication of the Property for cemetery use, i.e. that the Evangelical Association and its successors had accepted and effectuated a dedication. In the 1983 Deed, the UCC conveyed the Property to the Hawai'i Conference Foundation (HCF), and the deed states, in relevant part, "TO HAVE AND TO HOLD the same, together with the improvements thereon and all rights, easements, privileges and appurtenances thereunto belonging or appertaining, unto the Grantee, its successors and assigns, for cemetery purposes only, forever." (Emphasis added.)² The 1915 Deed and the 1983 Deed do not contain express language that the Property be used for a "public" cemetery. However, neither deed restricts the cemetery to the exclusive use of church members.

Even though the 1915 and 1983 deeds do not state that the Property is to be used as a public cemetery, Mikala's intent can be implied from the public's use of the cemetery. As the

¹ The Evangelical Association apparently changed its name several times and in 1983, the name of the successor entity was the Hawaii Conference of the United Church of Christ.

² Regardless of whether Kaiawe has standing to "enforce" the 1983 Deed, he has standing to assert a common law dedication of the property. "The critical inquiry in determining standing is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his [or her] invocation of ... [the court's] jurisdiction and to justify exercise of the court's remedial powers on his [or her] behalf." McDermott v. Ige, 135 Hawai'i 275, 284, 349 P.3d 382, 391 (2015) (internal quotation marks and citations omitted). Generally, "a plaintiff must allege that: (1) he or she has suffered an actual or threatened injury as a result of the defendant's wrongful conduct; (2) the injury is fairly traceable to the defendant's actions; and (3) a favorable decision would likely provide relief for the plaintiff's injury." Id. With regard to his claim for a common law dedication, Kaiawe is seeking to establish that the Property is a public cemetery. Kaiawe meets the three-part test for standing because his great grandmother Mikala's 1915 Deed is the basis for his assertion of a common law dedication and she is buried on the Property. Ibbetson's Complaint For Injunctive Relief and Damages (Complaint) alleges that Kaiawe and others came onto the Property on January 22, 2006, removed plant material from one of the grave sites, refused Ibbetson's demands that they leave, and that Ibbetson called the police. Ibbetson's Complaint seeks to enjoin Kaiawe from coming to the Property, except in accordance with terms in a Limited Warranty Deed that conveyed the Property from HCF to Ibbetson. Kaiawe's Counterclaim alleges that, as a lineal descendant of Mikala, he asserts a right to enter the Property to engage in appropriate activity on the land and to visit the burial sites.

Hawai'i Supreme Court noted in In re Banning, "[w]hen there is no express offer, the offer may be implied under the circumstances and the acceptance may also be implied by the nature of the public use. In other words, the duration and type of public use can raise both the presumption of the owner's intent (or offer) to dedicate land to public use, as well as constitute acceptance by the public." 73 Haw. at 305, 832 P.2d at 729 (emphasis added) (citations omitted). Thus, evidence of the cemetery's use by the public is relevant to determine if there was a common law dedication to the public.

Kaiawe submitted evidence that, considered in the light most favorable to Kaiawe as the non-movant, raises a genuine issue of material fact as to whether the cemetery was utilized by the public. In opposing the summary judgment motion, Kaiawe submitted his declaration to which he attached, *inter alia*, a transcript from a hearing before the County of Hawai'i Planning Commission,³ which was addressing Ibbetson's application for a special permit to allow a bed and breakfast on the Property. The transcript includes the testimony of Nancietta Haalilio (Haalilio) before the Planning Commission, in which she states that she serves as the Pastor for Pukaana Congregational Church (Pukaana Church), a "sister church" across the street from the Property. She stated that the Pukaana Church "became somewhat of the steward to that cemetery" and "all through the years, the 50's, the 60's, 70's, 80's we were still cleaning as often as we could." As to who is buried in the cemetery, Haalilio stated that in addition to her own family members, "[t]here's quite a few." Further, when asked if she had been in touch with descendants of other people buried in the cemetery, Haalilio

³ The parties do not address whether this hearing transcript is admissible. However, even if Ibbetson challenged the admissibility of the transcript, his argument would be deemed waived because he did not challenge it in the circuit court. Price v. AIG Hawai'i Ins. Co., 107 Hawai'i 106, 111-12, 111 P.3d 1, 6-7 (2005) (holding that an appellant's failure to challenge the admissibility of documents related to a summary judgment motion in the trial court waived the issue on appeal).

responded:

Okay, I need to have you understand that there was never such thing as a master list back then. When people died they were buried in the back yard or the front yard or wherever. And it just so happened that this church that's across of the highway did have this piece of property graciously given over to the church for burial purposes. There was no master list as to who was really buried there. It's just by knowledge passed down from generation to generation that so and so is over here and so and so is over there. And that's how it is with my in-laws, my immediate family. But there's also family members that have been taking care of their portions, their family portions, that's not here in Kona. Some are from Kau and Dean Kaiawe's ohana were all scattered all over but as often as we are able we try to maintain those particular plots. But it's not necessary that because my family is buried in A that I would know who's buried in B. Many of those plots were not marked or identified by name.

Haalilio's testimony before the Planning Commission indicates that individuals beyond members of the church situated on or next to the Property were buried in the cemetery. Given this record, there appears to be a genuine issue of material fact as to whether the cemetery was used by the public.

"[A] summary judgment movant may satisfy his or her initial burden of production by either (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the nonmovant will be unable to carry his or her burden of proof at trial." Ralston v. Yim, 129 Hawai'i 46, 60, 292 P.3d 1276, 1290 (2013) (citation omitted). "Where the movant attempts to meet his or her burden through the latter means, he or she must show not only that the non-movant has not placed proof in the record, but also that the movant will be *unable to offer proof at trial*." Id. at 60-61, 292 P.3d at 1290-91 (citation omitted and emphasis in original).

In his reply memorandum supporting his summary judgment motion, Ibbetson argued that the "Hoikeana Cemetery⁴ was for members of the Hoikeana Church and their families, not the general public." However, Ibbetson did not cite to any evidence

⁴ It appears from the record that Hoikeana Church was the name of the church on or next to the subject Property.

that the cemetery was intended and used only for members of the Hoikeana Church.⁵ Rather, it appears there is no such evidence in the record and, instead, Haalilio's testimony before the Planning Commission suggests otherwise. As the summary judgment movant, Ibbetson failed to provide "evidence negating an element of the non-movant's claim," such as evidence that the cemetery was not used by the public and instead was used exclusively by members of Hoikeana Church, the Evangelical Association, or UCC. Ibbetson also has not demonstrated that Kaiawe will be unable to carry his burden of proof at trial to establish a common law dedication of the Property as a public cemetery.

Viewing the evidence in the record in a light most favorable to Kaiawe as the non-movant, as is required under the summary judgment standard, there is a genuine issue of material fact whether the cemetery was intended and utilized as a public cemetery.

For these reasons, I would vacate summary judgment on Kaiawe's claim of a common law dedication of the Property, and would remand the case to the circuit court for further proceedings on this issue.

F. W. King

⁵ HCF's answering brief on appeal also asserts, without citation to evidence in the record, that "[t]he gravesites were reserved specifically for the congregation of the now-defunct Hoikeana Church."