

NO. CAAP-12-0000731

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

**PROBATE NO. 6664**

IN THE MATTER OF THE ESTATE OF  
SAMUEL M. DAMON, Deceased.

**EQUITY NO. 2816-A**

TRUST CREATED UNDER THE WILL OF  
SAMUEL M. DAMON, Deceased.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

**MEMORANDUM OPINION**

(By: Nakamura, C.J., Foley and Ginoza, JJ.)

Respondent/Appellant Myrna B. Murdoch (Murdoch) and  
Respondent/Cross-Appellant Christopher Damon Haig (Haig)  
(collectively Appellants) both appeal from the Judgment, filed on  
August 2, 2012 in the Circuit Court of the First Circuit (probate  
court).<sup>1</sup>

Appellants' combined points of error contend that the  
probate court erred when it: (1) did not compel trustees David M.  
Haig, Paul Mullin Ganley, and Walter A. Dods, Jr. (Trustees) to  
respond to requests for information or make documents available  
to Appellants; (2) adopted the "Petition for Approval of 1999,

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<sup>1</sup> The Honorable Derrick H.M. Chan presided.

2000, 2001, 2002 and 2003 Income and Principal Accounts" (1999-2003 Accounts Petition) without an independent review; (3) approved the Trustees' 1999-2003 Accounts Petition despite evidence of spoliation; (4) did not assign the case to the trial court docket; (5) denied Haig's conflict of interest objections to the sale of BancWest Corporation (BancWest) stock; and (6) denied Haig's objections to the sale of real estate assets.<sup>2</sup>

## **I. Background**

The Damon Trust was created by the Last Will and Testament of Samuel M. Damon dated November 10, 1914.<sup>3</sup> At its inception in 1924, the value of the Trust was estimated to be \$3 million. In November 2004, when the Trust terminated, it was valued at approximately \$836 million.<sup>4</sup>

Upon termination of the Trust, the Trustees filed various petitions seeking approval of post-termination distributions of principal, annual accounts, and other termination-related actions. The probate court has approved all accounts from 1924 through 2007, including the 1999-2003 accounts disputed in this appeal. Haig and Murdoch are the only beneficiaries that are challenging the 1999-2003 Accounts Petition.

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<sup>2</sup> Several points of error do not comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4)(D) because they do not quote the objection to the Master's Report. While noncompliance with HRAP Rule 28(b)(4) is sufficient cause to deny a point of error, we will address the issues to the extent discernible, adhering to the policy of "affording litigants the opportunity to have their cases heard on the merits, where possible[.]" In re Estate of Damon, 119 Hawai'i 500, 505, 199 P.3d 89, 94 (2008)(citation omitted).

<sup>3</sup> Many of the facts in this background section are taken from the undisputed facts contained in the "Master's Report Re: Petition for Approval of 1999, 2000, 2001, 2002, 2003 Income and Principal Accounts."

<sup>4</sup> The Supreme Court of Hawai'i held that the Trust was to terminate upon the death of the last measuring life. In re Estate of Damon, 76 Hawai'i 120, 124, 869 P.2d 1339, 1343 (1994). The last measuring life was Damon's granddaughter, Joan Damon Haig, who died on November 9, 2004. The first distribution was made on December 17, 2004, less than two months after termination. Other relevant background regarding the formation of the Damon Estate has been set forth in prior appellate decisions. See In re Estate of Damon, 109 Hawai'i 502, 504-06, 128 P.3d 815, 817-19 (2006); In re Estate of Damon, 119 Hawai'i at 501-02, 199 P.3d at 90-91.

During the 1999-2003 accounting period, the Trust sold its entire 13% interest in BancWest common stock, its prime industrial and commercial land in Honolulu, two walnut ranches, and a significant portion of real estate on Hawai'i Island. In re Estate of Damon, 119 Hawai'i 500, 502, 199 P.3d 89, 91 (2008) (Damon I). Appellants received annual accountings from the Trustees throughout the period of 1999-2003.

The Trustees filed the 1999-2003 Accounts Petition on April 30, 2004. Based on a conflict of interest involving the appointed master, the Hawai'i Supreme Court vacated the probate court's original judgment filed on January 12, 2005, which had granted the 1999-2003 Accounts Petition. The case was remanded to the probate court. Damon I, 119 Hawai'i at 512, 199 P.3d at 101.

Upon remand, on June 2, 2009, the Trustees filed a "Petition for Appointment of Master." On February 10, 2010, Haig filed an "Objection to Trustees' Petition for Appointment of Master, Filed June 2, 2009."

On February 11, 2010, Haig filed his first "Petition for Assignment to Civil Trials Calendar of the First Circuit Court" (Petition to Transfer) contending that the issues surrounding the 1999-2003 Accounts Petition were complex and time consuming thus requiring discovery and an evidentiary hearing.

On February 12, 2010, Trustees filed "Trustees' Response to Christopher James Damon Haig's Objection to Trustees' Petition for Appointment of Master." On February 18, 2010, the probate court held a hearing on the petition to appoint a master.

On April 1, 2010, in a hearing on the Petition to Transfer, the probate court orally ruled that it would continue Haig's Petition to Transfer until the court reviewed the new master's report.

On April 16, 2010, the probate court filed an "Order Granting Petition for Appointment of Master." The probate court appointed the Honorable Gail Nakatani (retired) as the new master (Master) to "examine and report on [the] Estate's income and principal accounts for the period January 1, 1999 through

December 31, 2003[.]"

Over one year later, in a letter sent to the Master dated August 5, 2011, Murdoch requested that the Damon Estate produce a wide range of documents for inspection and copying. In a letter to the Master dated August 10, 2011, Haig made substantially similar requests. In addition, in a letter to the Trustees dated September 2, 2011, Appellants made a combined request for documents in a number of areas. In each of the letters, Appellants' reasoning for the requested documents was to understand and track the transactions that occurred between 1999-2003.

Finally, in a letter to the Master dated September 29, 2011, Appellants requested that the Master compel the Trustees to provide the requested documents from the previous letters. In response, the Master stated: "Since I was not appointed discovery master, I do not believe that it is within my appointed powers and authority to compel the Trustees to provide discovery. As such, if Ms. Murdoch and Mr. Haig wish to compel discovery, they must address their respective discovery requests to the Court."

On October 10, 2011, Appellants each filed a petition for assignment of this case to the circuit court pursuant to Hawai'i Probate Rules (HPR) Rule 20, or, in the alternative, for an order compelling discovery and appointing a discovery master. On November 7, 2011, the Trustees filed an objection to the petitions. The probate court held a hearing on December 1, 2011, and subsequently entered orders denying both petitions.

On March 9, 2012, the Master filed "Master's Report Re: Petition for Approval of 1999, 2000, 2001, 2002, 2003 Income and Principal Accounts" (Master's Report).

On April 18, 2012, Haig filed "Beneficiary Christopher Damon Haig's Petition to Compel Production of Documents and Continue Deadline to Respond to Master's Report" (Petition to Compel), seeking production of the documents he had previously requested, including all documents reviewed by the Master.

On April 25, 2012, Haig submitted his objections to the Master's Report. On April 26, 2012, Murdoch submitted her

objections to the Master's Report.

On May 10, 2012, Murdoch filed a Joinder in Haig's Petition to Compel.

On May 25, 2012, the Master filed "Master's Response to Objections to Master's Report Re: 1999, 2000, 2001, 2002, 2003 Income and Principal Accounts" (Master's Response), in which the Master briefed and replied to several objections raised by Appellants.

On May 31, 2012, the probate court held a hearing on the Petition to Compel. On June 19, 2012, the probate court issued a minute order denying the Petition to Compel stating: "The Court finds that there is no basis to compel the Trustees to produce all the documents reviewed by the Master. The Court also denies the Petitioner's request to transfer the matter to the civil trials calendar."

On June 21, 2012, the probate court held a hearing on the 1999-2003 Accounts Petition. On July 3, 2012, the probate court issued a minute order, which adopted the Master's recommendations, and approved the 1999-2003 Accounts Petition. On August 2, 2012, the probate court filed an "Order Granting Petition for Approval of 1999, 2000, 2001, 2002 and 2003 Income and Principle Accounts" which, *inter alia*, (1) granted the 1999-2003 Accounts Petition; and (2) settled, allowed, and approved the income and principal accounts and inventory of the estate for the calendar years 1999, 2000, 2001, 2002, and 2003. On August 2, 2012, the probate court also filed the Judgment, which entered final judgment on, *inter alia*, the following orders: (1) Order Granting Petition for Approval of 1999, 2000, 2001, 2002 and 2003 Income and Principal Accounts; (2) Orders Denying Appellants' Petitions to Renew Request for Assignment of Case to Circuit Court Pursuant to Probate Rule 20 or in the Alternative, for Appointment of Discovery Master; and (3) Order Denying Haig's Petition to Compel.

On August 22, 2012, Murdoch filed her notice of appeal. On August 31, 2012, Haig filed a notice of cross-appeal.

## **II. Standard of Review**

We start with the well-settled principle that trustees benefit from a presumption of regularity and good faith. In re Estate of Campbell, 42 Haw. 586, 607 (Haw. Terr. 1958).

Specifically, the Hawai'i Supreme Court long ago adopted

a rule which accords to the trustee the benefit of the presumption of regularity and good faith and imposes upon the person questioning the trustee's action the burden of overcoming the presumption, but which requires the trustee ultimately to justify his action if sufficient evidence is produced to overcome the presumption.

Id.

To the extent that a court adopts the findings of a master, the findings are considered the findings of the court. Hawaii Ventures, LLC v. Otaka, Inc., 114 Hawai'i 438, 456, 164 P.3d 696, 714 (2007) (quoting Hawai'i Rules of Civil Procedure (HRCP) Rule 52(a)). A master's factual findings are reviewed under the clearly erroneous standard, with deference to the "superior position" of the master "to consider credibility and to draw inferences from the testimonial evidence." Id. (citation omitted); see also In re Estate of Chuck, 33 Haw. 445, 453 (Haw. Terr. 1935) (stating "the master's findings of fact should not be disturbed without clear proof of error or mistake on his part"). A master's "conclusions of law, however, are not entitled to any special weight." Id. at 457, 164 P.3d at 715. The master's conclusions of law that are adopted by the circuit court are treated as the conclusions of the circuit court and are freely reviewed for their correctness under the right/wrong standard.

Id.

## **III. Discussion**

**A. The probate court did not err when it did not compel Trustees to provide Appellants with the requested documents and did not appoint a discovery master.**

Appellants contend that the Trustees had a duty to keep the beneficiaries reasonably informed about the administration of the trust and therefore the probate court erred when it did not compel the Trustees to provide the documents that were requested in several letters to the Master and the Trustees themselves.

Appellants also contend that Appellants needed the information they requested to fully articulate any objections to the 1999-2003 Accounts Petition.

Hawaii Revised Statutes (HRS) § 560:7-303 (2006) provides:

**§560:7-303 Duty to inform and account to beneficiaries.** The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration . . . . In addition:

. . . . .

- (2) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect the beneficiary's interest and with information about the assets of the trust and the particulars relating to the administration.
- (3) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

(Emphasis added.)

The Master's Report concluded:

[T]he Beneficiaries, including [Appellants], were provided with notices and relevant documentation of the Trust's operation, administration, management, and termination planning as follows:

1. For each of the years in the 1999 - 2003 Accounting Period, the Trust sent to all Beneficiaries copies of the annual accounts and audited financial.

2. For each of the years in the 1999 -2003 [sic] Accounting Period, the Trust sent Beneficiaries copies of the minutes of the Trustees' weekly meetings. The Trustees designated one Trustees' meeting per quarter for Beneficiaries to meet with the Trustees to ask questions regarding the minutes of the Trustees' meetings or to discuss matters regarding the administration of the Trust.

3. Beginning in January 1995, the Damon Trust held annual Beneficiaries' Briefings (except for 2000 and 2001) to discuss and request input regarding performance of the Trust, termination options and planning, and any other related issues. Initially, the only persons invited to the Beneficiaries' Briefings were first generation of contingent remaindermen, i.e., the great-grandchildren of Samuel Damon and his then living grandchildren; however, upon her request, Ms. Murdoch was allowed to attend the 1999 Beneficiaries' Briefing and, following a policy change, she was invited to attend the 2002 and 2003 Beneficiaries' Briefings.

4. [Appellants] attended several Beneficiaries' Briefings and Quarterly Meetings.

5. The Damon Trust provided Beneficiaries written updates regarding the Trust administration and termination-planning issues, and invited the Beneficiaries'

input.

6. The Trust's records and documents confirmed that the Trustees had an "open door" policy where Beneficiaries could meet with Trustees and Estate staff, review Estate records and documents, and ask questions on trust-related matters. There is no evidence that the Trustees refused any reasonable request of any Beneficiary.

(Emphasis added.)

On appeal, Appellants do not dispute the Trustees' contention and the Master's findings that at the conclusion of each year in the 1999-2003 accounting period, the Estate provided all beneficiaries, including Appellants, with the annual accounts and audited financial statements. Each of the Financial Statements and Schedules for the 1999-2003 accounting period provided a detailed list of, *inter alia*, assets and liabilities and undistributed income and principal. The Financial Statements and Schedules included, *inter alia*: (1) Summary of Significant Accounting Policies; (2) Investments; (3) Property, Improvements, and Equipment; (4) Note Payable and Line of Credit; (5) Fiduciary Income Taxes; (6) Sales of Land; (7) Pension Plan; and (8) Lease Commitments. Trustees also provided to the beneficiaries an account for each of the years 1999-2003, which included, *inter alia*: receipts; all payments made; administrative expenses; expenses from the properties; Trustees' commissions; and inventory of land, corporate stocks, livestock, and other assets.

Appellants do not contend that they objected to any of the detailed Financial Statements and Accounts from the Trustees at the time they received them. Rather, Appellants contend that despite receiving the annual Financial Statements and Accounts, they should have had access to additional records at the time the Trustees' filed the 1999-2003 Accounts Petition.

The Financial Statements and Accounts provided to Appellants annually contained a detailed accounting of the transactions of the Trust. Despite this fact, Appellants sent multiple letters to the Master and the Trustees requesting a wide range of documents that covered a large swath of information. However, Appellants do not point to a specific reason for the requested documents other than a generalized assertion that they

need to understand and track the Trustees' transactions. Thus, it is not clear what Appellants would gain from the documents and Appellants fail to meet their burden of overcoming the presumption of regularity and good faith of the Trustees.

Therefore, the Master's conclusion that the beneficiaries were reasonably informed of the trust and its administration was not clearly erroneous. In addition, given the above, the probate court did not err when it denied Appellants' request to appoint a discovery master while the appointed Master was conducting her review.

Haig asserts that his procedural due process rights were violated because he "could not respond to the analysis of the Master in a meaningful manner, without being provided with an opportunity to review the same information that was made available for the Master's analysis." Haig also contends that the Master had multiple private communications with the Trustees, and Haig himself did not have the same access to the Master.

The Constitution of the State of Hawai'i provides: "No person shall be deprived of life, liberty or property without due process of law[.]" Haw. Const. art. I, § 5. "The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner." Hou v. Bd. of Land and Nat. Res., 136 Hawai'i 376, 389, 363 P.3d 224, 237 (2015) (citation omitted).

Appellants point to Hou, a recent Hawai'i Supreme Court decision discussing due process, to support their contention that their due process rights were violated. Hou involved an appeal from an agency decision. The supreme court stated: "In an adjudicatory proceeding before an administrative agency, due process of law generally prohibits decisionmakers from being biased, and more specifically, prohibits decisionmakers from prejudging matters and the appearance of having prejudged matters." Id.

In Hou, the Hawai'i Board of Land and Natural Resources (BLNR) approved a permit for a proposed astronomy observatory, ancillary facilities, and an access road on the upper slopes of

Mauna Kea. Id. at 381, 383, 363 P.3d at 229, 231. The issue in Hou was "whether Appellants were given an opportunity to be heard at a meaningful time and in a meaningful manner when -- despite their pending requests for a contested case hearing and specific requests to not issue a permit before such hearing -- BLNR issued the permit before resolving those requests and conducting a contested case hearing." Id. at 390, 363 P.3d at 238.

The supreme court concluded that the process of approving the permit prior to holding a contested case hearing created the "appearance of impropriety," which did not "warrant judgment in favor of BLNR." Id. at 399, 363 P.3d at 247. Therefore, the supreme court held that "BLNR acted improperly when it issued the permit prior to holding a contested case hearing." Id.

This case is fully distinguishable from Hou. Here, the probate court did not provide any preliminary approval of contested matters before making its final decision. Rather, during the April 1, 2010 hearing regarding the petition for assignment to the civil trials calendar, the court asked Appellants whether the Master's Report would address their concerns and if there would be any prejudice to the Appellants if the court waited to assign the matter until after an opportunity to review the Master's Report. The court thus deferred the question of transferring the case to the civil trials calendar until it had a chance to see the Master's Report.

At the December 1, 2011 hearing regarding the assignment of the case to the civil trials calendar, the court stated that the parties could use the Master's Report to "focus or hone in on the issues." The court also asked "why don't we wait to see what the Master's report shows[?]" The court concluded:

I know you have major concerns. I know there are -- your clients have matters that they want the Court to focus on. But at this point in time, there's nothing to -- to make me want to deviate from the normal process. Like I said, you'll have an opportunity to respond to the Master's report. Your issues are preserved. There's nothing before me now that says, If we don't do it now, Judge, we're never going to be able to address these issues. So what you're telling me to

do is to allow discovery at this juncture, at this point in time, which is totally extraordinary, and there's nothing to motivate me to grant that extraordinary relief, that I can see.

Based on the probate court's statements, it is clear that it had not made any preliminary determination before the Master's Report was issued and the court's final decision was made. Thus, Hou is inapplicable.

Haig also contends his due process rights were violated because he did not have access to the Master. However, this contention is without merit. The Master's Report lists both Appellants as individuals with whom the Master conferred and had contact. Further, the Master's Timesheet attached to the "Declaration of Master Re: Fees and Costs" filed on June 15, 2012, indicates that the Master met with or spoke over the phone with Appellants and/or their attorneys on several occasions. The Master also responded to Appellants' letters addressed to the Master requesting documents. Finally, the Master's Report specifically addresses Appellants' objections that were submitted to the Master.

Therefore, Appellants' due process rights were not violated.

**B. The probate court did not err when it retained the matter on the probate calendar.**

Appellants contend the probate court erred when it did not transfer the matter to the civil trials calendar or, in the alternative, provide for an opportunity for discovery and an evidentiary hearing.

The probate court is statutorily empowered, *inter alia*, to make orders and judgments in trust proceedings, and, furthermore, to use discretion in its exercise of power. HRS § 560:1-302(a)(3), (b) (2006). Hawai'i Probate Rules (HPR) Rule 20(a) provides: "The court by written order may retain a contested matter on the regular probate calendar or may assign the contested matter to the civil trials calendar of the circuit court." The commentary to HPR Rule 20(a) provides in pertinent

part:

It is anticipated that the court will assign to civil trials the more complex and time consuming cases, although the court may retain such a case if it involves technical issues that are within the experience and expertise of the probate court (and therefore involve less time and effort to educate a trial judge).

HPR Rule 20(b) provides in pertinent part:

The court may use as a guideline on whether to assign a contested matter to the civil trials calendar the expected length of the hearing and whether it will take more than one-half day. The court may also assign other matters to the civil trials calendar, with or without the stipulation of the parties, and the court, at the request of all parties, may retain on the probate calendar a contested matter that would otherwise be assigned to the civil trials calendar, if the court determines the matter can be handled more efficiently and effectively.

The commentary to HPR Rule 20(b) provides in pertinent part:

"This rule provides standards for assigning contested matters to either the probate calendar or the civil trials calendar, with a great deal of flexibility built in." Thus, under HPR Rule 20(a) and (b), it is within the discretion of the probate judge whether to transfer the case to the civil trials calendar and the rules are meant to give the probate court flexibility in making the decision.

In the alternative, Appellants contend that if the probate court did not err by retaining the matter, the probate court should have granted Appellants' request for discovery.

In contested matters retained by the probate court, however, discovery is not automatically permitted. HPR Rule 20(d) gives the probate court discretion to "designate and order that any one or more of the Hawai'i Rules of Civil Procedure and/or Rules of the Circuit Courts shall be applicable in such matter." The commentary to HPR Rule 20(d) provides:

This rule allows the court to adopt any of the Rules of Civil Procedure or Rules of the Circuit Court to govern the conduct of the contested matter. It is anticipated that most, if not all, of the rules regarding discovery, summary judgment, trial testimony, and pretrial practices will be adopted. Currently, contested matters in probate do not clearly give rise to the right to discovery, and it is rare for the court to specifically address the issue.

Although the rule allows the probate court to adopt the Rules of Civil Procedure, including as to discovery, it is clearly a matter of discretion on the part of the probate court. Here, the record shows that the Estate provided beneficiaries with annual accounts and audited financial statements and that the Trustees kept the beneficiaries reasonably informed of the trust and its administration. The probate court appointed an independent Master who conducted a thorough investigation of the accounts, prepared a comprehensive report, and responded to Appellants' objections. Moreover, Appellants requested a wide range of documents without providing specific or clear bases warranting the extensive reach of their requests. Under these circumstances, we cannot say that the probate court abused its discretion when it denied discovery. The probate court's denial of Appellants' discovery requests was consistent with one of the principal purposes and policies of Hawaii's Uniform Probate Code: To "[p]romote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the decedent's successors[.]" HRS § 560:1-102(b)(3) (2006).

Further, for the reasons stated above, given the wide discretion granted to the probate court in the HPR and that one of Appellants' main reasons for requesting the case be transferred to the civil trials calendar was so that they could conduct discovery, the probate court did not abuse its discretion when it retained the matter on the probate calendar.

**C. Appellants' spoliation claims**

Appellants contend that the Trustees committed spoliation because the Trustees either destroyed or lost the 1999-2002 receipts and invoices. Appellants argue that this destruction of evidence necessitates the presumption that the 1999-2003 Accounts Petition cannot be approved.

Spoliation is defined as the "intentional destruction, mutilation, alteration, or concealment of evidence[.]" *Spoliation*, Black's Law Dictionary (9th ed. 2009) (emphasis added).

Appellants' spoliation argument stems from a statement in the Master's Report that "[t]he 1999-2002 receipts and invoices were unlocatable and, according to Controller Mizuno, were probably destroyed as part of the Trust's regular document culling process." This statement is taken out of context in the sense that the Master fully addressed the issue of the missing receipts and invoices with the full cooperation of the Trustees. The full paragraph from which the sentence was taken reads:

Your Master verified the accuracy and reliability of the Trust's financial accounts by examining the statements of assets and liabilities, income and expenses, and random examination of the 2003 receipts and invoices. The 1999-2002 receipts and invoices were unlocatable and, according to Controller Mizuno, were probably destroyed as part of the Trust's regular document culling process. Controller Mizuno assured the Master that he has seen and audited most of the 1999-2002 receipts and invoices when he was part of the KPMG LLP (hereinafter KPMG) audit team and approved some of the 2002 receipts and invoices when he was hired as the Estate's Controller in October 2002. The 1999-2003 annual statements, which were mailed annually to all Beneficiaries, were created from the receipts and invoices. He also confirmed that the Trust's internal controls requiring at least three levels of approval, including those of the Trustees, were uniformly followed in all of the years in the 1999-2003 Accounts Period.

In response to the Appellants' assertion, the Master's Response states:

Due to the seriousness of the situation and the claim of spoliation, your Master further investigated this matter to ascertain what happened to the 1999-2002 documents and to determine whether there are other documents that provide the same information as the missing documents. Your Master requested that the Trust and its attorneys conduct a thorough examination and search of the Trust's financial records and to report their findings to the Master. The Master conducted independent spot checks of the financial records and the record keeping procedures, the results of which are described in this Response. This additional examination was limited to the Estate's 1999-2002 financial records. The Master is informed that financial records for 2003 are all available.

Thus, the Master, in her own independent investigation, conducted spot checks of the financial records and the record-keeping procedures and requested that the Trust conduct a thorough examination. The Master also included a detailed list of the financial documents she reviewed and the names of individuals

contacted who were involved with the trust administration and accounting over the period of 1999-2002.

The Master's Response also clarifies that the Trust had "no document retention or destruction policy[,]" and that, rather, the "Trust went through a major transition in 2007 when it closed its office and packed its documents for storage. However, no one could recall or state with any degree of certainty that the documents were discarded in this process." (Emphasis added.) Although the 1999-2002 check vouchers were not located, the Trust was able to locate records that provided the same information.

The Master summarized her extensive investigation regarding Appellants' spoliation claims as follows:

Although the Master's Report indicated that the missing documents were "destroyed," the Master did not mean to infer that Trust and/or its employees and/or the Trustees intentionally or negligently destroyed evidence. As we know now, the documents are inexplicably missing.

While it is not known when or how the records went missing, a lot is known about the Trust's financial statements, including but not limited to how the financial records were regularly prepared in the ordinary course of the Trust's business, how several employees were responsible for the preparation and reconciliation of all records, how invoices were checked for accuracy and required multi-layers of approval prior to payment, how check payments required dual signatures, how checks were meticulously posted by payor name and amount on the deposit slips, how bank deposits were made daily, how First Hawaiian Bank affixed a validation stamp to each deposit slip, how a check register was diligently prepared and kept, how all of the Trust's financial information was posted and maintained in the most important financial record, the general ledger, how bank statements were regularly reconciled with the check register, how all relevant underlying source documents were available when KPMG conducted its annual audits, how KPMG spot-checked source documents, how KPMG issued unqualified opinions on the financial statements for each year, 1999-2002, how there were no discrepancies with the Master's examination and testing of the Trust's records, and how the Annual Accounts were prepared contemporaneously with all of the Trust's other financial records. More importantly, we know that other financial documents are available to provide the same information as the missing documents and that the Trust's Annual Accounts and financial records can be checked and reconciled for accuracy and fairness. Based on all that the Master has learned and knows of the Trust's financial records, its regular record keeping procedures and controls, the Master is reasonably assured that the Trust did not intentionally destroy or discard the missing records and that the Annual Accounts are fair, reliable, and accurate.

(Emphasis added.) Importantly, the Master further concluded that "[i]f the Beneficiaries are concerned that there may have been internal tampering, the Master is also reasonably assured that such a situation could not have occurred, in part, because many individuals were regularly involved in creating, posting, maintaining, reconciling, and reviewing different parts of the Trust's financial records."

In light of the Master's conclusions, the Appellants fail to present any evidence to overcome the "presumption of regularity and good faith" favoring the Trustees. Campbell, 42 Haw. at 607. Appellants do not challenge any specific findings of the Master, but vaguely assert that the missing documents were necessary to pursue their claims. Appellants do not explain how the missing documents would aid them in proving any alleged breaches of fiduciary duties or the duty of loyalty, any self-dealing, or any failure to comply with the prudent investor rule, and why different, but readily available, documents are not acceptable.

Given the presumption of good faith and regularity in favor of the Trustees, and Appellants' failure to overcome this presumption, we disagree with Appellants that given their claim of spoilation the probate court erred in approving the 1999-2003 Accounts Petition.

**D. The probate court did not err in approving the transactions associated with the sale of the BancWest stock and the real estate transactions.**

Haig contends that the probate court erred when it determined that Haig waived his objections to the sale of the BancWest stock and in turn approved the sale of the BancWest stock. Haig also contends the probate court erred when it approved certain real estate transactions.<sup>5</sup>

In terms of the sale of BancWest stock, the Master found that Haig's objection to the sale of BancWest stock was

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<sup>5</sup> In her appeal, Murdoch does not challenge the sale of BancWest stock or the approval of certain real estate transactions.

barred by waiver, estoppel, and laches because he failed to timely object at the time of the transaction or in the original proceedings, and he was "also estopped from objecting because he expressly approved of the transaction." The Master found that "during the seven months, from May 10, 2001, when Beneficiaries were first notified of the transaction, to December 20, 2001, the date the transaction closed, neither Mr. Haig nor Ms. Murdoch made any objections." The Master's Report found that Haig expressly approved of the transaction:

Mr. Haig is estopped from objecting to the transaction because he sought an order requiring the Trustees to [diversify] the Estate's investments and expressly approved of the transaction, which closed upon the material terms as he knew and understood them to be.

. . . . .

Mr. Haig and his advisors reviewed the transaction documents and on September 10, 2011, Mr. Haig wrote to the Trustees, stating, "We support the proposed sale of BWE stock." The next day, Mr. Haig and his attorney attended the Trustees' meeting and confirmed his support for the BancWest/BNP Paribas transaction. The merger closed upon the material terms as Mr. Haig knew and understood them to be and the success of the merger between BancWest and BNP Paribas was essential to the ability of the Trust to diversify its investment portfolio as Mr. Haig had long sought.

(Emphasis added.) Because Haig does not attempt to controvert the Master's statements with any evidence suggesting that he did not approve the transaction, we affirm the probate court's adoption of the Master's conclusion that Haig's objection to the sale was barred.

Next, Haig argues that the Master erred in summarily dismissing his objections relating to the sale of real estate without allowing him the opportunity to review records pertinent to those objections, and that the probate court erred in affirming the Master's determination.

Here, the Master determined that Haig's objections regarding the sale of O'ahu properties were barred under the doctrine of laches as follows:

As discussed in this Report, beginning in 1995 the Trustees had numerous meetings with the Beneficiaries concerning termination planning options leading up to the Trustees' decision in 2002 to retain a real estate advisor when the Beneficiaries were unable to reach a consensus on any post-termination plan. The Trustees provided the Beneficiaries with information and documents regarding the exhaustive process that resulted in the Trustees' decisions to hire Eastdil and to sell the real estate portfolio in 2003. Mr. Haig hired consultants to evaluate the real estate transaction and both he and Ms. Murdoch attended meetings with the Trustees and reviewed Estate documents. Mr. Haig and Ms. Murdoch never objected to the Oahu real estate transactions at that time and first raised objections in this remanded proceeding more than 7 years after the sale closed. They had two opportunities to object to the sale, prior to the closing of the sale and then in the original proceedings in this case, but remained silent each time. As such, the Master finds that under the doctrine of laches their lack of diligence bars the untimely objections now raised by them. *Poka v. Holi*, 44 Hawaii 464, 357 P.2d 100 (1960) (citing to *Houghtailing v. De La Nux*, 25 Haw. 438, affirmed 9 Cir., 269 F. 751; *Bertelmann v. Lucas*, 35 Haw. 335, 345).

(Emphasis added.)<sup>6</sup>

Two conditions must be present for the doctrine of laches to apply:

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<sup>6</sup> Although the Master found that these claims were barred, she nevertheless responded to the merits of Haig's objections. The Master rejected Haig's complaints about selling individual parcels both because they were inconsistent and because they were impossible to evaluate in that "he does not identify the specialty buyers or strategic packaging he believes were affected by the sales." Haig also complained about every aspect of the sale, but the Master emphasized that "[t]hese criticisms, for the most part, are not supported by competent evidence and amount to second guessing the decisions of the Trustees who, with expert advice and guidance, exercised their reasonable judgment to sell the Oahu real estate portfolio." Although Haig attempted to introduce the opinions of his own experts suggesting otherwise, the Master highlighted that under Hawaii's Uniform Trustees' Powers Act, the Trustees have the right to rely on the recommendation of professional consultants, including investment and real estate advisors, in exercising their collective business judgment. See HRS § 554A-3(c)(23)(2006). Accordingly, the Master concluded that "[o]n balance, it cannot be said that Mr. Haig's experts' credentials are superior to that of the Trust's experts" or that he could show that the Trust's experts' recommendations were inadequate.

The Master did not conclude that Haig's objections to the sale of Wheatland Ranch were barred by the doctrine of laches. However, the Master's Report points to the fact that Haig's expert in the original proceeding actually supported the sale of Wheatland Ranch, whereas in the remanded proceeding Haig obtained a new expert that questioned the sale for the first time. The Master emphasized that Haig's new expert's criticisms were "lacking in evidentiary sufficiency to overcome the presumption of regularity and good faith favoring the Trustees." Haig does not point to anything specific in the record that overcomes the presumption of regularity and good faith favoring the Trustees with regard to Wheatland Ranch.

First, there must have been a delay by the plaintiff in bringing his claim, and that delay must have been unreasonable under the circumstances. Delay is reasonable if the claim was brought without undue delay after plaintiff knew of the wrong or knew of facts and circumstances sufficient to impute such knowledge to him. Second, that delay must have resulted in prejudice to defendant. Common but by no means exclusive examples of such prejudice are loss of evidence with which to contest plaintiff's claims, including the fading memories or deaths of material witnesses, changes in the value of the subject matter, changes in defendant's position, and intervening rights of third parties.

Adair v. Hustace, 64 Haw. 314, 321, 640 P.2d 294, 300 (1982) (citations omitted).

In this case, Haig did not raise any objection until more than seven (7) years after the sale had been closed and does not present any evidence excusing his failure to raise objections in a timely manner. In addition, Haig's delay in objecting to the sale of real estate certainly results in prejudice to the Trustees. Thus, Haig's objections are barred by the doctrine of laches.

Therefore, the probate court did not err in affirming the Master's determination that Haig's objections to the sale of BancWest stock and the sale of real estate were barred.

**E. Appellants' contention that the probate court did not conduct a meaningful review of the Master's Report is without merit.**

Appellants contend that the probate court adopted the Master's Report without a meaningful review of the report.

A master "serves as the eyes and ears of the court." Damon I, 119 Hawai'i at 506, 199 P.3d at 95 (citation omitted). Further, the court gives a master "particular deference" because the master sits in a superior position "to consider credibility and to draw inferences from the testimonial evidence." Hawaii Ventures, 114 Hawai'i at 456, 164 P.3d at 714 (citation omitted).

The probate court appointed a master and, as stated above, the Master conducted a thorough review of the case. The probate court thereafter heard Appellants' arguments on and considered their objections to the Master's Report. Appellants

do not point to any specific finding of the Master that was clearly erroneous. Therefore, the probate court did not err when it approved and adopted the recommendations of the Master.

**IV. Conclusion**

The Judgment filed on August 2, 2012, in the Circuit Court of the First Circuit, is affirmed.

DATED: Honolulu, Hawai'i, June 2, 2016.

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