

NO. CAAP-14-0001308
IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

In the Matter of the SHARON M. Y. YOUNG
REVOCABLE LIVING TRUST AGREEMENT
Dated April 28, 1995

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CASE NO. T-05-1-0001)

ORDER: (1) DISMISSING APPEAL FOR LACK OF APPELLATE
JURISDICTION; (2) DENYING ALL PENDING MOTIONS AS
MOOT; AND (3) TAKING NO FURTHER ACTION ON ORDER
TO SHOW CAUSE FILED ON JANUARY 19, 2016
(By: Fujise, Presiding Judge, Reifurth and Ginoza, JJ.)

Upon review of the record, it appears that we lack appellate jurisdiction over Beneficiary-Appellant Mark Young's (Appellant Young) appeal from the Honorable Derrick H.M. Chan's October 21, 2014 "Order Granting Petition for Approval of the Trustee's First Account Through Ninth Account, Appointing Successor Co-Trustees and Vesting Title" (October 21, 2014 Order). The probate court has not yet entered a final judgment terminating the underlying proceedings, or a separate judgment on the October 21, 2014 Order as to one or more but fewer than all claims or parties pursuant to Rule 54(b) of the Hawai'i Rules of Civil Procedure (HRCP), as Hawaii Revised Statutes (HRS) § 641-1(a) (1993 & Supp. 2015) and Rule 34(a) of the Hawai'i Probate Rules (HPR) require for an appeal from a trust proceeding under these circumstances.

"When we perceive a jurisdictional defect in an appeal, this court must, *sua sponte*, dismiss the appeal." Ciesla v. Reddish, 78 Hawai'i 18, 20, 889 P.2d 702, 704 (1995) (citation omitted). HRS § 641-1(a) (Supp. 2015) is the law that authorizes appeals from a probate court's final judgments, orders, or decrees. Appeals under HRS § 641-1 "shall be taken in the manner . . . provided by the rules of court." HRS § 641-1(c) (1993). HPR Rule 34 applies to, among other things, trust proceedings (see HPR Rule 1), and generally requires the entry of a judgment for an appeal:

RULE 34. ENTRY OF JUDGMENT, INTERLOCUTORY ORDERS, APPEALS.

(a) Entry of Judgment. All formal testacy orders, orders of intestacy and determination of heirs, orders establishing conservatorship and/or guardianship, and orders establishing protective arrangements shall be reduced to judgment and the judgment shall be filed with the clerk of the court. Such judgments shall be final and immediately appealable as provided by statute. Any other order that fully addresses all claims raised in a petition to which it relates, but that does not finally end the proceeding, may be certified for appeal in the manner provided by Rule 54(b) of the Hawai'i Rules of Civil Procedure.

(b) Interlocutory Orders. In order to appeal from any other order prior to the conclusion of the proceeding, the order must be certified for appeal in accordance with Section 641-1(b) of the Hawai'i Revised Statutes.

(c) Final Judgment Closing Proceeding. At the conclusion of the proceeding, a final judgment closing the proceeding shall be entered and filed with the clerk of the court, at which time all prior uncertified interlocutory orders shall become immediately appealable.

(d) Appeals. Final judgments as to all claims and parties, certified judgments, certified orders, and other orders appealable as provided by law may be appealed pursuant to the Hawai'i Rules of Appellate Procedure applicable to civil actions.

HPR Rule 34 (emphasis added). "Rule 34 is written to conform probate practice to the policy against piecemeal appeals, see, e.g., Jenkins v. Cades Schutte Fleming & Wright, 76 Haw. 115, 869 P.2d 1334 (1994), to bring certainty to the timing of when and how an appeal can be taken, and to comply with the provisions of HRS § 641-1." HPR Rule 34 cmt.

Under the holding in Jenkins, "[a]n appeal may be taken . . . only after the orders have been reduced to a judgment and the judgment has been entered in favor of and against the appropriate parties pursuant to HRCP [Rule] 58[.]" 76 Hawai'i at

119, 869 P.2d at 1338. "Thus, based on Jenkins and HRCF Rule 58, an order is not appealable, even if it resolves all claims against the parties, until it has been reduced to a separate judgment." Carlisle v. One (1) Boat, 119 Hawai'i 245, 254, 195 P.3d 1177, 1186 (2008). "[A]n appeal from any judgment will be dismissed as premature if the judgment does not, *on its face*, either resolve all claims against all parties or contain the finding necessary for certification under HRCF [Rule] 54(b)." Jenkins, 76 Hawai'i at 119, 869 P.2d at 1338 (emphasis omitted). Thus, in cases where HPR Rule 34 applies, the Supreme Court of Hawai'i has held that when "final judgment terminating the proceeding has not been entered, and these [appealed] orders were not certified for appeal[,] . . . those orders are not before us." In re Guardianship of Carlsmith, 113 Hawai'i 211, 223, 151 P.3d 692, 704 (2006).

On January 8, 2015, the probate court clerk filed the record on appeal for appellate court case number CAAP-14-0001308 which does not contain an appealable final HPR Rule 34 judgment. Appellant Young contends that an exception to the final judgment requirement, the Forgay doctrine, applies to give this court jurisdiction over the October 21, 2014 Order. See Forgay v. Conrad, 47 U.S. 201 (1848). As described in Ciesla,

We have jurisdiction to consider appeals from judgments which "require[] immediate execution of a command that property be delivered to the appellant's adversary, and the losing party would be subjected to irreparable injury if appellate review had to wait the final outcome of the litigation." *Penn v. Transportation Lease Haw., Ltd.*, 2 Haw.App. 272, 274, 630 P.2d 646, 649 (1981) (citing *Forgay v. Conrad*, 47 U.S. (6 Haw.) 201, 12 L.Ed. 404 (1848)). The *Forgay* doctrine is an exception to the finality requirement for appeals and it allows an appellant to immediately appeal a judgment for execution upon property, even if all claims of the parties have not been finally resolved.

Ciesla, 78 Hawai'i at 20, 889 P.2d at 704. Appellant Young contends that the Forgay doctrine applies because the October 21, 2014 Order requires the immediate execution of property and irreparable harm because property must be sold to satisfy the ordered attorney's fees and master's fees; discharge of the deceased former trustee causes permanent harm because the former

trustee's estate will distribute and there will be no assets left to pursue; and discharge of the deceased former trustee extinguishes the beneficiaries' right to a jury trial. Despite Appellant Young's contentions, the October 21, 2014 Order does not require the immediate execution of a command to deliver property to Appellant Young's adversary. See Greer v. Baker, 137 Hawai'i 249, 253, 369 P.3d 832, 836 (2016) (noting that the Forgay doctrine authorizes appeals from a judgment for immediate execution against an interest in real property).

Moreover, neither of the other two exceptions to the final judgment requirement (the collateral order doctrine and HRS § 641-1(b) (1993) apply. See Abrams v. Cades, Schutte, Fleming & Wright, 88 Hawai'i 319, 322, 966 P.2d 631, 634 (1998) (regarding the three requirements for the collateral order doctrine); HRS § 641-1(b) (regarding the requirements for an appeal from an interlocutory order).

Absent an appealable judgment, we lack appellate jurisdiction and Appellant Young's appeal is premature.

Therefore, IT IS HEREBY ORDERED that appellate court case number CAAP-14-0001308 is dismissed for lack of appellate jurisdiction.

IT IS FURTHER HEREBY ORDERED that all pending motions in appellate court case number CAAP-14-0001308 are denied as moot.

Additionally, in light of the dismissal of this appeal for lack of appellate jurisdiction, we will take no further action with regard to the order to show cause issued on January 19, 2016 to attorney Frank T. Kanemitsu (Kanemitsu). However, we strongly caution Kanemitsu because he was the attorney of record in this appeal and received notice of Appellant Young's Notice of Appeal, Statement of Jurisdiction, and opening brief, and this court's April 24, 2015 Order instructing his client to file an answering brief; yet, Kanemitsu failed to file an answering brief, a statement contesting jurisdiction, or a timely Suggestion of Death regarding his client having passed away. Due

to Kanemitsu's inactivity, his client was declared in default of the answering brief. Repetition of such actions in the future may result in sanctions.

DATED: Honolulu, Hawai'i, June 13, 2016.

Presiding Judge

Associate Judge

Associate Judge