IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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KARL ROBERT BRUTSCH,
Respondent/Plaintiff-Appellee/Cross-Appellant,

vs.

CELIA KAY BRUTSCH,
Petitioner/Defendant-Appellant/Cross-Appellee.

SCWC-12-0000703

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-12-0000703; FC-D NO. 09-1-2906)

MARCH 2, 2017

CONCURRING AND DISSENTING OPINION BY
RECKTENWALD, C.J., IN WHICH NAKAYAMA, J., JOINS

I agree with the Majority's holding regarding Category 3 credits. This case should be remanded for further proceedings consistent with this court's recent holdings in Hamilton v. Hamilton, 138 Hawaiʻi 185, 378 P.3d 901 (2016). However, I respectfully dissent with respect to Husband's motion for attorney's fees under Hawaiʻi Family Court Rules (HFCR) Rule 68.

The validity of HFCR Rule 68 was recently addressed by this court in Cox v. Cox, 138 Hawaiʻi 476, 382 P.3d 288 (2016). As noted by the Majority, the Court determined in Cox that "HFCR Rule 68 does not apply to proceedings governed by HRS § 580-47" and therefore Husband could not bring an HFCR Rule 68 motion in this divorce proceeding.

I dissented from the decision in Cox, based on my view that HFCR Rule 68 can be interpreted in a manner consistent with HRS § 580-47:

> If read to advance equitable considerations and preserve its validity, HFCR Rule 68 provides that the court retains discretion over awarding attorney's fees and costs and must exercise this discretion based on equitable concerns. HFCR Rule 68 thus does not force the court to award attorney's fees and costs in conflict with HRS § 580-47. Rather, HFCR Rule 68 establishes a presumptive entitlement to fees, which can be overcome consistent with HRS § 580-47.

138 Hawaiʻi at 492-93, 382 P.3d at 304-05 (2016) (Recktenwald, C.J., dissenting).

The instant case was pending when Cox was decided, and accordingly, I respectfully dissent on the same grounds here. While we differed in Cox on when and how changes to the rule should be made, I nevertheless agree with the Majority that the operation of the rule poses complex policy issues that should be addressed to ensure that the resulting approach is fair and equitable.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama