IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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IN THE MATTER OF
THE ELAINE EMMA SHORT REVOCABLE LIVING TRUST AGREEMENT
DATED JULY 17, 1984, as amended.

SCWC-15-0000960

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000960; T. NO. 15-1-0165)

JUNE 18, 2020

OPINION CONCURRING IN PART AND DISSENTING IN PART,
BY RECKTENWALD, C.J., WITH WHOM NAKAYAMA, J., JOINS

In my view, the Intermediate Court of Appeals (ICA) did not err by reviewing the extrinsic evidence that the probate court considered in granting First Hawaiian Bank's (FHB) petition. I write briefly to add that the majority's conclusion that the ICA acted improperly is contravened by well-established case law and the Hawai'i Probate Rules (HPR). I therefore respectfully dissent in part from the majority opinion and would

not require the probate court to enter Findings of Fact.[1]

The majority concludes that the ICA impermissibly weighed extrinsic evidence of Elaine Emma Short's intent after determining that the trust language was ambiguous. Majority at 20-26. Under the majority's analysis, the probate court's failure to include Findings of Fact in its written order precluded the ICA from examining the evidence in the record to determine whether the probate court's findings were clearly erroneous.

There are several problems with that analysis. First, the Petitioners failed to provide this court with a transcript of the November 19, 2015 hearing at which the probate court made the rulings that are at dispute in this appeal. Although the minutes of that hearing provide some insight into what occurred - we know, for example, that the probate court held that "there [was] an ambiguity" and that it was proper to "focus on settlor's intent" – they do not set forth the procedures the parties asked the court to follow in resolving the dispute. As a result, the ICA and this court are left to speculate about what happened.

It is the Petitioners' burden to ensure that relevant

[1] I agree with the majority's conclusion that the Cooks were entitled to the trust's accounting information pursuant to HRS § 560:7-303. Majority at 47. I would therefore remand the case to the probate court, but for a narrower purpose than the majority.

transcripts are included the record on appeal. See Hawai'i Rules of Appellate Procedure (HRAP Rule 10(b)(1)(A) (requiring appellant to file a request for transcripts "[w]hen an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court appealed from[.]"); see also HRAP Rule 10(b)(3) ("If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion."). Although the Cooks' request for the transcript of the hearing on FHB's petition is in the record, the transcript of the hearing is not. Our rules place the burden of providing a transcript on the appellant precisely because of the challenge presented here: without a transcript, it is difficult to fairly evaluate the actions of the probate court. See Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) ("The burden is upon appellant in an appeal to show error by reference to matters in the record, and he [or she] has the responsibility of providing an adequate transcript.") (citation omitted).

Second, to the extent there is an argument to be made that the probate court erred procedurally with regard to how it disposed of the petition, that argument has been waived. In their application for certiorari, Petitioners suggest that the

probate court erred by failing to hold a contested matter hearing to resolve disputed issues of fact regarding the settlor's intent. The problem with that argument, however, is that it has been waived, both in the probate court and the ICA. At no point in their written submissions to the probate court did Petitioners indicate that such a hearing should be held. The minutes of the November 19 hearing do not reflect such a request. And of course, as noted above, we do not have the transcript, so we cannot tell whether any party even raised this issue to the probate court and, if it was raised, how it was resolved.

In their opening brief to the ICA, the Petitioners argued that the dispute could be resolved based on "a plain reading" of the Trust. However, in the alternative, they specifically invited the ICA to consider the extrinsic evidence. ("[I]f this Appellate Court is inclined to look beyond the four corners of the Trust to determine Elaine's intent, the [Petitioners] contend the facts speak for themselves"); ("While the Court need not look beyond the language of the Amendment, if it were to do so, other available evidence supports the conclusion that David is not entitled to Trust principal[.]"). There was no hint of a challenge to the procedure followed by

the probate court, and accordingly, the issue was waived.[2] HRAP Rule 28(b)(4)(D) ("Points not presented . . . will be disregarded[.]").

Instead of taking up this obviously waived argument, the majority creates a closely-related procedural challenge to the actions taken by the probate court, one that was similarly not preserved for review by Petitioners: the suggestion that the probate court erred by failing to make written findings of fact. Majority at 1-2.

However, the probate court was not required to enter written Findings of Fact in resolving a contested matter pursuant to the HPR. Rule 19 states, in relevant part, "A contested matter is any one in which an objection has been filed." The Cooks filed an objection to FHB's proposed amendments to the trust; the matter was thus contested. With respect to contested matters, HPR Rule 20 states in relevant part:

> (a) **Assignment.** 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.
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> . . .
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> (d) **Procedures in Retained Contested Matters.** Whenever the

[2] It was not until their reply brief in the ICA that Petitioners suggested that, "[a]t the very least, the extrinsic evidence offered by the [Petitioners] precludes the granting of FHB's Petition, and the matter should be remanded the [sic] probate Court with instructions to have the proceedings deemed a contested matter as there are material disputed issues of fact[.]" However, this was too late to revive a claim of error that had been waived by its omission from the opening brief.

> court retains jurisdiction of a contested matter as a probate proceeding, the court in the order of assignment may, at the request of the parties, designate and order that any one or more of the Hawai'i Rules of Civil Procedure and/or the Rules of the Circuit Courts shall be applicable in such matter.[3]
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> . . .
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> (f) **Appeals.** An order resolving the issues in a contested matter shall be reduced to judgment in accordance with Rule 34 of these rules and may be appealed as provided therein.

The HPR contain no other relevant reference to requirements of written orders, written judgments, or written Findings of Fact for contested matters. In fact, nothing in the rules requires that the probate court enter Findings of Fact when adjudicating a contested matter.

Although the probate court did not issue an order retaining or transferring the contested matter, the court clearly retained it. Probate courts have wide discretion to control hearings on contested matters. For example, in Tr. Created Under the Will of Damon, 140 Hawai'i 56, 68, 398 P.3d 645, 657 (2017), this court held that if the probate court retains a contested matter, it has the discretion to decide whether to allow discovery. There is no indication in the record that the Cooks requested any additional procedures at the hearing on the contested matter.

In contrast to the HPR, the Hawai'i Rules of Civil

[3] The record does not reflect that the probate court designated any of the Hawai'i Rules of Civil Procedure to apply to the contested matter.

Procedure (HRCP) and the Hawaiʻi Family Court Rules (HFCR) have specific provisions requiring written Findings of Fact. HRCP Rule 52, Findings by the Court, states:

> **(a) Effect.** In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon[.] . . . Findings of fact shall not be set aside unless clearly erroneous[.]

Similarly, HFCR Rule 52, Findings by the Court, states:

> **(a) Effect.** In all actions tried in the family court, the court may find the facts and state its conclusions of law thereon or may announce or write and file its decision and direct the entry of the appropriate judgment; except upon notice of appeal filed with the court, the court shall enter its findings of fact and conclusions of law where none have been entered, unless the written decision of the court contains findings of fact and conclusions of law.

All of the cases the majority cites in support of its conclusion on the extrinsic evidence issue are cases to which the family court rules or rules of civil procedure apply. The HPR contain no analogue rule requiring probate courts to enter written Findings of Fact. We construe rules in pari materia, "or upon the same subject matter," together. Wells Fargo Bank v. Omiya, 142 Hawaiʻi 439, 450, 420 P.3d 370, 381 (2018) (citation omitted). From the fact that the HRCP and the HFCR include a provision that the HPR do not, we may reasonably infer that the decision not to require probate courts to enter Findings of Fact reflects a conscious choice.[4] Consequently, the

[4] I respectfully disagree with the majority's assertion that the structure of the probate court rules always requires Findings of Fact, making

probate court need not enter written Findings of Fact when it disposes of a contested matter, particularly when, as is the case here, the record does not indicate that any party asked it to do so. In my view, the ICA was correct not to remand the case to the probate court for it to enter Findings of Fact. Indeed, it is unreasonable to expect the ICA to remand for entry of Findings of Fact where no rule, statute, or case requires that it do so.

Moreover, even without a section in the probate court's order titled "Findings of Fact," it is clear that the probate court did make findings based on the extrinsic evidence – namely that Elaine intended for David to receive distributions of income and principal.[5] Contrary to the majority's conclusion,

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a specific rule on the matter unnecessary. Majority at 28-31. In the instant case, the probate court retained the contested matter and the parties did not request that HRCP Rule 52 apply. Consequently, there was no rule in effect that required Findings of Fact.

I also note that the lack of a retention order did not deprive the parties of an opportunity to request that HRCP Rule 52 apply. According to the plain language of HPR Rule 20(d), a retention order itself designates any rules of civil procedure to apply. This means that the parties must request that specific rules apply before the probate court issues a retention order. No party in this case did so. The majority is correct to point out that in In re Estate of Campbell, this court observed that the probate court did not satisfy "[t]he prerequisites of HPR Rule 20(d)" and that an order pursuant to Rule 20(a) allows the court to decide whether to apply any of the rules of civil procedure. 106 Hawai'i 453, 460 n.16, 106 P.3d 1096, 1103 n.16 (2005). But instead of holding that the probate court erred in that respect, this court affirmed the probate court's judgment, as I would here. See also In re Estate of Kam, 110 Hawai'i 8, 24, 129 P.3d 511, 527 (2006) (holding that the probate court had discretion over whether to issue an order retaining or transferring a contested matter).

[5] The majority contends that the probate courts minutes "could have referred to a focus on Elaine's intentions as to the purpose or purposes of the trust or her intention for David to receive distributions of the

a reviewing court must look to the extrinsic evidence in the record in this circumstance, where there is no other way to review the probate court's judgment because the rules do not require Findings of Fact.

Finally, the majority ignores the well-settled rule that a reviewing court may affirm the judgment below for any reason supported by the record. Poe v. Hawai'i Labor Relations Bd., 87 Hawai'i 191, 197, 953 P.2d 569, 575 (1998) ("Where the circuit court's decision is correct, its conclusion will not be disturbed on the ground that it gave the wrong reason for its ruling. An appellate court may affirm a judgment of the lower court on any ground in the record that supports affirmance." (brackets, citations, and quotation marks omitted)). I do not

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principal." Majority at 26 n.18. Respectfully, I believe these are one and the same. FHB's petition states:

> [T]he Settlor's primary intent appears to be the support of [her] issue. Currently, David is the Settlor's last surviving issue. . . . If the Trustee were to distribute income only to David, David would not be the primary beneficiary of the Trust. Instead, the contingent remainder beneficiaries, the Settlor's heirs at law, would primarily benefit from the trust estate because the Settlor's heirs at law would receive the bulk of the trust estate. It does not appear that the Settlor intended such a result.

Thus, Elaine's intent as to whether David should receive principal distributions flows from her intent as to the purpose of the trust, which is also intertwined with FHB's claim that an unforeseen circumstance would thwart Elaine's intent: if Elaine intended to make David the primary beneficiary, she also intended to allow principal distributions if the unforeseen circumstance arose that William and David both died without issue. In my view, this case is a simple one. The majority makes it more complicated by speculating about matters unmoored from the record.

endorse "scour[ing]" the record for "any factual basis" on which to uphold the probate court's opinion, Majority at 25, but where the record supports the conclusion that the trial court did not clearly err, I believe that upholding the probate court's findings is consistent with Poe and our other jurisprudence on this issue. Respectfully, I believe the majority is thus incorrect to conclude that the ICA improperly weighed the evidence in the record to affirm the probate court, particularly when Petitioners invited it to do so.

Factual findings of a trial court are reviewed for clear error. "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." State v. Alvarez, 138 Hawai'i 173, 181, 378 P.3d 889, 897 (2016) (quoting State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995)). Although the ICA did not recite the standard of review for factual findings of intent with respect to trusts, the ICA's opinion provides no reason to conclude that it applied anything but clear error review to this portion of the probate court's findings. And even if the ICA applied the wrong standard, this court would nonetheless be permitted to affirm on any basis supported by the record, based on the analysis above.

Thus, with respect to the probate court's factual determination that Elaine intended to allow for distribution of the trust's principal to David, the ICA correctly examined the evidence in the record to analyze whether the probate court's findings were clearly erroneous. Specifically, the ICA's Memorandum Opinion stated, "we first determine whether Elaine's intent to allow discretionary payments of principal to David can be unambiguously ascertained from the plain language[,] . . . and, if not, whether extrinsic evidence supports the Probate Court's ruling." (Emphasis added.) In my view, to hold that the ICA erred is inconsistent with our case law and introduces unnecessary uncertainty for courts and litigants.

In sum, the issue that the majority finds dispositive is not properly before this court. And even if it were, the HPR did not require that the probate court enter Findings of Fact in the circumstances here. The ICA was thus required to examine the extrinsic evidence in the record to affirm or vacate the probate court's order. It properly did so. For these reasons, I respectfully dissent in part from the majority opinion and would vacate the probate court's judgment only in part.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama