IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---o0o---

ESTATE ADMINISTRATIVE SERVICES, LLC, Interim Personal Representative for the Estate of Philip Finn,
Respondent/Plaintiff-Appellee,

vs.

SIONE P. MOHULAMU, FALAULA TINOGA, SR., and SAMANTHA KALIKO,
Respondents/Defendants-Appellees,

and

CHRISTY TIGILAU,
Petitioner/Defendant-Appellant.

SCWC-19-0000050

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-19-0000050; CASE NO. 1RC181008145)

JUNE 19, 2020

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

I. INTRODUCTION

Hawai'i Rules of Appellate Procedure (HRAP) Rule 24 is unambiguous: Christy Tigilau was required to file her motion to

proceed in forma pauperis (IFP) in the district court. Instead, she filed it in the Intermediate Court of Appeals (ICA) twice. The ICA directed Tigilau to file the motion in the district court both times, citing the language of HRAP Rule 24(a) that allows litigants to file the motion with the ICA only if they can show that filing in the court appealed from is impracticable. But Tigilau did not comply with HRAP Rule 24(a) and never filed an IFP motion in the district court. Consequently, after Tigilau failed to pay the necessary filing fees, the ICA properly dismissed her appeal.

The majority concludes that the ICA abused its discretion by dismissing the appeal instead of adjudicating the motion itself. I respectfully disagree.

Directing the ICA to rule on Tigilau's IFP motion reads out HRAP 24(a)'s requirement that an appellant who wants the appellate court (rather than the trial court) to consider the IFP motion must show that "application to the court appealed from for the relief sought is not practicable[.]" HRAP Rule 24(a). While I agree with the majority that pleadings prepared by pro se litigants should be liberally construed, no plausible construction of Tigilau's IFP motions provided a basis for the ICA to consider the merits of the motions.

For these reasons, I respectfully dissent.

II. DISCUSSION

A. The ICA Did Not Abuse Its Discretion in Denying Tigilau's IFP Motions and Dismissing Her Appeal

1. Tigilau did not show that filing her IFP motion in the district court was impracticable.

HRAP Rule 24(a) states in relevant part:

> A motion for leave to proceed on appeal in forma pauperis from the circuit, district, family, land, environmental, or tax appeal court . . . shall ordinarily be made in the first instance to the court or agency appealed from.
>
> A party . . . who desires to proceed on appeal in forma pauperis may file in the appellate court a motion for leave to so proceed. The motion shall be accompanied by an affidavit or declaration, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay the required filing fees or to give security for costs, the party's belief that he or she is entitled to redress, and a statement of the issues that the party intends to present on appeal. If the appeal is from a court, the motion shall show that application to the court appealed from for the relief sought is not practicable, or that the court appealed from has denied an application, or has failed to afford the requested relief, with the reasons given by the court appealed from for its action.

(Emphases added.)

According to HRAP Rule 24(a), Tigilau was only permitted to file her IFP motion in the ICA if the motion showed "that application to the court appealed from for the relief sought is not practicable, or that the court appealed from has denied an application, or has failed to afford the requested relief, with the reasons given by the court appealed from for its action." The majority's emphasis on the word "ordinarily" in Rule 24(a) to conclude that Tigilau did not need to file her motion in the district court is thus misplaced. The exception to the rule that a party must file in the court appealed from

only applies when the above conditions are met. Tigilau did not refile her IFP motion in the district court but instead filed it a second time in the ICA — and, once again, omitted any showing of why it was not practicable to make her motion to the district court. Once again, the ICA denied her motion and directed her to file in the district court; once again, it cited the requirement that a party seeking to bypass the trial court must show why it was not practicable to submit the motion to that court. When Tigilau again failed to file in the district court, the ICA dismissed the appeal. It is undisputed that Tigilau's two IFP motions did not comply with HRAP Rule 24(a), nor with the ICA's explicit instructions. The ICA therefore did not abuse its discretion in dismissing the appeal.

Although Hawai'i courts construe pro se filings liberally, pro se litigants must still comply with the court's rules. Lepere v. United Pub. Workers, Local 646, 77 Hawai'i 471, 473 n.2, 887 P.2d 1029, 1031 n.2 (1995) (stating that the right of self-representation is not "a license not to comply with the relevant rules of procedural and substantive law" (quoting Faretta v. California, 422 U.S. 806, 835 n.46 (1975))). Where Tigilau's IFP motion did not contain the required information or a reason the required information could not be included, treating it as if it did so would go well beyond liberal construction. Thus, Tigilau's submissions to the ICA cannot

plausibly be construed to raise a reason why it was impracticable for her to apply to the district court for the relief sought.[1]

2. HRS § 607-3 is not an independent basis for waiving the costs of an appeal.

The majority also contends that the ICA should have considered Tigilau's IFP motion under Hawai'i Revised Statutes (HRS) § 607-3 (2016), which purportedly provides an independent basis for waiving the costs of appeal.[2] In my view, holding that HRS § 607-3 is an independent basis on which an appellate court can waive filing fees renders HRAP Rule 24 and its procedural safeguards superfluous. And that is impermissible because "our rules of statutory construction require[] us to reject an interpretation . . . that renders any part of the statutory language a nullity." Coon v. City & Cty. of Honolulu, 98 Hawai'i 233, 250, 47 P.3d 348, 365 (2002) (citation omitted). Further, because Rule 24 does not prescribe the standard for granting an IFP motion – merely the procedure for filing it – holding that

[1] The majority further holds that the ICA erred when it did not "provide" Tigilau with the opportunity to show that filing her IFP motion in the district court was impracticable; respectfully, I believe that the ICA effectively did so by citing the applicable exception in its orders. In holding that the ICA's orders were insufficient to "provide" Tigilau with this opportunity, the majority effectively creates a new requirement with no basis in the rule itself.

[2] HRS § 607-3 states, "The judges of all the courts of the State shall have discretionary power to waive the prepayment of costs or to reduce or remit costs where, in special or extraordinary cases, the cost of any suit, action, or proceeding may, to the judges, appear onerous."

the rule is independent from HRS § 607-3 - which does prescribe a standard - is illogical. The two cannot be independent from each other: the statute provides the standard, and the rule provides the process for invoking it.

Moreover, the case law the majority cites for the proposition that HRAP Rule 24 and HRS § 607-3 are independent does not support that conclusion. The majority asserts that the court in Blaisdell v. Department of Public Safety, 113 Hawai'i 315, 151 P.3d 796 (2007), "analyzed a self-represented prisoner's IFP motion in a civil case solely under the 'onerous' standard of HRS § 607-3" even though the Rules of the Circuit Courts of the State of Hawai'i (RCCH) Rule 2.2(13) allowed waiver of costs for good cause. Majority at 18. But the court's choice not to analyze the issue under a circuit rule is irrelevant to whether HRS § 607-3 exempts a litigant from complying with HRAP Rule 24(a). I would hold that the statute does not exempt an IFP movant from complying with the applicable rule.

3. The majority's policy arguments do not override HRAP Rule 24's plain language.

The majority asserts that the ICA should have ruled on Tigilau's IFP motion because it was "just as readily able" to do so as the district court. Majority at 15. As an initial matter, it is well-settled in our case law that trial courts are

best situated to find facts such as whether a person's financial means qualify them for IFP status. See Goo v. Arakawa, 132 Hawai'i 304, 317, 321 P.3d 655, 668 (2014) ("Remand to the lower court [for factual determinations] protects the 'orderly operation of the judicial system' by leaving fact-finding powers with the trial courts and review of the trial courts' discretion to the appellate courts." (quoting U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 27 (1994))); 24 C.J.S. Criminal Procedure and Rights of Accused § 2083 (2020) ("Whether a defendant seeking to appeal in forma pauperis is indigent is a mixed question of fact and law."); cf. State v. Mickle, 56 Haw. 23, 27, 525 P.2d 1108, 1111 (1974) (holding that trial court should take into consideration evidence about applicant's income, expenses, assets, borrowing capacity, "and all other factors and circumstances bearing upon the question of eligibility" for court-appointed counsel in a criminal proceeding).

In addition, the majority's statement that the ICA was capable of evaluating Tigilau's IFP application rests upon the majority's distinction between plaintiffs and defendants. According to the majority, while the ICA is "just as readily able" as the trial court to evaluate a defendant's IFP application, the trial court would be better positioned to evaluate a plaintiff's. Majority at 15. However, this

distinction between plaintiffs and defendants is altogether unsupported by the rule itself.

B. The Appropriate Mechanism to Address the Access to Justice Concerns the Majority Identifies Is an Amendment to HRAP Rule 24

HRAP Rule 24 states that an IFP application can be filed in the appellate court only when the movant shows that application to the court appealed from is not practicable. The ICA gave Tigilau two opportunities to file her motion in the district court, and it cited that language on both occasions. Given these circumstances, I cannot say that the ICA abused its discretion or that it was unmindful of access to justice principles. In order to grant the motion, the ICA would have had to ignore the plain language of Rule 24, which, one might argue, would have been an abuse of discretion.

To the extent that the majority wants to avoid such situations in the future, the appropriate avenue would be amending the rule to explicitly give the appellate court the discretion to grant the motion even if the appellant does not make the required showing of impracticability. The provisions of the rule that are at issue here were adopted by this court in 2015, and we can further amend them going forward to provide greater flexibility. Order Amending the Hawai'i Rules of Appellate Procedure, SCRU-10-0000012 (Oct. 13, 2015),

https://perma.cc/F9FP-VWFX.[3] But in my view, what we should not do is conclude that the ICA abused its discretion by implementing the requirements of the rule as it was written.

III. CONCLUSION

While I wholeheartedly share the majority's commitment to access to justice, I respectfully disagree that the ICA abused its direction by requiring that Tigilau comply with HRAP Rule 24. For the foregoing reasons, I would affirm the ICA's judgment on appeal. I therefore respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

[3] Prior to 2015, HRAP Rule 24(a) required that appellants file IFP motions in the appellate court. In 2015, this court amended the language to its current form to require that, in most circumstances, appellants file the motion in the trial court.