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NO. 25398

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

THE ESTATE OF EDITH I. KAM,
aka EDITH ING KAM, DECEASED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(P. NO. 00-1-0281)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

Petitioners-Appellants Robert A. Smith (Smith) and Paz F. Abastillas (Abastillas), collectively referred to as "Appellants," appeal from the following judgments entered in the Circuit Court of the First Circuit by Judge Colleen K. Hirai:

(1) the September 13, 2002 "Final Judgment Re Order Denying Petition to Vacate Previous Order for Probate of Will, to Redetermine Heirship, for Formal Probate of Will and for Formal Appointment of Personal Representative Filed November 2, 2000, Filed January 2, 2002";

(2) the September 16, 2002 "Final Judgment Re Order Granting Petition for Instructions Filed October 11, 2000, Filed January 2, 2002"; and

(3) the September 13, 2002 "Final Judgment Re Order Denying Petition for Allowance of and to Enforce and Obtain Payment on Creditors' Claims Filed September 11, 2000, Filed November 8, 2000."

E.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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Regarding judgments (1) and (2), Abastillas specifically asserts the following points of error:¹

Accordingly, Abastillas argues that Judge Hirai erred when she granted Cedric[Kam]'s petition for instructions and denied her petition to redetermine heirship, because:

1. Judge [Darryl Y. C.] Choy's [April 22, 1997] order [entered in FC-AA No. 96-0003] was not "valid and enforceable[";] rather, it was null and void *ab initio* for lack of subject matter jurisdiction.

2. [In FC-AA No. 96-0003,] Judge [John C.] Bryant lacked personal jurisdiction over Edith [Ing Kam].

3. Judge Bryant did not actually adjudicate any issue concerning Edith's testamentary capacity or whether Abastillas unduly influenced Edith to execute her 1996 will, as there was never an adversary, evidentiary hearing in which any fact was tried; instead, the case settled.

4. For these reasons, no "finding" which Judge Bryant made was *res judicata*.

5. There were material issues of fact concerning the issues of testamentary capacity and undue influence which required adjudication by jury trial and prevented summary disposition of this contested matter.

Judge Hirai made these errors when she denied Abastillas' petition on January 2, 2002. Abastillas called these errors to Judge Hirai's attention in her objections to Cedric's petition for instructions and attached memorandum and in her response to Cedric's objection to her petition to redetermine heirship and her supporting memorandum, as just cited.

(Internal citations omitted.)

Regarding judgment (3), Appellants specifically challenge Judge Kevin S. C. Chang's October 20, 2000 oral decision and corresponding November 8, 2000 "Order Denying Petition for Allowance of and to Enforce and Obtain Payment on Creditors' Claims Filed September 11, 2000," and assert the following points of error:

1. The probate court erred when it did not follow H.R.S. [Hawaii Revised Statutes] § 560:3-804 and Probate Rule 63 by holding

¹ Representing Petitioners-Appellants Robert A. Smith (Smith) and Paz F. Abastillas (Abastillas), collectively referred to as "Appellants," attorney Roger Y. Dewa (Dewa) filed a second amended opening brief. Representing only Abastillas, Dewa filed an opening brief.

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that Creditors should have filed all their documentary proof with their petition. The probate court made this error at the October 20 hearing, when, as earlier quoted, it stated that it would disregard Creditors' reply as "untimely" because the exhibits attached to the reply should have been part of Creditors' petition. . . .

2. The probate court also erred on October 20 when it summarily denied Creditors' petition without treating it as a contested matter and deferring it for rescheduled hearing, thereby violating Probate Rules 19 and 20.

We vacate the three final judgments appealed from. We remand for further proceedings consistent with this opinion.

BACKGROUND

A. FC-AA No. 96-0003 - Family Court Protection Proceedings

Hawaii Revised Statutes (HRS) Chapter 346 (1993) states, in relevant part, as follows:

[PART X.] DEPENDENT ADULT PROTECTIVE SERVICES

[\$ 346-221] Purpose; construction. The legislature recognizes that citizens of the State who are elder and mentally or physically impaired constitute a significant and identifiable segment of the population and are particularly subject to risks of abuse, neglect, and exploitation.

The legislature also recognizes that it is a person's dependency status, not age, which is often encountered in cases of abuse, neglect, and exploitation. While advanced age alone is not sufficient reason to intervene in a person's life, the legislature finds that many elders have become subjects of abuse and neglect. Substantial public interest exists to ensure that this segment of the population receives protection.

The legislature declares that the State shall develop and promote community services for the economic, social, and personal well-being and protection of its elder citizens who are mentally or physically impaired.

In taking this action, the legislature intends to place the fewest possible restrictions on personal liberty and to permit the exercise of constitutional rights by adults consistent with protection from abuse, neglect, and exploitation.

[\$ 346-222] Definitions.

"Abuse" means actual or imminent physical injury, psychological abuse or neglect, sexual abuse, financial exploitation, negligent treatment, or maltreatment as further defined in this chapter.

Abuse occurs where:

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(5) There has been a failure to exercise that degree of care toward a dependent adult which a reasonable person with the responsibility of a caregiver would exercise, including, but not limited to, failure to:

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(E) Protect against acts of abuse by third parties;

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(7) There is financial and economic exploitation. For the purpose of this part, "financial and economic exploitation" means the wrongful or negligent taking, withholding, misappropriation, or use of a dependent adult's money, real property, or personal property. "Financial and economic exploitation" can include but is not limited to:

(A) Breaches of fiduciary relationships such as the misuse of a power of attorney or the abuse of guardianship privileges, resulting in the unauthorized appropriation, sale, or transfer of property;

(B) The unauthorized taking of personal assets;

(C) The misappropriation, misuse, or transfer of moneys belonging to the dependent adult from a personal or joint account; or

(D) The intentional or negligent failure to effectively use a dependent adult's income and assets for the necessities required for the person's support and maintenance.

The exploitations may involve coercion, manipulation, threats, intimidation, misrepresentation, or exertion of undue influence.

"Capacity" means the ability to understand and appreciate the nature and consequences of making decisions concerning one's person or to communicate such decisions.

"Court" means the family court having jurisdiction over a matter under this part.

"Department" means the department of human services and its authorized representatives.

"Dependent adult" means any adult who, because of mental or physical impairment is dependent upon another person, a care organization, or a care facility for personal health, safety, or welfare.

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"Imminent abuse" means that there exists reasonable cause to believe that abuse will occur or recur within the next ninety days.

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"Party" means those persons, care organizations, or care facilities entitled to notice of proceedings under sections 346-237 and 346-238, including any state department or agency that is providing services and treatment to a dependent adult in accordance with a protective services plan.

"Protective services plan" means a specific written plan, prepared by the department, setting forth the specific services and treatment to be provided to a dependent adult.

[\$ 346-223] Jurisdiction; venue. The family court shall have jurisdiction in protective proceedings under this part concerning any dependent adult who was or is found within the circuit at the time such facts and circumstances occurred, were discovered, or were reported to the department, which constitute the basis for a finding that the person has been abused and is threatened with imminent abuse; provided that the protective proceedings under this part are not exclusive and shall not preclude the use of any other criminal, civil, or administrative remedy. The protective proceedings under this part shall be held in the judicial circuit in which the dependent adult resides at the time of the filing of the petition or in which the dependent adult has assets.

. . . .

[\$ 346-228] Action upon investigation. Upon investigation the department shall take action toward preventing further abuse and shall have the authority to do any or all of the following:

. . . .

- (6) Seek any protective or remedial actions authorized by law.

. . . .

[\$ 346-231] Order for immediate protection. (a) If the department believes that a person is a dependent adult and it appears probable that the dependent adult has been abused and is threatened with imminent abuse unless immediate action is taken; and the dependent adult consents, or if the dependent adult does not consent and there is probable cause to believe that the dependent adult lacks the capacity to make decisions concerning the dependent adult's person, the department shall seek an order for immediate protection in accordance with this section.

(b) A finding of probable cause may be based in whole or in part upon hearsay evidence when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses who will be able to testify to facts from personal knowledge.

(c) Upon finding that the person is a dependent adult and that there is probable cause to believe that the dependent adult has been abused and is threatened with imminent abuse unless immediate action is taken; and the dependent adult consents, or if the dependent adult does not consent and there is probable cause to believe that the dependent adult lacks the capacity to make decisions concerning the dependent adult's person, the court shall issue an order for immediate protection. This order may include, but is not limited to:

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- (2) An authorization for medical examinations;

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- (4) Such other matters as may prevent imminent abuse, pending a hearing under section 346-232.

(d) The court may also make orders as may be appropriate to third persons, including temporary restraining orders, enjoining them from:

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- (2) Abusing the dependent adult;

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- (5) Selling, removing, or otherwise disposing of the dependent adult's personal property;
- (6) Withdrawing those funds from any bank, savings and loan association, credit union, or other financial institution, or from a stock account in which the dependent adult has an interest;
- (7) Negotiating any instruments payable to the dependent adult;
- (8) Selling, mortgaging, or otherwise encumbering any interest that the dependent adult has in real property;
- (9) Exercising any powers on behalf of the dependent adult by representatives of the department, any court-appointed guardian or guardian ad litem or any official acting on their behalf;
- (10) Engaging in any other specified act which, based upon the facts alleged, would constitute harm or present a threat of imminent harm to the dependent adult or would cause the loss of the dependent adult's property.

(e) Court orders under section 346-232 and this section may be obtained upon oral or written application by the department, without notice and without a hearing. Any oral application shall be reduced to writing within twenty-four hours. The court may issue its order orally, provided that it shall reduce the order to writing as soon as possible thereafter and in any case not later than twenty-four hours after the court received the written application. Certified copies of the application and order shall be personally served upon the dependent adult and any other person or entity affected by the order together with the notice of the order to show cause hearing in section 346-232.

(f) If a written order for immediate protection is issued, the department shall file a petition invoking the jurisdiction of the court under this part within twenty-four hours.

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[§ 346-235] Consolidation with guardianship proceedings. A proceeding for the appointment of a guardian of the person or of the property under article V of chapter 560 may be consolidated with the proceedings under this part as the applicable circuit court and the family court, in the exercise of their discretion, shall permit.

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[§ 346-238] Service. (a) Service of the notice shall be made by delivery of a copy thereof together with a certified copy of the petition to each person or entity to be given notice either by personal service, by certified mail, return receipt requested and addressed to the last known address, by publication, or by other means authorized by the court. Upon a showing of good cause, the court may waive notice to any party except the dependent adult.

(b) Service shall be effected at least forty-eight hours prior to the time fixed in the notice for hearing when held pursuant to section 346-232(a), or at least fifteen days prior to the time fixed in the notice for an adjudicatory, disposition, or review hearing, unless the party otherwise was ordered by the court to appear at those hearings.

[§ 346-239] Required findings concerning postponed hearings. Except as otherwise provided, no hearing shall be delayed upon the grounds that a party other than the dependent adult is not present at the hearing or has not been served with a copy of the order for immediate protection or the petition, where reasonable efforts have been made to effect service and it would be detrimental to the dependent adult to postpone the proceedings until service can be made. Whenever a hearing is delayed or postponed under this section, the court shall enter a finding that it will not be detrimental to the dependent adult and shall also specify what additional measures shall be undertaken to effect service.

[§ 346-240] Adjudicatory hearing. (a) When a petition has been filed, the court shall set a return date hearing to be held within thirty days of the filing of the petition. On the return date, the parties personally or through counsel may stipulate to the entry or continuance of the orders as the court deems to be in the best interests of the dependent adult, and the court shall set the case for an adjudicatory hearing as soon as is practical.

(b) In an adjudicatory hearing, the court shall determine whether the person is a dependent adult, and whether the dependent adult has been abused and is threatened with imminent abuse, based upon a preponderance of the evidence. Evidence which is contained in a written report, study, or examination shall be admissible, provided that the maker of the written report, study, or examination be subject to direct and cross-examination upon demand when the maker is reasonably available. A social worker employed by the department in the area of adult protective services shall be presumed to be qualified to testify as an expert in the field of protective services.

(c) If facts sufficient to sustain the petition are established in court, or are stipulated to by all parties, the court shall enter an order finding that the dependent adult has been abused and threatened with imminent abuse and shall state the

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grounds for the finding. The court shall also make a finding concerning the capacity of the dependent adult to effectively make decisions concerning personal needs or property or both. If the capacity of the dependent adult is at issue, the court shall require that the dependent adult be examined by a psychiatrist or other physician who is skilled in evaluating the particular area in which the dependent adult is alleged to lack capacity before making any finding that the dependent adult lacks capacity. If there is no finding that the dependent adult lacks capacity to make such decisions and if the dependent adult does not give consent, the court shall not have authority to proceed further and the court shall dismiss the case.

(d) Upon the completion of the adjudicatory hearing, the disposition hearing may commence immediately after the required findings are made, provided the requirements of section 346-241(a) have been met, or the court may set the disposition hearing for such time as it deems appropriate.

(e) If facts sufficient to sustain the petition under this part are not established, the court shall dismiss the petition and shall state the grounds for dismissal.

(f) If the court sustains the petition and does not commence immediately to the disposition hearing, it shall determine, based upon the facts adduced during the adjudicatory hearing and any additional facts presented to it, whether any temporary orders should be issued pending final disposition.

§ 346-241 Disposition. (a) The department shall prepare a proposed protective order and a written protective services plan and submit copies to the court and each of the parties or their counsel at least seven days prior to the disposition hearing.

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(e) The court shall conduct a disposition hearing concerning the terms and conditions set forth in the proposed protective order and proposed protective services plan unless each of the appropriate parties accepts the order and plan, in which event, the court may approve the order and plan without a hearing.

On June 14, 1996, in the Family Court of the First Circuit, the State of Hawai'i Department of Human Services (DHS) filed a Petition for Protection in case FC-AA No. 96-0003 (the Protection Proceedings), stating, in relevant part, as follows:

3. The following information concerns the subject:

Name: Edith Ing Kam [(Edith or Mrs. Kam)]

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Date/Place of Birth: June 2, 1903/Kahuku, Hawaii

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4. The subject is a dependent adult within the meaning of § 346-222, [HRS], by reason of the following facts: Edith . . . is a 93 year old woman who has been observed by Dr. Vit Patel, psychiatrist, to have dementia, Alzheimer's type, which has made her vulnerable to exploitation. While Mrs. Kam comes across as socially appropriate and is fully ambulatory, she is dependent upon others for assistance with her needs for daily living, such as shopping, meal preparation, and general household maintenance. She is forgetful and even while Petitioner was present, she had something burning on the stove. Mrs. Kam also mentioned that she was "starving to death" because there was no food in the house and she had no explanation as to why. Mrs. Kam has not been able to account for her finances and does not have any idea as to how much money she receives every month for social security benefits or from her rental units.

5. The subject has been abused and is threatened with imminent abuse within the meaning of § 346-222, [HRS], unless immediate action is taken, by reason of the following facts:

a. On or about April 15, 1996, Lyle Nelson [(Mr. Nelson)], husband of Mrs. Kam's niece, reported to Adult Protective Services (APS), Department of Human Services (DHS) that he was concerned that Mrs. Kam was being financially exploited by her attorney, . . . Smith and his paralegal, . . . Abastillas. Presently . . . Abastillas has the durable power of attorney for Mrs. Kam and is about to be adopted or has been adopted by Mrs. Kam. Mr. Nelson questioned Mrs. Kam's reason for wanting to adopt . . . Abastillas after only knowing her for a few months. Mr. Nelson was further concerned that there was no food in Mrs. Kam's house, and that Mrs. Kam was neither aware of her monthly income nor the amounts she received from her rental units.

b. On April 17, 1996, Cedric Kam [(Cedric)], [Mrs.] Kam's son, who lives on the Mainland told Petitioner that he had been concerned about his mother's inability to make decisions in her best interest. He stated that his mother was elderly and could no longer make good decisions for herself as she was no longer rational. Further, Cedric . . . was concerned that . . . Abastillas, her attorney's paralegal, had convinced his mother that she should be adopted by her. In addition, he was concerned that . . . Abastillas was representing herself as Mrs. Kam's daughter, her lawyer, and her medical doctor.

c. Cedric . . . also stated that he was concerned because . . . Smith's law firm was charging his mother \$10,000.00 to \$30,000.00 per month for services which he believed were not ethical because of his mother's delusional thoughts. [Cedric] also explained that his mother's paranoia caused her to want to sue many people for which there may be no logical or ethical basis. Such actions include listing her real estate for sale and then withdrawing from the sale, which resulted in the potential buyers suing her. Mrs. Kam explained that the reason she changed her mind about one of the sales was that she was never properly introduced to the buyers, and that she had been drugged and poisoned when she entered into the agreement with them.

d. Cedric . . . stated that Mrs. Kam initiated a law suit against the security companies who installed a security system in her home because she claimed the system did not prevent people from entering her home and poisoning her. She also initiated a law suit against the Kam Benevolent Society to remove its non-

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profit status because it refused to assist with caring for her 64 year old son Edward [Kam (Edward or Eddie)], who has been diagnosed with a mental illness.

e. Cedric . . . further stated that his mother lost \$150,000.00 in a fraudulent Arby's Restaurant scheme recently. In addition, she has not filed state and federal taxes for several years because she claims that people have been stealing the paper work. [Cedric] reported that his mother believes that she is being persecuted, and likens herself to the biblical character of long suffering and pain, Job. Cedric . . . is also concerned about his mother's well-being because he has been called by her closest friends who have said that she is no longer able to care for herself properly, nor is she rational or able to make decisions for herself, and is constantly forgetting and losing her keys, checks, and checkbooks.

f. On April 17, 1996, Yvonne Bannister, who has known Edith . . . for over 16 years as a fellow Jehovah's Witness, expressed concern that Mrs. Kam has been forgetful and not able to remember things. She was also concerned that during the past few months Mrs. Kam has been completely dominated by . . . Abastillas. She questions . . . Abastillas' motives because . . . Abastillas has told Mrs. Kam she is studying the Bible to be a Jehovah's Witness, yet . . . Abastillas has not been participat[ing] in any of the Jehovah's Witness activities. She is further concerned that Mrs. Kam wants to adopt . . . Abastillas and that . . . Abastillas has been taking Mrs. Kam to look at real estate in Maui and in the Waialae Kahala area for the purpose of purchasing property so that they will be able to live together.

g. On April 18, 1996, Dr. Malcolm Ing [(Dr. Ing)], an ophthalmologist and nephew of Mrs. Kam reported to Petitioner that he was concerned about Edith He said that he was concerned [about] the relationship between . . . Abastillas and his aunt. Mrs. Kam was being advised by . . . Abastillas to move her trust account into a non trust account. Dr. Ing also stated that he had been appointed as a trustee for Mrs. Kam's trust account at Hawaiian Trust, but was asked to sign an agreement to have the trust account funds transferred to a non trust account to which he stated he did not agree. Furthermore, he did not believe that his signature or approval was required at that time. However, . . . Abastillas arranged to take Mrs. Kam to his office under the pretense of having an eye examination. Dr. Ing stated that . . . Abastillas presented him with documents to sign regarding his Aunt Edith's trust. When he refused to sign the documents, . . . Abastillas removed his aunt from his office, without the eye examination for which she had been scheduled.

h. Dr. Ing has been increasingly concerned about Mrs. Kam's paranoia regarding people trying to tap her phone and secretly entering her home. Dr. Ing is also concerned that Mrs. Kam, at age 93, wants to adopt . . . Abastillas after only knowing her for a short time.

i. On or about May 3, 1996, . . . Abastillas attempted to cash a check at a bank in Kaneohe signed by Mrs. Kam. When Mrs. Kam was called to confirm whether she signed the checked [sic], she denied writing such a check and the bank was not able to cash the check. On Monday, May 6, 1996, . . . Abastillas took Mrs. Kam to a different branch of the bank in Kailua to have a check cashed and one deposited to her account from Mrs. Kam's account.

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6. The subject does not consent to these proceedings and lacks the capacity to effectively make decisions concerning her person by reason of the following facts: According to Dr. Patel, Mrs. Kam suffers from dementia, Alzheimer's type, and [is] vulnerable to financial exploitation.²

² On April 19, 1996, Vit Patel, M.D., conducted a psychiatric examination of Edith Ing Kam (Mrs. Kam) and reported, in relevant part, as follows:

Interview with potential victim, [Mrs. Kam], was very pleasant and has a background of significant education and social prominence. As she began to talk however, things that were clearly noticeable right from the start were that she's very pressured of speech, she's extremely tangential and circumstantial and not being able to stay on the topic that she starts with getting derailed many times over and over again and losing track of not only what she was about to say but also never quite finishing it. There seems to be some indication to this interviewer that she tends to get lost in what she's saying and she really is not able to track her own verbalizations.

At the beginning of the interview on her own volition she began saying some grave things about some people trying to kill her and that her life might be in danger and so the examiner asked her specifically what she meant. Throughout the hour long interview she never quite got around to answering that question specifically or any other question. What she began essentially rambling about with speech that seemed superficial but when followed has little coherent substance to it was that she had a rental agent who used to collect the rent in cash and that she never gave her the money and that she did not know what happened to the money Then she mentioned yet another person who apparently is a paralegal for a certain lawyer that the patient has hired by the name of Mr. Robert Smith and whose girlfriend she may be also who's supposed to bring her some food. Patient then went on to state that this other person was a nice woman in her fifties whom she had even thought of adopting. Asked about why she would want to adopt a person at her age and somebody who was in no way related to her and who was this old, patient again did not have any particular or clear answer. She then went on to state on her own that some of the people in her church as Jehovah's Witness[es] and the elders did not like this other woman because they thought that she was scheming and perhaps not good for the patient and so patient stated that [she] was now having some doubts about adopting this other person.

Essentially no matter what was asked of her, patient could not give a straight or a goal directed answer and never got around to giving that answer. Much of what she was saying was rather vague and diffuse and clearly indicative of paranoid behavior as well as significant cognitive deficits and memory deficits. Asked about her income, she could not give any specific answers, asked about rental properties that she confirmed she had in Aiea that was rented out, she could not tell us as to who was taking care of that or how she was getting the money. . . .

When I inquired about her mentioning that she is suing a lot of people including her last rental agent and who was handling her case, she said that it was a certain Mr. Robert Smith that she had recently hired. She also stated that she has in the past fired

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(Footnote added.)

On June 14, 1996, Judge Bryant entered an Order for Immediate Protection stating, in relevant part, as follows:

1. The subject appears to be a dependent adult within the meaning of § 346-222, [HRS].
2. There is probable cause to believe that the subject has been abused, and is threatened with imminent abuse, unless immediate action is taken.
3. The subject does not consent to these proceedings and there is probable cause to believe that the subject lacks the capacity to make decisions concerning her person.

NOW THEREFORE IT IS ORDERED:

1. . . . Smith and . . . Abastillas are joined as parties to this action.
2. Until further order of the Court, . . . Smith and . . . Abastillas are enjoined and restrained from:
 - a. Selling, removing, or otherwise disposing of the subject's personal property.

other attorneys. It was not at all clear why she was suing one or more people. When further asked how much money she [was] expending in terms of fees or retainers to her lawyers she had absolutely no idea and her only answer was "it's per case". Patient stated vaguely that she may have had a \$5,000.00 retainer but she did not know how much she was being charged on a monthly basis.

When patient was specifically asked about some background information having been told to me by the APS worker that she was being charged \$10,000.00 a month possibly and that her own trust had refused to pay the bills without detailed statements that her lawyer had sued the trust and won she has absolutely no knowledge of this.

. . . .

Concerns this examiner would have is essentially [the] need for immediate protection of patient's property and financial resources to which is [sic] most vulnerable for exploitation because of her significant and clear dementia. While this dementia does not interfere with her functioning independently in terms of carrying on her basic life living at home and managing, it is clear that for 3 days she did not have any food and she obviously was not able to get it or did get it and she had no particular explanation for it. Secondly, she has a rather delusional belief system about her son that becomes significant in terms of rather significant distorted actions on her part. She for some reason [which is] not very clear, only talks in very critical and negative terms of her 64 year old son and connects it to the son's ex-wife and also what seems to be rather irrational and unreasonable ways.

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b. Withdrawing funds from any bank, savings and loan association, credit union or other financial institution, or from a stock account in which the subject has an interest.

c. Negotiating any instruments payable to the subject.

d. Selling, mortgaging, or otherwise encumbering any interest that the subject has in real property.

. . . .

5. Other Orders:

a. That the Office of Public Guardian . . . be appointed Temporary Guardian for Edith

6. This matter shall come on for a show cause hearing

7. The Applicant [DHS] shall file a Petition for Protection within twenty-four hours of the issuance of this order.

On June 24, 1996, Smith sent a letter to Judge Bryant stating, in relevant part, as follows:

Dear Judge Bryant:

In [FC-AA No. 96-0003], we are due to appear before you at 10:00 a.m., on Monday, July 1, for the show cause hearing. However, there is a further development in this matter, of which I should inform the Court.

Following last week's hearing on June 18, I have had several occasions to talk by telephone with Mrs. Kam (and with my paralegal, Dr. Abastillas, with whom Mrs. Kam is travelling on the mainland). After my first such conversation, I telephoned Colleen Chun on last Friday, June 21st, to tell her of Mrs. Kam's position. As of last evening, June 23, her position remains the same.

It is this: she is extremely distressed and frightened that these proceedings are taking place and that a guardian has already been appointed for her. She does not wish to lose her personal freedoms and liberties and control of her own life and financial affairs. Therefore, instead of returning today, June 24 (as previously scheduled), she will stay on the mainland. She does not wish to submit to the jurisdiction of the Court.

On June 26, 1996, Smith sent a letter to Mrs. Lyle Nelson stating as follows:

Dear Mrs. Nelson:

As I think you know, I have been [Mrs.] Kam's attorney since last June.

You appear to be involved in soliciting the recent action of Adult Protective Services in seeking court "protection" for Mrs. Kam. Now it appears that you have gone to the Honolulu Police Department and filed a "missing persons" report concerning Mrs. Kam.

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Mrs. Kam is not "missing." To the contrary (as I have informed Judge Bryant), she is simply taking appropriate steps *not* to return to Hawaii until the Adult Protective Services petition is dismissed for lack of jurisdiction.

I must warn you that although you may have a statutory immunity for preferring [sic] a complaint with Adult Protective Services, that immunity does not extend, in my opinion, to filing a missing persons complaint with HPD. You cannot imagine the mental distress which you are inflicting on Mrs. Kam. Because of your actions, she finds herself, at age 93, a fugitive from her own home, unable to return to Hawaii safely, without loss of her basic constitutional right to "life, liberty, and property." All of these freedoms are threatened by your actions, and I therefore urge you to reconsider what you are doing.

In all, I believe that you -- and those participating with you -- face very serious liability for malicious prosecution. I therefore urge you to withdraw your missing persons complaint immediately -- and, for that matter, the Adult Protective Services complaint as well. If you do not do so, Mrs. Kam will hold you responsible, to the extent the law allows, for all damages which she incurs, not least of which is continuing accrual of substantial attorney's fees, *including the immediate retention of expensive criminal counsel*, as she endeavors to protect her person and her property. If you perceive this letter as threat, let me assure you that it is no more (and no less) a threat to you than your actions are to Mrs. Kam.

Let me conclude this letter by saying that your actions, assuming that they are motivated by genuine concern for Mrs. Kam, are badly misconceived and misdirected. Mrs. Kam is enjoying new relationships which have freed her from many of her previous anxieties and brought her a renewed zest for life which, until your petition, she was enjoying in ways she has not enjoyed for years. To put it succinctly, she was *happy*; and your actions have caused that happiness to come crashing down, to be replaced by fear and dread for what the future holds for her.

Mrs. Kam remains the owner of her houses at Hokio and Lunahai. She is receiving substantial rental income for Hokio. She also receives social security. With ample cash reserves, she has no financial worries. She has not bought any new properties. And although she has broached the subject of adoption to my paralegal on several occasions, Dr. Abastillas has not fully consented to the idea and may not agree to it at all. Your apprehensions about "misappropriations" are therefore groundless.

I strongly suspect those truly behind the Adult Protective Services petition are not motivated by what is best for Mrs. Kam but by what is best for themselves, fearing that their own inheritances and favors are in jeopardy. If those concerns lie at the bottom of what is going on, then invocation of Adult Protective Services (and HPD as well) constitutes a huge abuse of process and is an independent basis of liability.

On June 27, 1996, the State of Hawai'i filed a motion to compel disclosure and to disqualify counsel. In the affidavit attached to the motion, Deputy Attorney General Colleen L. Chun

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stated, in relevant part, as follows:

4. Affiant believes that . . . Smith has knowledge or is able to obtain information as to the whereabouts of [Mrs.] Kam;

5. DHS is concerned about [Mrs.] Kam's safety because she is a dependent client in need of adult protective services.

6. The family of [Mrs.] Kam is extremely concerned about her safety and has filed a missing persons report with the Honolulu Police Department (HPD) due to Mrs. Kam's failure to return to Hawaii when she was supposed to on June 24, 1996.

7. Exhibit A attached hereto is a true and accurate copy of . . . Smith's letter to Judge Bryant representing that he has had contact with [Mrs.] Kam and . . . Abastillas on the mainland.

8. On June 21, 1996, Affiant asked . . . Smith if he represents . . . Abastillas and [Mrs.] Kam in the above-captioned matter, to which he said he does, despite the apparent conflict.

9. HPD contacted Affiant and . . . Smith about their attempt to locate [Mrs.] Kam. . . . Smith assured HPD she is not missing. . . . Smith and . . . Abastillas are the alleged perpetrators in this case. Mrs. Kam is the alleged victim of their financial exploitation. It is clearly a conflict of interest for . . . Smith to represent . . . Abastillas and Mrs. Kam.

10. [Mrs.] Kam is somewhere in the continental United States, and it is imperative that . . . Smith disclose her whereabouts as soon as possible to assure the family of Mrs. Kam's safety.

On July 1, 1996, Smith filed a "Motion to Dissolve Order for Immediate Protection, Vacate Appointment of Temporary Guardian, and Dismiss Petition for Protection". In this motion, Smith stated the following grounds:

- (1) the Court lacks jurisdiction because subject [MRS.] KAM has not been served with process;
- (2) the Court lacks jurisdiction because the applicant's own moving papers do not make out a *prima facie* showing that subject [MRS.] KAM is a dependent person; and
- (3) the Court lacks jurisdiction because the applicant's own moving papers do not make out a *prima facie* showing that subject [MRS.] KAM has been abused or is threatened with imminent abuse.

On July 3, 1996, Judge Bryant entered an "Order Granting Motion to Compel Disclosure and to Disqualify Counsel, and Denying Motion to Dissolve Order for Immediate Protection, Vacate Appointment of Temporary Guardian, and Dismiss Petition

for Protection" stating, in relevant part, as follows:

Applicant Department of Human Services' (DHS) Motion to Compel Disclosure and to Disqualify Counsel and . . . Smith's Motion to Dissolve Order for Immediate Protection, Vacate Appointment of Temporary Guardian, and Dismiss Petition for Protection came on for hearing on July 1, 1996 at 10:00 a.m. before the Honorable John C. Bryant, Jr. Present in court representing Applicant were Colleen L. Chun and Linda S. Martell, Deputy Attorneys General, and Applicant Sylvia Sugimoto, APS social worker. Also present were . . . Smith, Pro Se, and G. Cher Foerster, Deputy Attorney General representing the Office of Public Guardian, and Dennis Hilty, temporary guardian for [Mrs.] Kam. [Dr. Ing, Edward, and Mr. Nelson], family members, were also present in court.

Upon consideration of the record, memoranda submitted by the parties on the motion, and the arguments of counsel, THE COURT HEREBY FINDS THAT:

1. . . . Smith's argument that since DHS has not effected service on Mrs. Kam, the case must be dismissed, is contrary to the requirements of HRS section 346-221. Nothing in the statute explicitly mandates dismissal if the subject adult has not [been] served. Furthermore, such a construction could lead to the result which is in opposition to the clear intent of the statutory scheme. Should dismissal be mandated where the dependent adult is not served after a certain amount of time and all orders for immediate protection issued under HRS section 346-231 be vacated, the court would be allowing the abuse to continue. One would only have to secrete the dependent adult away, avoid service, and wait until [the] court dismisses the case. Such a result is ludicrous and clearly not intended by the statutory scheme.

THE COURT FURTHER FINDS PROBABLE CAUSE THAT:

1. [Mrs.] Kam is a dependent adult, who has been abused, and is threatened with imminent abuse. Because she remains on the mainland, it is unknown if [Mrs.] Kam consents to these proceedings, however, assuming she does not consent, the court further finds there is probable cause that she lacks capacity based on her advanced age, the diagnosis of Alzheimer's dementia, and that she was found without food for three days in her home. . . .

a. The adoption of . . . Abastillas by [Mrs.] Kam is another factor evidencing [Mrs.] Kam's lack of capacity to make responsible decisions.

b. [Mrs.] Kam's statements to Dr. Patel that people are trying to kill her, steal her food, and that her son Edward gives her food away also gives rise to probable cause of lack of capacity.

2. The disputed issues raised by . . . Smith's motion will be addressed at the Order to Show Cause hearing or the Adjudicatory hearing, if any.

THE COURT THEREFORE ORDERS THAT:

1. Smith's Motion to Dissolve Order for Immediate Protection, Vacate Appointment of Temporary Guardian, and Dismiss Petition for Protection is denied. . . .

.

3. The Motion to Disqualify Counsel regarding the representation of Mrs. Kam by . . . Smith is granted.

Prior to January 1, 1997, Hawai'i's Uniform Probate Code stated, in relevant part, as follows:³

**ARTICLE I
GENERAL PROVISIONS, DEFINITIONS AND
PROBATE JURISDICTION OF COURT**

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§ 560:1-102 Purposes; rule of construction. (a) This chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this chapter are:

- (1) To simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;
- (2) To discover and make effective the intent of a decedent in distribution of the decedent's property;
- (3) To promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the decedent's successors;
- (4) To facilitate use and enforcement of certain trusts; and

³ Section 1 of Act 161 (2004) states that "Article V of chapter 560, Hawaii Revised Statutes [(HRS)], is amended by adding four new parts to read as follows[.]" The "four new parts" are:

- Part 1. GENERAL PROVISIONS (§§ 560:5-101 through -117);
- Part 2. GUARDIANSHIP OF MINOR (§§ 560:5-201 through -210);
- Part 3. GUARDIANSHIP OF INCAPACITATED PERSON (§§ 560:5-301 through -318); and
- Part 4. PROTECTION OF PROPERTY OF PROTECTED PERSON (§§ 560:5-401 through -433.

It appears that the words "by adding four new parts" should say "by replacing the existing four parts (HRS §§ 560:5-101 through -105, 560:5-201 through -212, 560:5-301 through -313, and 560:5-401 through 431 (1993 and Supp. 2003)) with the following four parts."

The new statute is the "Uniform Guardianship and Protective Proceedings Act." The new § 560:5-106 clearly defines the circuit (probate) court's jurisdiction and the family court's jurisdiction in such cases.

Act 161 (2004) takes effect on January 1, 2005.

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- (5) To make uniform the law among the various jurisdictions.

. . . .

§ 560:1-201 General Definitions. Subject to additional definitions contained in the subsequent Articles which are applicable to specific Articles or Parts, and unless the context otherwise requires, in this chapter:

. . . .

- (5) "Court" means the circuit court having jurisdiction in matters relating to trusts and the estates of decedents, missing persons, protected persons, minors and incapacitated persons.

. . . .

- (9) "Disability" means cause for a protective order as described by section 560:5-401.

. . . .

**ARTICLE III
PROBATE OF WILLS AND ADMINISTRATION**

. . . .

PART 4. FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

§ 560:3-401 Formal testacy proceedings; nature; how commenced.⁴ A formal testacy proceeding is litigation to (i)

⁴ Commencing January 1, 1997, Hawaii Revised Statutes (HRS) § 560:3-401 states as follows:

Formal testacy proceedings; nature; when commenced. (a) A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by an interested person filing a petition as described in section 560:3-402(a) in which the person requests that the court, after notice and hearing, enter an order probating a will, or a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application, or a petition in accordance with section 560:3-402(b) for an order that the decedent died intestate.

(b) A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

(c) During the pendency of a formal testacy proceeding, the registrar shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

(d) Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a

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determine whether a decedent left a valid will, or (ii) resolve whether or not an estate may be probated or a personal representative appointed informally, or (iii) resolve any other disputes arising in informal proceedings. A formal testacy proceeding may be commenced by an interested person filing a petition as described in section 560:3-402(a) in which the interested person requests that the court, after notice and hearing, enter an order (i) probating a will; (ii) granting a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application; (iii) granting a petition in accordance with section 560:3-402(b) for an order that the decedent died intestate; (iv) appointing as a personal representative one who does not have priority; (v) granting a petition to require that informal probate proceedings be made supervised on account of the value of the estate; or (vi) granting a petition concerning any other disputes arising in informal proceedings.

A petition for formal testacy proceedings may be filed without regard to whether the same or a conflicting will has been informally probated. If a personal representative has been previously appointed, a formal testacy proceeding may, but need not, involve a request for appointment of a successor personal representative. If a personal representative has not been previously appointed, a formal testacy proceeding shall request the appointment of a personal representative.

During the pendency of a formal testacy proceeding, the registrar shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising the personal representative's power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of the personal representative's office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising the personal representative's power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of the personal representative's office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

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§ 560:3-803 Limitations on presentation of claims.⁵ (a) All

⁵ Effective January 1, 1997, HRS § 560:3-803 states as follows:

§ 560:3-803 Limitations on presentation of claims. (a) All claims against either a decedent or a decedent's estate which arose before the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or non-claim statute, are barred against the estate, the personal representative, the decedent's trustee and the heirs and devisees of the decedent, unless presented within the earlier of the following:

(1) No later than:

- (A) Four months after the date of the first publication of notice to creditors if notice is given in compliance with section 560:3-801(a); or
- (B) Sixty days after the mailing or other delivery of written notice, as provided in section 560:3-801(b); whichever period (A) or (B) expires later; or

(2) Within eighteen months after the decedent's death, if notice to creditors has not been published as provided in section 560:3-801(a) or delivered as provided in section 560:3-801(b).

(b) A claim described in subsection (a) which is barred by the non-claim statute of the decedent's domicile before the giving of notice to creditors in this State is barred in this State.

(c) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, the decedent's trustee, and the heirs and devisees of the decedent, unless presented as follows:

- (1) A claim based on a contract with the personal representative or trustee, within four months after performance by the personal representative or trustee is due; or
- (2) Any other claim, within the later of four months after it arises, or the time specified in subsection (a)(2).

(d) Nothing in this section affects or prevents:

- (1) Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;
- (2) To the limits of the insurance protection only, any proceeding to establish liability of the decedent or

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claims against a decedent's estate which arose before the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) No later than:

(i) Four months after the date of the first publication of notice to creditors if notice is given in compliance with section 560:3-801(a); or

(ii) Sixty days after the mailing or other delivery of written notice, as provided in section 560:3-801(b); whichever period (A) or (B) expires later; or

(2) Within three years after the decedent's death, if notice to creditors has not been published as provided in section 560:3-801(a) or delivered as provided in section 560:3-801(b).

(b) A claim described in subsection (a) which is barred by the non-claim statute of the decedent's domicile before the giving of notice to creditors in this State is barred in this State.

(c) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) A claim based on a contract with the personal representative, within four months after performance by the personal representative is due; or

(2) Any other claim, within the later of four months after it arises.

(d) Nothing in this section affects or prevents:

(1) Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;

the personal representative or the decedent's trustee for which the personal representative or the trustee is protected by liability insurance; or

(3) Collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or trustee or by the attorney or accountant for the personal representative of the estate or the decedent's trustee.

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- (2) To the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which the personal representative is protected by liability insurance; or
- (3) Collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

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ARTICLE V
PROTECTION OF PERSONS UNDER DISABILITY AND
THEIR PROPERTY

PART 1. GENERAL PROVISIONS

§ 560:5-101 Definitions and use of terms. Unless otherwise apparent from the context, in this chapter:

- (1) "Guardianship proceeding" is a proceeding to appoint a guardian of the person for an incapacitated person or a minor;
- (2) "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning one's person;
- (3) A "protective proceeding" is a proceeding under the provisions of section 560:5-401 to determine that a person cannot effectively manage or apply the person's estate to necessary ends, either because the person lacks the ability or is otherwise inconvenienced, or because the person is a minor, and to secure administration of the person's estate by a guardian of the property or other appropriate relief;
- (4) A "protected person" is a minor or other person for whom a guardian of the property has been appointed or other protective order has been made;
- (5) A "ward" is a person for whom a guardian of the person has been appointed. A "minor ward" is a minor for whom a guardian of the person has been appointed solely because of minority.

§ 560:5-102 Jurisdiction of subject matter; consolidation of proceedings. The court has jurisdiction over protective proceedings and the family court has jurisdiction over guardianship proceedings. Where protective and guardianship proceedings relating to the same person have been initiated, they may be consolidated in the court or in the family court as the court and the family court in the exercise of their discretion shall determine.

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§ 560:5-312 **General powers and duties of guardian of the person.** (a) A guardian of the person of an incapacitated person has the same powers, rights and duties respecting the guardian's ward that a parent has respecting the parent's unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian of the person has the following powers and duties, except as modified by order of the family court:

- (1) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, the guardian is entitled to custody of the person of the guardian's ward and may establish the ward's place of abode within or without this State.
- (2) If entitled to custody of the guardian's ward the guardian shall make provision for the care, comfort and maintenance of the guardian's ward and, whenever appropriate, arrange for the ward's training and education. Without regard to custodial rights of the ward's person, the guardian shall take reasonable care of the guardian's ward's clothing, furniture, vehicles and other personal effects and commence protective proceedings if other property of the guardian's ward is in need of protection.
- (3) The guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service.
- (4) If no guardian of the property of the ward has been appointed, the guardian may:
 - (i) Institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform the person's duty;
 - (ii) Receive money and tangible property deliverable to the ward and apply the money and property for support, care and education of the ward; but, the guardian may not use funds from the guardian's ward's estate for room and board which the guardian, the guardian's spouse or reciprocal beneficiary, parent, or child have furnished the ward unless a charge for the service is approved by order of the family court made upon notice to at least one of the next of kin of the ward, if notice is possible. The guardian must exercise care to conserve any excess for the ward's needs.
- (5) The guardian shall report the condition of the guardian's ward and of the estate which has been subject to the guardian's possession or control, as required by the family court or family court rule.
- (6) If a guardian of the property has been appointed, all of the ward's estate received by the guardian of the

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person in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the guardian of the property for management as provided in this chapter, and the guardian of the person must account to the guardian of the property for funds expended.

(b) Any guardian of the person of one for whom a guardian of the property also has been appointed shall control the custody and care of the ward, and is entitled to receive reasonable sums for the guardian of the person's services and for room and board furnished to the ward as agreed upon between the guardian of the person and the guardian of the property, provided the amounts agreed upon are reasonable under the circumstances. The guardian of the person may request the guardian of the property to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.

. . . .

**PART 4. PROTECTION OF PROPERTY OF
PERSONS UNDER DISABILITY AND MINORS**

§ 560:5-401 Protective proceedings. Upon petition and after notice and hearing in accordance with this Part, the court may appoint a resident of this State or a trust company organized under the laws of this State or a nonresident nominated by the will of a parent as a guardian of the property or make other protective order for cause as follows:

. . . .

- (2) Appointment of a guardian of the property or other protective order may be made in relation to the estate and affairs of a person if the court determines that
- (i) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, disappearance or other incapacity; and
 - (ii) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds.

. . . .

§ 560:5-404 Original petition for appointment or protective order. (a) The person to be protected, any person who is interested in his estate, affairs or welfare including his parent, guardian of the person, or custodian, or any person who would be adversely affected by lack of effective management of his property and affairs may petition for the appointment of a guardian of the property or for other appropriate protective order.

(b) The petition shall set forth to the extent known, the interest of the petitioner; the name, age, residence and address of the person to be protected; the name and address of his guardian of the person, if any; the name and address of his

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nearest adult relative known to the petitioner; a general statement of his property with an estimate of the value thereof, including any compensation, insurance, pension or allowance to which he is entitled; and the reason why appointment of a guardian of the property or other protective order is necessary. If the appointment of a guardian of the property is requested, the petition also shall set forth the name and address of the person whose appointment is sought and the basis of his priority for appointment.

§ 560:5-408 Permissible court orders. The court has the following powers which may be exercised directly or through a guardian of the property in respect to the estate and affairs of protected persons:

- (1) While a petition for appointment of a guardian of the property or other protective order is pending and after preliminary hearing and without notice to others, the court has power to preserve and apply the property of the person to be protected as may be required for the person's benefit or the benefit of the person's dependents.
- (2) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, the minor's family and members of the minor's household.
- (3) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, and subject to the limitations as to specified powers as contained in [paragraph] (4) below, the court has, for the benefit of the person and members of the person's household, all the powers over the person's estate and affairs which the person could exercise if present and not under disability, except the power to make a will. These powers include, but are not limited to power to make gifts, to convey or release the person's contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to exercise or release the person's powers as trustee, personal representative, custodian for minors, guardian of the property, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond the person's disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise the person's rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise the person's right to an elective share in the estate of the person's deceased spouse or reciprocal beneficiary and to renounce any interest by testate or intestate succession or by inter vivos transfer.

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- (4) The court may exercise or direct the exercise of, its authority to sell, mortgage, lease or otherwise encumber the real property of the protected person, to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding twenty per cent of any year's income of the estate or to change beneficiaries under insurance and annuity policies, only if satisfied, after a hearing preceded by notice pursuant to section 560:1-401 to the persons entitled to notice under section 560:5-405, that it is in the best interests of the protected person, and that the person either is incapable of consenting or has consented to the proposed exercise of power.
- (5) An order made pursuant to this section determining that a basis for appointment of a guardian of the property or other protective order exists, has no effect on the capacity of the protected person.

On July 31, 1996, Mrs. Kam's new counsel, Dana W. Smith (Dana Smith), filed a "Memorandum Re: Applicant's Motion to Appoint Co-Guardians of the Property for Edith Ing Kam"⁶ in which he argued, in relevant part, as follows:

The [DHS]'s Motion seeks appointment of Co-Guardians of the Property of [MRS.] KAM pursuant to [HRS] Section 346-228(6). . . .

. . . .

Attorneys for the [DHS] seek to "piggy-back" on this action both appointment of a guardian of the person as well as co-guardians of the property of [MRS.] KAM.

The appointment of the Office of Public Guardian to be the temporary guardian of [MRS.] KAM vests in the Public Guardian powers under Section 560:5-312 of the [HRS]. . . .

. . . .

C. Other than monitoring payments for regular and reoccurring support and care, there is no need for the appointment of a guardian of the property. There is currently no requirement that [MRS.] KAM sell any portion of her estate for her immediate needs. The income generated from her rental units, plus other monthly income from Social Security, is sufficient to meet [MRS.] KAM's current financial obligations. There is no need to appoint a guardian of the property because there is no need to buy or sell any real property at the present time.

D. The financial relationship between . . . Abastillas and [MRS.] KAM is regulated by existing orders

⁶ The record does not contain a copy of "Applicant's Motion to Appoint Co-Guardians of the Property for Edith Ing Kam[.]"

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and the voluntary termination by . . . Abastillas of any ownership interest in bank accounts of [MRS.] KAM[.]

On August 27, 1996, Judge Bryant entered an "Order Granting in Part and Denying in Part Applicant's Motion to Appoint Co-Guardians of the Property for Edith Ing Kam" stating, in relevant part, as follows:

Based upon discussion and consideration of the record, THE COURT HEREBY ORDERS THAT:

1. Dawn Slaten, Esq. is appointed the temporary guardian of the property for [Mrs.] Kam until further order of this court; and that Letters be issued to said Guardian without bond.

.

THE COURT FURTHER ORDERS THAT:

1. [Apellants] shall disclose all joint accounts with [Mrs.] Kam, remove their names from the accounts, and turn over all property of [Mrs.] Kam, including but not limited to checking accounts, bank accounts, CD's, mutual funds, travelers checks, investments, and safe deposit boxes and its keys.

On September 9, 1996, Judge Bryant entered an "Order Appointing Temporary Co-Guardians of the Property and Continuing Existing Orders" stating, in relevant part, as follows:

IT IS HEREBY ORDERED THAT:

.

3. [Mr.] Nelson and [Dr.] Ing are appointed as temporary co-guardians of the property. Upon their appointment, Dawn Slaten is discharged as the temporary guardian of the property;

.

5. This Order shall stand in place of a Protective Services Plan, a return hearing and an adjudicatory hearing;

.

8. Trial set for September 23 and 24, 1996 is taken off the calendar.

9. Parties shall submit proposed findings within seven days.

Smith as "Party Pro Se" and "Counsel for Paz Abastillas" and Dana Smith, as counsel for Mrs. Kam, "refused" approval.

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On October 3, 1996, Judge Bryant entered the following Findings of Fact:

Based upon the record of this case, the Court finds that:

A. [Appellants] are parties to this action;

B. The Court appointed Patricia Blanchette, M.D., as an Independent Medical Examiner, to examine [Mrs.] Kam and report back to the court;⁷

C. Dr. Blanchette examined [Mrs.] Kam on July 18, 1996 and rendered a report to the Court dated August 8, 1996;

D. [Mrs.] Kam does not consent to these proceedings;

E. [Mrs.] Kam is an incapacitated adult as evidenced by Dr. Patricia Blanchette's report in that:

1. she suffers from Alzheimer's Disease and suffers from dementia of the Alzheimer's Type;
2. she is unable to care for her person, by bathing, dressing, toileting, cooking, and eating without either supervision or assistance;
3. she does not have the capacity to make reasoned decisions concerning her money and properties; and
4. she lacks the capacity to make and communicate decisions concerning her person;

F. [Mrs.] Kam is a "dependent adult" as defined in HRS Section 346-222;

G. Pursuant to Section 346-228(1), [HRS], the department may resolve any case "in an informal fashion as is appropriate . . ." In this case, the department has appropriately chosen to resolve this case in such an informal fashion. Therefore, findings as to abuse or threatened abuse are not required;

H. The relief ordered in this case is in Mrs. . . . Kam's best interest;

I. At the Pretrial Conference held September 9, 1996, the Court was informed that the parties had reached an agreement to settle this case by the entry [of] the Order Appointing Temporary Co-Guardians of the Property and Continuing Existing Orders, filed on September 9, 1996, on the understanding that, while parties [Mrs.] Kam, . . . Smith, and . . . Abastillas would not sign

⁷ In a letter dated July 8, 1996, Smith faxed a letter to Judge John C. Bryant which states, in relevant part, as follows:

This letter contains my suggestions for physicians to conduct the Independent Medical Examination. I am suggesting the following physicians, listed in the order of preference and qualification:

1. Patricia Lanoie Blanchette, M.D., MPH
Geriatric Specialist

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approval as to form or substance, neither would they oppose the entry of the order or protest it once entered.

(Footnote added.)

B. FC-G No. 96-0299 - Family Court Guardianship Proceedings

On September 4, 1996, the Office of the Public Guardian commenced, in the Family Court of the First Circuit, case FC-G No. 96-0299 (the Guardianship proceedings) by filing a "Petition for Appointment of Co-Guardians of the Person of an Alleged Incapacitated Person" that stated, in relevant part, as follows:

1. This petition is for the appointment of co-guardians of the person of [Mrs.] Kam, who appears to be an incapacitated person residing or present within the jurisdiction of this Court, pursuant to section 560:5-102, [HRS].

. . . .

4. Such appointment is necessary as a means of providing continuing care and supervision of the subject for the reason that the subject lacks sufficient understanding or capacity to make or communicate responsible decisions.

On October 8, 1996, and based on the provisions of Hawai'i's Uniform Probate Code, HRS § 560:5-102, Judge Bryant appointed Mr. Nelson and Dr. Ing as co-guardians of Mrs. Kam's person.

Effective January 1, 1997, the HRS § 560:1-201 definition of "Court" was changed and HRS § 560:1-302 was added as follows:

§ 560:1-201 General definitions. Subject to additional definitions contained in the subsequent articles that are applicable to specific articles, parts, or sections, and unless the context otherwise requires, in this chapter:

. . . .

"Court" means the circuit court in this State having jurisdiction in matters relating to the affairs of decedents.

. . . .

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PART 3. SCOPE, JURISDICTION, AND COURTS

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§ 560:1-302 **Subject matter jurisdiction.** (a) To the full extent permitted by the Constitution and except as otherwise provided by law, the court has jurisdiction over all subject matter relating to:

- (1) Estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons;
- (2) Protection of minors and incapacitated persons; and
- (3) Trusts.

(b) The court has full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

(c) The court has jurisdiction over protective proceedings and the family court has jurisdiction over guardianship proceedings.

(d) Where protective and guardianship proceedings relating to the same person have been initiated, they may be consolidated in the court or in the family court as the court and the family court in the exercise of their discretion shall determine.

On February 10, 1997, notwithstanding HRS § 560:5-101 and the amendments quoted above, Mr. Nelson and Dr. Ing filed a "Petition for Appointment of Co-Guardians of the Property" that stated, in relevant part, as follows:

1. This petition is for the appointment of co-guardians of the property of [Mrs.] Kam, who is a protected person residing or present within the jurisdiction of this Court, pursuant to the Order Granting Petitioners [Mr.] Nelson and [Dr.] Ing's Motion for Leave to File Petition for Appointment of Co-Guardians of the Property filed herein on January 2, 1997 and H.R.S. §§ 560:5-102 and 560:5-404.

.

5. Appointment of Co-Guardians of the Property of [Mrs.] Kam is necessary because she is unable to manage her property and affairs effectively, as defined by H.R.S. §§ 560:1-201(9) and 5-401(2), and she has property that will be wasted or dissipated unless proper management is provided, and funds are needed for the support, care and welfare of the above-named protected person and that protection is necessary and desirable to obtain or provide funds, as evidenced by the report of Patricia Blanchette, M.D. made pursuant to Order for Independent Medical Examination entered July 9, 1996 in FC-AA 96-0003. A copy of said report is attached hereto as Exhibit B.

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On April 22, 1997, Judge Choy entered an "Order Granting Petition for Appointment of Co-Guardians of the Property, Filed February 10, 1997". This order appointed Mr. Nelson and Dr. Ing as "Co-Guardians of the Property of [Mrs.] Kam without bond".

On February 25, 1997, Mr. Nelson and Dr. Ing filed a "Motion to Void Estate Planning Documents" seeking to void a list of "estate planning documents executed by [Mrs.] Kam during her incapacity and while under undue influence." Appellants were given notice of the motion. In a memorandum accompanying the motion, Mr. Nelson and Dr. Ing alleged, in relevant part, as follows:

On or about June 7, 1995, [Mrs.] Kam entered into a Fee and Retainer Agreement with . . . Smith, . . . for professional legal services. Mrs. Kam executed an Amended Fee and Retainer Agreement on June 9, 1995. [Abastillas], . . . Smith's wife, works as . . . Smith's paralegal. Carla F. Dominguez and Sheila A. Villalon are . . . Abastillas' daughters.

Prior to Mrs. Kam's employment of . . . Smith, neither . . . Abastillas nor her daughters were named in Mrs. Kam's estate plan either as fiduciaries or as beneficiaries. Following Mrs. Kam's employment of [Appellants], significant changes were made to her estate plan which are summarized as follows:

1. On December 22, 1995 Mrs. Kam executed a Seventh Amendment to Edith I. Kam Revocable Living Trust naming . . . Abastillas as successor trustee in case of Mrs. Kam's inability to act as trustee.

2. On December 22, 1995, Mrs. Kam executed a Revocation of Durable Power of Attorney revoking the appointment of [Dr.] Ing, her nephew, as her attorney-in-fact and executed a Durable Power of Attorney naming . . . Abastillas as her attorney-in-fact.

3. On February 9, 1996, Mrs. Kam executed a will which named . . . Abastillas as the personal representative of her estate.

4. On February 9, 1996, Mrs. Kam executed a Revocation of Living Trust revoking the Edith I. Kam Revocable Trust which was executed on September 8, 1998. On that same day, Mrs. Kam executed a new Edith I. Kam Revocable Living Trust naming [Abastillas] as successor trustee and [Abastillas'] daughters . . . as next successor trustees. [Abastillas], her daughters and a to-be-formed non-profit organization to be run by . . . Abastillas were all named as beneficiaries of this trust.

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5. On May 24, 1996, Mrs. Kam executed a Will which revokes all prior wills and directs that her estate be distributed to the Edith Ing Kam Trust executed on the same date. The Will names Paz F. Abastillas as personal representative and names [Abastillas'] daughters . . . as successor personal representatives, to serve without bond.

6. On May 24, 1996, Mrs. Kam executed the Edith Ing Kam Trust. Again, . . . Abastillas and her daughters are named as successor trustee and as beneficiaries along with a to-be-formed non-profit organization to be run by . . . Abastillas.

7. On May 24, 1996, Mrs. Kam executed a General Individual and Trustee Power of Attorney appointing . . . Abastillas as attorney-in-fact, individually and as trustee of the Edith Ing Kam Trust of the same date.

8. The estate planning documents executed in December of 1995 and February of 1996 by which . . . Abastillas and her daughters became fiduciaries and beneficiaries of Mrs. Kam's estate were drafted by . . . Smith. The estate planning documents executed in May of 1996 were drafted by the Law Offices of Neil T. Nakamura & Associates under the direction of [Appellants].⁸

⁸ Attached to the memorandum as an exhibit is a May 29, 1996 letter written by Abastillas to Neil T. Nakamura, Esq. It states, in relevant part, as follows:

Dear Mr. Nakamura:

I have now had a chance to review and try to take in the sense of the total package of trust documents executed at your office last week. I have the following inquiries:

A. The Revocable Living Trust

1. **Revocation of Existing Living Trust:** nowhere (that I can find) in the new Living Trust does it revoke the present Living Trust. I assume this should be done; I also suppose that Mr. Smith can do this.

2. **Preamble ¶ B (Spendthrift Trust for Eddie):**

. . . .

(c) **Trustee:** I do not see any specific provision designating who is Eddie's trustee, and I wonder if this is covered by the Preamble, and its designation of Edith as trustee followed by myself, Carla, and Sheila, or in the general definition of "trustee" contained in Part Three, ¶ 60.

. . . .

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(Footnote added; internal citations omitted.)

On April 22, 1997, Judge Choy entered an "Order Granting Motion to Void Estate Planning Documents, Filed February 25, 1997" that stated, in relevant part, as follows:

Movants['] . . . Motion to Void Estate Planning Documents, . . . having come on for hearing on March 19, 1997, . . . no opposition having been filed or otherwise made to said Motion, and this Court having jurisdiction pursuant to H.R.S. § 560:5-408 and being fully advised in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED that the Motion shall be and is hereby granted and that the following estate planning documents executed by [Mrs.] Kam be and are hereby declared null and void:

1. Seventh Amendment to Edith I. Kam Revocable Living Trust dated December 22, 1995

3. Preamble ¶ C (Lunahai):

- (a) **Sub ¶ (1) (a) (Eddie's ½ Life Estate):**
This paragraph gives Eddie a life estate in half of Lunahai, remainder to Alison and Christopher. As an outright life estate, and as a gift free of trust, this means that half of Lunahai is Eddie's without restriction for his life. He would be entitled, for example, t[o] half the income. In the proposed living trust drafted by Mr. Smith, there was a specific protective provision giving me the right to determine where and under what conditions Eddie will have a place of abode (whether at Lunahai or somewhere else). I refer to Article VII, ¶ D, sub ¶ 7 on p. 10. Further, his life estate was also in trust. This in effect gave me as trustee the power to sell Lunahai, and use the proceeds to buy Eddie a studio apartment, for example. It seems to me that these are important limitations on Eddie's interest in Lunahai.
- (b) **Sub ¶ 1(b) (My ½ Interest):** this paragraph gives me the other one half in a life estate, remainder to my children. I do not know where the "life estate/remainder" concept came from. It limits me in what I can do with Lunahai. I would think that Eddie's one half should be in trust (as just suggested) and that my one half should not be limited to a life estate but to the whole property (to me and my heirs).

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2. Revocation of Durable Power of Attorney dated December 22, 1995 revoking Durable Power of Attorney dated July 7, 1995

3. Durable Power of Attorney dated December 22, 1995 appointing . . . Abastillas . . . as attorney-in-fact

4. Last Will and Testament of Edith I. Kam dated February 9, 1996

5. Revocation of Living Trust dated February 9, 1996

6. Edith I. Kam Revocable Living Trust dated February 9, 1996

7. Will of Edith Ing Kam dated May 24, 1996

8. Edith Ing Kam Trust dated May 24, 1996

9. General Individual and Trustee Power of Attorney dated May 24, 1996 appointing . . . Abastillas as attorney-in-fact

IT IS FURTHER ORDERED THAT:

10. The Deed dated May 24, 1996 by and between Edith I. Kam as Trustee of the Edith I. Kam Revocable Trust, an unrecorded Revocable Living Trust dated September 8, 1988, as Grantor, and Edith Ing Kam, Trustee of the Edith Ing Kam Trust, an unrecorded Revocable Living Trust dated May 24, 1996, as Grantee, and the Transfer Certificate of Title No. 476,059 issued pursuant to said Deed be and are hereby declared null and void

11. Title to the real property described in . . . said Deed shall be and hereby is vested in Malcolm Ing, as Successor Trustee of the Edith I. Kam Revocable Trust, an unrecorded Revocable Living Trust dated September 8, 1988, as amended by First through Sixth Amendments to Edith I. Kam Revocable Trust

12. Any and all other transfers of real or personal property made to any of the trusts voided by this Order or made pursuant to any powers of attorney voided by this Order be and are hereby declared null and void.

C. P. No. 00-1-0281 - Probate Proceedings

On January 8, 2000, Mrs. Kam died. On May 5, 2000, her son, Cedric, filed a "Petition for Formal Probate of Will and Appointment of Personal Representative" (Petition for Probate) commencing, in the Circuit Court of the First Circuit, case P. No. 00-1-0281. In relevant part, the petition states as follows:

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1. A formal determination of probate of will is sought pursuant to HRS § 560:3-401 and Rule 50 of the Hawaii Probate Rules.

2. Petitioner . . . has an interest in the estate as (a) the nominee personal representative, (b) sole devisee under decedent's will as trustee of the decedent's trust, and (c) as decedent's son.

3. The decedent was born on June 2, 1903 and died on January 8, 2000 at the age of 96 in Honolulu, Hawaii. At the time of death, the decedent's permanent domicile was the City and County of Honolulu, State of Hawaii.

. . . .

6. Venue for this proceeding in this Court is proper because at the time of death decedent was domiciled in this judicial circuit.

7. There are no personal representatives of the decedent's estate whose appointments have not been terminated.

8. Petitioner has received no demand for notice nor is Petitioner aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this State or elsewhere.

9. The time limit for a probate proceeding seeking to establish a will has not expired.

. . . .

11. The original of decedent's last Will, dated September 8, 1988, accompanies this petition.

12. Petitioner believes the Will to have been validly executed.

13. After the exercise of reasonable diligence, Petitioner is unaware of any valid instrument revoking the Will.

14. Petitioner believes that this Will comprises decedent's Last Will and is not one of a series of testamentary instruments, the latest of which does not expressly revoke the earlier.

A copy of the September 8, 1988 Last Will and Testament of Edith I. Kam was certified and presented for probate.

A hearing on the Petition for Probate was held on June 30, 2000. On July 17, 2000, Judge Hirai entered an order granting the Petition for Probate and filed a "Judgment of Order Granting Petition for Formal Probate of Will and Appointment of Personal Representative". The former states, in relevant part, that "[t]he decedent died testate, having duly executed the Will dated September 8, 1988 in the manner required by law, and the

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same is valid and unrevoked." The latter states, in relevant part, that "[t]he Will of the decedent dated September 8, 1988 is admitted to probate as and for the Last Will and Testament of the decedent[.]"

On September 11, 2000, Appellants filed a "Petition for Allowance of and to Enforce and Obtain Payment on Creditor's Claims" (Petition for Allowance) stating that they have "timely presented their claims under Hawaii's non-claims statute, H.R.S. § 560:3-803(a)(1)(A)." In an accompanying affidavit, Abastillas stated the following:

1. I am resident of Kaneohe, Hawaii, and a creditor in the above entitled estate.
2. From June 1995 through July 1996, at the request of decedent, I rendered professional services to her, including but not limited to services of personal friend and companion and financial affairs manager.
3. These services were of the reasonable value of \$42,000.00, and decedent agreed to pay this sum to me.
4. There is justly due, owing, and unpaid from decedent to me the sum of \$42,000.00, together with interest thereon at the rate of 10% per annum from May 3, 1996, together with attorney's fees as allowed by law.
5. Said sum is not contingent or unliquidated. No payments have been made thereon which are not credited, and there are no offsets against the claim to my knowledge.

In an accompanying affidavit, Smith stated the following:

1. I am an attorney duly licensed to practice law in the State of Hawaii and a creditor in the above entitled estate.
2. From June 1995 through July 1996, at the request of decedent and pursuant to a written fee agreement, I rendered professional legal services to her, for which I have not been paid, as set forth in Exhibits A and B attached hereto.
3. There is justly due, owing, and unpaid from decedent to me the sum of \$25,851.83, together with interest thereon at the rate of 12% per annum from 10/1/96, plus attorney's fees as provided by agreement and as allowed by law.
4. Said sum is not contingent or unliquidated. No payments have been made thereon which are not credited, and there are no offsets against the claim to my knowledge.

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On September 11, 2000, an order setting time and place of hearing on the Petition for Allowance was filed. It set the hearing to occur on October 20, 2000 at 9:00 a.m.

On October 11, 2000, Cedric filed two documents. The first was an "Objection to Petition for Allowance . . . Filed September 11, 2000". In the accompanying Memorandum in Support of Objection, Cedric argued the following:

Abastillas alleges that [Mrs.] Kam agreed to pay her the sum claimed, but has presented no evidence of such agreement or that any services were in fact provided or that any such services were of the value claimed.

.

As will be discussed below, the so-called "services" [Appellants] rendered to [Mrs.] Kam were in fact part of a scheme to ingratiate themselves with an elderly woman with diminished mental capacity, obtain access to her assets, and influence her to change her estate plan to their benefit and to the detriment of Mrs. Kam and her family. As such, the so-called "services" were of no benefit to Mrs. Kam and in fact were to her detriment.

B. EXPLOITATION OF [MRS.] KAM BY [APPELLANTS]

On June 14, 1996, Sylvia Sugimoto, a social worker with the State of Hawaii Department of Human Services, filed a Petition for Protection and an Ex Parte Application for Immediate Protection in the Family Court of the First Circuit Court of the State of Hawaii seeking protection for [Mrs.] Kam In the Matter of the Protection of Edith Inq Kam, FC-AA No. 96-0003. The basis for both the Petition for Protection and the Ex Parte Application was the abuse and threatened imminent abuse of Mrs. Kam by [Appellants]. The Petition and Application were supported by reports from Mrs. Kam's family and long-time friends, including the following:

1. "Lyle Nelson, husband of Mrs. Kam's niece, reported to Adult Protective Services (APS), Department of Human Services (DHS) that he was concerned that Mrs. Kam was being financially exploited by her attorney, . . . Smith and his paralegal . . . Abastillas. Presently . . . Abastillas has a durable power of attorney for Mrs. Kam and is about to be adopted or has been adopted by Mrs. Kam. Mr. Nelson questioned Mrs. Kam's reasons for wanting to adopt . . . Abastillas after only knowing her for a few months. Mr. Nelson was further concerned that there was no food in Mrs. Kam's house, and that Mrs. Kam] was neither aware of her monthly income nor the amounts she received from her rental units."
2. "Cedric Kam also stated that he was concerned because . . . Smith's law firm was charging his mother \$10,000.00 to \$30,000.00 per month for services he believed were not ethical because of his mother's delusional thoughts."

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3. "On April 17, 1996, Yvonne Bannister, who has known [Mrs.] Kam for 16 years as a fellow Jehovah's Witness, expressed concern that Mrs. Kam has been forgetful and not able to remember things. She was also concerned that during the past few months Mrs. Kam has been completely dominated by . . . Abastillas. She questions Abastillas' motives because . . . Abastillas has told Mrs. Kam she is studying the Bible to be a Jehovah's Witness, yet . . . Abastillas has not been participated [sic] in any of the Jehovah's Witness activities. She is further concerned that Mrs. Kam wants to adopt . . . Abastillas and that . . . Abastillas has been taking Mrs. Kam to look at real estate in Maui and in the Waiialae Kahala area for the purpose of purchasing property so that they will be able to live together."

4. "On or about May 3, 1996, . . . Abastillas attempted to cash a check at a bank in Kaneohe signed by Mrs. Kam. When Mrs. Kam was called to confirm whether she signed the checked [sic], she denied writing such a check and the bank was not able to cash the check. On Monday, May 6, 1996, . . . Abastillas took Mrs. Kam to a different branch of the bank in Kailua to have a check cashed and one deposited to her account from Mrs. Kam's account."

At the time the Petition was filed, Mrs. Kam was 93 years old and had been diagnosed by a psychiatrist, Dr. Vit Patel, as having Alzheimer's Disease and as being vulnerable to financial exploitation. (Dr. Patel's diagnosis was confirmed in August 1996 by Dr. Patricia Blanchette, a court-appointed independent medical examiner.) Moreover, in the Application for Immediate Protection, Ms. Sugimoto reported that: "Mrs. Kam is forgetful and unable to handle her financial matters. She does not know how much money she receives from her social security or her rentals and how much she is paying for legal services from . . . Abastillas and the Law Offices of . . . Smith."

On June 14, 1996, Judge Bryant of the Family Court granted the Ex Parte Application and issued an Order for Immediate Protection, finding that there was probable cause that [Mrs.] Kam had been abused and was threatened with imminent abuse unless immediate action was taken. The order enjoined and restrained [Appellants] from selling, removing or otherwise disposing of [Mrs.] Kam's personal property, withdrawing funds from any of her accounts

.....

Despite the fact that he and his paralegal had been charged with financially exploiting Mrs. Kam, and were the subject of Judge Bryant's restraining order, Smith, in a flagrant conflict of interest, continued to represent Mrs. Kam.

Moreover, at that time, Mrs. Kam was on the mainland, where she had gone with Abastillas. During their trip, Mrs. Kam and Abastillas opened two bank accounts for Mrs. Kam with Abastillas as a co-signatory.

Smith attempted to use Mrs. Kam's absence from Hawaii as a basis for dismissing the Petition, due to the fact that Mrs. Kam had not been personally served, and on June 18, he made an oral motion to that effect. Mrs. Kam was due to return on June 24, but on that date, despite Dr. Patel's findings and Judge Bryant's Order, Smith sent a letter to Judge Bryant informing him that Mrs. Kam did not wish to submit to the jurisdiction of the court and would therefore

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be remaining on the mainland. He also sent a letter to Mrs. Nelson, who had filed a missing person's complaint with the police, threatening her with liability for filing the complaint and urging her to withdraw the Adult Protective Services Complaint.

On June 27, 1996, the Attorney General's office filed a Motion to Compel Disclosure and to Disqualify Counsel, seeking an order to compel Smith to disclose the whereabouts of Mrs. Kam and to disqualify Smith as her counsel. On July 3, 1996, the Family Court granted the motion, again finding probable cause that Mrs. Kam had been abused and was threatened with imminent abuse. The order also disqualified Smith as counsel for Mrs. Kam. Judge Bryant also denied Smith's motion to dismiss, pointing out that under Smith's argument, someone could secrete the dependent adult, avoid service, and thereby achieve dismissal of the case. Judge Bryant characterized Smith's position as "ludicrous".

In addition to putting all Mrs. Kam's bank accounts into joint ownership with her, Abastillas accepted a \$42,000 gift from Mrs. Kam in May 1996 (after Mrs. Kam's visit with Dr. Patel at which she was diagnosed with Alzheimer's), and moved Mrs. Kam into her house. In addition, \$11,000 of Mrs. Kam's money was expended on travel expenses for Abastillas and Mrs. Kam during the June and July 1996 mainland trip mentioned above. The \$42,000 and \$11,000 was ultimately returned to Mrs. Kam, and Abastillas' name was taken off the joint bank accounts, but only after Judge Bryant's Order of July 3, 1996.

On August 27, 1996, Judge Bryant issued a further Order ordering Smith and Abastillas to disclose all joint accounts with [Mrs.] Kam, to remove their names from those accounts, and to turn over to Dawn Slaten, who was appointed Mrs. Kam's temporary guardian, all property of Mrs. Kam, including bank accounts, CD's, investments and safe deposit boxes.

C. HISTORY OF UNDUE INFLUENCE BY [APPELLANTS].

On September 4, 1996, the Office of the Public Guardian filed a Petition for Appointment of Co-Guardians of the Person of an Alleged Incapacitated Person in the Family Court In the Matter of the Guardianship of Edith Ing Kam, An Incapacitated Person; FC-G-96-0299. The petition was granted and by Order entered October 8, 1996, [Mr.] Nelson and [Dr.] Ing . . . were appointed as co-guardians of the person of Mrs. Kam. On April 22, 1997, the Family Court, in exercise of its right to consolidate protective and guardianship proceedings relating to the same person, entered an order appointing Mr. Nelson and Dr. Ing as co-guardians of the property of Mrs. Kam.

On February 25, 1997, Mr. Nelson and Dr. Ing filed a Motion to Void Estate Planning Documents, seeking to void certain documents executed by Mrs. Kam during her incapacity while under the undue influence of [Appellants]. The documents at issue included: (a) Durable Powers of Attorney appointing Abastillas as attorney-in-fact for Mrs. Kam; (b) amendments to Mrs. Kam's revocable living trust naming Abastillas and Abastillas' children as successor trustees and beneficiaries of the trust; (c) a new will revoking an existing will, naming Abastillas as personal representative of Mrs. Kam's estate and Abastillas' children as successor personal representatives. The documents executed in December of 1995 and February of 1996 by which Abastillas and her children became fiduciaries and beneficiaries of Mrs. Kam's estate were drafted by Smith. The documents executed in May of 1996 were drafted by the Law Offices of Neil T. Nakamura & Associates under the direction of [Appellants].

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On April 22, 1997, the Family Court entered an Order granting the motion and voiding the documents at issue, as well as any transfers of real or personal property made pursuant to the voided documents.

[D]. THE SERVICES ALLEGEDLY RENDERED WERE OF NO VALUE

Abastillas claims to have rendered "professional services" to Mrs. Kam and has been presented as a medical doctor. See the heading on the billing statements submitted by Smith in support of his Creditors' Claim. However, while Ms. Abastillas may be a licensed physician in some other jurisdiction, according to the records of the Hawaii Department of Commerce and Consumer Affairs, she is not licensed to practice medicine in the State of Hawaii.

Abastillas claims to have rendered services as a "personal friend and companion" to Mrs. Kam. As evidenced by the Family Court protective proceedings, Abastillas was no friend of Mrs. Kam. In fact, her relationship with Mrs. Kam resulted in the need for the filing of adult abuse proceedings to protect Mrs. Kam from Abastillas.

Abastillas claims to have rendered services to Mrs. Kam as a "financial manager". The financial management that Abastillas exerted over Mrs. Kam and her estate consisted of her attempts to gain control over Mrs. Kam's assets while as her attorney-in-fact and upon her death or incapacity as successor trustee of her trust and upon her death as personal representative of her estate and to make a place for herself and her children as beneficiaries of Mrs. Kam's trust and estate. While these "services" would have resulted in substantial benefit to Abastillas and her children had she not been thwarted in her efforts, they were of no benefit to Mrs. Kam.

Smith claims to have rendered professional legal services to Mrs. Kam. However, his services were of no benefit to her. To the contrary, they were a detriment to Mrs. Kam and her estate. Moreover, a closer look at the billing statements submitted by Smith in support of his claim show that they include charges for time spent in the Family Court protective proceedings, basically defending himself against allegations that he had abused Mrs. Kam.

It is interesting to note that in his July 1, 1996 motion filed with the Family Court in FC-AA No. 96-0003 to dismiss the petition for the protection of Mrs. Kam, Smith indicated that he was filing the memorandum in his capacity as a "Party" to the proceeding and "insofar as he is able", on behalf of Mrs. Kam. Smith obviously recognized that since he was the one who was being accused in the petition of exploiting Mrs. Kam, there was a bit of an ethical problem for him to purport to file a motion in her behalf in that proceeding seeking to dismiss the petition. Nevertheless, after attempting to skate around the ethical problem by filing the petition in his own behalf as a party and after being formally disqualified as Mrs. Kam's counsel on July 3, 1996, Smith has no problem billing Mrs. Kam for the time he had spent on that motion and seeking to collect from her estate for his "services" rendered in that regard. . . . Even more remarkable, the billing statements submitted by Smith in this case include numerous charges for legal services he claims to have rendered to Mrs. Kam after July 3, 1996, the date he was disqualified by Judge Bryant from further representation of Mrs. Kam.

In addition, once guardians for Mrs. Kam were appointed, the guardianship estate was forced to expend thousands of dollars to extricate Mrs. Kam from unnecessary litigation that Smith either initiated or provoked. For example, the guardianship estate paid

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\$17,000 to settle a suit brought by Smith against Hawaiian Trust Company, Ltd., which was managing Mrs. Kam's trust assets and which began to question the large legal bills presented by Smith and the illogical and improvident instructions being given to them by Mrs. Kam and by Smith on her behalf. Ultimately, the guardians of Mrs. Kam's property, after reviewing the Hawaiian Trust case with counsel, came to the conclusion that it had no merit whatsoever, that, to the contrary, it exposed the estate to a substantial claim by Hawaiian Trust for legal fees, and that the only one who had benefitted from pursuit of the case was Smith.

The guardianship estate also spent \$20,000 to settle a mechanic's lien suit brought against Mrs. Kam by a contractor for work on her home. Again, after reviewing the case with counsel, the guardians of Mrs. Kam's property concluded that Smith's hard-line defense of that suit was completely dis-economic from Mrs. Kam's standpoint and served only to provide Smith with a vehicle to run up legal fees on an elderly, incapacitated woman who had no idea what Smith's "services" were costing her. That suit resulted in the guardianship estate also having to pay \$1,200 to the American Arbitration Association to settle a claim for fees and costs incurred by the Association in an arbitration proceeding instituted by Mrs. Kam's former counsel. After he took over the defense of the case, Smith refused to participate in the arbitration on the grounds that Mrs. Kam was a Jehovah's Witness and her religion did not permit her to participate in an arbitration proceeding where the opposing party was not telling the truth.

The foregoing settlement amounts do not include the substantial attorneys' fees and costs that the guardianship incurred to get these matters resolved without further liability to the guardianship estate.

Accordingly, the so-called "services" rendered by Smith and Abastillas were of no value to Mrs. Kam and, to the contrary, were to her detriment. In fact, Smith's so-called legal services were simply a vehicle by which Smith unjustly, unconscionably, unprofessionally and unethically attempted to enrich himself at the expense of an elderly, delusional woman who had only the vaguest idea of what was going on and how much it was costing her. Smith, as an attorney, is not entitled to compensation for this type of "services". By the same token, since Abastillas was at all relevant times Smith's paralegal, her "services" are subject to the same standards as are applicable to Smith and are therefore also non-compensable. In addition, any claims that Smith and Abastillas might conceivably have against the estate would be more than wholly offset by the counterclaims the estate have against them for the harm they caused to Mrs. Kam and her estate.

[E]. CONCLUSION

Whatever "services" Smith and Abastillas rendered were not for Mrs. Kam's benefit, but rather were for the sole purpose of taking advantage of her vulnerable state in an attempt to fill their own pockets. Smith and Abastillas have already cost Mrs. Kam many thousands of dollars. Now that Mrs. Kam has died, the assertion of their claims some four years after the events in question is not only a classic example of unmitigated gall, but sadly for a family that has already been emotionally and financially victimized by their greed, manipulation and exploitation, it is having the effect of further depleting what is left of Mrs. Kam's modest estate.

Respondent respectfully requests that the Petition for Allowance and the claims made therein be denied in their entirety and that the estate be awarded its reasonable attorney's fees and

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costs incurred in responding to the baseless and frivolous claims made by Smith and Abastillas.

(Internal citations omitted; use of "sic" in original.) Second, Cedric filed a Petition for Instructions "regarding the claims made by . . . Abastillas." This petition noted that "Abastillas' claims are based upon a will and trust agreement executed in May of 1996, both of which were voided by the Family Court's April 22, 1997 Order," and prayed, in relevant part, for (1) a decision "that the claims made by Abastillas under the May 1996 will and trust agreement are without merit, and (2) that the Court instruct [Cedric] to proceed pursuant to" the July 17, 2000 "Order Granting Petition for Formal Probate of Will and Appointment of Personal Representative" and "Judgment of Order Granting Petition for Formal Probate of Will and Appointment of Personal Representative".

On October 19, 2000, at 4:21 p.m., Appellants filed their 309-page "Creditor's Reply to Objection Filed 10/11/00 By Personal Representative to Creditor's Petition filed 9/11/00 For Allowance of Creditor's Claims", which includes twenty-eight exhibits. Their reply stated, in relevant part, as follows:

Creditors apologize to the Court for the lateness of this filing; but they point out that the Personal Representative's Objection was filed and served only last Wednesday, October 11. Creditors have thus only a little over five working days to put together this Reply.

.

C. THE COMING WILL CONTEST.

The Court should also be aware that this estate will shortly involve a will contest triable to a jury. Cedric, the personal representative, has offered for probate Edith's 1988 will. That will was revoked eight years later [by] Edith's 1996 will. . . . Cedric and his counsel have been provided with a copy

. . . .

D. CEDRIC'S ATTEMPTED PREEMPTIVE STRIKE.

In fact, Cedric has attempted to fire a preemptive strike: on the same date as he filed his Objection to the Creditors' Claims, he also filed a "Petition for Instructions" attaching the same exhibits as are attached to his Objection. . . .

E. EVENTUAL CONSOLIDATION

After the petition to vacate and for probate of the 1996 will is filed, counsel will seek to consolidate all three of these matters in one proceeding under Probate Rule 14 or Haw. R. Civ. P. 42(a). The reason is that they all involve the same four questions: (1) whether Family Court Judge Bryant's "findings" and orders in FC-AA No. 96-0003 determine any issue in this case; (2) whether Family Court Judge Choy's order in FC-G No. 96-0299 voiding 1996 will and trust was valid and enforceable or instead null and void *ab initio* for lack of subject matter jurisdiction; (3) whether decedent had testamentary capacity; and (4) whether decedent was subject to undue influence.

. . . .

IV: Conclusion

This case is an adversary, contested case. It is about to be joined by two other, related cases, which should be consolidated together. This case should be assigned to the civil calendar and the Hawaii Rules of Civil Procedure be made applicable.

Included in the documents was the October 19, 2000

Declaration of Paz F. Abastillas that stated, in relevant part, as follows:

2. When I first met Edith, she was barricaded in her Maunawili home, with three locks on the door, and never ventured out. Eddie, her son, had sued her in active ongoing litigation, yet persisted in living with her. He lived in the garage but would break into Edith's house and steal her possessions and her food. She was also beset by a "sister" in Jehovah's Witnesses named Paulette Paonessa. Paulette had gotten her in bad situations, such as the purchase of a Cadillac that Edith never enjoyed and an investment of \$150,000 for an Arby's franchise which turned out to be a scam and a total loss.

. . . .

7. I am part Chinese. I believe that in me, Edith saw her own self in younger life--competent, active, educated (Edith had a degree from Boston University), worldly, and independent. There was genuine love and affection between us. While in California, we stayed at my relatives who are from mainland China. . . .

. . . .

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10. While we were in Los Angeles, and after we learned of the Protective Proceedings, I made an appointment for Edith at UCLA Medical Center to see an Alzheimer's specialist, to whom I had been referred by one of the Doctors (now retired) on the Presidential Blue-Ribbon Commission on Alzheimer's Disease.

11. When Edith was required to take a mental competency examination with Dr. Blanchette, she told me that she deliberately mocked Dr. Blanchette's tests. She wanted desperately to get away from the protective services people and had unknowingly created for herself a situation that would eventually take away her freedom. . . .

12. Edith said she was affronted at being forced by the State of Hawaii . . . to undergo mental capacity testing by Dr. Blanchette. She said she proceeded with the examination unwillingly, refusing to cooperate fully and finishing it by mocking the tests, as in drawing the clockfaces backwards. Had I known that she was going to deliberately sabotage the tests, I would have exhorted her to do her level best and explained to her that her freedom and future depended on it. She thought it was "just for the records" as she was told, and then she could go home again.

. . . .

14. I am a licensed physician in the Philippines, where I was trained. When I came to the United States, I worked as a research physician in California under a UCLA grant on research in metabolic and endocrine diseases, and later on as a Fogarty Fellow at the National Institutes of Health (Maternal and Child Health and Human Development), in Bethesda, Maryland. I came to Hawaii to take care of my mother's illness and shifted focus from medical to paralegal. I am not interested in the actual practice of medicine and never purported to do so with anyone, including Edith. When she needed medical attention, I took her to different specialists to treat her.

. . . .

20. As Edith and I became closer and closer and spent more and more time together, she began to talk of adopting me. She said that she had always wanted a daughter, had treated a relative as one, but had had a falling out with her. She also told me that she wanted to leave her property to me in her will.

At the October 20, 2000 hearing, the following was stated, in relevant part:

[JUDGE CHANG]: Did you receive [Counsel for Appellant's] reply?

[COUNSEL FOR CEDRIC]: . . . [I]t was delivered to our office at about 5:00 o'clock yesterday afternoon.

[COUNSEL FOR APPELLANTS]: Your Honor, I apologize for the presentation. Opposing counsel's two documents were overwhelming for us and we tried our best to have some kind of response to the court because we believe that this is a complex litigation matter

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plus the fact that we are also preparing to file in probate the 1996 will of the decedent.

And I had spoken to opposing counsel about a suggestion of continuing today's matter to December 1st where he has a petition for instructions hearing date. And hopefully, Your Honor, our request would be that the two cases could be assigned to the civil calendar and presented as a complex litigation case - cases.

[COUNSEL FOR CEDRIC]: Let me respond to that, Your Honor. Number 1, I guess undisputed the reply memo is untimely, you know, by a lot. Number 2, . . . , the bulk of it rehashes matters that have taken place over years including various other orders by the court and just tries to make argument of things that really aren't before the court on this petition. And then the balance of the memo, the reply memo includes argument and exhibits which if you look at them should have been part of the original petition.

. . . .

[COUNSEL FOR APPELLANTS]: Well, Your Honor, my clients believe that, you know, there are two sides to every question. And we believe that there are a lot of issues here that have not been resolved as they have not had an opportunity to address. And they feel that . . . they should have an opportunity to present their side of the argument and to have hearings and trials on their positions and also on the fact that there is a subsequent will that decedent signed and that they would want an opportunity to try to probate that will.

[JUDGE CHANG]: Before the court this morning is a petition to allow for certain claims being asserted by . . . Abastillas and . . . Smith. The court first finds that the reply filed on October 19th at 4:21 in the afternoon is untimely.⁹

The court further examining this document notes that there are 28 exhibits attached as part of this reply memo. These exhibits certainly should have been attached as part of the

⁹ Prior to December 15, 1997, Hawai'i Probate Rules (HPR) Rule 10(c) stated, in relevant part, as follows:

(c) Time to File Pleadings or Reports. . . . Unless otherwise ordered by the court, pleadings in response to a response or objection, and guardian ad litem, Kokua Kanawai, and master reports, shall be filed with the court and served on counsel for parties who have appeared in the proceeding no less than 72 hours prior to the time set for the hearing as originally set.

The 2004 version of HPR Rule 10(c) states, in relevant part, as follows:

(c) Time to File Pleadings or Reports. . . . In all other cases and unless otherwise ordered by the court, any party objecting or responding to a guardian ad litem's or Kokua Kanawai's report, shall file a petition to confirm or reject the report and shall serve it on all counsel for parties who have appeared in the proceeding no less than 72 hours prior to the time set for the hearing as originally set.

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original petition, and if they were known in the exercise of reasonable due diligence would have been or should have been discovered by creditors so as to file this at the time the original petition was filed. The court finding that this document is untimely filed disregards and does not consider it in connection with the petition filed on behalf of Abastillas and Smith.

Having reviewed the timely filed and properly submitted matters presented to the court, the court finds simply that the petitioners in this case, Abastillas and Smith, have failed to establish factual and/or legal basis which would warrant their entitlement for payment of claims as requested or alleged. The petition is denied.

On November 8, 2000, Judge Chang entered an "Order Denying Petition for Allowance . . . Filed September 11, 2000".

On November 2, 2000, Abastillas filed (1) a "Petition to Vacate Previous Order for Probate of Will, to Redetermine Heirship, for Formal Probate of Will, and for Formal Appointment of Personal Representative" (Petition to Vacate), and (2) a "Presentation to Court of True and Correct Copies of Decedent's 1996 Will and Trust".

On November 2, 2000, the court clerk filed an order setting the time and place of hearing on the Petition to Vacate, which stated, in relevant part, as follows:

That . . . Jan[uary 12, 2001] at 9:00 a.m., . . . is the time and place of hearing of the petition.

That Petitioner shall give notice of the hearing in the manner prescribed in H.R.S. § 560:1-401 to the persons enumerated in H.R.S. § 560:3-403 and, upon payment by the demandant [sic] of the cost of reproducing copies, to any additional person who has filed a demand for notice under H.R.S. § 560:3-204.

That pursuant to Rule 10(c) of the Hawaii Probate Rules, any party wishing to object or respond to the petition shall file such objection or response with the Court and serve it on all interested persons within 30 days of service of the Petition and this Order or on the date of the scheduled hearing, whichever date occurs earlier.

On November 13, 2000, Abastillas filed the "Objections of Paz F. Abastillas to Petition for Instructions Filed

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10/11/00; Request for Continuance of Hearing and Consolidation of This Matter for Hearing with Respondent's Petition Filed 11/2/00 to Vacate Previous Order for Probate of Will and to Redetermine Heirship, Set for Hearing on January 12, 2001". It stated the following objections:

Objection 1:

The petition must be dismissed for lack of jurisdiction because this Honorable Probate Court cannot issue instructions when the subject concerns a will and not a trust.

Objection 2:

The petition must be dismissed for lack of jurisdiction because there is no will or testamentary trust of which petitioner is seeking construction.

Objection 3:

The petition must be dismissed for lack of jurisdiction because it constitutes an attempt by Petitioner to deprive Respondent of her right to trial by jury in a will contest case.

Objection 4:

The order voiding estate planning documents issued by Family Court Judge Choy is void *ab initio* for lack of jurisdiction of the subject matter.

.

8. Pursuant to Probate Rule 14, Respondent further requests that this matter be consolidated for hearing with Respondent's Petition filed 11/2/00 to Vacate Previous Order For Probate Of the 1988 Will and To Redetermine Heirship in accordance with the 1996 will (and trust).

On November 27, 2000, Cedric filed the following: (1) a "Response to 'Objections of Paz F. Abastillas to Petition for Instructions Filed 10/11/00; Request for Continuance of Hearing and Consolidation of This Matter for Hearing with Respondent's Petition Filed 11/2/00 to Vacate Previous Order for Probate of Will and to Redetermine Heirship Set for Hearing on January 21, 2001', Filed November 13, 2000"; (2) an "Objection to 'Petition of Respondent Paz F. Abastillas for Continuance of the 12/1/00

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Hearing on Personal Representative Cedric C.I. Kam's Petition for Instructions Filed 10/11/00 to the Date of 1/12/2001', Filed November 13, 2000"; and (3) "Objection to 'Petition of Paz F. Abastillas for Consolidation of Hearing on Personal Representative Cedric C.I. Kam's Petition for Instructions Filed 10/11/2000 and Set for Hearing on 12/1/2000 and on Paz F. Abastillas' Petition to Redetermine Heirship Filed 11/2/2000 and Set for Hearing on 1/12/2001', Filed November 13, 2000".

In his Memorandum in Support of Response and Objections, Cedric argued that the family court had subject matter jurisdiction to void the 1995-1996 estate planning documents. In his view,

When a guardianship of the property proceeding is consolidated in Family Court with a pending guardianship of the person proceeding, as specifically permitted by §§ 346-235, 560:1-302 and 560:5-102, HRS, it is those statutes that confer jurisdiction on the Family Court to administer the guardianship of the property proceeding.

It being clear that the Family Court had, by statute, the jurisdiction to administer the guardianship of the property proceeding, the next question is: Where the Family Court is acting within its statutory jurisdiction in administering a guardianship of the property proceeding, what is the Family Court empowered to do in connection with that proceeding, and what may it not do?

The only rational answer to this question is that the Family Court has the power to do all things in that proceeding that the Probate Court could do in a guardianship of the property proceeding being administered in the Probate Court under HRS Chapter 560, Article V, Part 4

. . . .

. . . [O]nce the Family Court concluded that the documents had in fact been executed under undue influence or without the requisite mental capacity, or both, the Court was acting "for the benefit of the protected person" in voiding those documents. . . .

. . . .

Under HRS § 560:5-408(3), it is clear that the Family Court had the authority and jurisdiction to void the 1995-1996 estate

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planning documents if it concluded that doing so would be for Mrs. Kam's benefit. . . .

. . . .

In addition, independently of its power to issue the Order pursuant to the power granted to it by HRS § 560:5-408(3), the Family Court also has broad equity powers under § 571-3, Hawaii Revised Statutes, which states as follows:

"In any case in which it has jurisdiction, the family court shall exercise general equity powers as authorized by law."

. . . .

The fact that [Appellants], at their own risk, chose to deliberately ignore the Family Court proceedings to void the estate planning documents . . . is not a bar to the application of issue preclusion, *res judicata* and/or collateral estoppel, for even a default judgment has preclusive effect where the party challenging the judgment was afforded full and fair opportunity to litigate the issues, and declined to do so. . . . Accordingly, since the Family Court had jurisdiction to hear to [sic] Guardians' motion, and since [Appellants] received timely notice of [the motion to void the estate planning documents] and had the full opportunity to contest that motion and made their own decision not to [do] so, the Family Court's Order is *res judicata*, and they are therefore barred from re-litigating the issues raised in that motion.

(Internal brackets omitted.)

At the December 1, 2000 hearing on the Petition for Instructions, Judge Hirai denied Abastillas' request for continuance of hearing to January 12, 2001 and did not make any other rulings.

On December 13, 2000, Cedric filed an "Objection to Petition to Vacate" In a memorandum in support of the objection, Cedric stated that the May 24, 1996 Will and Trust

executed by [Mrs.] Kam while incapacitated and under the undue influence of Abastillas and [Smith], Abastillas' husband and [Mrs.] Kam's former attorney, were declared null and void by the Honorable Darryl Y.C. Choy by Order entered April 22, 1997 in the Family Court of the First Circuit of the State of Hawaii, In the Matter of the Guardianship of Edith Ing Kam, An Incapacitated Person, FC-G No. 96-0299[.]

According to Cedric, the family court entered this order based on evidence that

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significant changes were made to [Mrs.] Kam's estate plan soon after [Appellants] entered [Mrs. Kam's] life. . . .

On April 19, 1996, about a month before [Mrs.] Kam executed the May 24, 1996 Will, [she] was evaluated by Vit U. Patel, M.D. Dr. Patel concluded that [Mrs.] Kam suffered from Alzheimer's type dementia. . . . On August 8, 1996, Patricia Blanchette, M.D., a psychiatrist appointed by the Family Court in FC-AA No. 96-0003, evaluated [Mrs.] Kam and concluded that she suffered from moderate dementia of the Alzheimer's type and that she lacked the capacity to make reasoned decisions concerning her money and properties[.]

At the January 12, 2001 hearing, Judge Hirai stated

that

[t]he Court will deny the [Petition to Vacate]. The order that was previously filed on April 2[2], 1997 in FC-G No. 96-0299 still remains in effect and voided this will. And the court has already granted at a prior hearing a petition for formal probate of will and has appointed Cedric . . . as the personal representative, and that order still rema[i]ns in effect.

On January 30, 2001, Appellants filed a petition "for Rule 54(b)/Interlocutory Appeal Certifications; for Entry of Final Judgment; and for Stay of Distribution Pending Appeal."

On January 2, 2002, the Court entered: (1) an "Order Granting Petition for Instructions Filed October 11, 2000"; (2) an "Order Denying Petition to Vacate . . . Filed November 2, 2000"; and (3) an "Order Granting in Part and Denying in Part the Petition Filed January 30, 2001 by [Appellants] for Rule 54(b)/Interlocutory Appeal Certifications; for Entry of Final Judgment; and for Stay of Distribution Pending Appeal."

Order (1) states, in relevant part:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Petition for Instructions shall be and is hereby granted, the Court finding that the Order Granting Motion to Void Estate Planning Documents filed February 25, 1997 that was entered on April 22, 1997 in FC-G No. 96-0299, in the Family Court of the First Circuit, State of Hawaii, and the Order Granting Petition for Formal Probate of Will and Appointment of Personal Representative entered herein on July 17, 2000, are valid and enforceable and remain in effect.

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Order (2) states, in relevant part:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Petition shall be and is hereby denied, the Court having determined that the Order Granting Motion to Void Estate Planning Documents filed February 25, 1997 which was entered on April 22, 1997 in FC-G No. 96-0299, in the Family Court of the First Circuit, State of Hawaii, and the Order Granting Petition for Formal Probate of Will and Appointment of Personal Representative filed herein on July 17, 2000, are valid and enforceable and remain in effect.

Order (3) was amended on August 5, 2002, when Judge Hirai entered an "Amended Order Granting in Part and Denying in Part the Petition Filed January 30, 2001 by [Appellants] for Rule 54(b)/Interlocutory Appeal Certifications; for Entry of Final Judgment; and for Stay of Distribution Pending Appeal" that stated, in relevant part, as follows:

1. Based on the agreement of counsel, the petition is granted as to the appeal pursuant to Probate Rule 34.
2. The Court expressly determines that there is no just reason for delay in the entry of final judgment on the [November 8, 2000] Creditors' Claim Denial Order, the [January 2, 2002] Instructions Order and the [January 2, 2002] Heirship Redetermination Denial Order, and the Court hereby directs entry of final judgment on said Orders under HRCP 54(b).
3. Judgments may be submitted for each of the aforesaid Orders.
4. The Petition is denied as to the request to stay distribution of the assets of the estate. During the pendency of the appeal(s) of the aforesaid Orders, the attorney's fees and costs awarded by the Court in connection with the Instructions Order may be paid from the estate, and the personal representative may proceed with the administration of the estate and pay the expenses of administration, including reasonable attorney's fees and costs; provided, however, estate assets shall not be distributed to beneficiaries during the pendency of the appeal.

On September 13, 2002, the court entered (1) a "Final Judgment Re Order Denying Petition for Allowance . . . Filed November 8, 2000"; and (2) a "Final Judgment Re Order Denying Petition to Vacate . . . Filed January 2, 2002." On September 16, 2002, the court entered the "Final Judgment Re

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Order Granting Petition for Instructions Filed January 2, 2002," that stated, in relevant part, as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Petition for Instructions, filed herein on October 11, 2000 by Petitioner/Personal Representative Cedric C.I. Kam, shall be and is hereby granted, the Court having determined that the Order Granting Motion to Void Estate Planning Documents filed February 25, 1997, which was entered on April 22, 1997 in FC-G No. 96-0299, in the Family Court of the First Circuit, State of Hawaii, and the Order Granting Petition for Formal Probate of Will and Appointment of Personal Representative filed herein on July 17, 2000, are valid and enforceable and remain in effect.

On October 11, 2002, Appellants filed an appeal from these judgments.

On October 16, 2002, counsel for Smith filed a "Dismissal of Appeal of [Smith] From: (1) the Final Judgment Filed September 16, 2002, Re Order Filed January 2, 2002, Granting Petition for Instructions . . .; and (2) the Final Judgment Filed September 13, 2002, Re Order Filed January 2, 2002, Denying Petition . . . to Vacate . . ." due to the fact that Smith was "neither a petitioner nor respondent in respect of said judgments[.]" In other words, Smith appeals only the September 13, 2002 "Final Judgment Re Order Denying Petition for Allowance . . . Filed November 8, 2000".

This case was assigned to this court on October 3, 2003.

ARGUMENT

- A. Judge Bryant's Orders in FC-AA No. 96-0003
(Family Court Protection Proceedings)

Abastillas challenges all orders and findings entered by Judge Bryant in the Protection Proceedings. The following orders and findings are relevant:

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First, the June 14, 1996 Order for Immediate Protection that states, in relevant part, as follows:

1. The subject appears to be a dependent adult within the meaning of § 346-222, [HRS].
2. There is probable cause to believe that the subject has been abused, and is threatened with imminent abuse, unless immediate action is taken.
3. The subject does not consent to these proceedings and there is probable cause to believe that the subject lacks the capacity to make decisions concerning her person.

Second, the July 3, 1996 "Order Granting Motion to Compel Disclosure and to Disqualify Counsel, and Denying Motion to Dissolve Order for Immediate Protection, Vacate Appointment of Temporary Guardian, and Dismiss Petition for Protection" that states, in relevant part, as follows:

THE COURT FURTHER FINDS PROBABLE CAUSE THAT:

1. [Mrs.] Kam is a dependent adult, who has been abused, and is threatened with imminent abuse. Because she remains on the mainland, it is unknown if [Mrs.] Kam consents to these proceedings, however, assuming she does not consent, the court further finds there is probable cause that she lacks capacity based on her advanced age, the diagnosis of Alzheimer's dementia, and that she was found without food for three days in her home.

Third, the following findings of fact entered on October 3, 1996 that state, as follows:

E. [Mrs.] Kam is an incapacitated adult as evidenced by Dr. Patricia Blanchette's report in that:

1. she suffers from Alzheimer's Disease and suffers from dementia of the Alzheimer's Type;
2. she is unable to care for her person, by bathing, dressing, toileting, cooking, and eating without either supervision or assistance;
3. she does not have the capacity to make reasoned decisions concerning her money and properties; and
4. she lacks the capacity to make and communicate decisions concerning her person;

F. [Mrs.] Kam is a "dependent adult" as defined in HRS Section 346-222[.]

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Abastillas argues that Judge Bryant's orders and findings are invalid for the following reasons:

2. Judge Bryant lacked personal jurisdiction over Edith.

3. Judge Bryant did not actually adjudicate any issue concerning Edith's testamentary capacity or whether Abastillas unduly influenced Edith to execute her 1996 will, as there was never an adversary, evidentiary hearing in which any fact was tried; instead, the case settled.

4. For these reasons, no "finding" which Judge Bryant made was *res judicata*.

This argument does not have merit.

On the question of personal jurisdiction, counsel for Abastillas stated, in a memorandum filed on November 13, 2000, in relevant part:

The Family Court Protection Petition was filed June 14, 1996. Edith and Abastillas had left Hawaii the day before, June 13, on their mainland trip. It was a busy day for Edith Then she and Abastillas boarded a plane for San Francisco. Thus Edith was on the mainland on June 14 and was never personally served with the petition.

Edith at first was determined to resist and wrote a personal letter to Judge Bryant so stating. Her decision was to remain on the mainland, rather than return and subject herself to the Family Court's jurisdiction. Abastillas made an appointment for Edith at UCLA Medical Center to see an Alzheimer's specialist, to whom she had been referred by one of the doctors (now retired) on the Presidential Blue-Ribbon Commission on Alzheimer's Disease. Then Judge Bryant ordered Smith not only to furnish Edith's whereabouts but also to produce her in Court and told Smith that unless he complied he would be jailed for contempt

Thus under coercion from the Court--exercised against her counsel--Edith was forced to return to Hawaii and appear before Judge Bryant.

Smith had moved to dismiss the Protection Proceeding for lack of jurisdiction. It was scarcely ludicrous of Smith to suggest to Judge Bryant that personal service was essential before a court acquired judicial power over a defendant. Personal service and *in personam* jurisdiction are in legal fact the fountainhead of judicial power.

(Internal citations omitted.)

The relevant statute is HRS § 346-231(e). It requires that "[c]ertified copies of the application and order shall be

personally served upon the dependent adult[.]" Counsel for Abastillas alleges that

Edith was on the mainland on June 14 and was never personally served with the petition.

Edith at first was determined to resist and wrote a personal letter to Judge Bryant so stating. Her decision was to remain on the mainland, rather than return and subject herself to the Family Court's jurisdiction. . . .

Thus under coercion from the Court--exercised against her counsel--Edith was forced to return to Hawaii and appear before Judge Bryant.

The statement that Mrs. Kam was never personally served with the petition is based solely on Smith's declaration that "[t]o the best of my knowledge, Edith was on the mainland on June 14 when the Protective Proceedings were filed and was not personally served with the petition." Although the record does not answer the question as to whether Mrs. Kam was personally served with the petition, it does show, in her June 24, 1996 letter to Judge Bryant¹⁰, that she admits having personal knowledge of the petition and decided not to respond to it. In addition, the record shows, and counsel for Abastillas admits, that Mrs. Kam actually returned to Hawai'i and appeared before

¹⁰ This handwritten letter states, in relevant part, as follows:

I know my Constitutional Rights as American born citizen of U.S.A., The Land of The Free and the Brave!

Therefore, I am wherever I am by choice to maintain all such privileges!

I know where and what my assets are and I want to keep them that way!

I called The Social Services to keep my son Edward Jr. away from me; instead, they . . . brought to my Residence a Doctor to examine me without my consent or knowledge! Consequently, I am declared no longer a normal functioning human being!

I am truly forced by these circumstances to stay away. I am extremely distressed by such limitations!

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Judge Bryant. The record does not show that this appearance was a special appearance.

We conclude that the service requirement stated in HRS § 346-231(e) is a notice requirement that can be satisfied by actual knowledge or by a general appearance. In light of the record, we conclude that HRS Chapter 346 provided the family court with jurisdiction to take appropriate action in the Protection Proceedings.

Regarding adjudication, on September 9, 1996, Judge Bryant entered an "Order Appointing Temporary Co-Guardians of the Property and Continuing Existing Orders" stating that the "[t]rial set for September 23 and 24, 1996 is taken off the calendar," and ordering that the "[p]arties shall submit proposed findings within seven days[.]" Smith, as "Party Pro Se" and "Counsel for Paz Abastillas" "refused" to approve this order. However, on October 3, 1996, the court entered a finding that "[a]t the Pretrial Conference held September 9, 1996, the Court was informed that the parties had reached an agreement to settle this case by the entry [of] the Order Appointing Temporary Co-Guardians of the Property and Continuing Existing Orders . . . on the understanding that, while parties [Mrs.] Kam, . . . Smith, and . . . Abastillas would not sign approval as to form or substance, neither would they oppose the entry of the order or protest it once entered." Therefore, Abastillas did not disagree with the settlement. In effect, her non-disagreement is the stipulation referred to in HRS § 346-240(c), and the acceptance

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referred to in HRS § 346-241(e).

Consequently, in light of the following rule of law and subject to one exception to be discussed in the next part, we conclude that Abastillas is bound by Judge Bryant's decisions.

In Doe v. Doe, 99 Hawai'i 1, 52 P.3d 255 (2002), the child's mother filed a petition for paternity against the alleged father. The Hawai'i Supreme Court decided that the doctrine of issue preclusion barred the child's mother from bringing the paternity action because the divorce decree between the mother and her former husband had declared that the child was the son of the mother and her former husband, and the issue of paternity was essential to the portion of the final judgment of divorce that ordered the former husband to make support payments and provided for custody and visitation. The opinion of a majority of the court states, in relevant part, as follows:

Issue preclusion, or collateral estoppel, bars relitigation of an issue where: (1) the issue decided in the prior adjudication is identical to the one presented in the action in question; (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior adjudication. Issue preclusion can be raised defensively by one who was not a party in the prior adjudication.

Pratt v. Pratt, 104 Hawai'i 37, 40, 84 P.3d 545, 547 (Hawai'i App. 2004).

B. Judge Choy's April 22, 1997 Order
Granting Motion to Void [1995 and 1996]
Estate Planning Documents, Filed February 25, 1997
in FC-G No. 96-0299 (Guardianship Proceedings)

Regarding the family court's jurisdiction to enter, in FC-G No. 96-0299 (Guardianship Proceedings), the April 22, 1997 "Order Granting Motion to Void Estate Planning Documents, Filed February 25, 1997", Abastillas argues that the family court is of "limited jurisdiction", does not have the power to probate or void a will, and, therefore, Abastillas was "free to, and did, ignore the motion before Judge Choy because Judge Choy's order was a 'complete nullity'; its defectiveness is not subject to

waiver; and it may be attacked, directly or collaterally, at any time in any court." This argument has merit.

On October 8, 1996, based on the provisions of Hawai'i's Uniform Probate Code, HRS §§ 560:5-101 and -102, the family court appointed Lyle and Dr. Ing as co-guardians of Mrs. Kam's person.

On February 10, 1997, allegedly based on the provisions of Hawai'i's Uniform Probate Code, Lyle and Dr. Ing filed a "Petition for Appointment of Co-Guardians of the Property." On April 22, 1997, Judge Choy entered (1) an "Order Granting Petition for Appointment of Co-Guardians of the Property, Filed February 10, 1997." This order stated that the family court had "jurisdiction pursuant to H.R.S. § 560:5-102" and appointed Lyle and Dr. Ing as "Co-Guardians of the Property of [Mrs.] Kam . . . without bond[,] " and (2) an "Order Granting Motion to Void Estate Planning Documents, Filed February 25, 1997."

In the Guardianship Proceedings, we conclude that: (1) the family court had jurisdiction over the "guardian of the person"; (2) no later than January 1, 1997, the family court did not have jurisdiction over the "guardian of the property"; and (3) HRS Chapter 560, Hawai'i's Uniform Probate Code, did not authorize the family court to enter its two April 22, 1997 orders, and, therefore, those orders are void ab initio.

HRS §§ 560:5-101 and -102 state as follows:

560:5-101 Definitions and use of terms. Unless otherwise apparent from the context, in this chapter:

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(1) "Guardianship proceeding" is a proceeding to appoint a guardian of the person for an incapacitated person or a minor;

. . . .

(3) A "protective proceeding" is a proceeding under the provisions of section 560:5-401 to determine that a person cannot effectively manage or apply the person's estate to necessary ends, either because the person lacks the ability or is otherwise inconvenienced, or because the person is a minor, and to secure administration of the person's estate by a guardian of the property or other appropriate relief;

(4) A "protected person" is a minor or other person for whom a guardian of the property has been appointed or other protective order has been made;

(5) A "ward" is a person for whom a guardian of the person has been appointed. A "minor ward" is a minor for whom a guardian of the person has been appointed solely because of minority.

560:5-102 Jurisdiction of subject matter; consolidation of proceedings. The court has jurisdiction over protective proceedings and the family court has jurisdiction over guardianship proceedings. Where protective and guardianship proceedings relating to the same person have been initiated, they may be consolidated in the court or in the family court as the court and the family court in the exercise of their discretion shall determine.

Prior to January 1, 1997, in HRS § 560:1-201(5), Hawai'i's Uniform Probate Code stated that "'Court' means the circuit court having jurisdiction in matters relating to trusts and the estates of decedents, missing persons, protected persons, minors and incapacitated persons." This definition of "Court" includes both the probate court and the family court.¹¹ It

¹¹ HRS § 571-11 (1993) states, in relevant part, as follows:

Jurisdiction; children. Except as otherwise provided in this chapter, the court shall have exclusive original jurisdiction in proceedings:

- (1) Concerning any person who is alleged to have committed an act prior to achieving eighteen years of age which would constitute a violation or attempted violation of any federal, state, or local law or municipal ordinance. . . .

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allowed the following interpretation of HRS § 560:5-102: "The [probate court and the family court have] jurisdiction over protective proceedings and the family court has jurisdiction over guardianship proceedings."

Commencing January 1, 1997, Hawai'i's Uniform Probate Code states, in HRS § 560:1-201, that "'Court' means the circuit court in this State having jurisdiction in matters relating to the affairs of decedents" and, in HRS § 560:1-302(c), that "[t]he court has jurisdiction over protective proceedings [HRS § 560:5-401] and the family court has jurisdiction over guardianship proceedings." These changes require the following interpretation

-
- (2) Concerning any child living or found within the circuit:
 - (A) Who is neglected as to or deprived of educational services because of the failure of any person or agency to exercise that degree of care for which it is legally responsible;
 - (B) Who is beyond the control of the child's parent or other custodian or whose behavior is injurious to the child's own or others' welfare;
 - (C) Who is neither attending school nor receiving educational services required by law whether through the child's own misbehavior or nonattendance or otherwise; or
 - (D) Who is in violation of curfew.
 - (3) To determine the custody of any child or appoint a guardian of the person of any child.
 -
 - (6) For judicial consent to the marriage, employment, or enlistment of a child, when such consent is required by law.
 - (7) For the treatment or commitment of a mentally defective, mentally retarded, or mentally ill child.
 - (8) Under the Interstate Compact on Juveniles under chapter 582.
 - (9) For the protection of any child under chapter 587.

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of HRS § 560:5-102: "The [probate] court has jurisdiction over protective proceedings [including all proceedings involving a guardian of the property] and the family court has jurisdiction over guardianship [of the person] proceedings."

C. Judge Hirai's Decisions Regarding
Cedric's Petition for Instructions in
P. No. 00-1-0281 (Probate Proceedings)

Abastillas challenges Judge Hirai's (1) September 13, 2002 "Final Judgment Re Order Denying Petition to Vacate . . . Filed January 2, 2002", and (2) September 16, 2002 "Final Judgment Re Order Granting Petition for Instructions . . . Filed January 2, 2002".

As noted previously, the September 16, 2002 judgment states, in relevant part, as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Petition for Instructions, filed herein on October 11, 2000 by Petitioner/Personal Representative Cedric C.I. Kam, shall be and is hereby granted, the Court having determined that the Order Granting Motion to Void Estate Planning Documents filed February 25, 1997, which was entered on April 22, 1997 in FC-G No. 96-0299, in the Family Court of the First Circuit, State of Hawaii, and the Order Granting Petition for Formal Probate of Will and Appointment of Personal Representative filed herein on July 17, 2000, are valid and enforceable and remain in effect.

Abastillas asserts the following points of error:

1. Judge Choy's order was not "valid and enforceable;" rather, it was null and void *ab initio* for lack of subject matter jurisdiction.
2. Judge Bryant lacked personal jurisdiction over Edith.
3. Judge Bryant did not actually adjudicate any issue concerning Edith's testamentary capacity of whether Abastillas unduly influenced Edith to execute her 1996 will, as there was never an adversary, evidentiary hearing in which any fact was tried; instead, the case settled.
4. For these reasons, no "finding" which Judge Bryant made was *res judicata*.
5. There were material issues of fact concerning the issues of testamentary capacity and undue influence which required adjudication by jury trial and prevented summary disposition of this contested matter.

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Judge Hirai made these errors when she denied Abastillas' petition on January 2, 2002.

(Internal citations omitted.)

For two reasons, we conclude that Judge Hirai's two challenged final judgments are wrong.

First, Judge Bryant's October 3, 1996 finding that Mrs. Kam did "not have the capacity to make reasoned decisions concerning her money and properties" is expressly based on Dr. Blanchette's examination of Mrs. Kam on July 18, 1996. Based on Judge Bryant's valid finding, Judge Choy decided that various "estate planning documents executed by [Mrs.] Kam be and are hereby declared null and void[.]" The first of those documents is dated July 7, 1995, and the last is dated May 24, 1996. All of these documents were executed prior to Dr. Blanchette's examination of Mrs. Kam on July 18, 1996. Admittedly, the record indicates that Mrs. Kam showed signs of Alzheimer's no later than April of 1996. Dr. Vit Patel, who made this diagnosis based upon an April 19, 1996 interview, stated that "[c]oncerns this examiner would have is essentially need for immediate protection of patient's property and financial resources to which is most vulnerable for exploitation because of her significant and clear dementia." Judge Bryant did not, however, find that Mrs. Kam did "not have the capacity to make reasoned decisions concerning her money and properties" when she executed the documents declared null and void by Judge Choy's April 22, 1997 order.

Second, no later than January 1, 1997, the family court did not have jurisdiction over the "guardian of the property",

and HRS Chapter 560, Hawai'i's Uniform Probate Code, as amended effective January 1, 1997, did not authorize the family court to enter the two April 22, 1997 orders in the Guardianship Proceedings.

D. Creditor's Claims of Abastillas and Smith
in the Probate Proceedings

In challenging the September 13, 2002 "Final Judgment Re Order Denying Petition for Allowance . . . Filed November 8, 2000", Appellants argue that:

1. The probate court erred when it did not follow H.R.S. § 560:3-804 and Probate Rule 63 by holding that Creditors should have filed all their documentary proof with their petition.¹² The

¹² HRS § 560:3-804 (Supp. 2003) states as follows:

Manner of presentation of claims. Claims against a decedent's estate may be presented as follows:

- (1) The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made;
- (2) The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of the claimant's claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of the decedent's death;
- (3) If a claim is presented under [paragraph] (1), no proceeding thereon may be commenced more than sixty days after the personal representative has [mailed] a

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probate court made this error at the October 20 hearing, when, as earlier quoted, it stated that it would disregard Creditors' reply as "untimely" because the exhibits attached to the reply should have been part of Creditors' petition. Creditors cited H.R.S. § 560:3-804 both in their creditors' claims and in their petition. The point was not specifically called to the attention of the probate court during oral argument, as Creditor's were surprised by the probate court's position.

2. The probate court also erred when it held the reply "untimely," failed to follow Probate Rules 19 and 20, and summarily denied Creditors' petition without treating it as a contested matter. The probate court made these errors at the October 20, 2000, hearing, when, as quoted above, it stated that Creditors' reply was "untimely," then ignored the rules and procedures for handling a "contested matter," and denied Creditors' petition summarily without considering its merits at a deferred and rescheduled hearing. Creditors pointed these errors out to the probate court and objected thereto in their memorandum of law in support of their reply[.] . . . Creditors further stated that

Probate Rule 19 defines "a contested matter" as "any one in which an objection has been filed." Under Probate Rule 20(a), the Court 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 this rule states in paragraph (a) that ". . . the court will assign to civil trials the more complex and time consuming cases" This commentary further states in paragraph (b) that ". . . the court may use as a

notice of disallowance; but, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the sixty-day period, or to avoid injustice the court, on petition, may order an extension of the sixty-day period, but in no event shall the extension run beyond the applicable statute of limitations.

Hawai'i Probate Rule 63 states that "[a] creditor seeking payment from the deceased shall present a claim by (a) delivering the claim, with an affidavit in support thereof, to the personal representative, or (b) filing the claim and affidavit with the court and timely serving a copy of the claim to the personal representative." In the Commentary to Rule 63, it states, "This rule explains the two methods by which a claim may be presented to the personal representative under HRS § 560:3-805(1). Although presenting the claim to the personal representative directly is preferred, there may be times when filing with the court is necessary." The relevant commentary that Abastillas cites to, including its context states that,

If a claim is presented directly to the personal representative, the claimant may file a proof of service to establish a record of when the claim was presented. Claims are by and large administrative matters, and the courts prefer to have as little paperwork in the probate files as possible. Therefore, an attempt is made in this rule to keep any court-filed documents with respect to presenting a claim as minimal as possible by not requiring that all supporting documentation be attached, but only that the claim be supported by affidavit. This rule does not prohibit the pursuit of claims by any other legal method.

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guideline . . . the expected length of the hearing and whether it will take more than half a day.["]

(Footnote added.)

The events relevant to this point on appeal occurred as follows:

On July 3, 1996, in the Protection Proceedings, Judge Bryant entered an "Order Granting Motion to Compel Disclosure and to Disqualify Counsel, and Denying Motion to Dissolve Order for Immediate Protection, Vacate Appointment of Temporary Guardian, and Dismiss Petition for Protection".

On Monday, September 11, 2000, at 11:03 a.m., Appellants filed the Petition for Allowance. Abastillas sought "\$42,000.00 together with interest thereon at the rate of 10% per annum from May 3, 1996, plus attorney's fees as allowed by law for professional services rendered including but not limited to services of personal friend and companion and financial affairs manager[.]" This request was for services "[f]rom June 1995 through July 1996[.]" Smith sought "\$25,851.83, together with interest thereon at the rate of 12% per annum from 10/1/96, plus attorney's fees as provided by agreement and as allowed by law for professional services rendered and costs incurred, in accordance with the billings attached hereto as Exhibits A and B[.]" This request noted that Smith had been paid for his services prior to June 1996. For June 1996, he sought a total of \$13,077.19 (\$379.24 costs, \$12,190 fees, and \$507.95 state excise tax). For July, he sought a total of \$12,774.64 (\$1,425.65 costs, \$10,895 fees, and \$453.99 state excise tax).

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On September 11, 2000, at 11:05 a.m., Appellants filed an "Order Setting Time and Place of Hearing on Petitioners' Petition for Allowance" This order scheduled the hearing to be held on Friday, October 20, 2000, at 9:00 a.m. At that time, HPR Rule 10(c) stated, in relevant part, as follows:¹³

(c) Time to File Pleadings or Reports. A party objecting or responding to a petition must file the objection or response with the court and served it on interested persons within 30 days of service of the petition and notice of hearing, Unless otherwise ordered by the court, pleadings in response to a response or objection, . . . shall be filed with the court and served on counsel for parties who have appeared in the proceeding no less than 72 hours prior to the time set for the hearing as originally set[.]

On Wednesday, October 11, 2000, the 30th day after Appellants filed their Petition for Allowance, Cedric filed his "Objection to Petition for Allowance . . . Filed September 11, 2000." The certificate of service states that a copy of this objection was "duly mailed, postage prepaid" to the attorney for Appellants on October 10, 2000.

On Tuesday, October 17, 2000, HPR Rule 10(c)'s "72 hours prior to the time set for the hearing" occurred at 9:00 a.m. Prior to the hearing on October 20, 2000, Appellants did not ask the court for additional time to respond to Cedric's objection.

On Thursday, October 19, 2000, at 4:21 p.m., Appellants filed their "Creditors' Reply to Objection Filed 10/11/00 by Personal Representative to Creditors' Petition Filed 9/11/00 for Allowance of Creditors' Claims." It states in its first

¹³ HPR Rule 10(c) was substantively amended effective July 1, 2003. As amended, it is silent with respect to "pleadings in response to a response or objection".

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paragraph:

Creditors apologize to the Court for the lateness of this filing; but they point out that the Personal Representative's Objection was filed and served only last Wednesday, October 11. Creditors have thus had only a little over five working days to put together this Reply.

At the October 20, 2000 hearing, Judge Chang stated, in relevant part, as follows:

THE COURT: Before the court this morning is a petition to allow for certain claims being asserted by . . . Abastillas and . . . Smith. The court first finds that the reply filed on October 19th at 4:21 in the afternoon is untimely.

The court further examining this document notes that there are 28 exhibits attached as part of this reply memo. These exhibits certainly should have been attached as part of the original petition, The court finding that this document is untimely filed disregards and does not consider it in connection with the petition filed on behalf of Abastillas and Smith.

Having reviewed the timely filed and properly submitted matters presented to the court, the court finds simply that the petitioners in this case, Abastillas and Smith, have failed to establish factual and/or legal basis which would warrant their entitlement for payment of claims as requested or alleged. The petition is denied.

In light of the record prior to the September 11, 2000 petition, especially given the actions by the family court and the probate court, we conclude that (1) Appellants knew or should have known the various burdens they would face when they asserted their claims for costs, fees, and state excise taxes, and should have confronted and satisfied those burdens in their September 11, 2000 petition; (2) when the October 20, 2000 hearing was scheduled, Appellants knew or should have known that if Cedric used all of the 30 days permitted for him to file his objection, Appellants would not have much time to timely file a reply to Cedric's objection which was no less than 72 hours before the hearing; (3) the court did not consider Appellants'

reply because it was not timely filed; (4) the court's decision that much of what the reply said should have been said in the original petition was only one of the reasons why the court did not excuse the untimely filing; (5) the applicable standard of review is the abuse of discretion standard; (6) an abuse of discretion occurs if the trial court has "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant[,]" Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992) (citation omitted); and (7) the court did not abuse its discretion.

Abastillas further argues that the September 11, 2000 petition is a "contested matter" and as such, the court should have deferred it for a rescheduled hearing pursuant to HPR Rules 19 and 20. HPR Rule 19 defines a "contested matter" as "one in which an objection has been filed."¹⁴ HPR Rule 20 states how the court should dispose of "contested matters":

RULE 20. Disposition of contested matters.

(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.

¹⁴ The commentary to Hawai'i Probate Rule 19 states that

This rule sets the stage for the rules that follow. Of importance is the recognition that a contested issue can be separated from the normal progress of the estate, guardianship, or trust, and dealt with separately, while normal uncontested matters may continue to be addressed in normal course while the contested issue is resolved. In this way, a proceeding is not completely put on hold because of a dispute about one issue.

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(b) Guideline for Assignment. 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. When the court assigns a contested matter to either calendar, the court may set a status conference date, which the court clerk will note in the order assigning the contested matter, or in a separate status conference order.

(c) Effect of Assignment to Civil Trials Calendar. The Hawai'i Rules of Civil Procedure and the Rules of the Circuit Courts will apply to all contested matters assigned to the civil trials calendar. However, no right to jury trial shall be created by assignment to the civil trials calendar where such a right does not exist in the underlying proceeding. When a matter is assigned to the civil trials calendar, then for all procedural purposes, the party objecting to the petition shall be considered the plaintiff, the objection is to be treated as a complaint, and the complaint shall be deemed to have been filed on the date of the assignment to the civil trials calendar.

(d) Procedures in Retained Contested Matters. Whenever the 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.

(e) Effect on Underlying Matter. The designation of an issue as a contested matter and the assignment thereof to the civil trials calendar or the probate calendar shall not affect the underlying proceeding, and the proceeding shall continue to the extent that such administration is not inconsistent with the issues being contested.

(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.

We agree with Abastillas that the creditor's claim in the Petition for Allowance became a "contested matter" when Cedric filed an objection to it. It was within Judge Chang's discretion to retain the matter or assign it to the civil trials calendar. Abastillas argues that Judge Chang abused his discretion because he "failed to make the order of assignment[.]" Essentially, Abastillas is arguing that the creditors' claim is a "complex and time consuming" case that HPR Rule 20 required Judge

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Chang to assign to the civil court. Abastillas fails to appreciate HPR Rule 20's use of the word "may". Assuming the creditors' claim in this case was a "complex and time consuming" case, it was within Judge Chang's discretion to retain it and not assign it to the civil court.

Mrs. Kam showed signs of Alzheimer no later than April of 1996. Dr. Vit Patel, who made this diagnosis based upon an April 19, 1996 interview, stated that "[c]oncerns this examiner would have is essentially need for immediate protection of patient's property and financial resources to which is most vulnerable for exploitation because of her significant and clear dementia." Dr. Blanchette's diagnosis in August of 1996 confirmed that Mrs. Kam "is sufficiently impaired so that she lacks the capacity to make and communicate decisions concerning her person." Smith's creditor claims cover his billing for legal fees dating from June 1996 to July 1996.¹⁵ Essentially, Smith is claiming attorney fees for work completed on behalf of Mrs. Kam during a time when, according to the record, Mrs. Kam did not have the mental capacity to manage her own financial affairs. Moreover, Smith was expressly disqualified as attorney for Mrs. Kam by court order on July 3, 1996.

¹⁵ Smith alleged that after he was paid \$11,203.54 on June 7, 1996, he was owed the following:

Total Costs, Fees and Excise Taxes All Cases

Billing Period - June 1996	\$13,077.19
Billing Period - July 1996	<u>\$12,774.64</u>
Total	\$25,851.83

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Abastillas asserts the following claim:

2. From June 1995 through July 1996, at the request of decedent, I rendered professional services to her, including but not limited to services of personal friend and companion and financial affairs manager.

3. These services were of the reasonable value of \$42,000.00, and decedent agreed to pay this sum to me.

4. There is justly due, owing, and unpaid from decedent to me the sum of \$42,000.00, together with interest thereon at the rate of 10% per annum from May 3, 1996, together with attorney's fees as allowed by law.

This claim suffers from the following deficiencies.

First, Abastillas does not explain why, for services "[f]rom June 1995 through July 1996[,] " an interest charge of 10% per annum commences on May 3, 1996. Second, the record contains evidence supporting rejection of a claim for services after April 18, 1996. Third, Abastillas failed to satisfactorily respond to the evidence that during the six months after Abastillas became a "friend" to Mrs. Kam, changes were made to Mrs. Kam's estate plan including the following: a revocable living trust naming Abastillas as successor trustee; a Revocation of Durable Power of Attorney revoking the appointment of her nephew as her attorney-in-fact and executing a new Durable Power of Attorney naming Paz F. Abastillas as her attorney-in fact; the revocation of the Edith I. Kam Revocable Trust executed on September 8, 1988 and the new Edith I. Kam Revocable living trust naming Abastillas as successor trustee and Abastillas' daughters as next successor trustees; and the naming of Abastillas, her daughters, and a to-be-formed non-profit organization to be run by Abastillas as beneficiaries of this trust. Fourth, without more details, this claim is insufficient to support favorable action by the court.

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Abastillas argues that even if it was within Judge Chang's discretion to retain the case, the hearing should have been deferred and rescheduled for a later date. She contends that "[a]t the rescheduled hearing, the probate court could then have considered Creditors' reply and its exhibits and memorandum of law." In light of the record, we conclude that the court did not abuse its discretion in deciding not to consider the reply.

Nevertheless, in light of our decision vacating the final judgments pertaining to the probate of the will and the petition for instructions, we also vacate the final judgment pertaining to Appellants' creditor's claims.

CONCLUSION

We vacate (1) the September 13, 2002 "Final Judgment Re Order Denying Petition to Vacate Previous Order for Probate of Will, to Redetermine Heirship, for Formal Probate of Will, and for Formal Appointment of Personal Representative Filed November 2, 2000, Filed January 2, 2002"; (2) the September 16, 2002 "Final Judgment Re Order Granting Petition for Instructions Filed October 11, 2000, Filed January 2, 2002"; and (3) the September 13, 2002 "Final Judgment Re Order Denying Petition for Allowance of and to Enforce and Obtain Payment on Creditors' Claims Filed September 11, 2000, Filed November 8, 2000."

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We remand for further proceedings in the light of, and consistent with, this opinion.

DATED: Honolulu, Hawai'i, August 8, 2005.

On the briefs:

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for Appellee.

James A. Burns
Chief Judge

Corinne K. Utanaka
Associate Judge

Daniel R. Foley
Associate Judge