

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28147

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

Probate No. 6664

IN THE MATTER OF THE ESTATE OF
SAMUEL M. DAMON, Deceased

Equity No. 2816-A

TRUST CREATED UNDER THE WILL OF
SAMUEL MILLS DAMON, Deceased

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2006 DEC 22 AM 9:46

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

ORDER GRANTING THE NOVEMBER 22, 2006
MOTION TO DISMISS THE APPEAL

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

Upon review of (1) Petitioners-Appellees Trustees David M. Haig, Fred C. Weyand, Paul Mullin Ganley, and Walter Dods, Jr.'s (the Appellee Trustees), November 22, 2006 motion to dismiss Respondent-Appellant Christopher Damon Haig's (Appellant Haig) appeal, (2) Appellant Haig's November 30, 2006 memorandum in opposition to the Appellee Trustees' November 22, 2006 motion to dismiss, and (3) the record, it appears that Appellant Haig's appeal is untimely, and, thus, subject to dismissal.

Rule 34(a) of the Hawai'i Probate Rules (HPR) authorizes appeals from a final probate court judgment, as provided by statute, when the judgment is certified for appeal in the manner provided by Rule 54(b) of the Hawai'i Rules of Civil

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Procedure (HRCP). HRS § 641-1(a) (Supp. 2005) authorizes appeals from final judgments, orders, or decrees.

Pursuant to HRS § 641-1(a)(1993), appeals are allowed in civil matters from all final judgments, orders, or decrees of circuit and district courts. . . . When a written judgment, order, or decree ends the litigation by fully deciding all rights and liabilities of all parties, leaving nothing further to be adjudicated, the judgment, order, or decree is final and appealable.

Casumpang v. ILWU, Local 142, 91 Hawai'i 425, 426, 984 P.2d 1251, 1252 (1999) (citations and footnote omitted).

Appellant Haig has attempted to appeal from the following five orders and judgments:

- (1) an April 11, 2006 order granting the Appellee Trustees' petition for approval of post-termination distributions, actions and plans;
- (2) an April 11, 2006 order granting the Appellee Trustees' petition for approval of 2004 income and principal accounts excluding post-termination distributions;
- (3) an April 11, 2006 HPR Rule 34(a) judgment on the order granting the Appellee Trustees' petition for approval of post-termination distributions, actions and plans;
- (4) an April 11, 2006 HPR Rule 34(a) judgment on the order granting the Appellee Trustees' petition for approval of 2004 income and principal accounts excluding post-termination distributions; and
- (5) an August 16, 2006 order denying Appellant Haig's HPR Rule 36 motion for reconsideration.

The two April 11, 2006 orders were not independently appealable orders because they did not end their respective proceedings. However, the two April 11, 2006 judgments adjudicated all of the issues of the Appellee Trustees' corresponding petitions, and two April 11, 2006 judgments were certified for appeal in the manner provided by HRCF Rule 54(b). The two April 11, 2006 judgments ended the proceedings for the two petitions, leaving nothing further to be adjudicated. Therefore, the two April 11, 2006 judgments were final appealable judgments under HPR Rule 34(a) and HRS § 641-1(a) (Supp. 2005).

However, Appellant Haig did not file his September 13, 2006 notice of appeal within thirty days after entry of the two April 11, 2006 judgments, as Rule 4(a)(1) of the Hawai'i Rules of Appellate Procedure (HRAP) required. Pursuant to HRAP Rule 4(a)(3), Appellant Haig extended the time period for filing a notice of appeal by filing his April 21, 2006 HPR Rule 36(b) motion for reconsideration within ten days after entry of the two April 11, 2006 judgments. However, the circuit court did not adjudicate this motion within ninety days after the filing date of Appellant Haig's April 21, 2006 HPR Rule 36(b) motion for reconsideration, and, thus, Appellant Haig's April 21, 2006 HPR Rule 36(b) motion for reconsideration was deemed denied under HRAP Rule 4(a)(3) at the close of the business day on July 20, 2006. Appellant Haig did not file his September 13, 2006 notice of appeal within thirty days after July 20, 2006, as HRAP

Rule 4(a)(3) required. Therefore, Appellant Haig's appeal is not timely.

Although the circuit court, the Honorable Colleen K. Hirai presiding, later entered a separate written order written order, on August 16, 2006, that purported to deny Appellant Haig's April 21, 2006 HPR Rule 36(b) motion for reconsideration, Appellant Haig's April 21, 2006 HPR Rule 36(b) motion for reconsideration had already been deemed denied under HRAP Rule 4(a)(3) at the close of the business day on July 20, 2006. The August 16, 2006 written order that purported to deny Appellant Haig's April 21, 2006 HPR Rule 36(b) motion for reconsideration was a nullity, and, thus, not an independently appealable post-judgment order.

The failure to file a timely notice of appeal in a civil matter is a jurisdictional defect that the parties cannot waive and the appellate courts cannot disregard in the exercise of judicial discretion. Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1128 (1986); HRAP Rule 26(b) ("[N]o court or judge or justice thereof is authorized to change the jurisdictional requirements contained in Rule 4 of [the HRAP]."). Therefore, we not have jurisdiction over Appellant Haig's appeal. Accordingly,

IT IS HEREBY ORDERED that the Appellee Trustees'

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November 22, 2006 motion to dismiss this appeal is granted, and this appeal is dismissed for lack of jurisdiction.

DATED: Honolulu, Hawai'i, December 22, 2006.

James A. Burns
Chief Judge

Corinne K. A. Watanebe
Associate Judge

Daniel R. Foley
Associate Judge