NO. 29173

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

In the Matter of the JACK WONG YUEN and LEI YOUNG WONG YUEN REVOCABLE LIVING TRUST dated April 22, 1996

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(TRUST NOS. 06-1-0019; 07-1-0001 and 07-1-0003 (HILO))

ORDER DENYING THE OCTOBER 27, 2008 MOTION
TO DISMISS THIS APPEAL FOR LACK OF JURISDICTION
(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

Upon review of (1) Respondents-Appellees Jarrett N. Wong, Jamie S. Wong, Jace T. Wong and Jacelyn Wong's (the Wong Appellees) October 27, 2008 motion to dismiss Petitioner-Appellant Frances Kailieha's (Appellant Kailieha) appeal as untimely, (2) Appellant Kailieha's November 5, 2008 (filed ex officio on November 3, 2008) memorandum in opposition to the Wong Appellees' October 27, 2008 motion to dismiss, and (3) the record, we decline to dismiss this appeal as untimely.

Appellant Kailieha is appealing pursuant to Hawaii Revised Statues (HRS) § 641-1(a) (1993 & Supp. 2007) and Rule 34 of the Hawai'i Probate Rules (HPR). Rule 4 of the Hawai'i Rules of Appellate Procedure (HRAP) governs the time limit for filing a notice of appeal. Appellant Kailieha filed her May 19, 2008 notice of appeal prior to entry of the July 9, 2008 judgment. HRAP Rule 4(a)(2) provides that, "[i]f a notice of appeal is filed after announcement of a decision but before entry of the judgment or order, such notice shall be considered as filed immediately after the time the judgment or order becomes final for the purpose of appeal." HRAP Rule 4(a)(2). The Wong

Appellees argue that HRAP Rule 4(a)(2) does not authorize Appellant Kailieha's appeal from the July 9, 2008 judgment, because Appellant Kailieha's premature May 19, 2008 notice of appeal referred to the following two orders instead of an appealable judgment:

> (1) a May 2, 2008 "Order Granting in Part Motion to Enforce Settlement Agreement or, in the Alternative, to Grant Petition and Complaint to Compel Accounting, to Compel Distribution of the Trust Estate, to Remove and Surcharge Trustee, and to Appoint Successor Trustee, Filed February 5, 2008" (the May 2, 2008 order); and
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> (2) a February 6, 2008 "Order Granting Respondents Jarrett N. Wong, Jamie S. Wong, Jace T. Wong and Jacelyn Wong's Motion for Summary Judgment, Filed November 30, 2007" (the February 6, 2008 order).

In support of their argument for dismissal, the Wong Appellees cite a published opinion in which the intermediate court of appeals held that, where a plaintiff filed a notice of appeal from an interlocutory order that "was not final or appealable upon its entry," the rule authorizing premature appeals, "HRAP Rule 4(a)(2)[,] does not permit Plaintiff's March 3, 1992 Notice of Appeal to serve as an effective notice of appeal from the subsequently entered July 24, 1992 Amended Final Judgment." Wong v. Takeuchi, 83 Hawaiʻi 94, 101-02, 924 P.2d 588, 595-96 (App. 1996).

However, the instant case is distinguishable from Wong, because the May 2, 2008 order was arguably appealable upon its entry under the Forgay doctrine in that the May 2, 2008 order expressly ordered Respondent-Appellee Moira Kelekolio-Bright to distribute the trust estate to, among other people, Appellant Kailieha's adversaries, the Wong Appellees, which, in turn,

arguably subjected Appellant Kailieha to irreparable injury if appellate review had to wait the final outcome of the litigation. See Ciesla v. Reddish, 78 Hawai'i 18, 20, 889 P.2d 702, 704 (1995) (explaining the two requirements for invoking the Forgay doctrine).[1] In contrast, the appealed order in Wong was not appealable under the Forgay doctrine because, among other things, the order "did not authorize immediate execution of a command that Plaintiff deliver property to another, thus subjecting Plaintiff to irreparable injury." Wong, 83 Hawai'i at 99, 924 P.2d at 593 (emphasis added). As the Wong court noted, the federal counterpart to HRAP Rule 4(a)(2), i.e., "FRAP Rule 4(a)(2)[,] was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment." Wong 83 Hawai'i at 101, 924 P.2d at 595 (citation, internal quotation marks and original brackets omitted). At a minimum, Appellant Kailieha could have reasonably believed that the May 2, 2008 order was appealable under the Forgay doctrine, and, thus, HRAP

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[1] The Forgay doctrine is based on the United States Supreme Court's holding in Forgay v. Conrad, 47 U.S. 201 (1848). The Supreme Court of Hawai'i has acknowledged the Forgay doctrine as "allow[ing] an appellant to immediately appeal a judgment for execution upon property, even if all claims of the parties have not been finally resolved." Ciesla, 78 Hawai'i at 20, 889 P.2d at 704 (1995). Under the Forgay doctrine, the appellate courts "have jurisdiction to consider appeals from judgments which [1] require immediate execution of a command that property be delivered to the appellant's adversary, and [2] the losing party would be subjected to irreparable injury if appellate review had to wait the final outcome of the litigation." Id. (citations, internal quotation marks omitted; some brackets omitted, some brackets added). Thus, in an appeal from a summary possession case, where a district court entered a judgment for possession that did not, resolve an outstanding counterclaim in the case, the Supreme Court of Hawai'i held that "the judgment for possession was a judgment immediately appealable under the Forgay doctrine." Id.

Rule 4(a)(2) appears to apply to Appellant Kailieha's premature May 19, 2008 notice of appeal and the subsequent July 9, 2008 judgment.

Additionally, the record indicates that when Appellant Kailieha filed her May 19, 2008 notice of appeal, the parties anticipated that the probate court would soon reduce the two appealed orders to an appealable final judgment. For example, within the May 19, 2008 notice of appeal, Appellant Kailieha explained that she was in the process of requesting the circuit court to reduce both of the appealed orders to an appealable final judgment in the manner provided in Rule 54(b) of the Hawai'i Rules of Appellate Procedure. Furthermore, just three days later, on May 22, 2008, the Wong Appellees submitted to the probate court a proposed final judgment resolving all claims that the probate court eventually approved and entered as the final judgment on July 9, 2008. Although Appellant Kailieha's May 19, 2008 notice of appeal referred to the May 2, 2008 order and the February 6, 2008 order rather than the July 9, 2008 judgment, both orders contained dispositive rulings, and Hawai'i appellate courts have consistently held that, "a mistake in designating the judgment . . . should not result in [the] loss of the appeal as long as the intention to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake." State v. Graybeard, 93 Hawai'i 513, 516, 6 P.3d 385, 388 (App. 2000) (internal quotation marks omitted) (quoting City & County v. Midkiff, 57 Haw. 273, 275-76, 554 P.2d 233, 235 (1976) (quoting 9 Moore's Federal Practice § 203.18 (1975))); see

also Ek v. Boggs, 102 Hawai'i 289, 294, 75 P.3d 1180, 1185 (2003); In re Brandon, 113 Hawai'i 154, 155, 149 P.3d 806, 807 (App. 2006). Under the circumstances of this case, one could reasonably infer that Appellant Kailieha intended to appeal from a final judgment that incorporated all of the dispositive rulings and resolved all of the claims. Therefore, HRAP Rule 4(a)(2) appears to authorize Appellant Kailieha's premature May 19, 2008 notice of appeal as a timely appeal from the July 9, 2008 judgment, and we have appellate jurisdiction over this case. Accordingly,

IT IS HEREBY ORDERED that the Wong Appellees' October 27, 2008 motion to dismiss this appeal as untimely is denied.

DATED: Honolulu, Hawai'i, November 18, 2008.

Presiding Judge

Associate Judge

Associate Judge