NOT FOR PUBLICATION

NO. 25760

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

JOHN DOE, Plaintiff-Appellee

vs.

JANE DOE, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 95-2875)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ., and Circuit Judge Raffetto, in Place of Duffy, J., Recused)

Defendant-Appellant Jane Doe (Wife)[1] appeals from (1) the March 11, 2003 Stipulated Order resolving issues raised in the December 24, 2001 motion for post-decree relief filed by Plaintiff-Appellee John Doe (Husband) and Wife's January 22, 2002 affidavit in opposition thereto and other issues pending in other courts (Stipulated Order), filed in the family court of the first circuit[2] (the court); and (2) the April 23, 2003 order denying Wife's March 11, 2003 motion for reconsideration of the Stipulated Order.

[1] For purposes of preserving confidentiality, Defendant-Appellant is referred to as "Wife," Plaintiff-Appellee is referred to as "Husband," and the couple's child is referred to as "Daughter." The trust created for Daughter's benefit is referred to as "the Mary Roe Trust."

[2] The Honorable Allene Suemori presided.

I.

Husband and Wife were married in 1983 and divorced in 1996. Their sole child (Daughter) was born on June 9, 1992. The present litigation began on August 2, 1995, when Husband filed a complaint for divorce against Wife in the family court. On July 17, 1996, the parties reached an agreement regarding custody and visitation. The parties memorialized their agreement in an "Agreement Incident to Divorce Re: Custody and Visitation." A week later, on July 23, 1996, the parties reached an agreement regarding property division and other financial issues. The agreement was set forth in an "Agreement Incident to Divorce." On July 24, 1996, the family court filed an uncontested divorce decree resolving all issues.[3] Wife was awarded sole legal and physical custody of Daughter, with reasonable visitation by Husband.

In 1999, the parties agreed to custody modification to allow for joint legal and physical custody. Two years later, on December 24, 2001, Husband filed a motion for post-decree relief, seeking sole legal and physical custody of Daughter. Wife opposed the motion and sought sole legal and physical custody. Trial was scheduled for October 15, 2002.

II.

In July 2001, the parties began a series of settlement negotiations with their attorneys, at times in the presence of a

[3] The Honorable Darryl Choy presided.

"custody evaluator," Linda Martel. The parties filed at least two sets of settlement conference statements. On October 9 and 10, 2002, Husband presented Wife and the court with a written offer outlining his desired settlement terms.

On October 11, 2002, the parties met with the court to place a settlement agreement on the record. Both parties were sworn in at the beginning of the proceeding. Next, the court confirmed with the parties' attorneys that they had reached a "resolution and agreement . . . as to all the details[.]" The court thanked the parties for reaching a resolution, despite the "emotional and spiritual beatings[.]" The court stated its hope that "this agreement may very well, and I'm hoping it probably will, resolve your problems for the minority of your daughter."

Husband's attorney, Mr. Kleintop (Kleintop), began by stating the terms of the agreement. After laying out custodial matters he proceeded to discuss financial matters relevant to the settlement. He declared that "[t]here are two pending appeals at the –- either the supreme court or the intermediate court of appeals. These are two appeals brought by [Husband] from family court decisions. Those appeals will be withdrawn and dismissed as part of this settlement."

Referring to a pending probate court case, Kleintop added that

> [t]here is a matter pending at probate court also. And the parties have agreed to resolve that issue by joining in a joint application to the probate court asking that the $55,000 surcharge imposed by that court against [Wife] be set aside. And that the $17,000 master's fee that was

> assessed against [Wife] be paid not by [Wife] but by the [Mary Roe] trust.[4]
>
> Now, I understand also that [Wife] has taken appeals from these two decisions so by doing this that appeal will be rendered moot and will be able to be withdrawn also.

(Emphases added.) Husband's attorney related that, "[w]ith respect to each –- the balance of each party's attorney's fees and cost, each party will pay his or her own –- the balance of his or her own attorney's fees and costs." In ending, Kleintop said:

> MR. KLEINTOP: And that, I believe, is our global settlement of the issues that were scheduled for hearing in the upcoming trial.
>
> THE COURT: Mr. Lebb.
>
> MR. LEBB: Yes. I have a few additional items or items of clarification.

Following Kleintop's statement, Wife's attorney, Mr. Lebb (Lebb), proceeded with items of clarification. The bulk of this clarification was a discussion of the hours to be spent with Daughter on particular days, most notably Mother's Day and Father's Day.

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[4] By its description, the probate court case involved the Mary Roe Trust involved in the appeal filed in S.Ct. No. 24967.

The Mary Roe Trust, created in 1992 by Husband, gave Wife, as trustee, powers to determine what distributions could be made on [Daughter's] behalf, as well as when the distributions would occur. Wife's right to payments from the Trust was considered in the computation of Father's child support obligations in the 1996 divorce decree. Pursuant to Article 1-4.1 of the Mary Roe Trust, the trustee has the right to make "discretionary distributions" for "the benefit of [Daughter]" of "so much of the income or the principal, or both, of the trust estate, as the trustee, in its sole discretion, shall deem necessary or advisable for her health, support, maintenance and education." The language of the trust agreement itself makes clear that the trustee is free to use the income of the estate for Daughter's well-being. "The trustee may, but is not required to, take into consideration any other assets available to the beneficiary for such purposes." "The settlor grants to the trustee discretion and complete power to administer the trust estate." Additionally, according to Article 1-4.1, "[u]nless in conflict with applicable law, the trust shall be administered free from active supervision of any court." "This agreement and the trust hereby created are irrevocable [and] settlor reserves no right, power or privilege to alter or amend the same."

After the statements by both parties' attorneys, the court directly addressed the parties and asked if either had questions:

> THE COURT: Okay. I think if we have covered everything -- kind of -- and I think we have, [Wife] and [Husband], do you have any further questions you would like to first address to your counsel?"
> [WIFE]: No.
> [HUSBAND]: No.

(Emphases added.) Because it was evident that both parties had nothing further to say, the court asked who would be drafting the order. Kleintop agreed to do so.

On December 13, 2002, a conference was held with the court. Because the December 13 conference was not recorded, it is unclear what was discussed. However, the minutes indicate that the parties' attorneys and the custody evaluator were in attendance. The conference was rescheduled three times and was eventually held on February 3, 2003.

On January 24, 2003, Wife filed an "Affidavit of [Wife]; Proposed Stipulated Order," objecting to the proposed settlement.

III.

On February 3, 2003, the court held an off-the-record conference with counsel only. Following the conference on the same day, a hearing regarding the disputed terms was held.[5] The court stated, "[T]he issue of some concern regarding the settlement provisions is what the parties had agreed to regarding

[5] The court also considered Lebb's motion to withdraw as counsel and granted it, conditioned on the signing of the Stipulated Order.

the appeals." In addition to the appeal provision, Wife objected to a provision requiring an amendment of the Trust agreement[6] with regard to housing and Wife's right to Trust distributions.

The court indicated that the parties "weren't into restricting the trustee or limiting or expanding things" at the October 11 hearing. According to the court, "the order or the petition of the document drafted by Miss Griswold, [(Husband's probate court attorney),] is not acceptable to the court" and "it need[ed] to be redrafted to reflect that agreement." Lebb agreed, indicating that "[t]hat was not part of the agreement on October 11."

Kleintop acknowledged that the order had some "additional terms that we went over in our court conference in December[.]" He further added that, "I think you will find that the additional provisions that <u>weren't stated on the record</u> are totally consistent with the terms of the settlement stated on the record." (Emphasis added.) Because the December court conference was unrecorded, it is unclear whether or not the disputed provisions were to be added in order to "capture the spirit" of the October 11, 2002 agreement. In any case, the court remained silent while Kleintop discussed the provisions, neither agreeing with nor denying his assertions.

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[6] The proposed amendment stated that "the assets of the [Mary Roe] Trust shall not be used for any expenses related to providing housing for [Daughter]," and that "the trustee shall take into consideration all other assets available to [Daughter] . . . before making any distributions to or on behalf of [Daughter]."

Wife repeatedly attempted to testify about the disputed provisions at the February hearing. She addressed the court, asking, "May I testify and go on record at some point during this hearing?" The court denied Wife's request and explained that

> [t]his is not a hearing in the sense of an evidentiary hearing. There was – something went on on October 11th. All I'm trying to get to was whether or not there was or wasn't something that happened on October 11th. Your intention, side bars, or anything have nothing to do with what happened on October 11th.

(Emphasis added.) Although the parties were permitted to file comments about the disputed settlement agreement, the court refrained from conducting an evidentiary hearing. At the end of the hearing, the court requested proposed stipulated orders from both parties. Husband resubmitted his stipulated order and attachments with no additional changes.

On February 24, 2003, Lebb filed an "Affidavit of Edward R. Lebb," addressing Husband's resubmitted order. Lebb attached several documents to the affidavit, including the written settlement offer from Husband that was used by the court during the October 8-11, 2002 settlement negotiations. According to Wife, the settlement offer "state[d] nothing about fees in the [sur]name appeal,[7] Mother's trusteeship, Mother's probate appeal, or the modification of trustee duties."

The court declined to rule on Wife's objections and on March 11, 2003, signed Husband's resubmitted Stipulated Order.

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[7] The "surname appeal" apparently referred to the appeal in S.Ct. No. 23378. See discussion infra.

Wife refused to sign the Stipulated Order. On March 19, 2003, Wife filed a motion for reconsideration of the March 11, 2003 Stipulated Order, stating that she never agreed to drop the probate appeal.

On April 10, 2003, Wife filed a notice of appeal from the March 11, 2003 Stipulated Order, although reconsideration had not yet been denied.

On April 23, 2003, the court executed and filed an order denying Wife's motion for reconsideration.

On May 1, 2003, Wife filed an amended notice of appeal, from both the March 11, 2003, Stipulated Order and the April 23, 2003 Order Denying Her Motion for Reconsideration.

On July 28, 2003, the family court entered an "Order Regarding the Enforcement of the March 11, 2003 Stipulated Order Resolving Issues Raised in Plaintiff's December 24, 2001 Motion for Post-Decree Relief and Defendant's January 22, 2002 Affidavit in Opposition to Plaintiff's Motion for Post-Decree Relief, Other Related Issues, and Issues Pending in Other Courts" (July 28, 2003 Order). This July 28, 2003 Order required the Chief Clerk of the first circuit court to sign Wife's letters to her witnesses after she failed to do so of her own accord, as required under the March 11, 2003 Stipulated Order. On August 5, 2003, the clerk signed the letters and the letters were subsequently mailed.

IV.

On appeal Wife asserts that (1) the court erred because "the October 11 agreement did not comply with HFCR Rule 58(d), [and] . . . the parties did not assent to its terms," and (2) "the court should have conducted an evidentiary hearing and allowed [Wife] to testify about the settlement negotiations, the probate case and the agreement." Wife seeks (1) vacation of the Stipulated Order and remand for trial or (2) vacation of the Order and remand for entry of an order consistent with the settlement conference agreement or (3) vacation with instructions to conduct an evidentiary hearing to determine whether the additional provisions were consistent with the October 11 agreement.

V.

Whether the parties entered into a settlement agreement is essentially a question of fact and therefore reviewed under the clearly erroneous standard.[8] See Assocs. Fin. Serv. Co. of Hawaiʻi, Inc. v. Mijo, 87 Hawaiʻi 19, 28-29, 950 P.2d 1219, 1228-29 (1998). However, "since very important rights are at stake in most cases, appellate courts must strive to ensure that the purported compromise agreement sought to be enforced is truly an agreement of the parties." Id. at 29, 950 P.2d at 1229 (citations and emphasis omitted). Thus, "[t]o determine the

[8] However, a "trial court's determination regarding the enforceability of a settlement agreement is a conclusion of law reviewable de novo." Assocs. Fin. Serv. Co. of Hawaiʻi v. Mijo, 87 Hawaiʻi 19, 28, 950 P.2d 1219, 1228 (1998) (citation omitted).

validity of the settlement agreement, the court looks to the totality of the circumstances surrounding the making of the agreement." Id. (citations omitted).

"A compromise and settlement should be construed to include only those matters the parties intended to include; it should not be construed to extend to other matters." Wiginton v. Pac. Credit Corp., 2 Haw. App. 435, 443, 634 P.2d 111 (1981) (quoting 15A Am. Jur. 2d Compromise and Settlement, § 23 (1976)). Wife thus contends that the stipulation must "substantially reflect the terms and conditions reached in settlement." Assocs. Fin. Servs. v. Mijo, 87 Hawaiʻi 19, 31, 950 P.2d 1219, 1231 (1998). According to Wife, the party drafting the agreement is prohibited from adding "a material term which was not agreed upon by the parties at the settlement conference." Id. at 32, 950 P.2d at 1232.

In that regard, Wife maintains that a stipulated order entered under HFCR Rule 58(d) cannot add "a material term which was not agreed upon by the parties at the settlement conference," citing In re Doe, 90 Hawaiʻi 200, 209, 978 P.2d 166 (App. 1999), and that HFCR Rule 58(d) expressly requires the provisions of a stipulated order to be "consistent with the provisions stipulated to in court."[9]

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[9] HFCR Rule 58 states in its entirety:

PREPARATION AND SIGNING OF JUDGMENTS AND OTHER ORDERS.
(a) Preparation of Judgments and Other Orders. Within 10 days after entry or announcement of the decision of the
(continued...)

According to Wife, four matters in this appeal were "never discussed during the settlement negotiations." Wife contends that (1) her appeal in S.Ct. No. 23378, the surname appeal, should not have been dismissed or withdrawn as a condition of the Stipulated Order because her request for

[9](...continued)

court, the prevailing party, unless otherwise ordered by the court, shall prepare a judgment or order in accordance with the decision and secure thereon the approval as to form of the opposing counsel or party (if pro se) and deliver to the court the original and necessary copies, or if not so approved, serve a copy thereof upon each party who has appeared in the action and deliver the original and copies to the court. Any party objecting to a proposed judgment or order shall, within 5 days after receipt, serve upon all parties and deliver to the court that party's proposed judgment or order, and in such event, the court shall proceed to settle the judgment or order.

(b) Signing of Judgment or Order. Upon a showing in writing that opposing counsel or a party in a contested case fails or refuses to approve a judgment or order submitted to that opposing counsel or party by the other counsel in accordance with the above, the court shall sign the judgment or order notwithstanding the absence of approval of the opposing counsel or party, provided that the submitted judgment or order conforms with the decision of the court.

(c) Documents Submitted for Court's Signature Pursuant to Formal Hearing. All documents submitted for the court's signature that are pursuant to formal hearing shall reflect the exact hearing date or dates and the name of the hearing judge under the case number and character of the document and shall comply with the Rules of the Circuit Courts.

(d) Preparation of Stipulated Order when Provisions on Record. If a party or parties are present in court, with or without an attorney, and state for the record that the parties stipulate to the entry of orders, the stipulation shall be reduced to writing by the attorney designated by the court, within 10 days, and shall be approved by all parties and their attorneys, if any, unless such a requirement is waived by the court. If a party who was present in court, fails or refuses to approve the stipulation and order within 5 days after receipt, the court may approve the stipulation and order without approval of either the party or the party's attorney, if any, <u>provided that the provisions are consistent with the provisions stipulated to in court</u>, and provided that the attorney preparing the stipulation and order informs the court in writing that either the party or the party's attorney, if any, refused or failed to approve the stipulation and order within the 5-day period.

(Emphasis added.)

attorney's fees pursuant to HRAP Rule 38 was outstanding, (2) the Stipulated Order should not have mandated Wife to dismiss her appeal in S.Ct. No. 24967 challenging her removal as trustee of the Mary Roe Trust, (3) changes in Wife's trustee duties in the Mary Roe Trust were not discussed, and (4) the letters to friends and relatives were never discussed. In that regard, the relevant parts of the Stipulated Order are as follows:

> 20. Payment of Attorney's Fees. Each party shall assume and pay the balance of his or her own attorney's fees and costs in this matter. Each party also specifically waives any and all claims against the other party for attorney's fees and costs pursuant to Rule 68, [Rules of the Family Court of the State of Hawai‘i (HFCR)], as a result of any offer made at any time in this case to date.
>
> . . . .
>
> 22. Withdrawal of Current Appeals. The parties shall withdraw and have dismissed by stipulation all of [Husband's] Family Court appeals now pending in the appellate courts of the State of Hawai‘i and all of [Wife's] Probate Court appeals now pending in the appellate courts of the State of Hawai‘i. The parties shall accomplish this by executing, concurrently with the execution of the Stipulated Order, the original documents of the copies reflected in Exhibit "2" attached hereto and incorporated herein by reference.[10] The original documents shall then be submitted to the appropriate appellate court for approval and filing.
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> 23. Probate Court Action. The parties shall file a joint ex parte petition to the First Circuit Probate Court asking the Court to set aside the surcharge it previously assessed against [Wife] ($51,407.45), to order the remaining Master's fees ($11,197.54 as of November 20, 2002) to be paid from the assets of the [Mary Roe] Trust and not by [Wife] personally as previously ordered by the Probate court, and to clarify the future use of the assets of the [Mary Roe] Trust. The parties shall accomplish this by executing, concurrently with the execution of this Stipulated Order, the original document of the copy reflected in Exhibit "3" attached hereto and incorporated herein by reference. The original document shall then be submitted to the Probate Court for approval and filing. If the Probate Court declines to grant the ex parte petition and wants a hearing on the matter, the parties shall cooperate and execute appropriate documents to file with the Probate Court so that the matter can be heard.
>
> 24. Witnesses for Trial. All of the lay witnesses

[10] With respect to the withdrawal of appeals, Exhibit 2 contained forms for stipulated withdrawals in S.Ct. No. 23378 (the surname appeal) and S.Ct. No. 24967 (the Mary Roe Trust appeal).

> named by [Husband] and [Wife] for trial in this pending action have either had or may have in the future some influence on [Daughter's] life. It is therefore important that these persons understand that the parties have resolved and settled their differences through an agreement that is fair and reasonable to both of them and, most importantly, is in [Daughter's] best interest. Accordingly, <u>each party shall notify each of the lay witnesses that the parties have resolved and settled their differences through an agreement that is fair and reasonable to both of them and, most importantly, is in [Daughter's] best interest</u>. Each party shall do this within thirty (30) days following the entry of this Stipulated Order using the form letter attached hereto as Exhibit "4" and incorporated herein by reference.

(Emphases added.) Wife's contentions are discussed in seriatim.

VI.

First, in the surname appeal, S.Ct. No. 23378, Husband appealed the denial of his requests with respect to changes in Daughter's last name and the award of attorney's fees to Wife. The matter was briefed and assigned to this court. Wife separately petitioned for attorneys' fees, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 38,[11] alleging that Husband's appeal was frivolous. In a summary disposition order (SDO), <u>Doe v. Doe</u>, 102 Hawai'i 527, 78 P.3d 340 (2003), the surname appeal was resolved. As to the HRAP Rule 38 request for fees, this court denied Wife's motion for attorneys fees on February 4, 2004. Thus, this aspect of Wife's appeal in the instant case is now moot. <u>See</u> <u>In re Doe</u>, 102 Hawai'i 75, 78, 73 P.3d 29, 32 (2003) ("It is well settled in Hawaii that a case is 'moot' where the question to be determined is abstract and does

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[11] HRAP Rule 38 states in its entirety: "**DAMAGES AND COSTS FOR FRIVOLOUS APPEALS.** If a Hawai'i appellate court decides that an appeal decided by it was frivolous, it may, after a separately filed motion and notice from the appellate court and reasonable opportunity to respond, award damages, including reasonable attorneys' fees and costs, to the appellee."

not rest on existing facts or rights.”); Johnston v. Ing, 50 Haw. 379, 381, 441 P.2d 138, 140 (1968) (noting that “appellate courts will not consider moot questions”).

VII.

A.

Second, as to dismissal of her probate appeal in S.Ct. No. 24967, the transcript of the October 11, 2002 settlement conference discloses that the condition that appeals be withdrawn or dismissed initially applied to “two appeals brought by [Husband] from family court decisions.” As mentioned, Kleintop had stated that Husband’s two pending appeals from family court decisions would be withdrawn and dismissed. However, Kleintop further stated, “There is a matter pending at probate court also.” At that point, Kleintop indicated the parties had agreed with respect to a surcharge against Wife and the probate court master’s fees. Kleintop indicated that Wife had taken “appeals from these two decisions so by doing this that appeal will be rendered moot” and thus, “will be able to be withdrawn also.” (Emphasis added.) Subsequently, Wife’s attorney maintained that,

> [h]ad [Wife] been informed that in return for [Husband’s] application to set aside the surcharge or to reassign the Master’s fees, she would have to give up her appeal to be reinstated as trustee (or restructure what could or could not be paid by the trustee) she would have clearly declined.

However, Kleintop did refer expressly to withdrawal of Wife’s probate appeal, which would plainly include all matters raised in that appeal. Hence, the appeals denominated in the conference as being withdrawn included the probate appeal taken by Wife.

B.

However, as Wife contends, there was no agreement on the record as to the other provisions in paragraph 23 having to do with "clarify[ing] the future use of the assets of the [Mary Roe Trust]." At the October 11, 2002 settlement conference, Husband's attorney did not state anything for the record regarding trust matters except that a "joint application" would be made "to the probate court asking that the $55,000 surcharge imposed by that court against [Wife] be set aside," and that the "master's fee . . . assessed against [Wife] . . . be paid . . . by the [Mary Roe] Trust[]" and dismissal of Wife's probate court appeal. At no time during the settlement conference did either party discuss a change in trustee duties.

In the February 3, 2003 conference, Wife's attorney stated, "The primary concern relates to the probate matter not only with regard to the appeal, but also with regard to the restrictions on what the probate court can do as far as giving monies out or not which was not in the settlement." "[T]here's additional language as to what the trustee in probate may treat as income to the client or income to the beneficiary." "That was never discussed." Wife asserts that the provision mandating joint application to the probate court as agreed to at the settlement conference "had nothing to do with trustee duties at the [Mary Roe] Trust," inasmuch as "[t]here certainly was nothing in [the October 11, 2002 agreement] that talked about resolving

issues at the probate level or restricting or expanding the powers of the trustee."

Despite the court's execution of the Stipulated Order re-submitted by Husband's attorney, the change in trustee duties was simply not discussed in the October 11, 2002 settlement conference. Again, beyond mention of a joint application to the probate court asking that the surcharge imposed against Wife be set aside, the master's fees be paid by the trust, and the dismissal of the pending probate appeal, the record fails to disclose any additional discussion of probate court or trust matters. Therefore, other provisions regarding the trust should not have been included in the Stipulated Order.

VIII.

Finally, the transcript of the October 11, 2002 conference contains no mention of informing family and friends of the settlement agreement through letters. Despite Kleintop's contention that the provision regarding letters was discussed in the December court conference, and that "the few additional provisions that weren't stated on the record are totally consistent with the terms of the settlement stated on the record," the fact remains that this provision was not discussed on the record. Although Lebb clarified additional items, none of these items consisted of the signing and mailing of letters. Hence, the Stipulated Order should not have referred to such letters and the letters should not have been sent out over the

signature of the clerk.[12]

IX.

Under HFCR Rule 58(d), "the court may approve the stipulation and order without approval of either the party or the party's attorney, if any, provided that the provisions are consistent with the provisions stipulated to in court." (Emphasis added). Because neither Wife nor Husband agreed at the settlement conference (1) to alter the trust or (2) to notify friends and relatives that they had "resolved and settled their differences through an agreement that is fair and reasonable to both of them," such nonconforming provisions should not have been included in the Order.

X.

Wife maintains that the court should have conducted an evidentiary hearing to determine if the four disputed provisions were consistent with the October 11, 2002 agreement, rather than accepting and signing the Order drafted by Husband's attorney. She maintains that "[i]f a settlement agreement is ambiguous, however, the court must conduct an evidentiary hearing."

A.

"A motion to enforce a settlement agreement may not be decided summarily if there is any question of fact as to whether

[12] Wife does not state what relief she is seeking or is specifically entitled to if it is found that the family court acted improperly in ordering the clerk to sign and mail the letters without her approval. She only seeks, generally, vacation of the Order and remand for entry of an order consistent with the October 11 agreement.

a mutual, valid and enforceable settlement agreement exists between the parties." Moran v. Guerreiro, 97 Hawai'i 354, 371, 37 P.3d 603, 620 (App. 2002) (citing Miller v. Manuel, 9 Haw. App. 56, 63, 828 P.2d 286, 293 (1991)). In Miller, a dispute arose over the terms of an agreement and stipulation. 9 Haw. App. at 60, 828 P.2d at 290. The trial court in Miller, over objection and without an evidentiary hearing, disregarded the discrepancies between the documents and approved the stipulation. Id. at 60-61, 828 P.2d at 290. The Intermediate Court of Appeals reversed the trial court, treated the disputed documents as a motion for summary judgment, and stated that:

> The question is whether the evidence presented to the court indicated that there was no genuine issue of material fact and that as a matter of law the parties had entered into a valid compromise agreement. If not the lower court should have either set the case for trial or at least held an evidentiary hearing on whether there was a compromise agreement among the parties.

Id. at 64-65, 828 P.2d 286 at 292 (emphasis added).

Husband contends that there was no need to have a separate evidentiary hearing because "the parties were sworn in, the material terms of the settlement agreement were read in open court, . . . there was no question that there was a mutual agreement[,]" and Wife did not object to the terms placed on the record and did not have any questions when asked by the court.

As Husband argues, both parties were sworn at the October 11, 2002 settlement conference. The purpose of the conference was to place a settlement on the record. The parties agreed on the record in court to settle disputes between them.

That agreement was recorded. When queried by the court, neither Husband nor Wife had questions. Hence, there is no genuine issue of material fact as to what was agreed to.

As far as item 1 is concerned, that matter was decided by this court in connection with the surname appeal and is thus moot. As to item 2, the withdrawal of the probate court appeal, the agreement to do so was placed on the record and no genuine material issue of fact exists as to Wife's agreement thereto. As to items 3 and 4, changes to the trust and letters to third persons, the case is remanded with instructions to vacate those parts of the Stipulated Order.

B.

In the instant case, the record is clear that at the February 3, 2003 hearing, the court sought to resolve the proposed written settlement agreement with what was agreed to between the parties at the October 11, 2002 settlement conference. To reiterate, the court stated that the February 3, 2003 hearing was "not a hearing in the sense of an evidentiary hearing. All I'm trying to get to was whether or not there was or wasn't something that happened on October 11th. [Wife's] intention, side bars, or anything have nothing to do with what happened on October 11th." (Emphasis added.)

"[A] judgment entered pursuant to the prior stipulation of the parties . . . may not be modified or set aside by the court

absent a showing that the stipulation itself is open to attack on grounds of fraud, mistake, or misrepresentation." Ainamalu Corp. v. Honolulu Transp. & Whse. Corp., 56 Haw. 362, 362, 537 P.2d 17, 18 (1975). Here, Wife has not alleged fraud, mistake or misrepresentation. She has maintained only that the approved Order differed from the provisions discussed in the October 11, 2002 settlement conference. That matter has been resolved, supra.

XI.

Therefore, this case is remanded with instructions to the court to strike those provisions of the March 11, 2003 Stipulated Order that were not agreed to, consistent with this decision, and the April 23, 2003 order denying Wife's motion for reconsideration is vacated to that extent. The March 11, 2003 Stipulated Order and the said April 23, 2003 order are affirmed in all other respects.

DATED: Honolulu, Hawai‘i, December 23, 2004

On the briefs:

Peter Van Name Esser for
defendant-appellant.

Charles T. Kleintop and
Renee M. Yoshimura
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