

NOT FOR PUBLICATION

NO. 26483

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

TAMARA ANN YAMAGUCHI, Plaintiff-Appellee, v.
RANDAL MICHITO YAMAGUCHI, Defendant-Appellee,
and
TOMOE YAMAGUCHI and MICHIO YAMAGUCHI,
Parties in Interest-Appellants

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 00-1-2961)

MEMORANDUM OPINION

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

Parties-in-Interest Michio Yamaguchi (Michio) and Tomoe Yamaguchi (Tomoe) appeal from the orders of Family Court of the First Circuit, as follows: (1) the February 3, 2004 Decision and Order Re: Motion to Enforce Settlement Agreement, (2) the March 5, 2004 order directing Michio and Tomoe to sign the trust agreement pursuant to the February 3, 2004 decision and order, and (3) the March 8, 2004 order awarding attorney fees to counsel for Plaintiff-Appellee Tamara Ann Yamaguchi (Tamara or Plaintiff). We vacate all three orders and remand for action consistent with this opinion.

BACKGROUND

Defendant-Appellee Randal Michito Yamaguchi (Randal or Defendant) was born in 1951. Michio and Tomoe are Randal's parents. Tamara was born in 1949.

MEMORANDUM
CLERK, APPELLATE COURTS
STATE OF HAWAII

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Tamara and Randal were married on May 4, 1985 in Honolulu, Hawai'i. Their daughter (Ashley) was born on August 11, 1987.

On September 7, 2000, Tamara filed a Complaint for Divorce. On September 27, 2000, Judge Allene R. Suemori (Judge Suemori) entered an order awarding temporary sole legal and physical custody of Ashley to Tamara and specifying that Randal was not permitted any "visitation until he is clinically released from residential treatment at Hina Mauka[.]" On December 13, 2000, Judge Suemori entered an order determining that "[t]here is no present need for appointment of a Guardian Ad Litem for [Randal][.]"

On December 22, 2000, Judge Paul T. Murakami entered an order approving a Stipulation Regarding Plaintiff's Motion and Affidavit for Pre-Decree Relief. It stated, in relevant part:

2. Interim financial management. Pursuant to this Court's Order of October 18, 2000, [Tamara], her counsel, [Randal's] counsel and [Randal's] mother [Tomoe] met on October 24, 2000 to exchange financial information and work out interim financial orders. [Randal] had authorized such in advance. As a result of those discussions, the parties agree that:

a) The debts and other necessary expenses of the family have long, and currently continue to exceed [Randal's] monthly income. The following provisions are deemed temporary in nature pending the parties and their representatives' further review of the family's financial situation and options, and are intended to be reviewed and adjusted as necessary at further review hearing.

b) Family support. Pending further order of the Court or agreement of the parties, [Randal] and/or his agent shall pay directly to [Tamara] the sum of \$975.00 per month

c) Payment of bills. Pending further order of the Court or agreement of the parties:

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(1) [Randal] and/or his agent shall do their best to pay the following monthly obligations from the income payable to [Randal] from his business interests:

- (a) the mortgage on the former marital residence
- (b) all existing insurance premiums (. . .)
- (c) the debt to Kaiser-Permanente Medical Center
- (d) Ashley's Punahou tuition and related fees and expenses

.

c) [sic] [Tamara's] and [Ashley's] respective periodic incomes from [Randal's] family's business of approximately \$500.00 per month each shall continue to be paid directly by Michio and Tomoe Yamaguchi et al, Ltd. [Ashley's] interest to continue to be deposited into her HUTMA account on her behalf.

.

3. Interim Occupancy. [Tamara] and [Ashley] are awarded temporary exclusive use and possession of the former marital residence at 99-1759 Hoapono Place, Aiea, Hawaii for so long as they reside therein, pending further order of the court.

Michio and Tomoe signed this stipulation under the heading:

"APPROVED AS TO AIEA RENTAL PROVISION".

On April 5, 2002, Tamara filed a Motion and Affidavit for Pre-Decree Relief alleging that "[Randal] has substance abuse problems and is unable to reason coherently. He receives \$9,000 per month and refuses to comply with a court order to pay the monthly mortgage debt, Punahou tuition[,], insurance premiums[,], etc." Tamara requested an order appointing her "as [Randal's] agent so that [Tamara] can pay the marital joint obligations from the \$9,000 per month [Randal] receives from his business interests."

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On May 13, 2002, Tamara filed a motion to join Tomoe as a party because

[Randal] is not paying the support he was ordered to pay for the family. [Randal] receives approximately \$9,000 per month from family ventures and [Tomoe] controls the distribution of the money to him. [Randal] has chemical dependency problems. Until January 2002 [Tomoe] paid [Randal's] support obligations before giving money to him. In January 2002, [Tomoe] stopped paying and turned the entire amount over to [Randal]. In March 2002, [Tamara] became aware that the mortgage and other debts were not being serviced. . . .

Joining [Tomoe] allows the court to by-pass [Randal] to ensure that the court ordered support is paid and that the family estate remains in tact [sic] until the allocation of assets can be made at the dissolution of the marriage.

On June 12, 2002, Judge Suemori entered an order stating, in relevant part, "Before 6/19/02, Tomoe Yamaguchi has agreed to authorize Pacific Century Trust to disburse the following amounts from the monies otherwise payable to [Randal] to the payees on the attached continuation sheet." Those amounts were listed as follows:

- 1) Bank of America - \$3,185 per month
- 2) Countrywide Home Loans - \$767.61 per month
- 3) Punahou School
(Tuition and expenses per monthly billing) - \$1,400.00/mo. est.
- 4) GEICO - \$128.00 per month (. . .)
- 5) Kaiser Permanente - \$624.65 per month
- 6) USAA Homeowners Ins. - \$246.70 per month
- 7) Tamara Yamaguchi - \$975.00 per month family support

On June 21, 2002, Judge Suemori entered an order stating that "Plaintiff's **Motion to Join Party**, filed May 13, 2001 is dismissed without prejudice."

On July 23, 2002, Judge Suemori entered an "Order to Sequester and Distribute Defendant's Pacific Century Trust Funds" that stated, in relevant part:

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Orders were previously entered regarding the funds to be distributed to him from Pacific Century Trust but the orders were not effective to implement the court's intent. . . .

IT IS HEREBY ORDERED, ADJUDGED and DECREED . . . as follows:

1. Effective immediately and until further order of the court, PACIFIC CENTURY TRUST shall pay or deliver to [Tamara] any and all funds that would otherwise be payable to [Randal] less any administrative or processing costs incurred by PACIFIC CENTURY TRUST.

. . . .

3. [Tamara] shall use the funds to pay the debts and expenses previously ordered by this court to be paid by [Randal] in *Order Re Plaintiff's Motion to Join Party*, filed June 12, 2002, and the *Order Granting Plaintiff's Motion for Pre-Decree Relief as to Attorney Fees and Costs, Arrears, and Reimbursements*, filed June 26, 2002.

4. After payment of all debts and expenses by [Tamara], any money left over shall be paid by [Tamara] to [Randal].

(Emphases in original.)

On January 7, 2003, Tamara filed Plaintiff's Motion to Join Parties that stated, in relevant part:

The parties' sole source of income is approximately \$9,000 per month from family ventures related to income producing real estate holdings. [Randal] has chemical dependency problems and has failed to maintain his financial obligation. By court order, filed December 22, 2000, payments were to be made directly from Michio and Tomoe Yamaguchi et al, Ltd. to pay the parties' monthly obligations. Until January 2002 Tomoe Yamaguchi maintained the parties' debts as ordered by the court. In January 2002, she stopped paying and turned the entire amount over to [Randal] who continued to have chemical dependency problems. In March 2002, [Tamara] became aware that the mortgage and other debts were not being serviced. By order filed July 23, 2002, Pacific Century Trust was directed to deliver to [Tamara] all funds otherwise payable to [Randal].

The parties' marital residence is now in foreclosure because Michio and Tomoe Yamaguchi et al, Ltd. and [Randal] failed to pay the mortgage.

It has now come to [Tamara's] attention that Michio and Tomoe Yamaguchi initiated legal proceedings in the State of Texas to sell the real estate that generates income for the parties. [Tamara] believes the court action is designed to remove the assets from the marital estate.

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On July 25, 2003, Darwin L. D. Ching, as attorney for Michio and Tomoe, filed the "Affidavit of Darwin L.D. Ching in Support of Grandparents Michio Yamaguchi and Tomoe Yamaguchi's Oral Motion to Continue Trial Week of August 18, 2003" in which he stated, in relevant part:

3. Affiant submits this affidavit in support of Michio and Tomoe Yamaguchi's oral motion to continue the trial date of on or about July 9, 2003.

4. Said motion was made at the conclusion of a settlement conference after the Court had rendered its oral decision to join the grandparents as parties. Said motion was taken under advisement by the Court for decision

. . . .

9. As the Grandparents [Michio and Tomoe] were not orally joined until July 9, 2003 and have not been able to assert their defenses in response to any written order (which is pending) or file any motions since they were not a party, they need additional time to prepare and defend.

10. That the Grandparents [Michio and Tomoe] have engaged in good faith settlement negotiations as directed by the Court and have focused their energies in that regards.

In other words, although the court did not enter a written order joining Michio and Tomoe as parties, Michio and Tomoe admitted that on July 9, 2003, the court orally joined them as parties.

On September 15, 2003, counsel for Michio and Tomoe proposed "a Rule 408, H.R.E. [Hawai'i Rules of Evidence] and Rule 68 F.C.R.P. [Hawai'i Family Court Rules] settlement offer." In relevant part, this settlement offer stated as follows:

1. As part of a global settlement agreement, the Grandparents [Michio and Tomoe] will acquire Randal, Tamara and Ashley Yamaguchi's outstanding, remaining, prior, present, and future rights, interests, and accounts in any and all of the Yamaguchi Family investments, partnerships, businesses and properties. These include but are not limited to the all [sic] properties including North Carolina, Puu Heleakala, Kahe Kai; the Family Limited Partnership; (Kukui Plaza,

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Mililani, Coral Terrace). The rights, interests and accounts will be acquired for \$375,000.00 payable to Tamara Yamaguchi. Any issues as to alimony, property equalizations, reimbursements, credits or offsets, child support and educational support between Randal and Tamara will be reserved and determined by future Family Court proceedings. . . .

2. In addition, the Grandparents [Michio and Tomoe] will arrange for the transfer of the Waikiki Condominium Unit 804, (Waikiki) Coral Terrace, 2222 Aloha Drive, Honolulu, Hawaii, (with stipulated value of \$185,000.00) into a trust for Ashley with a right of occupancy to Tamara and remainder to Ashley. Said trust will provide that the sale of that condo will not be permitted until Ashley is 30 years old. Upon transfer of the unit into the trust, which shall be done forthwith, Tamara will be responsible for the costs, maintenance and upkeep of the property. Until the property is transferred into the trust and effective upon the next month after the signing of the settlement agreement the granddaughter [Ashley] will be entitled to the net rental income for child support/educational support and credited towards Randal Yamaguchi's obligations.

After failing to agree to other amended versions, all parties agreed to the following final version of paragraph "2" of the September 15, 2003 settlement agreement:

2. In addition, the Grandparents [Michio and Tomoe] will arrange for the transfer of the Waikiki Condominium Unit 804, (Waikiki) Coral Terrace, 2222 Aloha Drive, Honolulu, Hawaii, (with stipulated value of \$185,000.00) into a trust. Tamara will have the right to occupy or use the property for life, remainder to Ashley. A quitclaim deed will convey the property into the trust. Said trust will provide that the sale of that condo will not be permitted until Ashley is 30 years old. Upon transfer of the unit into the trust, which shall be done forthwith, the trust/Tamara will collect the rent and will be responsible for the costs, maintenance and upkeep of the property. Until the property is transferred into the trust and effective upon the next month after the signing of the settlement agreement the granddaughter [Ashley] will be entitled to the net rental income for child support/educational support and credited towards Randal Yamaguchi's obligations.

On October 13, 2003, Judge Darryl Y.C. Choy (Judge Choy) conducted the divorce trial.

On November 5, 2003, Tamara filed a "Motion to Enforce Settlement Agreement" seeking the enforcement of the fourth and

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final version of the September 15, 2003 settlement agreement.

The trust document prepared by counsel for Tomoe and Michio pursuant to paragraph "2" of the fourth and final version of the September 15, 2003 settlement agreement states, in relevant part:

1.01. Beneficiaries. The intended beneficiaries of this trust are [Tamara] who shall only be entitled to the right to occupy and use the property located at 2222 ALOHA DRIVE, unit 804; and [Ashley], who shall own all other beneficial interests in Trust property including the right to occupy and use said property during her lifetime.

. . . .

2.01.

(a) Right to Occupy. The Trustee shall allow [Tamara] the right to occupy (which means reside in) the Trust Property located at 2222 ALOHA DRIVE, UNIT 804 (hereinafter "the Aloha Drive Condo") as long as the Aloha Drive Condo is held in this Trust. . . . The Trustee shall also allow [Ashley] the right to occupy the Aloha Drive Condo,

Should [Tamara] and/or [Ashley] notify the Trustee in writing that she [sic] has made arrangements to reside elsewhere other than the Aloha Drive Condo, the Trustee shall rent out the Aloha Drive Condo. Any net proceeds shall be retained in trust and used first to offset any rent incurred by [Ashley] and/or [Tamara] because either or both of them reside elsewhere other than the Aloha Drive Condo. If [Ashley] and [Tamara] reside in different places, the Trustee shall divide the net rent received by the Trustee equally to offset their respective rent whether or not there is a disparity in the cost of rent If the Trustee sells the Aloha Drive Condo, the Trustee shall use the net proceeds of such sale only for [Ashley's] BENEFIT and not for [Tamara's] BENEFIT as described in (b) and (c) below.

. . . .

2.02. Termination of Trust. The trust shall terminate when [Ashley] dies (provided that [Tamara] is dead, if in the event that [Tamara] is not dead, the Trust shall continue to provide that [Tamara] may reside in said property until she decides not to continue to reside in said property or dies as provided in paragraph 5.01(a) [sic] above. . . .

The trust document prepared by counsel for Tamara pursuant to paragraph "2" of the fourth and final version of the

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September 15, 2003 settlement agreement states in relevant part:

1.01. Beneficiaries . . . [Tamara] shall have the right to occupy or use the property located at 2222 ALOHA DRIVE, Unit 804 for life and [Ashley] shall have a remainder [sic] interest.

. . . .

2.01.

(a) Right to Occupy or Use the Aloha Drive Condominium. [Tamara] shall have the right to occupy or use . . . 2222 ALOHA DRIVE, UNIT 804 (hereinafter "the Aloha Drive Condo").

. . . .

2.02. Sale and Disposition of Trust Property. At such time that [Ashley] attains the age of thirty (30) (or is deceased), the Trustee shall sell the Aloha Drive Condo if directed to do so by [Tamara]. The Trustee shall then divide and distribute the net sales proceeds as directed by [Tamara] and [Ashley] by joint written instructions. In the absence of joint written distribution instructions, the Trustee shall value the life interest of [Tamara] and the remainder interest of [Ashley] consistent with the actuarial tables intended to value life/remainder interests pursuant to regulations promulgated by the Internal Revenue Service (IRS). The net sales proceeds shall be divided accordingly. . . .

If the Trustee desires to sell the Aloha Drive Condo, prior to [Ashley] attaining the age of thirty (30), the Trustee shall first secure, in advance, the written consent of [Tamara] to sell the condo. . . .

2.03. Termination of Trust. The trust shall terminate when [Ashley] dies (provided that [Tamara] is dead). In the event that [Tamara] is not dead, the Trust shall terminate upon the death of [Tamara]. . . .

. . . .

3.01. Statement of Grantor's Intent and Further Clarification of Trust Provisions. . . . [Tamara] will have the right to occupy or use the Aloha Drive Condo for life, remainder to [Ashley]. . . .

On November 12, 2003, Tamara filed a "Motion to Sequester Distributions of Randal Michito Yamaguchi's Bank of Hawaii Trust Funds".

On November 25, 2003, the parties executed a "Final Settlement, Mutual Release, and Indemnification Agreement of

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Parties". It contains more detail than the final version of the September 15, 2003 Settlement Agreement. It states, in relevant part:

1. The matter arises from claims and disputes concerning and related to Tamara Ann Yamaguchi v. Randal Michio Yamaguchi, FC-D No. 00-1-2961, Family Court of the First Circuit, State of Hawaii, disputed loans between the parties, the Michio and Tomoe Yamaguchi Family Limited Partnership, a Hawaii limited partnership investments, partnerships, businesses and/or properties related to Michio Yamaguchi, et al. v. Randal Yamaguchi, Civil No. 01-1-3485-12, First Circuit Court, State of Hawaii.

2. All parties named above now wish to compromise and settle all existing and possible future disputes between them, and to avoid the time and expense of continued lawsuits, trials, motions, appeals, arbitrations or the like upon the terms and conditions as provided for in this agreement. The intent of the parties is to settle their disputes and restore family harmony.

Therefore, in consideration of the above and the mutual promises made herein, the parties agree as follows:

A. The Grandparents [Michio and Tomoe] will acquire Randal, Tamara and Ashley Yamaguchis' outstanding, remaining, prior, present, and future rights, interests, and accounts in any and all of the Yamaguchi Family investments, partnerships, businesses and properties. These include but are not limited to the all [sic] properties including Puu Heleakala, Kahe Kai (Nanakuli); the Family Limited Partnership; the properties located at Kukui Plaza, 55 Kukui Street, Apartment #D-2412 and Parking No. 3060, Honolulu, Hawaii, Mililani, 94-366 Hokuuahiahi Street, Mililani, Hawaii, and Coral Terrace, 2222 Aloha Drive[,] Apartment #804, Honolulu, Hawaii.

These rights, interests and accounts will be acquired for \$375,000.00 payable to Tamara Yamaguchi. Any issues as to alimony, property equalizations, reimbursements, credits or offsets, child support and educational support between Randal and Tamara Yamaguchi were reserved and determined by Family Court proceedings. . . .

B. In addition, the Grandparents [Michio and Tomoe] will arrange for the transfer of the Waikiki Condominium Unit 804, (Waikiki) Coral Terrace, 2222 Aloha Drive, Honolulu, Hawaii, (with stipulated value of \$185,000.00) into a trust. Tamara Yamaguchi will have the right to occupy or use the property for life remainder to Ashley Yamaguchi. A quitclaim deed will convey the property into the trust. Said trust will provide that the sale of that condo will not be permitted until Ashley Yamaguchi is 30 years old. Upon transfer of the unit into the trust, which shall be done forthwith, the trust/Tamara Yamaguchi will collect the rent and will be responsible for the costs, maintenance and upkeep of the property. Until the property is transferred into the trust and effective upon the next month after the signing of the

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settlement agreement the granddaughter (Ashley Yamaguchi) will be entitled to the net rental income for child support/educational support and credited towards Randal Yamaguchi's obligations.

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E. A Trust for the care, maintenance and support of Randal Yamaguchi will be set up and funded by six (6) months from the date of the signing of this settlement agreement. The terms of the trust and amount of the trust shall be determined by the Grandparents [Michio and Tomoe], but in no event be funded in an amount less than \$150,000.

F. Randal, Tamara, and Ashley Yamaguchi will release, waive and forego any and all past, present, future and further claims against Mr. And Mrs. Michio and Tomoe Yamaguchi and the rest of all the Yamaguchi family

G. Likewise, the Grandparents [Michio and Tomoe] agree to settle the disputed claims and will release, waive and forego any further claims and any further collection efforts against Randal, Tamara and Ashley as to prior loans, promissory notes and judgments.

H. Any dispute arising out of this settlement agreement between the Grandparents [Michio and Tomoe] only and any or both parties will be resolved through binding arbitration under Hawaii law. However, this provision will not affect any rights or jurisdiction of the Hawaii Family Court to enforce the provisions between the husband [Randal] and the wife [Tamara] or enforce the required property transfers and/or payments herein.

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R. The terms of the settlement agreement will supercede [sic] all other previous agreements regarding this dispute.

On November 26, 2003, Tamara filed an "Ex Parte Motion to Sequester Distribution of Randal Michito Yamaguchi's Bank of Hawaii Trust Funds".

On December 2, 2003, the following stipulation was filed: "Stipulation to Partially Dismiss Plaintiff's (1) Motion to Enforce Settlement Agreement, Filed on 11/5/03; (2) Motion to Sequester Distributions of Randal Michito Yamaguchi's Bank of Hawaii Trust Funds, Filed on 11/12/03; (3) Ex Parte Motion to Sequester Distribution of Randal Michito Yamaguchi's Bank of

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Hawaii Trust Funds" [sic], Filed on 11/26/03; Order". By this stipulation Tamara, having received payment of \$375,000.00 from Tomoe and Michio, withdrew and dismissed with prejudice all of her requests except that

2. Tamara Yamaguchi specifically does not withdraw or dismiss her motion to enforce the settlement agreement as it pertains to the establishment and terms of the trust into which title is to be conveyed to the condominium located at street address 2222 Aloha Drive, Unit 804, Coral Terrace, Honolulu, Hawaii, nor does this Stipulation to Dismiss withdraw or dismiss [Tamara's] request for attorney's fees related solely to that issue. . . . The "Final Settlement, Mutual Release, and Indemnification Agreement of Parties" executed by the parties was signed without prejudice to either parties' differing positions with respect to the **Motion to Enforce Settlement Agreement**.

(Emphasis in original.) In an accompanying memorandum, Tamara noted that

[t]he Stipulation to Partially Dismiss this Motion to Enforce Settlement Agreement did not withdraw or dismiss Tamara's Motion to Enforce as it pertains to the establishment and terms of the trust referred to in [paragraph] 2 of the Agreement, nor did it withdraw or dismiss Tamara's request for attorney's fees and costs related to that issue[,]

and stated that "[i]n particular, Tamara seeks a Court order to establish a trust on terms consistent with the Settlement Agreement." The court's Order approved this stipulation.

On December 24, 2003, Judge Choy entered a Divorce Decree. Its caption listed Michio and Tomoe as "Joined Third-Party Defendants". It awarded Tamara sole legal and physical custody of Ashley and, at paragraph 9, stated in relevant part: "The agreement entered into between the parties and Defendant/Father's parents, Michio and Tomoe Yamaguchi, dated September 15, 2003, relating to the parties' property interests,

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is incorporated into this decree by reference."

On February 3, 2004, Judge Suemori entered a "Decision and Order Re: Motion to Enforce Settlement Agreement" stating, in relevant part:

Parties counsel disputed the terms of the settlement agreement related to the agreement establishing of [sic] the trust for the minor child. After hearing arguments and denying [Michio and Tomoe's] motion to call witnesses. [sic] The Court noted that the settlement of this case had been lengthy and detailed. . . .

After argument, the terms in dispute by the parties were the specific manner of termination of the trust, the disposition of the trust res, and the rights of the mother and daughter vis-a-vis the life estate. Having read the terms of the much worked upon Settlement Agreement, the Court finds that the terms of the agreement speak for themselves and that the exact language as used is sufficient for the functioning of the trust.

The language in the Settlement Agreement re: the disposition of the property and the termination of the trust was vague, but there is no conflict at this time because the disposition of the Trust property. i.e. sale of the condo, will not occur at least until Ashley turns 30; when she is an adult she can resolve those matters. As to the termination there is no conflict, the Court finds that at a minimum the termination of the trust will occur with the Rule against Perpetuities.

As to the issue of whether the Settlement Agreement bestows a life estate or is exclusive, the Court finds that the Settlement Agreement speaks for itself, that no conflict as to the language exists at this point and should there be a later conflict, this matter should be brought to the Probate Court for instruction.

The Court Orders that the disposition of the property shall be decided at some point prior to Ashley reaching age 30 when the Trust provides that the condo can first be placed for sale. It was suggested by the parties that Tamara and Ashley should start discussing the matter at least two years prior to that date. If Tamara and Ashley are unable to reach an agreement regarding the disposition of the property upon the dissolution of the trust, they shall enter into mediation with a neutral third party who is not a trustee of the trust. Should they be unable to resolve the matter by mediation, they shall ask the Probate Court for instructions.

The issue of attorney's fees is reserved,

After reviewing the terms of the proposed Trust Agreements as submitted, the Court finds that the agreement submitted by [counsel for Tamara] is accepted.

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On March 5, 2004, Judge Suemori entered an "Order Directing Michio and Tomoe Yamaguchi to Sign the Trust Agreement Pursuant to the Decision of February 3, 2004" that ordered Michio and Tomoe "to execute the trust agreement prepared by [counsel for Tamara] pursuant to the **Decision and Order Re: Motion to Enforce Settlement Agreement**, filed February 3, 2004." (Emphasis in original.)

On March 8, 2004, Judge Suemori entered an "Order Granting Plaintiff's Request for Attorneys' Fees and Costs Incurred in Creation of Trust Document" that ordered Michio and Tomoe to pay \$3,700 to one counsel for Tamara and \$11,389 to the other counsel for Tamara.

On April 1, 2004, Tomoe and Michio filed their notice of appeal. This appeal was assigned to this court on December 20, 2004.

DISPUTES BETWEEN THE PARTIES

As best as we can decipher the very confusing record and briefs, the parties dispute the answers to the following questions: (1) Does Ashley have a right to live in the Aloha Drive Condo post-age 18 without Tamara's consent? (2) After Ashley reaches age 30, is the Trustee authorized sell the Aloha Drive Condo without Tamara's consent? (3) If the Aloha Drive Condo is sold with Tamara's consent, "is the valuation of the life interests for both [Ashley's] and [Tamara's] benefit or

instead for [Tamara's] exclusive benefit[?]" and (4) Did the court err when it ordered Michio and Tomoe to pay attorney fees to Tamara's two attorneys?

ISSUES AND DECISIONS

Upon careful review of the record and the briefs and having given due consideration to the issues raised and arguments advanced, we resolve the issues as follows:

1. Michio and Tomoe contend that the court was not authorized to enter its February 3, 2004 decision and order prior to an evidentiary hearing. We disagree. The relevant documents are the December 24, 2003 Divorce Decree and the final version of the September 15, 2003 settlement agreement that was incorporated into the December 24, 2003 Divorce Decree. Both are unambiguous.

Even assuming that the terms of the November 25, 2003 "Final Settlement, Mutual Release, and Indemnification Agreement of Parties" superseded the terms of the final version of the September 15, 2003 settlement agreement, they did not supersede the terms of the December 24, 2004 Divorce Decree which incorporates the final version of the September 15, 2003 settlement agreement.

2. Michio and Tomoe contend that because Tamara had a conflict of interest with Ashley, the court

should have first reviewed and then ordered an appointment of a separate guardian at least as to the issue of that Trust. An evidentiary hearing should have then been held and input given by the Guardian. Only then the Court would have been in a position

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to make a fair decision for the parties. Without that, the Court should not have proceeded to decision making on [Tamara's] motion to enforce the settlement agreement and reformed the trust and settlement agreement.

We disagree. The relevant documents are unambiguous.

3. Tamara contends that because Michio and Tomoe did not request the entry of findings of fact and conclusions of law, the appeal should be dismissed. This contention erroneously ignores Hawai'i Family Court Rule 52(a) (2005) which requires the family court to enter findings and conclusions only in "actions tried in the family court[:]" In this case, none of the challenged orders resulted from a trial.

4. Tamara contends that the record on appeal is inadequate because Michio and Tomoe

purposely failed to include in the record on appeal the transcript of the divorce trial. The testimony at the divorce trial provided the history behind the settlement agreement that the court approved. The evidence produced at the divorce trial included the basis for the trial judge's specific oral finding that the financial transaction during the pendency of the divorce . . . was a "subterfuge" resulting in "bogus loans" that stripped the marital estate of assets. This evidence provides crucial context for the trial court's decisions regarding the post-divorce issues that are the subject of . . . appeal.

(Record references omitted.) This contention is without merit for the following two reasons. First, it recognizes and cites to Hawai'i Rules of Appellate Procedure Rule 10 (2005) which expressly specifies what is, and implicitly specifies what is not, in "the record on appeal" and then it ignores that rule by quoting a transcript that Tamara admits is not a part of the record on appeal in this case. Second, the relevant documents are unambiguous.

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5. The following arguments advanced by Michio and Tomoe are without merit: (a) Tamara is judicially estopped from arguing that the final version of the September 15, 2003 settlement agreement has no independent existence; (b) Michio and Tomoe were not parties to the Divorce Decree and the Divorce Decree did not involve them or bind them as to issues resolved between Randal and Tamara; and (c) the court erroneously reformed the September 15, 2003 final version of the settlement agreement.

Michio and Tomoe are parties in this divorce case and the final version of the September 15, 2003 settlement agreement is a part of the Divorce Decree. The issues in this case pertain to the meaning of the unambiguous language of paragraph "2" of the final version of the September 15, 2003 settlement agreement.

We note that the opening brief contains an ambiguity. At page 16 it speaks of Tamara's "life estate" while at page 24 it speaks of Tamara's and Ashley's "life interests". At page 23, however, it states that "[t]he settlement agreements do not speak of a 'life estate' but only a right to live for life."

Paragraph "2" of the final version of the September 15, 2003 settlement agreement, which was incorporated into the Divorce Decree, (a) requires Michio and Tomoe to convey the Aloha Drive condo by quitclaim deed into a trust, (b) awards to Tamara "the right to occupy or use the property for life, remainder to Ashley[,]" and (c) specifies that "the trust/Tamara will collect

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the rent and will be responsible for the costs, maintenance and upkeep of the property." In other words, the condo shall be conveyed by a quitclaim deed to a trust. Until (a) her death or (b) the sale of the condo with her consent on or after Ashley's 30th birthday, whichever occurs first, Tamara shall be the trustee of the trust and, as such, she shall have the exclusive rights to decide (a) who is authorized to occupy the condo, (b) the conditions, if any, of the authorized occupancy, and (3) the amount, if any, payable to the trust for the authorized occupancy. Tamara may occupy the condo. She may authorize Ashley and/or others to occupy the condo. While retaining these exclusive rights, Tamara will be the sole income beneficiary of the trust and she will be obligated to pay all of the debts of the trust, including the costs, maintenance and upkeep of the condo. Whenever (a) Tamara dies, (b) the court finds that Tamara is not paying for the costs, maintenance and upkeep of the condo, or (c) on or after Ashley's 30th birthday, Tamara permits the sale of the condo, whichever occurs first, the court shall terminate Tamara's interest in the trust. If Tamara's interest in the trust is terminated prior to Ashley's 30th birthday, Ashley will replace Tamara and the trust will continue to Ashley's 30th birthday. If Tamara's interest in the trust is terminated on or after Ashley's 30th birthday, the trust thereupon be terminated. When the trust is terminated, all of

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its liabilities shall be paid and all of its remaining assets shall be conveyed to Ashley.

Neither the trust document prepared by counsel for Michio and Tomoe nor the trust document prepared by counsel for Tamara conforms to this interpretation. Therefore, an amended trust document must be prepared and approved by the family court.

6. Michio and Tomoe challenge the March 8, 2004 order awarding attorney fees to counsel for Tamara on the following two grounds: First, they contend that it is unclear as to the basis for the Court's decision to award the fees and assert that the matter should be remanded for an evidentiary hearing as to whether the fees would be fair and reasonable. Second, they contend that, even if the award of fees was warranted, the record was insufficient to support any award because there were no time sheets, invoices, and other documentation. In light of our decision in "5" above, we vacate this order and remand for reconsideration.

CONCLUSION

Accordingly, we vacate (1) the February 3, 2004 Decision and Order Re: Motion to Enforce Settlement Agreement, (2) the March 5, 2004 order directing Michio and Tomoe to sign the trust agreement pursuant to the February 3, 2004 decision and order, and (3) the March 8, 2004 order awarding attorney fees to

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counsel for Tamara. We remand for action consistent with this opinion.

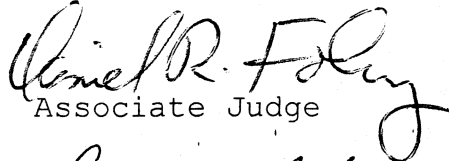
DATED: Honolulu, Hawai'i, November 21, 2005.

On the briefs:

John W. Schmidtke, Jr.
and Richard J. Diehl
for Plaintiff-Appellee.


Chief Judge

Darwin L.D. Ching
for Parties-in-Interest-
Appellants.


Associate Judge


Associate Judge