

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NOS. 28118 and 28615

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

No. 28118

IN THE MATTER OF THE CONSERVATORSHIP AND GUARDIANSHIP
OF GENEVIEVE FERNANDEZ NAITO
(C.G. NO. 06-1-0007)

and

No. 28615

IN THE MATTER OF THE CONSERVATORSHIP AND GUARDIANSHIP
OF GENEVIEVE FERNANDEZ NAITO
(C.G. NO. 06-1-0007)

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Fujise, and Leonard, JJ.)

In this consolidated appeal, Appellant Pat L. Mulvey (Mulvey), pro se, appeals from two judgments entered by the probate court¹: (1) the "Judgment on the Order Granting Petition for Appointment of Conservator and Guardian" filed on July 24, 2006, and (2) the "Judgment on the Order Denying Emergency Petition to Terminate and Remove Ralph Kaleo Naito as Conservator and Guardian of Genevieve Fernandez Naito" filed on May 2, 2007.

Ralph Kaleo Naito (Ralph) is the eldest son of Genevieve Fernandez Naito (Genevieve). Ralph petitioned the probate court (Ralph's Petition) pursuant to Hawaii Revised Statutes §§ 560:5-304 (2006 Repl.) and 560:5-401 (2006 Repl.) to appoint him as conservator and guardian of Genevieve to manage her care and assets because Genevieve was incapacitated.

¹ The Honorable Colleen K. Hirai presided and signed the two judgments.

Mulvey, who is one of Genevieve's daughters, filed an objection to Ralph's Petition.

Following a hearing, the probate court, on July 24, 2006, granted Ralph's Petition, appointed him the conservator and guardian for Genevieve, and entered an Order Granting Petition for Appointment of Conservator and Guardian. On that same date, the probate court also entered the judgment, pursuant to Hawai'i Probate Rules (HPR) Rule 34(a) and in the manner provided by Hawai'i Rules of Civil Procedure (HRCPP) Rule 54(b).

On August 22, 2006, Mulvey appealed the July 24, 2006 judgment (Appeal No. 28118).

On December 20, 2006, Mulvey filed an Emergency Petition to Terminate and Remove Ralph Kaleo Naito as Conservator and Guardian of Genevieve Fernandez Naito (Emergency Petition). After hearings on the Emergency Petition, the probate court entered an "Order Denying Emergency Petition to Terminate and Remove Ralph Kaleo Naito as Conservator and Guardian of Genevieve Fernandez Naito" on May 2, 2007. On the same day, the probate court filed the judgment, pursuant to HPR Rule 34(a) and in the manner provided by HRCPP Rule 54(b).

Mulvey moved to extend the time to for filing a notice of appeal, and the probate court granted the motion. On June 25, 2007, Mulvey filed a notice of appeal from the May 2, 2007 judgment (Appeal No. 28615).

On March 25, 2009, this court consolidated Mulvey's two appeals.

In appeal No. 28118, Mulvey contends the probate court erred when the court

(1) accepted the report of the Kokua Kanawai, over objections, because the Kokua Kanawai's report, which is the single most important report in the proceeding and must be

accurate to the smallest detail, was not an independent review of the situation as mandated by HPR Rule 113;

(2) considered the "wishes of the protected person" in making its ruling because the statements made by a person found to be incapacitated cannot be deemed reliable and should not be used as a basis for a finding of fact; and

(3) granted Ralph's Petition because the evidence presented by Mulvey and the other family members was reliable, probative, substantial, and raised questions that should have been answered prior to the court's ruling in this matter.

In appeal No. 28615, Mulvey contends the probate court erred

(1) by accepting the report and testimony of the Kokua Kanawai and testimony and pleadings of Ralph without question because Mulvey raised objections and presented contrary evidence and because the Kokua Kanawai was biased;

(2) by considering Genevieve's responses concerning her children, husband, finances, health care, and assets to the Kokua Kanawai for use in his report because Genevieve had been declared legally incompetent; and

(3) by denying Mulvey's Emergency Petition because Mulvey presented reliable and factual evidence and Ralph and the Kokua Kanawai made no offer of proof in their arguments.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we conclude that Mulvey's appeal is without merit.

As to appeal No. 28118, we conclude:

1. The report of the Kokua Kanawai correctly states the priority of appointment and qualifications of the proposed conservator and guardian, and the probate court properly

considered the report of the Kokua Kanawai in appointing Ralph as conservator and guardian:

(a) Ralph is clearly most qualified to serve as conservator and guardian, and

(b) the probate court properly exercised its discretion in appointing Ralph, although the other family members had equal priority to serve as conservator and guardian. In re Guardianship of Ward, 42 Haw. 60, 71 (Haw. Terr. 1957).

2. The probate court properly considered Genevieve's views in appointing Ralph as conservator and guardian. HRS §§ 560:5-310 (2006 Repl.) and 560:5-413 (2006 Repl.).

3. The probate court considered Mulvey's objections and properly appointed Ralph as conservator and guardian.

As to appeal No. 28615, we conclude:

1. The Kokua Kanawai was an independent court-appointed official, and a recommendation contrary to Mulvey's position does not mean the Kokua Kanawai was biased.

2. The probate court properly considered Genevieve's objection to removing Ralph as her conservator and guardian. HRS § 560:5-310 and 560:5-413 take into account the view and preference of a respondent when appointing a conservator and guardian. Genevieve's nomination of a conservator or guardian has higher priority than a nomination by her children.

3. The probate court did not err in denying the Emergency Petition because the record does not establish grounds for removal of Ralph as Genevieve's conservator and guardian and such removal is not in the best interest of Genevieve.

Therefore,

The "Judgment on the Order Granting Petition for Appointment of Conservator and Guardian" filed on July 24, 2006, and the "Judgment on the Order Denying Emergency Petition to Terminate and Remove Ralph Kaleo Naito as Conservator and

Guardian of Genevieve Fernandez Naito" filed on May 2, 2007 in the Circuit Court of the First Circuit are affirmed.

DATED: Honolulu, Hawai'i, April 22, 2009.

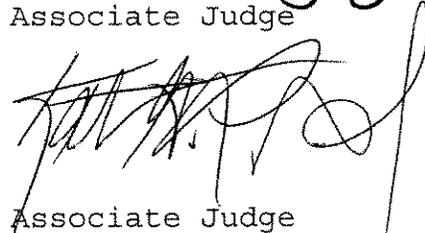
On the briefs:

Pat L. Mulvey,
Appellant pro se.

Judy Y. Lee
(Goodsill Anderson Quinn
& Stifel)
for Appellee Ralph Kaleo
Naito.


Daniel R. Foley
Presiding Judge


Anna D. Grijon
Associate Judge


Associate Judge