

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 29788

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAIIIn the Matter of  
CHARLOTTE HARRIET LUCAS CASSIDAY TRUST (Trust)APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(TRUST NO. 07-1-0009)ORDER DISMISSING APPEAL  
FOR LACK OF APPELLATE JURISDICTION  
(By: Watanabe, Acting C.J., Foley and Fujise, JJ.)

Upon review of the record, it appears that we do not have jurisdiction over the appeal that Petitioner-Appellant MacDonald Rudy Byrns O'Neill & Yamauchi (Appellant's) has asserted from the Honorable Bert J. Ayabe's December 19, 2008 "Order Denying MacDonald Rudy Byrns O'Neill & Yamauchi's Petition for Award of Attorneys' Fees and Costs Filed August 6, 2008" (the December 19, 2008 order denying Appellant's motion for attorneys' fees and costs), because the December 19, 2008 order denying Appellant's motion for attorneys' fees and costs is an interlocutory order that is not independently appealable pursuant to Hawaii Revised Statutes (HRS) § 641-1(a) (1993 & Supp. 2008) and Rule 34 of the Hawai'i Probate Rules (HPR).

HRS § 641-1(a) is the law that authorizes appeals from a probate court's final judgments, orders, or decrees. Appeals under HRS § 641-1 "shall be taken in the manner . . . provided by the rules of the court." HRS § 641-1(c). The Supreme Court of Hawai'i has promulgated Hawai'i Probate Rules (HPR) Rule 34, which generally requires the entry of a judgment for an appeal:

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RULE 34. ENTRY OF JUDGMENT, INTERLOCUTORY ORDERS, APPEALS

(a) Entry of Judgment. All formal testacy orders, orders of intestacy and determination of heirs, orders establishing conservatorship and/or guardianship, and orders establishing protective arrangements shall be reduced to judgment and the judgment shall be filed with the clerk of the court. Such judgments shall be final and immediately appealable as provided by statute. Any other order that fully addresses all claims raised in a petition to which it relates, but that does not finally end the proceeding, may be certified for appeal in the manner provided by Rule 54(b) of the Hawai'i Rules of Civil Procedure.

(b) Interlocutory Orders. In order to appeal from any other order prior to the conclusion of the proceeding, the order must be certified for appeal in accordance with Section 641-1(b) of the Hawai'i Revised Statutes.

(c) Final Judgment Closing Proceeding. At the conclusion of the proceeding, a final judgment closing the proceeding shall be entered and filed with the clerk of the court, at which time all prior uncertified interlocutory orders shall become immediately appealable.

(d) Appeals. Final judgments as to all claims and parties, certified judgments, certified orders, and other orders appealable as provided by law may be appealed pursuant to the Hawai'i Rules of Appellate Procedure applicable to civil actions.

HPR Rule 34 (emphases added). One exception to the requirement for a judgment is in HPR Rule 34(b), which authorizes an appeal if the probate court certifies an interlocutory order for appeal in accordance with HRS § 641-1(b) (1993 & Supp. 2008).

Nevertheless, "Rule 34 is written to conform probate practice to the policy against piecemeal appeals, see, e.g., Jenkins v. Cades Schutte Fleming & Wright, 76 Haw. 115, 869 P.2d 1334, 1994 Haw. LEXIS 19 (1994)." Commentary to HPR Rule '34. Under the holding in Jenkins, "[a]n appeal may be taken . . . only after the orders have been reduced to a judgment and the judgment has been entered in favor of and against the appropriate parties pursuant to HRCP [Rule] 58[.]" Jenkins, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994). "[A]n appeal from any judgment will be dismissed as premature if the judgment does not, on its face, either resolve

all claims against all parties or contain the finding necessary for certification under HRCP [Rule] 54(b)." Id. Therefore, under HRS § 641-1 and HPR Rule 34, a probate court order is eligible for appellate review only if the probate court either

- (a) reduces the order to a separate judgment pursuant to HPR Rule 34(a),
- (b) certifies the order for appeal in the manner provided by Rule 54(b) of the Hawai'i Rules of Civil Procedure (HRCP) pursuant to HPR Rule 34(a), or
- (c) certifies the order for appeal in accordance with HRS § 641-1(b) pursuant to HPR Rule 34(b).

The probate court has not reduced any of its substantive adjudication orders in this trust proceeding to a separate judgment. The probate court has not reduced the December 19, 2008 order denying Appellant's motion for attorneys' fees and costs to a separate judgment. The probate court has not certified the December 19, 2008 order denying Appellant's motion for attorneys' fees and costs in the manner provided by HRCP Rule 54(b). The probate court has not certified the December 19, 2008 order denying Appellant's motion for attorneys' fees and costs for an interlocutory appeal in accordance with HRS § 641-1(b). Therefore, the December 19, 2008 order denying Appellant's motion for attorneys' fees and costs is not eligible for appellate review pursuant to HRS § 641-1(a) and HPR Rule 34.

Although there are exceptions to the requirement of a final judgment for appealability, such as the collateral order doctrine (see Abrams v. Cades, Schutte, Fleming & Wright, 88 Hawai'i 319, 322, 966 P.2d 631, 634 (1998)) and the Forgay doctrine (see Ciesla v. Reddish, 78 Hawai'i 18, 20, 889 P.2d 702,

704 (1995)), Hawai'i appellate courts have consistently held that, "[a]bsent entry of an appealable final judgment on the claims [to which an award of attorneys' fees and costs relates], the award of attorneys' fees and costs is . . . not appealable." Fujimoto v. Au, 95 Hawai'i 116, 123, 10 P.3d 699, 706 (2001); CRSC, Inc. v. Sage Diamond Co., Inc., 95 Hawai'i 301, 306, 22 P.3d 97, 102 (App. 2001). As already stated, the probate court has not entered a final judgment in this trust proceeding. Therefore, the December 19, 2008 order denying Appellant's motion for attorneys' fees and costs is not appealable under the collateral order doctrine or the Forgay doctrine.

Absent an appealable judgment or an appealable order, this appeal is premature and we lack appellate jurisdiction. Therefore,

IT IS HEREBY ORDERED that this appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, August 31, 2009.

*Corinne K A Watanabe*

Acting Chief Judge

*Daniel R. Foley*

Associate Judge

*Alice A. Fujim*

Associate Judge