FC-S SDO'S & MEMO OPINIONS
(July 2009 to July 6, 2010)

HRAP Rule 35 (c) (2): Unpublished appellate decisions, entered after July 1, 2008, may be cited for persuasive value only. A copy of the decision (SDO/Memo Opinion) must be attached to the legal brief/memo. SDO/ Memo Opinions usually turn on the facts; important legal issues are digested only.

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In re R.G.B. http://www.state.hi.us/jud/opinions/ica/2009/ica28582sdo.pdf	SDO, No. 28582 (App. April 9, 2009); cert. granted Sept. 23, 2009; affirmed 123 Haw. 1, 299 P.3d 1066 (2010)	**NOTE**: The Supreme Court issued a published decision affirming the F/CT and the ICA. The Supreme Court decision is the controlling law of the case and precedent.
In re "R" Children: R.R. and K.R. http://www.state.hi.us/jud/opinions/ica/2009/ica29541mop.pdf	No. 29541, Memo. Op. (App. Aug. 26, 2009)	Vacated Order Adjudicating Petition, and remanded for entry of order dismissing Petition. Facts: Threatened harm based on Father's "addiction" to child pornography, as seen by his downloading child pornography. U.S. Navy, NCIS confiscated Father's computers. NCIS agent, over P's "Best Evidence" objection, allowed to testify about images. NCIS agent testified that he did not see images on Father's computers, and only saw downloaded images. 1. Standard of Review for HRE 1002, "Best Evidence Rule" is right/wrong standard. 2. HRE Rule 1002, "Best Evidence Rule" requires original of document; downloaded image from computer is an original. Reversible error to allow NCIS agent to testify about the images. 3. HRE Rule 1004 (4) exception (collateral matter) not applicable because child pornography images was the basis of DHS' case. 4. HRE Rule 1004 (4) exception (originals not obtainable by judicial means) not applicable. NCIS agent did not testify about the unavailability of the images, and did not assert any privileges. Nothing in the Record about any of the parties asking for court-assistance (i.e., court order) to obtain the images. In a footnote, ICA stated that Father tried to subpoena the images but was unsuccessful. 5. Since evidence of child pornography presented at trial was erroneously admitted, there is no evidence in the Record to support allegations of threatened harm.
In re K.K-G. http://www.state.hi.us/jud/opinions/ica/2009/ica29698sdo.pdf	No. 29698, SDO, (App. Aug. 28, 2009)	Affirmed permanent custody; case decided on the facts. Mother admitted to multiple failed drug treatments since 1999. Parental rights to her two older children were terminated in 2007. In this case, Mother ordered to treatment in 2007. Participated in Family Drug Court for one year, but could not complete Family Drug Court.

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		Tested (+) three times during case. Mother admitted that she still needed to complete drug treatment before she can reunify with Child. Child in foster custody for 16 months at trial.
In re D.H. http://www.state.hi.us/jud/opinions/ica/2009/ica29096sdo.pdf	No. 29096, SDO (App. Aug. 31, 2009)	Reversed Order denying DHS' Motion for Permanent Custody, and remanded for further proceedings. Note: Appealed taken as an interlocutory appeal. FACTS: Child was in court-ordered foster custody for 2 years and 10 months at trial. Father did his services. Child would not reunify because of his "perceived" fear of Father due Father's past abuse. 1. In proving HRS § 587-73 (a) (1) and (2) parental unfitness, DHS only has to prove that the parent is **either not willing or not able**. In re Doe, 95 Haw. 183, 20 P.3d 616 (2001). Family court was wrong in ruling that DHS must prove that parent is both not willing and not able. 2. Family court's legal ruling would have been harmless error, if the family court ruled that DHS did not prove that Father was not willing and not able. Based on Father's participation in services, ICA affirmed family court's ruling that Father was "willing." 3. Family court's ruling that although Father was willing and able but (Father) cannot provide a safe family home was a contradictory decision: not a discernible decision. 4. ICA did not rule on family court's "permanent plan" ruling because of defective "parental unfitness" ruling.
In re J.E http://www.state.hi.us/jud/opinions/ica/2009/ica29684sdo.pdf	No. 29684, SDO (App. Sept. 14, 2009)	Affirmed permanent custody. 1. Family court had jurisdiction. Mother defaulted at temporary foster custody trial. Temporary foster custody order is an appealable order, citing In re Doe, 77 Haw. 109, 883 P.2d 30 (1994), Mother did not appeal temporary foster custody order, and cannot raise issue on the permanent custody appeal. NOTE: Family court actually adjudicated case and awarded foster custody. 2. Rejected Mother's argument that DHS did not make reasonable efforts for failing to obtain an opinion whether Mother needed to participate in residential drug treatment after she failed outpatient drug treatment. Mother's assessments recommended outpatient drug treatment. No evidence of the need for residential drug treatment. ICA noted that Mother did not complete any of her court-ordered services during the 9 months from adjudication to the permanent custody trial.
In re M.B. http://www.state.hi.us/jud/opinions/ica/2009/ica29222sdo.pdf	No. 29222, SDO (App. Sept. 30, 2009)	Affirmed permanent custody. Major issue was Marshallese language interpreters for court proceedings and for court-ordered services. Child had special needs. Mother had cognitive deficits. 1. Due Process right to interpreters for court hearings is not limitless. Father failed to show

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		prejudice when he was not provided an interpreter for early court hearings. Hearings were continued for interpreters, and the Record showed that Father was capable of understanding English. 2. Interpreter for court-ordered services. a. Father not prejudiced because he was capable of understanding English. b. DHS' obligation to provide interpreter services is not limitless. Based on circumstances, DHS' obligation was impacted by factors beyond DHS' control, i.e. availability and reliability of interpreters, based DHS documented efforts to obtain interpreters. Obligation is based on the totality of the circumstances: resources available to the State and costs. Mother's reasonable efforts argument was based on the State Language Access Statute, HRS Chapter 371, Part II. 3. Judicial Notice. Father failed to show: 1) where in the Record he objected to the family court 's taking judicial notice of the maternal half-siblings' case and 2) prejudice. Therefore, he waived this issue. ICA declined to address plain error. 4. DHS not required to submit name of prospective adoptive parents under seal pursuant to HRS § 587-27 (1) (A). Even if required, error is harmless because the issue does not affect the determination of the Parents' ability to provide a safe family home. 5. Unfitness findings regarding Father are not clearly erroneous because: Father did not believe that the Child had special needs and believed the Child would be normal if returned, Father's visits were inconsistent, and Father deferred all childcare responsibilities to Mother who was caring for younger non-special needs sibling (but could not care for the Child with special needs). 6. Unfitness findings regarding Mother are not clearly erroneous when after hearing multiple witnesses about the Child's special needs, Mother, even with the help of an interpreter, could not state the Child's special needs and how to address them.
In re R.R. http://www.state.hi.us/jud/opinions/ica/2009/ica29683sdo.pdf	No. 29683, SDO (App. Oct. 4, 2009)	Father appealed permanent custody. Father had severe mental health problem, and given approximately 3 years to attempt reunification. Father was dedicated to services but continued to present anger management problems. Affirmed permanent custody based on the following: 1. Rejected Father's argument that he did not subject the Child to harm. ICA noted that this argument is further evidence of Father's failure to acknowledge his anger and domestic violence problems, which is a factor in determining his ability to provide a safe home. HRS § 587-25 (a) (8). 2. Although psychiatric condition stabilized, Father still displayed aggressive behaviors up to the day before trial. Credible testimony of DHS social worker that Father's periods of compliance then belligerent behavior showed inability to provide a safe home. 3. Evidence of DHS repeatedly explaining service plan requirements to Father. Family court

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		told Father that his anger management/domestic violence problems were the barriers that prevented reunification. 4. Psychologist's testimony that Father needed long-term professional support. ICA noted that Father's anger alienated his support system. 5. Services were exhausted. 6. Although he participated in services, Father did not make changes. Service plan compliance alone does not require the return of the Child.
In re J.J. http://www.state.hi.us/jud/opinions/ica/2009/ica29840sdo.pdf	No. 29840, SDO (App. Nov. 16, 2009)	Mother appealed permanent custody; ICA affirmed. Unidentified/Unadmitted Perpetrator. 1. Mother not denied reasonable opportunity to reunify when family court suspended Parents' visits. Visits were suspended at pre-adjudication and never reinstated. 2. Based on DHS social worker's testimony, Parents cannot provide a safe home because of their continued denial that the Child's injuries were caused by abuse. Shows that Parents' did not see the need to participate in services and to make changes. 3. Based on DHS social worker's testimony, giving Parents additional time (giving Parents the entire HRS § 587-73 (a) (2) 2-year period) to participate in services would be futile.
In re B.O. http://www.state.hi.us/jud/opinions/ica/2009/ica29130.pdf	No. 29854, SDO (App. Nov. 25, 2009)	Mother appealed permanent custody. ICA affirmed. 1. Rejected Mother's arguments that family court erred in finding that she could not provide a safe home in the reasonable future: a. Child in the continuous foster custody for 19 months at time of the trial, b. Harm: Mother throwing the child into the car seat and on the floor, c. Mother failed to maintain stable housing, d. Mother had very minimal parenting skills, e. Mother failed to complete parenting counseling and individual therapy, and f. Mother's history of slitting wrist, as late as one month before trial. 2. Without comment, ICA rejected Mother's reasonable efforts/opportunity argument.
In re A.H. http://www.state.hi.us/jud/opinions/ica/2009/ica29734sdo.pdf	No. 29734, SDO (App. Dec. 2, 2009)	Mother appealed permanent custody. ICA affirmed. Sufficiency of the evidence and reasonable efforts issues. Mother argued that DHS did not make reasonable efforts to reunify because she was not diagnosed with bipolar disorder until 2 months before trial. 1. The late bipolar diagnosis was caused by Mother's failure to consistently participate in therapy, and Mother's denying some symptoms for bipolar disorder when her therapist believed she had this condition. 2. Mother was not consistent in participating in services (i.e., drug treatment, with multiple relapses), failed to integrate concepts she should have learned in services (inappropriate parenting even though she participated in parenting education), and had an erratic and chaotic

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		lifestyle. 3. Mother did not challenge any of the findings of fact and conclusions of law, and they were binding on Mother.
In re Adoption of a Male Child, Born on July 25, 2004 http://www.state.hi.us/jud/opinions/ica/2009/ica29517sdo.pdf	No. 29517, SDO (App. Dec. 14, 2009) cert. rejected, April 22, 2010	Father killed Mother and DHS placed the Child with maternal great grandparents. Father's parental rights terminated in the FC-S case. DHS filed the adoption petition -- adoption by maternal great grandparents. In the adoption case, family court denied paternal grandparents' motion to intervene. In their motion, paternal grandparents asked to delay the adoption until "regular visits" with the paternal family were set-up. Paternal grandparents appealed. ICA affirmed. 1. Hawaii statutes do not give non-custodial grandparents the unconditional right to intervene (HFCR Rule 24 (a), intervention by right) in adoption cases. Consent of and notice to non-custodial grandparents to the adoption not required. HRS §§ 578-2 & 579-8 (a). Non-custodial grandparents do not have protected constitutional liberty interests in the adoption of their grandchildren. 2. Paternal grandparents were not denied the opportunity to meaningfully participate in the adoption proceeding when the family court reviewed their motion and the attached report, and heard remarks from paternal grandmother. The Record did not state whether paternal grandparents proffered witnesses were present to testify at the hearing.
In re A.A. http://www.state.hi.us/jud/opinions/ica/2010/ica29755sdo.pdf	No. 29755, SDO, (App. Jan. 20, 2010)	Mother and Father appealed permanent custody. ICA affirmed. Case decided on the facts. Medically fragile infant. Neglect & threatened neglect -- failure to thrive. Unchallenged findings that transitioning the Child from present placement would be against medical advice. Parents moved to the mainland; CPS intervention by New Jersey regarding Parents' newborn child; 1. Rejected Father's reasonable efforts arguments when he failed to complete required services and missed 21 out of 31 scheduled visits. Father did not participate in a psychological evaluation until 11 months after the service plan (that required the evaluation) was ordered: DHS' inability to assess need for more services was Father's fault because of his late psychological evaluation. 2. Although Mother appeared to be in substantial compliance and had stabilized, family court did not abuse its discretion in awarding permanent custody based on Parents' history of domestic violence, the Child's age and medical condition, the harm (i.e. failure to thrive). and CPS case in New Jersey. The Record did not show that family court used Mother's military service against her.
In re A.S-H.	No. 29902, SDO,	Father appealed permanent custody. ICA affirmed.

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http://www.state.hi.us/jud/opinions/ica/2010/ica29902sdo.pdf	(App. Jan. 28, 2010)	Father was incarcerated at the date of trial in March 2009. Child was in foster custody since December 2007. Father's sentence expired in December 2011. Father stated he had a parole hearing scheduled for September 2009. 1. Father waived findings of fact he stated to be in error because he made no arguments why the findings of fact were erroneous. 2. ICA cited to earlier appellate rulings that incarceration cannot be the sole reason to terminate parental rights. However, based on In re TH, 112 Haw. 331, 145 P.3d 874 (App. 2006), the rule does not apply when parent will not be released from incarceration until after the 2-year anniversary of court-ordered foster custody. DHS social worker testified that even if Father were paroled in September 2009 (before the 2-year anniversary of court-ordered foster custody), Father would need another 6-9 months of services. 3. DHS did not breach duty to protect the Child, when former step-farther attempted to kidnap Child from school, and DHS did not obtain a restraining order. DHS assessed need for the restraining order but foster parents did not want it because the restraining order would require disclosing personal information, and DHS stopping visits with Father who DHS believed was disclosing Child's whereabouts. 4. Father not denied Due Process for the family court's failure to compel DHS to produce the Child's therapist. The basis for the request given at trial (placement) was different than the argument on appeal (challenging the social worker's credibility and visits). Father did not properly preserve the issue for appeal, and waived the issue on appeal. Even if issue not waived, it would be harmless error beyond a reasonable doubt because testimony would not change the overwhelming evidence against Father, i.e. outstanding safety issues, need for services and period of incarceration.
In re M.A. and H.W. http://www.courts.state.hi.us/docs/opin_ord/ica/2010/apr/ica30032sdo.pdf	No. 30032, SDO (App. April 16, 2010)	Vacated (reversed) and remanded order awarding permanent custody. Family court did not enter findings of fact and conclusions of law. In the order denying Mother's motion for reconsideration, family court summarized the testimony of witnesses, but the family court mischaracterized the testimony of one witness. On appeal, Mother argued that the family court: 1) clearly erred in issuing its ultimate HRS § 587-73 (a) (1) and (2) parental unfitness findings; 2) clearly erred by failing to issue findings of fact and conclusions of law, and 3) clearly erred by mischaracterizing the testimony of a witness (on appeal DHS agreed that the judge mischaracterized the testimony of the witness, but argued that it was harmless error; ICA rejected this argument), and 4) unduly placed more emphasis on the age of the case than the HRS § 587-73 (a) criterion by clear and convincing evidence. [The SDO does not state the facts of the case, except for the facts regarding the absence of findings]. 1. Agreed with Mother-Appellant that the HRS § 587-73 (a) (1) and (2) findings in the permanent custody order, by itself, were not sufficient findings to support the decision, and

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		violates HFCR Rule 52 (requiring the family court to enter findings of fact and conclusions of law when a notice of appeal is filed). a. The summary of the testimony of witnesses, in the order denying Mother's motion for reconsideration were not findings of fact. Distinguished from In re Doe, 96 Haw 255, 30 P.3d 269 (App. 2001) where the ICA ruled that the family court's summary of the testimony of the witnesses could be validly converted into findings of fact because the family court expressly found the testimony to be credible. The summary of the testimony in the order denying Mother's motion did not contain such a ruling. b. Distinguished the ICA's ruling in In re T Children, 113 Haw. 492, 155 P.3d 675 (App. 2007). In T Children, father-appellant filed his notice of appeal after the trial judge retired. Another judge signed the findings of fact and conclusions of law. The ICA ruled that the other judge could properly sign the findings of fact and conclusions of law if the judge reviewed the trial transcripts, but the judge did not. The ICA vacated the findings of fact and conclusions of law, but further ruled that the ultimate HRS § 587-73 (a) findings contained in the permanent custody order were sufficient to support the family court's ruling. In M.A., the ICA ruled that the facts in T Children (the retirement of the judge) were different. [The ICA was concerned that there was no findings of fact concerning the credibility of the witnesses and the evidence, and enforcing HFCR Rule 52 (a). Per the ICA, the appellate courts cannot defer to the trial court's assessment of the weight and credibility of the evidence in an HRS § 587-73 (a) proceeding when there is no such findings. See In re Doe, 108 Haw. 134, 117 P.3d 866 (App. 2005) – findings of fact and conclusions of law were filed after the record on appeal was lodged; father-appellant filed his opening brief before the record on appeal was supplemented with the findings of fact and conclusions of law. ICA appeared to have placed a duty on the appellant to ensure that the family court issued findings of fact and conclusions of law by either filing a motion compelling the family court to issue them or to supplement the record on appeal.].
In re T.W. http://www.courts.state.hi.us/docs/opin_ord/ica/2010/apr/ica30015sdo.pdf	No. 30015, SDO (App. April 16, 2010)	Mother and Father appeal permanent custody. ICA affirmed. Both parents have drug problems, and Father was incarcerated at the time of trial. Mother. Mother did not challenge any of the findings of fact and conclusions of law. ICA did not address her "reasonable efforts" argument. [Mother did not specifically challenge any of the reasonable efforts and reasonable opportunity findings]. ICA only addressed the ultimate HRS § 587-73 (a) (1) & (2) parental unfitness determination. No error where Mother had dual mental health and substance abuse problems. Mother had a 14-year history of failed drug treatments and relapses, with her longest period of sobriety being 9 months. This was Mother's 4th child; her 2 oldest children were with their father and Mother's parental rights to her 3rd child were terminated in another CPA case. Mother did not start drug treatment until she was arrested on

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		Federal charges, and released on bail to a drug treatment program. Father. Family court correctly considered Father's incarceration and other factors. Father's incarceration would end 3 months before the HRS § 587-73 (a) (2) 2-year period, but would need at least another year to demonstrate his ability to provide a safe home.
In re M Children: TM, JM, AM http://www.courts.state.hi.us/docs/opin_ord/ica/2010/may/ica30091sdo.pdf	No. 30091, SDO (App. May 4, 2010)	Affirmed permanent custody. Severe neglect primarily by Mother, and some inappropriate physical discipline. Father contributed to the neglect and/or tacitly condoned the neglect. Both parents minimized and/or denied the abuse. Parents participated in some services and completed some services, but could not demonstrate changes to provide safe home 1. Family court did not abuse its discretion by qualifying the DHS social worker, with the title of Human Services Professional (workers in a social work position but given the HSP title because the worker did not have a social work degree), as an expert in social work. Testimony of worker that her work with DHS was in social work and was treated as a social worker. Per ICA, the social worker licensing statute HRS § 467E-6 (2) exempts persons employed by the federal, state or county as a social worker from the licensing requirement. 2. Based on case law, reasonable efforts argument failed because parent failed to preserve the issue by making a timely requests for services and/or accommodations. 3. Rejected Parents' arguments objecting to adoption by foster parents. Sufficient testimony that the goal of adoption was in the children's best interests.
In re RW http://www.courts.state.hi.us/docs/opin_ord/ica/2010/jun/ica28991sdo.pdf	No. 28991, SDO (App. June 28, 2010)	Mother appealed PC. ICA affirmed. Child injured by unidentified perpetrator. Case adjudicated based on Father's admission to being the perpetrator. DHS treated both Parents as the perpetrator. Case decided on its facts 1. Although Father admitted to being the perpetrator, no error when DHS treated both Parents as the perpetrator when there was sufficient evidence that : a. Based on expert medical testimony, Father's explanation about how he injured the Child was not consistent with the Child's injuries. b. The MDT did not determine the identity of the perpetrator. As a result, based on the expert testimony of Dr. Brenda J. Wong, Ph.D. of the KCPC MDT, both Parents must be treated as if they were the perpetrator. c. Expert testimony of DHS social worker and social worker supervisor that even if Mother did not cause the physical injury, she was perpetrator for her failure to protect the Child. 2. Rejected Mother's reasonable efforts arguments. a. Did not preserve all of her arguments by making demands for services at trial. b. No error when DHS' social worker supervisor testified that providing services would be a "shot in the dark" because the triggers that caused the perpetrator to injure the Child was unknown. Testimony was supported/corroborated by the expert testimony of Dr. Wong.

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		3. Although Mother participated in services, she did not have insight and did not demonstrate the ability to provide a safe home. Mother was also deceptive about her continued relationship with Father, including becoming pregnant during the case. When the Child was placed on the Mainland, Mother did not participate in "webcam" visits and write letters to the Child.