

2009 HAWAII LAW UPDATE

A stylized graphic of a balance scale, rendered in a dark blue color, positioned on the right side of the slide. The scale is tilted, with the right pan hanging lower than the left pan. The background is a solid medium blue.

July 24, 2009

- 2009 HAWAII LEGISLATION
- COURT RULE AMENDMENTS
- HAWAII APPELLATE DECISIONS
- WEBSITES





2009 HAWAII LEGISLATION

- None



COURT RULE AMENDMENTS

- (Appellate) Child Protective Pilot Project Rules
Extended from June 30, 2009 to June 30, 2010
- HRAP Form 9 – Request for Transcripts
Judge’s approval for confidential proceedings
- HSCR Rules 17 & 22 – Mandatory Continuing Legal Education (MCLE)
(effective 01/01/10)



HAWAII APPELLATE DECISIONS

- Child Protective Act (CPA)
 - Published
 - Summary Disposition Orders (SDO's) & Memorandum Opinions
- Other Family Court Cases



PUBLISHED CPA APPELLATE DECISIONS

- In re “A” Children, 119 Haw. 28, 193 P.3d 1228 (App. 2008)
 - Affirmed Family Court’s decision to grant DHS’ motion for permanent custody (MPC), as to Mother
 - Reversed Family Court’s decision to grant DHS’ MPC, as to Father. Father denied Due Process because Family Court appointed counsel two weeks before the MPC trial.



In re “A” Children (cont.)

- Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 et seq.
 - Native Hawaiian children do not fall under the ICWA definition of “Indian child”
 - ICWA does not apply to Native Hawaiian children



In re “A” Children (cont.)

□ RIGHT TO COUNSEL

- Family Court’s appointing counsel for the indigent Father two weeks before trial denied Father Due Process
- Parent’s right to raise child is a liberty interest protected by the Due Process Clauses of the U.S. Constitution, and independently by Art. 1, Sec. 5 of the Hawaii State Constitution
- Ruling based on the U.S. Constitution, not on the Hawaii State Constitution



In re “A” Children – Right to Counsel (cont.)

- Family Court has discretion to appoint counsel for indigent parents. HRS § 587-34. Subject to Due Process protections.
- Adopted Lassiter v. North Carolina
 - No “Bright Line” rule. Determined on a case by case basis.
 - Three-prong Eldridge test:
 - Private Interest at stake (parental rights)
 - Government Interest (welfare of the child)
 - **Risk that procedures used will lead to erroneous decision**



In re “A” Children – Right to Counsel (cont.)

- Factors:
 - Father was on probation. Facts in CPA case had strong implications on probation, i.e. drug use, self-incrimination
 - Conflicting positions with Mother at different times in the case
 - Father had limited cognitive functioning. He had difficulty grasping the “complex” issues and procedures
 - Family Court did not advise Father of his right to be represented by counsel, and that if he were indigent, the Family Court will appoint counsel, in a timely manner
 - Father was confused about the procedures in and the consequences in establishing paternity



In re “A” Children – Right to Counsel (cont.)

- Family Court erred by requiring indigent Father to establish paternity before appointing counsel when he admitted on the Record that he was the Children’s father.

Indigent **CONCERNED FATHERS** may be entitled to court-appointed counsel. Error for Family Court to / require an indigent concerned father to establish paternity before appointing counsel.



SDO's and Memorandum Opinions

- See Chart (handout)
- Highlights
 - Ineffective Assistance of Counsel. Use criminal standard
 - The issue of the child's permanent placement is not relevant to the HRS § 587-73 (a) analysis
 - Reasonable Efforts. Must make demand for services and/or challenge the Family Court's findings to preserve issue for appeal.
 - HRAP Rule 28 (b) (7). Point(s) of error on appeal, i.e. finding(s) of fact, will be waived if not specifically argued.
 - Must demonstrate PREJUDICE.



Other Family Court Appellate Decisions

- Doe v. Doe, 118 Haw. 293, 188 P.3d 807 (App. 2008)
- Doe v. Doe, 120 Haw. 149, 202 P.3d 610 (App. 2009)
- In re T.C., ____ Haw. ____, ____ P.3d ____, No. 28295 Slip Op. June 24, 2009 (App. 2009)



Doe v. Doe, 118 Haw. 293, 188 P.3d 807 (App. 2008)

- Party's access to Family Court's record of the case
- Denial of Due Process right of access to the court when Family Court limited a party's access to court file, without legitimate reason.



Doe v. Doe, 120 Haw. 149, 202 P.3d 610 (App. 2009)

□ Best Interests of the Child

A child's best interests can be justly and adequately determined only in proceedings that are consistent with the requirements of the Hawai'i Constitution and Applicable Law.



Doe v. Doe, 120 Haw. (cont.)

□ Polygraphs

■ Evidence inadmissible

- Reliability
- HRE Rule 403?
- Invading the province of the trier of fact to determine credibility
- The trier of fact is the “lie detector”

■ Allowable for

- Investigations
- Service Compliance




Doe v. Doe, 120 Haw. (cont.)

- Ex Parte Motions/Orders Changing Custody
 - Absent emergency/exigent circumstances, i.e. harm, ex parte orders changing physical custody is denial of Due Process
 - Not applicable to Chapters 586 & 587 proceedings
Caveat: Changing custody from absent unsafe custodial parent to safe non-custodial parent
 - If ex parte order changing custody issued:
 - Notice of “post deprivation” hearing
 - Notice of grounds for change of custody



Doe v. Doe, 120 Haw. (cont.)

- Guardian Ad Litem (GAL)
 - GAL's files are discoverable
 - Neutrality
- Discovery
 - Procedures for HFCR Rule 26 (c) protective orders
 - Parties must first try to resolve matter informally
 - Person seeking protective order has burden to show good cause
 - Court balance need for information against injury caused by uncontrolled discovery
 - Caveat: Unique laws in child protective situations



In re T.C., ___ Haw. ___, ___ P.3d ___, No. 28295 Slip Op. June 24, 2009 (App. 2009)

- In HRS § 587-11 (1) law violation cases, parents have standing and full party status.
- In related SDO regarding the Minor's younger sibling, In re N.C., SDO No. 28294 (App. June 26, 2009), ICA ruled that in HRS § 587-11 (2) status offense cases, parents have standing and full party status.



WEBSITES

- Hawaii Judiciary
- Hawaii Legislature
- HSBA
- Other Websites



Hawaii Judiciary

www.courts.state.hi.us

- Appellate Decisions
- Court Rules
- Court Records
- Court Forms
- Research Links



Hawaii Legislature

www.capitol.hawaii.gov

- Hawaii Revised Statutes
- Legislative History
- Track Legislation



HSBA

www.hsba.org

□ CASEMAKER

FREE Legal Research Tool !!!



Other Websites

- ABA – Center on Children and the Law
www.abanet.org/child
- U.S. Dept. of Health and Human Services -
Children's Bureau
Child Welfare Information Gateway
www.childwelfare.gov