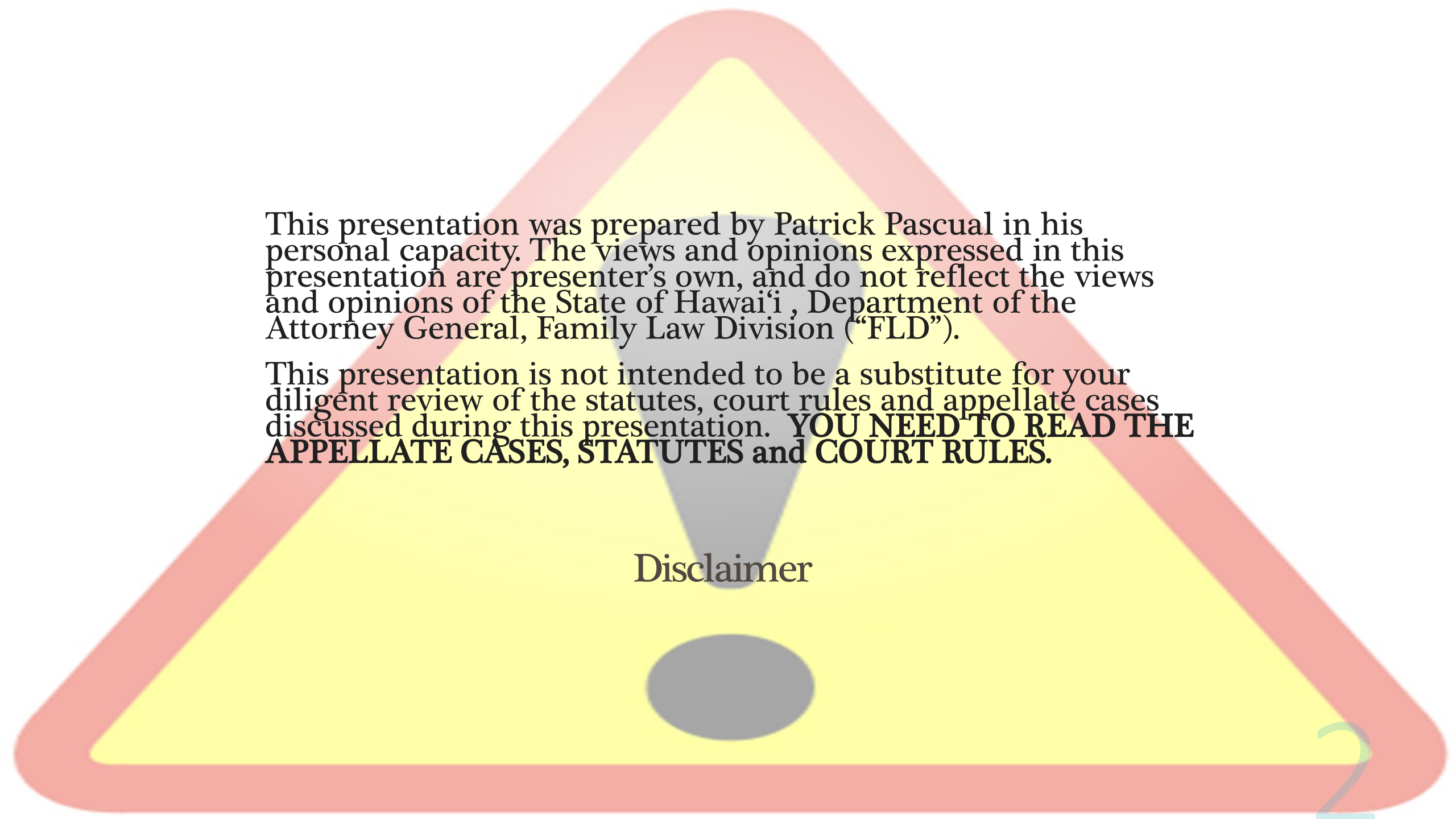




2019-2020
APPELLATE DECISIONS
and
STATUTES & RULES AMENDMENTS

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This presentation was prepared by Patrick Pascual in his personal capacity. The views and opinions expressed in this presentation are presenter's own, and do not reflect the views and opinions of the State of Hawai'i, Department of the Attorney General, Family Law Division ("FLD").

This presentation is not intended to be a substitute for your diligent review of the statutes, court rules and appellate cases discussed during this presentation. **YOU NEED TO READ THE APPELLATE CASES, STATUTES and COURT RULES.**

Disclaimer

A photograph of a courtroom interior. The walls are covered in dark wood paneling. In the center of the back wall, there is a large circular seal with an eagle perched on top. To the left, an American flag is partially visible. In the foreground, there are several rows of dark wooden desks and chairs, arranged in a semi-circle. The text "Appellate Cases" is overlaid in the center of the image.

Appellate Cases

The image shows the Hawaii State Capitol building, a grand neoclassical structure with a central clock tower. In front of the building is a large, circular lawn with a central statue of a Native Hawaiian figure on a white pedestal. The scene is framed by several tall palm trees and a clear blue sky with scattered clouds. The text 'Hawai'i Appellate Decisions' is overlaid in a large, white, serif font across the center of the image.

Hawai'i Appellate Decisions

In re AB,

145 Hawai'i 498, 454 P.3d 439 (2020)

In re AB ICA Decision

The Intermediate Court of Appeals Reversed Order Denying Motion to Intervene:

- K.L. had a right to intervene pursuant to HFCR Rule 24 (a)
- Based on her filing her adoption petition.

The Intermediate Court of Appeals' Other Ruling:

- No Appellate Jurisdiction of Other Orders Appealed Because Appeals were Untimely:
 - Order Awarding Permanent Custody (Order Terminating Parental Rights).
 - Order Continuing Permanent Custody (Authorizing Change in Placement with SH).
 - Even if Appeals were Timely, KL did not have Standing.
- Did Not Address Hānai Issue

In re AB
Hawai‘i Supreme Court Proceedings

- Accepted KL’s Application for Writ of Certiorari
- Ordered the Family Court to Conduct a Contested Placement Hearing “Giving Due Consideration to KL’s Status as a hānai parent, as well as AB’s best interests.”
- Retained Concurrent Jurisdiction to Enter an Opinion and Judgment.

In re AB
Hawai'i Supreme
Court Opinion

Appellate
Jurisdiction

Intervention

Placement and Best
Interests of the Child

In re AB

HĀNAI

HĀNAI

- The Hānai Relationship is Deeply Rooted in Native Hawaiian Tradition, Culture and History.
- The Hānai Relationship is Recognized in Hawai‘i Appellate (Case) Law, Hawai‘i Statutes, and Hawai‘i Administrative Rules.
- Family Court Erred When it did not Consider KL’s Hānai Relationship to AB in Denying KL’s Motion to Intervene.
- Family Court Abused its Discretion When it did not Consider KL’s Hānai Relationship (in addition to other factors) When it Authorized AB to be Placed with Paternal Aunt SH in New Hampshire.

HĀNAI

The Hawai'i Supreme Court's Ruling Did Not:

- Determine Which Relationships Will be Recognized in Child Protective Act Proceedings as Hānai Relationships.
- Limit the Applicability of Its Ruling to the Facts in the Case.
- Determine Whether KL's Status as a Hānai Parent Gave Her the Same Due Process Protections as Legal Parents.
- Disturb Its Prior Ruling Stopping Short of Using the Doctrine of Equitable Adoption to Make Hānai Children Heirs of their Hānai Parents.
- Reconcile the Historical/Traditional Definition of Hānai, and Various Hawai'i Laws.

Native Hawaiian Culture
vs.
Child Protective Act, HRS §
587A-4

Native Hawaiian Culture
(McKenzie, *Native Hawaiian Law: A Treatise*)

Child Protective Act
HRS § 587A-4

Meaning to “feed” or “to nourish, hānai refers to a child who is reared, educated, and loved by someone other than the child’s natural parents. Traditionally, kupuna and older siblings within the family exercised the right to hānai. The purpose of hānai was often to fill and emotional void for those without children in the home or to solidify a relationship between two families

...
Traditionally, natural parents renounced all claims to a child in a “binding agreement when the parents said in the hearing of others . . . I give this child, intestines and all.” The permanent quality of the hānai relationship made it a near equivalent of legal adoption. It is important to note that the permanency of hānai was never intended to sever the child’s genealogical heritage.

An adult, other than a blood relative, whom the court or department [DHS] has found by credible evidence to perform or to have performed a substantial role in the upbringing or material support of a child, as attested to by the written or oral designation of the child or another person, including other relatives of the child.

In re AB

APPELLATE JURISDICTION

Appellate Jurisdiction

- The Appellate Court's Had Appellate Jurisdiction to Review the Order Denying KL's Motion to Intervene and the Order Denying KL's Motion for Reconsideration (of the Order Denying KL's Motion to Intervene).
- KL's Motion to Intervene and Motion for Reconsideration Raised the Same Issue in her Opposition to the Order Continuing Permanent Custody that Authorized AB's Placement with SH in New Hampshire.
- Therefore, KL timely appealed the Order Continuing Permanent Custody, and the Appellate Courts had Jurisdiction to Review the Order Continuing Permanent Custody.

In re AB

INTERVENTION BY
RIGHT

HFCR Rule 24 (a)

Hawaii Family Court Rules, Rule 24 (a)

Rule 24. INTERVENTION.

(a) **Intervention of right.** Upon timely application anyone shall be permitted to intervene in an action:

(1) when a statute confers an unconditional right to intervene; or

(2) when the applicant claims an interest relating to the property, transaction, or custody, visitation, or parental rights of a minor child which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Intervention By Right

KL had the Right to Intervene Pursuant to HFCR Rule 24 (a) (2):

- HFCR Rule 24 Only Requires an Application, not an HFCR Rule 10 written or oral motion.
- The family court should have construed KL's (who *pro se* at the time) statements opposing the change of placement from her home to SH's home in New Hampshire as an application to intervene.
- The family court should have considered KL's status as AB's hānai parent (in addition to her being AB's resource caregiver, and the parent of AB's half-sister) as a factor weighing in favor of granting intervention.

In re AB

PERMANENT
PLACEMENT
and
BEST INTERESTS OF THE
CHILD

Hānai Relationship and Best Interests of the Child

- Given the significance of the Hānai relationship in Native Hawaiian Culture and history, and Hawai'i statutes and case law, the family court is required to consider these relationships whenever statutes require the family court to determine the best interests of the child.
- Now part of the HRS § 571-46 (b) best interests of the child analysis.

In-State Permanent Placement

- Confirmed/*Restated* ruling in *In re AS*, 132 Hawai'i 368, 322 P.3d 263 (2014).
- The DHS, as the permanent custodian, has the discretion to determine which permanent placement is in the child's best interests.
- The party challenging the DHS' permanent placement determination has the burden to prove by a preponderance of the evidence that the DHS' recommended permanent placement determination is not in the child's best interests.
- The family court must make its own best interests determination.

Out-of-State Permanent Placements

- HRS § 587A-15 (d) (2) requires prior court approval before a child is placed outside the State of Hawaii, regardless of whether the placement recommendation is contested.
- The family court must seriously and independently inquire and determine that the recommended/proposed out of state placement is in the child's best interests.

Out-of-State Permanent Placement Factors

- The Child's Position.
- The Guardian Ad Litem's Position.
- Impact on the Child's Relationships in the State of Hawai'i.
- Impact on the Child's Need for Relationships with Siblings.
- Impact on the Child's Stability.
- Other Possible Placement Options in the State of Hawai'i and Why These Placement Options were not Considered.
- Why the Need to Change Placement.

No Relative Permanent Placement Preference

“It is also unclear whether the family court considered this court’s [Hawaii Supreme Court’s] holding that ‘there is no relative placement preference in [HRS] chapter 587A with respect to permanent placement of foster children.’”

In re AS, 132 Hawai‘i at 370, 322 P.3d at 265.

In re R Children,

145 Hawai'i 498, 454 P.3d 439 (2020)

*In re
R Children*

Terminating the
Parental Rights of One
Parent, but not the
Other Parent

In re R Children
(ICA Decision)

- The Child Protective Act Only Authorizes the Termination of Parental Rights When All of the Elements of HRS § 587A-33 (a) Have Been Proven By Clear and Convincing Evidence.
- The Family Court Erred in Terminating the Parental Rights of the Father (but not the Mother) When It Ruled that the Permanent Plan with the Goal of Adoption was not in the Child's Best Interests, Even Though the Family Court Entered the HRS § 587A-33 (a) (1) & (2) "Parental Unfitness" Findings as to the Father.
- HRS § 571-63 Authorized the Family Court to Terminate the Parental Rights of One Parent (Father), But Not the Other Parent (Mother).

In re R Children
(Supreme Court Decision)

- In a Child Protective Act Proceeding under HRS Chapter 587A, the Termination of Parental Rights Provisions in HRS §§ 571 *et seq.* is NOT Interchangeable with the Termination Parental Rights Provisions of the Child Protective Act in HRS § 587A-33 (a).
- The Child Protective Act Contains an Additional Requirement: the Permanent Plan, with the Goal of Adoption or (Long-Term) Permanent Custody is in the Child's Best Interests.

DJ v. CJ,

147 Hawai‘i 2,464 P.3d 790 (2020)

DJ v. CJ

Constitutional Rights of Parents and Children, and Out-Of-State Relocation

Liberty Interests and Due Process

- Parent's Right to the Care, Custody and Control of the Parent's Child is a Fundamental Liberty Interest Protected by the Due Process Clause of the 14th Amendment to the U.S. Constitution, and Independently by the Due Process Clause of the Hawai'i State Constitution, article 1, section 5.
- The Relocation of a Child by One Parent is a Potentially Significant Deprivation of the Other Parent's Fundamental Liberty Interests.
 - Significant Curtailment of the Contacts with the Children, who Reside on the Continent, for the Other Parent, who Resides in Hawai'i.
 - Hawai'i is an Island State Separated by 2,000 Miles from the West Coast.
- Due Process Requires that a Person be Given the Opportunity to Heard in Meaningful Manner.
- Right to Be Heard in a Meaningful Manner (Due Process) Includes the Right of Cross-Examination.
- Due Process Must Prevail Over the Trial Court's Scheduling Concerns.

Out-Of-State Relocation and Best Interests of the Child

- The Court's Decision Whether to Allow a Child to Relocate Out of State Implicates:
 - The Parent's Fundamental Liberty Interests.
 - The Child's Liberty Interest to Parental Contact.
- The Court Must Decide Whether the Relocation is in the Child's Best Interests, not the Parent's Interests.
- The Court has the Discretion to Appoint a Guardian Ad Litem to Protect the Child's Best Interests.

Chen v. Mah,
146 Hawai‘i 157, 457 P.3d 157 (2020)

*Chen v.
Mah*

Setting Aside the Entry of Default

BDM v. Sageco, Inc.
57 Haw. 73, 549 P.2d 1147 (1976)
3-Part Test

- Prior Law: Based Case Precedent Courts Use the Same Standard to Set Aside the Default Judgment Under Rule 60 (b) and Entry of Default Under Rule 55 (c):
 - The Non-Defaulting Party Will Not be Prejudiced by the Reopening,
 - The Defaulting Party has a Meritorious Defense, and
 - The Default Was Not the Result of Inexcusable Neglect or a Wilful Act.
- Overruled the 3-Part *BDM* Test as to Rule 55 (c).

**New Rule:
Setting Aside Entry of Default
Rule 55 (c)**

- Rule 55 (c) Only Requires the Defaulting Party to Show “Good Cause” to Set Aside the Entry of Default.
- “Good Cause:”
 - The Defaulting Party Did Not Deliberately Fail to Plead or Otherwise Defend or Engage in Contumacious Conduct; or
 - If the Defaulting Party Did Fail to Plead or Otherwise Defend or Engage in Contumacious Conduct, There is No Actual Prejudice to the Non-Defaulting Party that Cannot be Addressed Through Lesser Sanctions.
- Applies to HFCR Rule 55 (c), HRCR Rule 55 (c), and DCRCR Rule 55 (c), effective January 30, 2020.
- Applies Prospectively Only.

CONTUMACIOUS CONDUCT

Conducting Self in a Willfully Defiant
Manner;

Willfully Stubborn and Disobedient
Conduct.

(Citations Omitted)





Other
Appellate Cases

Matter of Dependency of A.E.T.H.,
9 Wash.App.2d 502, 446 P.3d 667 (2019)

- Order Terminating Parental Rights Reversed Because of the Misconduct of the VGAL/CASA.
- The Court's Staff Attorney's Participation in the Misconduct of the VGAL/CASA Violated the Parents' Due Process Right to an Impartial Tribunal (Judge), Even Though the Presiding Judge Did Not Participate in the Misconduct and Did Not Show Any Bias.
- As a Result of the Misconduct, the Child May Have the Due Process Right to Counsel to Protect the Child's Legal Interests.



Hawai'i Legislation

2020 Session

HB 1942

H.D. 2; S.D. 2

Amendments to HRS Chapter 350:

- HRS § 350-1.1(a): Add the following the following Categories as Mandated Child Abuse Reporters:
 - Commercial Film and Photographic Print or Image Processors; and Commercial Computer Technicians who Discover Child Pornography in Electronic Medium.
 - “Electronic Medium”: Any Recording, Synthetic Media, Magnetic Disc Memory, Magnetic Tape Memory, Compact Disk, Digital Video Disk, Thumb Drive, or Any Other Data Recording Hardware or Media Used With a Computer. HRS § 350-1.
- Clergy or Custodian of Records of the Clergy.
 - From the Effective Date to March 1, 2021, May Make a Report(s) of Child Abuse Not Previously Reported, Even if the Victim Reached the Age of 18 at the Time of the Report.

MANDATED REPORTERS: CLERGY

- Exception:
 - The Information is Solely Received During a Penitential Communication, Such as Sacramental Confession.
 - If the Clergy Receives the Same Information From Another Source, the Clergy is Required to Report, Even If the Clergy Received the Same Information During a Penitential Communication.



HB 1942

H.D. 2; S.D. 2

- HRS § 350-1.1(d): [The Mandated Reporter] upon demand of the department (DHS) or any police department, shall provide all information related to the alleged incident of child abuse or neglect, including but not limited to medical records and medical reports and any image, film, video, or other electronic medium, that was not included in the written [mandated] report.

HB 1978

H.D. 1; S.D. 1

- Amends HRS § 571-11 by Adding Subsection (11). Specifically States (or Clarifies) that the Family Court Has Jurisdiction Over Custody or Guardianship of an Immigrant Child Pursuant to a Motion for Special Immigrant Juvenile Status Factual Findings Requesting a Determination that the Child was Abuse Neglected or Abandoned Before the Age of Eighteen Years for Purposes of Section 101(a)(27)(J) of the Federal Immigration and Nationality Act [Codified in 8 U.S.C. § 1101(a)(27)(J)]. For Purposes of this Paragraph “Child” Means an Unmarried Individual Under the Age of Twenty-One Years.

HB2425

H.D. 1; S.D. 1

Adds “Coercive Control” to the Definition of Domestic Abuse in HRS § 586-1.

EXECUTIVE
ORDER
STRENGTHENING
THE CHILD
WELFARE SYSTEM
FOR AMERICA'S
CHILDREN



STRENGTHENING
THE CHILD WELFARE SYSTEM FOR
AMERICA'S CHILDREN

- Strengthen the Country's Child Welfare System:
 - Improving Partnerships Between State Agencies, and Public, Private, Faith-Based Community Organizations;
 - Improving Access to Adequate Resources for All Parents;
 - Improving Federal Oversight.

