CHILD PROTECTIVE ACT
SUMMARY DISPOSITION ORDERS & MEMORANDUM OPINIONS

August 2019 – August 2020

HRAP Rule 35 (c) (2): Unpublished appellate decisions, entered after July 1, 2008, may be cited for persuasive value only, unless it establishes the law of the case of a pending case or has res judicata or collateral estoppel effect. 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.

CASE	DIGEST
In re HK and KK, No. CAAP-18-0000906 and *In re the Guardianship of HK and KK*, No. CAAP-18-0000907, 2019 WL 5188550 (Oct. 15, 2019) (SDO)	Father failed to appear at a mediation, mediation return hearing and periodic review hearing in the CPA -S case, and the continued hearing in the guardianship case. Father forgot about the concurrent proceedings. The family court denied father's motions to be excused and to be authorized to participate by telephone. The family court entered a default against father in both cases, granted the guardianship petition, and closed the CPA case. The family court denied father's motions to set aside default without hearing. Father appealed, and the ICA affirmed. 1. The family court did not abuse its discretion in denying father's motions to set aside default. 2. A party seeking to set aside the entry of default must show that (1) the non-defaulting party will not be prejudiced by the reopening of the case; (2) the defaulting party has a meritorious case; and (3) the default was not the result of inexcusable neglect or a willful act. *BDM v. Sageco, Inc.,* 57 Haw. 73, 76, 549 P.2d 1147, 1150 (1976). 3. The Children will be prejudiced: -Father wanted the children to be adopted rather than being placed in a guardianship because he did not want to pay child support; -The children were doing well in the home of their resource caregivers who were willing to become their co-guardians but were not in the position to adopt 4. Father did not have a meritorious case. 5. Father was previously defaulted in the CPA case and knew the consequences of not appearing at the hearing. His forgetting about the hearing is not the result of inexcusable neglect. Forgetting about the hearing is inexcusable neglect.
In re AC, No. CAAP-18-0000886, 2019 WL 5966938 (Haw. App. Nov. 13, 2019) (Order Dismissing Appeal for Lack of Appellate Jurisdiction)	The family court ordered family supervision with the placement with father in the State of California. Mother appealed. Mother's notice of appeal was filed 34 days after the entry of the order being appealed in violation of RECPA Rule 3 and HRAP Rule 4. ICA dismissed the appeal for lack of appellate jurisdiction. 1. Counsel was ineffective for failing to timely file the notice of appeal. 2. In a proceeding to terminate parental rights, the appellate court must determine whether the proceedings were fundamentally unfair because of counsel's incompetence in determining whether there is appellate jurisdiction. Therefore, the appellate court must review the issues raised by the appellant.

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	3. Mother did not make specific arguments as to each challenged finding of fact and conclusions of law, but instead made broad arguments. 4. No evidence in the record to support mother's argument that father committed "drug-fueled" violent behavior. 5. Although the service plan required father to participate in domestic violence / anger management education, he only participated in 4 general sessions. Based on the domestic violence / anger management assessment of father, and the psychological evaluation of father, father did not have an anger management problem. The DHS relied on these assessments. 6. Mother cited to no legal authority that the CPA has a legal preference for in-state placements. There was substantial evidence in the record to support the family court's decision to place the Child in a medical facility in California near father's home, and therefore the family court did not abuse its discretion in making its placement determination as being in the Child's best interests. 7. Mother demonstrated that she cannot address and care for the Child's medical needs, and the family court did not clearly err in determining that it was not in the Child's best interests not to be placed with mother.
In re G Children, No. CAAP-19-0000327, 2019 WL 7212600 (Haw. App. Dec. 27, 2019) (SDO)	The family court granted the DHS' MTPR. Mother appealed. The ICA affirmed. 1. Rejected mother's argument that the family court clearly erred in entering the findings regarding her inability to meet the Children's immediate needs because she was employed, she had an apartment that the DHS did not verify and visit, and the various caregivers she left the children with were the same persons the DHS approved as resource caregivers. The family court found the contrary expert testimony of the DHS CWS worker regarding the mother's inability to care for the children to be credible, and that the mother's testimony not to be credible. 2. Rejected mother's argument that the family court clearly erred in finding that Mother was unable to demonstrate consistent parenting and had unaddressed anger management issues that placed the children at risk of harm. Mother argued that she missed visits because of her employment and she was not provided the opportunity to have all her children with her at the same time. The credible evidence contained in the DHS reports show that her missed visits were not the result of her employment, the DHS provided her visits with all her children, and mother could not control her anger. 3. Rejected mother's argument that the family court clearly erred in finding that she had limited insight and understanding of her safety issues that placed the children at risk of harm because she testified that she agreed with the recommendations of her psychological evaluation. According to the credible evidence, mother did not believe that she had unresolved safety issues. 4. Rejected mother's argument that the family court clearly erred in finding that she had a pattern of failing to complete services because she either completed services or was on the wait list for services. However, mother admitted that she failed to attend her bi-weekly individual therapy sessions, failed to participate in intensive home-based services, and did not follow-up on DHS referrals for services. Any delays in mother's participation and completion of services was due to mother's conduct. 5. Therefore, the family court did not clearly err in entering its ultimate HRS § 587A-33 (a) determination
In re KS, No. CAAP-19-0000404, 2019 WL 7372749 (Haw. App. Dec. 31, 2019) (SDO)	The family court ordered the DHS to file its MTPR after mother failed to meet her burden at the show cause hearing to show why the DHS should not file an MTPR. The family court entered a default against mother and proceeded with the hearing on the MTPR without her presence. The family court granted DHS' MTPR. Mother filed a motion to set

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	aside default (titled as a "motion for immediate review"), which the family court denied. Mother appealed the TPR order and the default orders. The ICA affirmed. 1. Rejected mother's argument that the family court abused its discretion in entering the default against mother: a. Mother did not believe that her boyfriend sexually harmed the child, and continued in the relationship with her boyfriend. b. Mother appeared late to the scheduled concurrent show cause hearing, periodic review hearing and permanency hearing. The family court set aside the entry of default, and continued the hearing for one month. At the continued hearing, mother did not present any evidence, including her testifying on her behalf, and only cross-examined the DHS CWS worker. The family court set a hearing on the DHS' MTPR, a periodic review hearing and a permanency hearing approximately 3 months after the show cause hearing. c. The DHS filed its MTPR a little over 30 days after the show cause hearing, which was sufficient time and notice before the next scheduled hearing. Mother did not file an answer. d. The family court's granting of the DHS' MTPR was not based solely on the entry of the default against mother, but was based on the testimony presented at the hearing and the evidence in the record. e. The facts in *In re TW*, 124 Hawai'i 468, 248 P.3d 234 (App. 2011) are distinguishable: (1) In *TW*, it was the first hearing that the parent failed to appear, the MTPR was filed 6 days before the hearing, the parent's counsel did not receive the MTPR and was not sent to the parent, and the parent was actively engaged in services. In *TW*, the sanction of the default was a severe sanction based on the circumstances of the case, and the hearing was a procedural hearing to set a trial date. (2) In this case, mother's counsel was given the opportunity to cross-examine witnesses, mother, through her counsel, never stated that mother would testify or give an offer of proof, mother continued to live with her boyfriend (the perpetrator), mother had ample notice of the motion (counsel did not present evidence or make representations that mother did not receive a copy of the motion that counsel mailed to her), and the family court gave mother the opportunity to file an appropriate motion for relief. 2. Rejected mother's argument that the family court abused its discretion in denying her motion to set aside default based on the three-part test in *BDM, Inc. v. Sageco,* 57 Haw. 73, 77, 549 P.2d 1147, 1150 (1976). a. Mother did not appear at the motion to set aside default because the motion was "short-set" and mother had to work. b. Mother stated she missed the hearing on the MTPR because she woke up late and had transportation issues. c. Mother's counsel did not present any evidence or argument regarding mother having a "meritorious defense/case" and that there would be no prejudice to the other parties if the default were set aside. The family court stated that it was not aware of any "meritorious defenses," and would likely find that the child would be prejudiced by the delay because it would take longer to achieve permanency.
In re GC, No. CAAP-18-0000892, 2020 WL 550707 (Haw. App. Feb. 4, 2020) (SDO)	Family Court awarded foster custody to the DHS. Father (pro se) appealed the foster custody order, but not the adjudication order. ICA reversed. 1. Since the family court ruled that the father was innocent until proven guilty, the only basis for the family court's award of foster custody was based on the presumption of the possibility of father's being incarcerated. There was no evidence to support this presumption, and therefore the family court clearly erred in entering its rulings supporting foster custody.

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	2. Although the father argued on appeal that the family court's adjudication finding (based on the above presumption) was clearly erroneous, the ICA did not address the adjudication finding and order. Based on the plain reading of the SDO, the adjudication finding and order remain in effect.
In re SK, LK Jr., SKF, LLK, No. CAAP-19-0000068, 2020 WL 788899 (Haw. App. Feb. 18, 2020)	Family Court granted DHS' MTPR. Mother and father-1 (father of the 3 oldest children) appealed. ICA affirmed. Father-1. 1. The family court did not clearly err in finding that father-1 will was not willing and able to provide his children with a safe family home at the time of trial and will not become willing and able to provide a safe home within a reasonable period of time: -Father-1's incarceration was not the sole reason the family court terminated his parental rights: he admitted to sexually abusing a child the same age as SK; -Even if he were sentenced to probation, father-1 would need to successfully complete sexual offender treatment and he would not be able to complete sexual offender treatment before the 2-year anniversary of his children's date of entry into foster care; 2. The DHS made reasonable efforts to and gave father-1 the reasonable opportunity to reunify. father-1 did not cite to any legal authority stating that the DHS was required to extend the 2-year period to reunify. 3. Father-1 did not present any discernible argument why the family court's determination that the permanent plan with the goal of adoption is in the children's best interests, and waived this point of error. Mother. 1. The family court did not clearly err in finding that mother's untreated substance abuse placed the children at risk of harm: -During the pendency of the case, mother did not object to the DHS' assessment that Mother's untreated substance abuse was a safety issue; -Mother stipulated to the adjudication of the Petition that alleged that mother's untreated substance abuse was a safety issue, and therefore waived this issue; and -In the HRS § 587A-7(a)(7) safe family home factor, the family court is required to consider the parent's substance abuse in determining whether a parent can provide a safe family home. 2. The DHS made reasonable efforts to and gave mother the reasonable opportunity to reunify: -Prior to filing of the DHS' MTPR, mother did not make a demand for services, either at prior hearings, by direct demands to the DHS or by motion asking the court to compel the DHS to provide services; -Mother waited until the return hearing on the DHS' MTPR to make a demand for services and to raise the issue of whether the DHS made reasonable efforts and whether the DHS gave mother a reasonable opportunity to reunify, and therefore waived the issue; -Even if there was no waiver, there was sufficient evidence in the record supporting the family court's findings that the DHS made reasonable efforts and gave Mother the reasonable opportunity to reunify.
In re LI and HDK, No. CAAP-18-0000773, 2020 WL 1679419 (Haw. App. Apr. 6, 2020) (SDO); *App. For Writ of Cert. Granted* (Aug.5, 2020).	Family court granted DHS' MTPR. Mother appealed. ICA affirmed. 1. Although the DHS did not file its MTPR in a timely manner pursuant to HRS 587A-31 (g), the error is harmless: -Mother did not object and raise the issue before family court and therefore waived the issue. -There was no prejudice to the mother. The delay did not substantially affect / prejudice her rights. [As a practical matter the delay helped the mother].

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	2. Although the family court did not appoint counsel for the indigent mother in a timely manner, the ICA declined to vacate the TPR order for violation of the Due Process right to counsel, as stated in *In re TM* due to the mother's conduct: -Mother's conduct caused the delay. -There was no prejudice to mother by the 3-month delay in appointing counsel. -Mother had counsel for a significant period of time before the termination of her parental rights. 3. There was sufficient evidence in the record to support the TPR order. The children were exposed to illicit drugs (dangerous drugs, as defined by statute) in utero. Hawaii appellate decisions upheld TPR orders based on a parent's inability to address her/his drug problems. The unchallenged findings of fact regarding the mother's failure to complete services required in the service plans also supported the TPR order. The appellate court will not consider issues regarding the weight of the evidence.
In re LC1, No. CAAP-19-0000591, and *In re LC2*, No. CAAP-19-0000592, 2020 WL4333874 (Haw. App. Jul. 28, 2020) (SD0)	The family court affirmed DHS' assumption of foster custody from family supervision of LC1, and adjudicated the petition and awarded foster custody of LC2 to the DHS. Mother appealed both orders. The ICA vacated both orders and remanded back to the family court. 1. The basis for the DHS' taking foster custody was the mother's positive drug test at The Queen's Medical Center when she was admitted for LC2's birth, and LC2's positive meconium test for drugs. The family court abused its discretion by receiving both toxicology reports into evidence without proper foundation of the documents' authenticity. 2. Since both report were inadmissible, there was no evidence of the mother's drug use that was the basis for the harm/threatened harm, and the award of foster custody.