

2022 CASE LAW, STATUTES and RULES UPDATE

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In re AA,

150 Hawai'i 270, 500 P.3d 455 (2021); *petition
for writ of cert. filed May 23, 2022*

- Mother tells the DHS and the family court that her live-in boyfriend is not the Child's father.
- The Child's father, according to Mother, lives in Chuuk, but she does not know his name.

- The Unknown Natural Father is served by publication, and default is entered against the Unknown Natural Father.

- The family court grants the DHS' motion to terminate parental rights.
- The parental rights of the Unknown Natural Father are terminated.

- Boyfriend contacts the DHS and tells the DHS that he is the Child's father.
- Boyfriend files petition to establish paternity and is adjudicated to be the Child's father.

- Father's motion to intervene is set for trial.
- The family court directs Father to file a motion to set aside default, which is set for trial. The court rules that setting aside the default is the precondition to allow Father to intervene.

- Using the analysis to set aside the entry of default (HFCR Rule 55 (c)) and to set aside a default judgment [TPR order] (HFCR Rule 60(b)), the family court denies Father's motion.

- Father appeals to the ICA.
- The ICA affirms.
- The Hawai'i Supreme Court grants Father's application for *writ of certiorari*.

Hawai'i Supreme Court's Decision

Affirmed in part, and reversed in part:

- Father was not denied Due Process when he was served by publication, as the Unknown Natural Father, and the default was entered against the Unknown Natural Father. The order terminating the parental rights of the Unknown Natural Father was effective against Father.
- The family court did not err by not setting aside the entry of default against Father (HFCR Rule 55(c)), and the order terminating parental rights [default judgment] (HFCR Rule 60(b)).
- The family court erred when it required Father to set aside the defaults as a condition to intervene. Setting aside the defaults would re-instate parental rights.
- Intervention is limited to the issues of residual parental rights and duties:
 - Child Support.
 - Visitation.

Petition for *Writ of Certiorari*

- Petition for *Writ of Certiorari* filed in the U.S. Supreme Court on May 23, 2022.
- Docket No. 21-1467.
- Distributed for the Conference of September 28, 2022 .



In re HV and MV,

150 Hawai'i 424, 504 P.3d 1012 (App. 2021).

Based on Father's counsel's oral request to appoint a guardian ad litem ("GAL") for Father and HRS § 587A-16(b), the family court ordered Father to participate in a "psychological evaluation" (professional evaluation) to determine whether Father needs a GAL.

At the return hearing on the evaluation, the DHS did not agree to pay for the evaluation.

At the contested hearing on the issue, the family court ordered the DHS to pay for the evaluation because the evaluation was a service under HRS § 587A-41.

- The family court denied the DHS' motion for reconsideration.
- The DHS appealed.

Hawai'i ICA's Decision

Reversed and remanded:

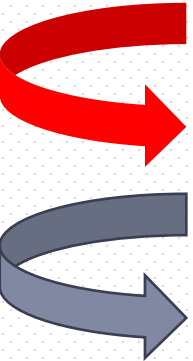
- Since the evaluation was a “professional evaluation” to determine whether a GAL should be appointed for Father, the payment provision of HRS § 587A-16(f) controls, not HRS § 587A-41. The professional evaluation was not a “psychological evaluation” (which is a service that the DHS is required to pay under HRS § 587A-41).
- Based on the plain language of HRS § 587A-16(f), the family court is responsible for all costs associated with the appointment of a GAL for a parent, including costs prior to the appointment of the GAL, such as the professional evaluation.



RIGHT TO COUNSEL

Hawai'i Right to Counsel Case Law

- *In re TM*, 131 Hawai'i 419, 319 P.3d 338 (2014) (The Due Process Clause of the Hawai'i Constitution, article 1, section 5 requires the appointment of counsel for an indigent parent when a petition of foster custody or temporary foster custody is filed in CPA cases).
- *In re LI and HDK*, 149 Hawai'i 118, 482 P.3d 1079 (2021) (The Due Process Clause of the Hawai'i Constitution, article 1, section 5 requires the appointment of counsel for an indigent parent when a petition for family supervision is filed in CPA cases. The failure to appoint counsel when a CPA petition is filed is “structural error” requiring *vacatur* of the order terminating parental rights. Proof of prejudice not required.).
- *In re J.M. and Z.M.*, 150 Hawai'i 125, 497 P.3d 140 (App. 2021) (Discharge of counsel after the entry of default of the parent is “structural error.”).

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- The court appoints counsel for the indigent parent.
 - The parent fails to appear at a hearing, and the court enters a default against the parent.
 - The court discharges the indigent parent's court-appointed counsel, subject to recall.
 - Parent re-appears at a subsequent hearing and counsel is re-appointed, or never re-appears.

- Parental rights are terminated.

- ICA reverses and vacates the TPR order in its entirety on the grounds that the discharge of counsel was "structural error."
- Remands to family court.
 - Remand is not the beginning of a "new" two-year period for the parents to address safety issues.
 - The family court to determine whether a particular permanent plan is in the child's best interests.

Application for Writ of Certiorari Granted

In re JB, No. CAAP-21-0000283, 2022 WL 833166 (Haw. App. Mar. 21, 2022) (SDO); *app. for writ of cert. granted* No. SCWC-21-0000283 (June 22, 2022).

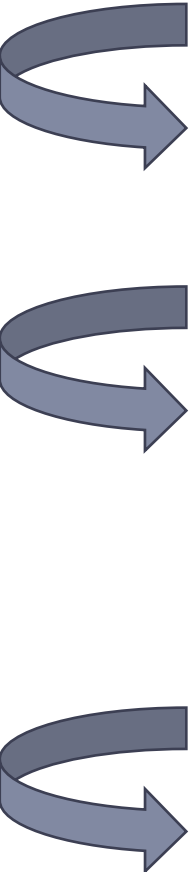
In re JH, No. CAAP-21-0000316, 2022 WL 277658 (Haw. App. Jan. 31, 2022) (SDO); *app. for writ of cert. granted* No. SCWC-21-0000316 (June 24, 2022).

Consolidated Oral Argument: August 18, 2022 at 10:00 a.m., Hawai'i Supreme Court Courtroom. Livestream on the Judiciary's YouTube channel at [YouTube.com/hawaicourts](https://www.youtube.com/hawaicourts).



SC v. TG and AG,

151 Hawai'i 153, 509 P.3d 1116 (App. 2022)

- 
- Colorado divorce decree awards sole custody of the two children to Mother.
 - Mother passes away in October 2017 and custody transfers by operation of law to Father, who resides in Hawai'i.

- In October 2018, the Colorado court grants the Maternal Grandparents' March 2018 motion for visitation.
- The visitation order states that visits will occur in Colorado on specific dates.

- In February 2020, Father registers the Colorado visitation order in the Hawai'i Family Court pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), HRS Chapter 583A.
- Father files motion to modify the visitation order to restrict the Maternal Grandparents visitation to Hawai'i.

- Colorado relinquishes jurisdiction and Hawai'i assumes jurisdiction.
- The family court denies Father's motion on the grounds that the Children would suffer significant harm if the visitation order were modified.

Controlling Appellate Cases

- *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion).
 - The Washington State visitation statute was unconstitutional because it allowed third parties (such as grandparents) to be granted visitation even if the parent is “fit.”
 - There is a rebuttable presumption that a “fit” parent is capable of determining whether visitation with a third party is in the child’s best interests.
- *Doe v. Doe*, 116 Hawai‘i 323, 172 P.3d 1067 (2007).
 - Independent of the U.S. Constitution, parental rights is a liberty interest and a privacy interest protected by the Hawai‘i State Constitution.
 - The state can only invade these interests when there is a compelling state interest: the child has been harmed or is subject to threatened harm; the parent is “not fit.”
 - The Hawai‘i grandparent statute, HRS § 571-46.3 is unconstitutional because it authorized the court to order visitation with grandparents, upon the finding that such visitation is in the child’s best interests, even if the parent is “fit.”

Hawai'i ICA's Decision

Affirmed (“Based on the **Unique Circumstances** of this Case”):

- The family court correctly applied federal and Hawai'i appellate law on the issue of grandparent/third party visitation when the parent's fitness has not been challenged.
- The *Doe v. Doe* “harm-to-the-child standard” applies to situations, as in this case, when a parent, whose fitness has not been challenged, seeks to modify a visitation order authorizing third parties/grandparents to visit the children.
- Third parties/grandparents must overcome the rebuttable presumption in favor of the parent whose fitness has not been challenged.
- After finding that the Children would suffer substantial harm if the visitation order were modified, the family court correctly applied the HRS § 571-46(b) “best interests” in determining that modification of the visitation order would not be in the Children's best interests.
- The family court did not err when it did not apply HRS § 571-46.3. Even if it were not declared to be unconstitutional, it would not apply to modification of existing orders authorizing visitation for grandparents/third parties.

2022 Act 17

Amends HRS Chapter 588, Children's Justice Center:

- **Adds to the mission of the Children's Justice Centers of servicing cases involving victims of child sexual abuse and serious physical child abuse:**
 - **Child sex trafficking,**
 - **Commercial sexual exploitation of children ("CSEC").**
 - **Other child maltreatment, and**
 - **Child witnesses to crime or violence.**
- **Effective Date: April 27, 2022**

2022 Act 125

- Establishes visitation and resource centers on the grounds of state correctional centers/facilities for children and families of incarcerated parents.
- The DHS, as the lead agency, shall work with the Department of Public Safety (“PSD”), the family reunification working group and other stakeholders.
- A pilot visitation and family resource center will be established at the Waiawa Correctional Facility. The center will be operated by a non-profit agency.

2022 Act 127

- Establishes a five-year child wellness pilot program with the DHS to ensure the health of children in the State of Hawai'i.
- The pilot program shall pay each state Medicaid benefit recipient \$50.00 for each completed well-child examination of the recipient's child; limit to one per year.
- Effective Date: July 1, 2022, and sunsets on June 30, 2027.

2022 Act 129 – Family Resource Centers



The primary goal of the family resource centers is to assist families with supportive services before problems become crises that require intervention by child protective or other protective services. For school-based family resource centers, an added goal is to support a child's educational needs.

2022 Act 129

- Creates within the DHS a five-year family resource centers pilot program:
 - The family resource center shall be designed to meet the needs, cultures, and interests of the communities served by the centers.
 - Family services, including family preservation services, may be delivered directly to the families, contracted providers, or with the DOH and the DOE.
- The family resource centers program shall:
 - Develop and implement a statewide network of school- and community- based resource centers.
 - Establish definitions, standards and best practices.
 - Identify and align available services, goals, and outcomes.
 - Develop referral and data tracking.
- The DHS, the DOH and the DOE may coordinate with other public and private entities to develop and implement family resource centers.

2022 Act 130

- State Inter-agency pilot project, within the DHS for administrative purposes only, to provide safe spaces in each county for youth experiencing homelessness.
- Youth: Ages 14 to 25.
- Shelter for homeless youth are facilities operating to receive youth 24 hours a day, seven days per week, and provide youth services, such as:
 - Overnight lodging and supervision;
 - Hot meals and lodging;
 - Access to medical and behavioral health services; and
 - Education and employment support.



CRIMINAL JUSTICE: WOMEN OFFENDERS

2022 Legislation:

- **Act 243:** Women's Court Pilot Program (First Circuit)
- **Act 244:** Women's Corrections Implementation Commission: Develop programs for non-violent offenders, especially those with minor children, in lieu of incarceration, including diversion.
- **Act 245:** Community-Based Programs for Women, Including a Community-Based Work Furlough Program.
- **Act 246:** Residential Programs That Allow Minor Children to Remain with Their Mothers. Administered by the Judiciary.

2022 Act 250

- Increases the amount of unencumbered and unexpended moneys in the DHS' spouse and child abuse special fund from \$3, 000, 000.00 to \$5,000,000.00.
- Allows the State of Hawai'i to maximize the amount of Federal reimbursements through the Family First Prevention Services Act ("FFPSA").

2022 Act 290

- Amends HRS § 517-32 Detention; shelter; release; notice.
- If a minor is a law violator or believed to be a law violator, and is not deemed suitable of diversion, then the minor shall be to brought before the court or placed in a shelter designated by the court.
- Establishes the conditions for “room confinement” of minors being held in detention.

2022 Act 317

Requires the DHS CWS Branch to contract with a qualified child welfare provider to develop a “modern case management software solution that is compatible with existing child welfare technology.

- Method for CWS workers to:
 - More effectively track children in their case load;
 - Create and manage case plans; and
 - Manage visits.
- Family portal for RCG’s to document information regarding the children placed in their care.
- Online access for families to information regarding children placed in their care.
- Portal for children over the age of twelve in foster care to access resources online about available support services.

HAWAI'I FAMILY COURT RULES

(SCRU-11-0000582)

**Adopted and Promulgated by
the Supreme Court
of the State of Hawai'i**

**December 15, 1989
With Amendments as Noted**

*Comments and commentary are provided by the rules committee
for interpretive assistance. The comments and commentary express
the view of the committee and are not binding on the courts.*

**The Judiciary
State of Hawai'i**

**Amended March 24, 2022;
Effective April 25, 2022**



*David v.
Kaulukukui,*

___ F.4th ___, No. 21-15731, 2022 WL 2299036
(Jun. 4, 2022)

U.S. 9th Circuit Court of Appeals Decision

In a 42 U.S.C. § 1983 civil rights lawsuit, the U.S. District Court's denial of the police officer's motion to dismiss based on qualified immunity was affirmed:

- This appellate decision only addressed the issue of qualified immunity. Under the standard, the facts alleged are presumed to be true and are viewed in the light most favorable to the non-moving party.
- The police officer did not have qualified immunity for her conduct in taking the child into protective custody.
- The police officer's conduct violated the child's and the child's mother's constitutional right to family association under the U.S. Constitution.
- The right of family association under the U.S. Constitution was a clearly established right.



GOLAN v. SAADA,

596 U.S. ___, No. 20-1084, 2022 WL 2135489

(June 15, 2022)

The Hague Convention and ICARA

- The Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention”) requires the judicial or administrative authority of a “Contracting State” (Country) to order the return of a child to the child’s country of habitual residence upon the finding that the child has been wrongfully removed to or retained in the “Contracting State.”
- The United States is a signatory to the Hague Convention (treaty). The Hague Convention is implemented in the International Child Abduction Remedies Act (“ICARA”), 22 U.S.C. §§ 9001 et seq. Jurisdiction is given to federal and state courts.
- The Hague Convention and ICARA do not require the child’s return when the judicial or administrative authority finds that the return would expose the child to a **“grave risk” of “physical or psychological harm or otherwise place the child in an intolerable situation.”**
- The U.S. Second Circuit of Appeals required the courts consider all ameliorative measures to reduce the risk of harm to the child that might make it possible for the child to return to the child’s country of habitual residence.

U.S. Supreme Court's Decision

- Nothing in the Hague Convention and ICARA requires the court to examine all ameliorative measures before denying a Hague Convention petition on the grounds that the return would expose the child to a grave risk of harm.
- The Second Circuit's requirement that the court consider all ameliorative measures, in practice, re-writes the Hague Convention and ICARA. This interpretation placed the child's return over the objectives of the Hague Convention to protect the interests of the child and the parents.
- The court, in its discretion, may consider ameliorative measures. In the exercise of its discretion, the court must be guided by sound legal principles and the objectives of the Hague Convention and ICARA:
 - Ameliorative measures must prioritize the child's physical and psychological safety.
 - The court must abide by the Hague Convention's requirement not to usurp the role of the court that will adjudicate the underlying dispute.
 - The court must act as expeditiously as possible.

Brackeen
v.
Haaland





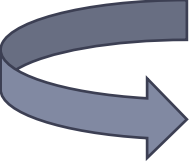
Indian Child Welfare Act ("ICWA")

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- Lawsuit filed in the U.S. District Court for the Northern District of Texas challenging the constitutionality of ICWA.

- The U.S. District Court ruled ICWA to be unconstitutional.

- The three-judge panel of the U.S. Fifth Circuit Court of Appeals reversed.

- Petition for rehearing *en banc* granted.
- In a “fractured” 350-page opinion, the *en banc* panel affirmed in part and reversed in part.

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- The parties filed *petitions for writ of certiorari* in the U.S. Supreme Court asking for review of the issues that they did not prevail in the U.S. Fifth Circuit Court of Appeals.
 - The Federal Agencies: Docket No. 21-376.
 - The Indian Nations/Tribes: Docket No. 21-377.
 - State of Texas: Docket No. 21-378.
 - The Individual Plaintiffs: Docket No. 21-380.

- The U.S. Supreme Court granted all four *petitions for writ of certiorari*.
- The cases are consolidated under Docket No. 21-376.

Issues Before the U.S. Supreme Court

- Whether Congress exceeded its Article I power/authority under the Indian Commerce Clause by enacting ICWA?
- Whether the ICWA's "Indian Child" classification violates the Equal Protection Clause of the Fifth Amendment?
- Whether provisions of ICWA violate the Anti-Commandeering Clause of the Tenth Amendment?
- Whether provisions of ICWA pre-empt state law (Article VI)?
- Whether the Bureau of Indian Affairs' ICWA regulations violates the Federal Administrative Procedures Act?