

## HANDOUTS FOR CONFIDENTIALITY PANEL

- Child Welfare Services' policies and procedures regarding confidentiality
- Order Appointing Guardian Ad Litem for Minor Child/Children
- Order Re: Confidential Information
- Hawaii Revised Statutes Section 587A-22 re: unavailability of specified privileges
- Hawaii Revised Statutes Section 587A-40 re: court records in child protective proceedings
- In re Interest of FG, 421 P.3d 1267 (Haw. 2018) re: court prohibition against disclosure of information in court records
- Hawaii Revised Statutes Section 587A-20 re: inadmissibility of evidence in other state actions or proceedings

## 2. Confidentiality

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**2.0 PURPOSE** The following procedures pertain to the confidentiality and security of child welfare services case records. Any release of information must conform to specific criteria in order to ensure the privacy of all the children.

### 2.1 AUTHORITY

- |    |                             |  |
|----|-----------------------------|--|
| A. | HRS 346-10                  | Protection of records (DHS)                                |
| B. | HRS 346-14                  | Duties generally   |
| C. | HRS 350-1.1                 | Child Abuse: Reports                                       |
| D. | HRS 350-1.4                 | Child Abuse: Confidentiality                               |
| E. | HRS 92-21                   | Copies of Records, other costs and fees                    |
| F. | HRS 571-84                  | Records (Family Court)                                     |
| G. | HRS 587-81                  | Court records  |
| H. | <a href="#">HAR 17-1601</a> | Confidentiality  |
| I. | HRS 325-101                 | Confidentiality of records and information (DOH)           |
| J. | 45 CFR 1340-14              | Child Abuse Prevention and Treatment Act                   |
| K. | 45 CFR 205.50               | Safeguarding information for financial assistance programs |
| L. | 42 USC 5106a-107(b)         | Confidentiality of Alcohol and Drug Abuse Patient Records  |

### 2.2 CONFIDENTIALITY AND SECURITY OF CWS REPORTS AND RECORDS

Federal and State laws require that reports and case records regarding Child Welfare Services (CWS) be confidential. Case records are to be kept secured and the release of any information from the records must follow strict guidelines in order to protect the privacy rights of the children and families being served.

**2.2.1 Client's right to confidentiality**

- A. The assigned worker will inform the client of his/her right to privacy and the responsibility of the department to maintain confidentiality and restrict access to department records.
- B. The assigned worker will provide a copy of DSSH-1451, "Your Rights-Fair Hearing, Confidentiality, Nondiscrimination" to recipients/clients.
- C. The assigned worker will inform the client of the criteria under which the department will share information with third parties to assure the safety and protection of the child and assure appropriate and effective services to both the child and the family.

**2.2.2 Reports and records**

- A. Reports and records include all information, electronic, written or oral, maintained by the department pertaining to the initial report of child abuse or neglect and subsequent child welfare services.
  - 1. Records include medical, psychological, psychiatric, or other social agency reports, electronic, written or oral.
  - 2. Any written or multi-media information that would identify a person as a client or recipient or identify a client or recipient through its contents is considered part of the case record.
  - 3. The term case record(s) includes hard copies of all of these records, reports and information, including worker's case notes and dictation, which are to be kept in case folders.
- B. Collection and maintenance of information on individuals should be limited to data needed to administer and manage the Child Welfare Services programs authorized by law. Data not needed should not be requested or maintained in department's records.
- C. Case records will be maintained pursuant to departmental procedures (Refer to CHAPTER III, Section 11, **RECORD**

**MAINTENANCE, CASE DOCUMENTATION AND FILING).**

- D. Case records and other confidential reports and records shall be physically protected.
- E. Clients, as well as other entities, are entitled to access the record, as specifically related to the individual requesting the information, either through consent or by order of the court.
- F. Active case records ARE NOT TO BE REMOVED from the work site, unless by approval of the supervisor. Supervisory approval is to be limited to extraordinary situations in which access to the record outside the work site is necessary to effectively service a client.

Closed case records are to be kept in a secure facility as determined by the department. Access to closed case records is governed by the same procedures as active case records.

- G. Active case records and client identifying data, such as reports and correspondence, should be secured at the end of each work day.

**2.3 DISCLOSURE OF CWS CASE RECORDS/INFORMATION**

**2.3.1 Disclosure of information to DHS non-CWS employees**

Non-CWS DHS employees obtaining information through internal disclosure must maintain confidentiality of the information and not further disclose or release the information without the consent of the CWS caseworker or client in accordance with Chapter 17-1601.

CWS social worker is to document (Log of Contacts, CPSS screen CA 52) the date of release, to whom, the reason why the information was being requested, and that the DHS non-CWS employee was reminded of confidentiality requirements.

**2.3.2 Disclosure of information to clients or client-authorized representatives**

**Disclosure of information ICFs**

➤ <a href="#">Revisions to APS and CAN Clearance Procedures 2/22/06</a>
➤ <a href="#">New Confidentiality Rule HAR 17-1601 12/14/04</a>
➤ <a href="#">CWS CAN Clearance for ACCSB's Medicaid Waiver Program Contractors 2/6/03</a>

➤ <a href="#">Sharing Information with BESSD 1/28/03</a>
➤ <a href="#">Protective Services Central Registry Checks for Medicaid Waiver Program Contractors 2/3/03</a>
➤ <a href="#">Child Abuse and neglect Clearance Requests 2/13/01</a>
➤ <a href="#">Release of Information by DOE to CWS for CWS Investigations and Case Management 5/19/00</a>

- A. Records and other information can only be released to a client or authorized representative after a written consent to release information has been obtained from the person to whom the requested case records and information applies.

The client can either sign the DSSH 1465, "Consent to Review/Release Information from Case Record" or put their request in writing.

Regardless of the format of the consent, the written consent shall specifically include:

1. Permission to release the records or other information relating ONLY to the client. If the information is about a child, the requesting individual must have the legal right to consent to the release of information relating to a child who is the subject of the report.
2. The name of the individual authorized to receive or review the case record/information.
  - a. If the individual is an employee of an organization, the name and address of that organization must be indicated on the consent form.
  - b. If the individual is a family member (by blood or marriage), the individual's relationship, name and address must be included on the consent form.
3. What portion of the case record is to be released.
4. The purpose for which the information is being requested.
5. Whether the information from the case record is to be released:

- a. Orally;
  - b. Through a physical review of the case record/ information; or
  - c. By receipt of copies of the case record at a cost specified pursuant to departmental procedures and postage, if any.
6. The period of time the authorization is valid, not to exceed ninety (90) days.
- B. Before copies of case records are released or reviewed, the department shall:
  1. Block out the name or other portion of the case record relating to persons other than the requestor.
  2. Reproduce a copy of the page/pages from which the portion of the record was blocked out.
  3. Provide the appropriate party the blocked out page/pages.
- C. When the case record requested contains or consists of coded or abbreviated material, such as computer input or output forms, the department shall provide an explanation concerning the information set forth in the record, if the client so requests.

### **2.3.3 Disclosure of information to third parties without client consent**

ICF Link

[Sharing Information with BESSD 1/28/03](#)

Reports and records may be released without written or oral authorization/ consent, at the discretion of the department or pursuant to a subpoena, to the following:

- A. Courts
  1. When the department receives a subpoena from the Court to produce a CWS case record, the social worker is to notify the Deputy Attorney General assigned to the case pursuant to procedures (CHAPTER III, Section 6,

**LEGAL INTERVENTION).**

2. The social worker is responsible for preparing the case record for the court review as outlined in subsection 2.4 of this Section.

ICF Link

Subpoena faxing to AG's Office 7/22/02

- 3.

B. Grand Juries

Follow the procedures as outlined in Section above when records are subpoenaed by a grand jury.

C. Other agencies, providers, individuals or entities necessary to protect the child

The social worker may release information to the following entities, both oral and written, regarding the child or his/her family, if such release is determined by both the social worker and the supervisor to be necessary to insure the safety of the child:

1. A person legally authorized to place a child in protective custody.
  - a. Information must be released to the police or other governmental entities who are authorized to remove children from the home.
  - b. Information that may be released is limited to information which is necessary to determine whether or not to remove a child(ren) from the home, such as the following:
    - i. Prior instances of abuse
    - ii. Agency involvement with the family
    - iii. Past actions taken by the department regarding the family or family members.
2. Agencies or individuals authorized, contracted or licensed to diagnose, care, treat, or supervise a child who is the subject of a report of harm or threatened harm.

- a. Information to **any individual** that will insure the proper treatment and safety of the child shall be released as needed.
- b. **Foster parents** shall be informed of the reason for placement, special concerns and considerations in caring for the child in out-of-home care.
- c. **Multidisciplinary or other consultant teams** under contract to, or in arrangement with, the department to give consultation to social workers. Reports of such contracted services are the property of the department.

D. Family members, significant others

CWS social workers may share information with other family members or significant others who have been identified during the assessment process as appropriate and possible placement and/or protective resources for the child and family.

E. State child death review team and citizen review panels authorized by law:

- 1. Information will be provided by the authorized DHS representative to the State child death review team established by State law, provided that:
  - a. Information shared with the death review team shall be presented orally and may not be duplicated, copied or further distributed.
  - b. Confidential information may not be shared at meetings which includes the public.
- 2. Information will be provided to citizen review panels established by the department, provided that all shared information must remain confidential and shall not be shared with the public.

F. Federal, state and local officials and their agents responsible for the administration and monitoring of child welfare service programs, legislation or registration



Included are agencies administering programs under the Social Security Act under such titles as IV-A, IV-B, IV-E, or IV-F or under titles X, XIV, XVI, or XX for purposes of:

1. The administration of federal or federally assisted programs which provide cash or in-kind assistance or services directly to individuals on the basis of need.
2. An audit or similar activity, conducted in connection with the administration of the social service program, by any government entity which is authorized by law to conduct the audit or activity.
3. Disclosure may also be made for purposes directly connected with any investigation, prosecution, or criminal and/or civil proceedings conducted in connection with the administration of the department's social services, financial assistance and food stamp programs. Under this paragraph, disclosure shall be permitted to police departments, prosecutor's offices, the attorney general's office, the ombudsman's office or any other state or federal agency involved.

G. Any licensed physician who has a child patient whom the physician reasonably suspects to be harmed or threatened with harm

H. Director's discretion

The Director may make public findings or information regarding a case of child harm which has resulted in a child fatality or near fatality.

The Director may also allow access to specified information to a person, agency, or organization engaged in research.

#### **2.3.4 Release of adoptive records**

Upon receiving a request for information from an adoptee, birth or adoptive parent, the social worker will refer the party to the Family Court or, if the request is in writing, forward the written request to the Family Court for appropriate action.

**2.3.5 Release of information relating to Human Immunodeficiency Virus (HIV), Acquired Immune Deficiency Syndrome (AIDS), AIDS related complex (ARC), and Hepatitis B**

**[PLEASE NOTE: Any person receiving information which indicates that a person has a Human Immunodeficiency Virus (HIV) Infection, Acquired Immune Deficiency Syndrome (AIDS), or AIDS related Complex (ARC) is subject to stringent confidentiality requirements (HRS 325-101). Civil penalty for willful violation includes a fine of up to \$10,000.]**

ICF Link

[HIPAA and Reporting Child Abuse and Neglect 5/15/03](#)

ICF Link

[HIPAA - Authorization for Release of Protected Health Information 4/14/03](#)

- A. Whenever it becomes known that an adult client or a child, who is **not under the placement responsibility** of the department, has AIDS, HIV, ARC or Hepatitis B, that information is to be kept confidential and is not to be shared with anyone, unless the client signs a consent to release the information. There is to be no notation in the case record of the diagnosis.
- B. For children who are **under the placement responsibility** of the department who have contracted AIDS, HIV, or ARC:
  - 1. The child's HIV status shall only be released by the case worker, the supervisor, or the administrator.
  - 2. The HIV status of a child under voluntary or court ordered placements shall be released to those entities listed below when: **1)** a child is 13 years old or younger (parental consent is needed if the child is under voluntary placement); **2)** a child 14 to 17 years old authorizes its release; or **3)** the child's physician releases it after consulting with and receiving the child's consent (child is 14 to 17 years old).
    - a. The natural parent of the child who is a client in the case. This release will include counseling for the parent which can be provided by the

department's caseworker. The AIDS Education Project at the University of Hawaii, The Life Foundation, the Department of Health (STD-AIDS Prevention Services Branch) are able to provide consultation to the department staff regarding information on counseling issues.

- b. The Family Court and each party to the court proceedings brought pursuant to HRS 587 and HRS 350. This notification shall be by:
  - i. A separate, **sealed** written communication to the court; and
  - ii. A verbal disclosure to all other indicated parties.
- c. Departmental professional personnel and consultants responsible for the management of the child's case.

Release will also be made to the social worker of a different child when that social worker is considering placing another child in the same home as the affected child. Physical care and medical management concerns should be the primary determinants for placement rather than transmission risks by the affected child.

- d. The child's *guardian ad Litem* (GAL)
  - e. Release will be made to a prospective adoptive parent only after the prospective adoptive parent has been fully informed about the responsibilities, difficulties and risks potentially inherent in the adoption of an HIV seropositive child.
  - f. An individual or agency with whom the child is placed for twenty-four hour residential care.
  - g. Medical or dental personnel responsible for the care or treatment of the child.
- 3. Documenting information on the HIV status child.
    - a. **Do not** document any information related to HIV

into the CPSS.

- b. Document the information on a separate piece of paper, using date and factual data only.
    - i. File information into a separate manila folder and store in the case record.
    - ii. If the case record is subpoenaed by another party or the court, **exclude** the privileged HIV information in the manila folder.
    - iii. Information is to be removed from the case record when the case is ready to be closed as it is **not** part of the official case record.
  - c. When the social worker first receives the medical results, these results are not to be documented in the petition or Safe Family Home Report, Service Plan or any other report to the court other than as cited above. Before taking ANY action, the social worker is to inform the Deputy Attorney General of the finding.
- 4. If problems arise concerning the release of this information, notify the Deputy Attorney General assigned to the case.
  - 5. Anyone given information on the HIV status of a child shall complete the DHS 1643, "HIV Disclosure" prior to any release of information by the department. This documents his/her understanding of the confidentiality of the information and the consequences of unlawful disclosure.

Give original to the requester and file a copy of DHS 1643 in the case record, in Part VI.

- C. For **children under the placement responsibility** of the department who have contracted HEPATITIS B, release of information by the department be followed:
  - 1. Once a child is identified either as a carrier of, or infected with, Hepatitis B; the Department of Health (Hepatitis B Section, Communicable Disease Division) must be notified immediately by the attending physician.

2. The social worker is to notify the foster parent, prospective adoptive parent, or individual/administrator of an agency responsible for the 24 hour care of the child.

### **2.3.6 Redisclosure of substance abuse records and information**

#### **ICF Link**

[Federal Regulations Regarding Release of Information Pertaining to Consumers of Substance Abuse Treatment 2/29/00](#)

Federal statute requires that any information related to an individual's diagnosis, prognosis, or progress and/or participation in a drug or alcohol treatment/assessment program cannot be obtained without the signed consent of the individual.

- A. The client is to complete the DHS 1644, "Consent for Disclosure of Confidential Information" when the social worker is requesting information from substance abuse treatment and assessment programs regarding client's participation and progress in services. The consent permits the sharing of information with the department and permits the department to further redisclose that information to service providers and the Family Court.

This form is not needed when the client has signed the treatment/ assessment program consent forms that allow the sharing of information.

- B. Include in the service plan the requirement that the client is to sign all necessary consents to share information with the Department, including substance abuse treatment.

The service plan becomes part of the court orders after it is ordered by the court. Non-compliance is contempt of court.

- C. If a client refuses to sign consents to release information, even though ordered by the court, inform the Deputy Attorney General assigned to the case to determine appropriate legal action.

## **2.4 PREPARATION/REDACTION OF CASE RECORDS**

A subpoena to produce a CWS case record has the authority of a court

order. Whenever a subpoena is received, the social worker must notify the Deputy Attorney General and follow the advice of the Deputy Attorney General as outlined in CHAPTER III, Section 6, **LEGAL INTERVENTION**.

The departmental social worker, not the Deputy Attorney General, is responsible for preparing the case record for the court review. Redacting, or removal of information, is used as a method of maintaining confidentiality of the information while still complying with the orders of the court.

**2.4.1** When the department receives a subpoena to produce a CWS case record or information in the case record pertaining to a specific individual, unless the Deputy Attorney General informs the social worker otherwise, the following redaction is to be done.

- A. The social worker will review the case record, marking any page where a redaction is recommended.
- B. Make one (1) copy of the case record in total and **an additional copy** of the pages where reaction is needed, if the subpoena requests the case record or the information pertaining to a specific individual.
- C. Using a BLACK permanent marker, the social worker will review the extra pages of the case record or the information on the specific individual and remove (redact) the following information:
  1. Client-attorney communications between the case workers and the deputy attorney general.
  2. The names, addresses, and telephone numbers of the reporter, the emergency shelter parents, the foster parents, and clients whose records have not been specifically subpoenaed.
- D. Re-copy the portion of the record that was redacted, making sure that none of the deleted information can be read on the copy.
- E. The Deputy Attorney General will represent the department in any hearing requesting records. The CWS social worker will also need to attend the hearing, unless instructed otherwise by the Deputy Attorney General.

If the social worker determines that the court needs an explanation of why the department opposes releasing the redacted information, a summary can be provided to the court.

The Deputy Attorney General will then request an in-camera review by the judge as to what information should be released. The clean copy of the record allows the court to review the unredacted information to determine whether the redacted information can be shared or should remain confidential.

- F. If the court decides that too much information has been redacted, comply with whatever orders the court issues regarding the release.

**2.4.2** When the department receives a subpoena that specifies the original record is to be delivered to the court, the following is to be done.

- A. Make one copy of the **entire** record. Have the supervisor certify and sign **that it is a true copy of the original record**.
- B. Deliver the certified copy of the case record to the court.
- C. After the *in-camera* review, the court may copy from the original case record the information it determines to release, or it may order the department to release specific information in accordance with its criteria.
- D. Follow the orders of the court regarding the criteria and time frame for the release of information.

## **2.5 COST OF DUPLICATION OF CASE RECORDS/INFORMATION**

Unless ordered by the court, the department is allowed to request payment for the duplication of case records or information. Pursuant to 92-21 HRS, the department shall charge no less than \$.50 per single page.

Payment that is not in cash should be made in the form of checks or money orders, payable to the Department of Human Services. Payment is to be made **prior** to the release of any duplicated information.

If requested, the social worker is to write out an invoice that states the

number of pages, the amount per page, the total amount due, as well as the need to pay the department. Social workers are NEVER to receive payments made in their names.

After the payment has been received, the social worker is to set up a refund plan, using the DSS-8, "Notice of Refund Plan" and submit both the form and the payment to fiscal for processing within one week of receipt.

ICF Link

[HIPAA FAQs 4/11/03](#)



<b>STATE OF HAWAII</b> <b>FAMILY COURT</b> <b>FIRST CIRCUIT</b>	<b>ORDER APPOINTING GUARDIAN AD LITEM</b> <b>FOR MINOR CHILD/CHILDREN</b>		<b>Case Number</b> <b>FC-S No.</b>
<b>IN THE INTEREST OF</b>  Born on		<b>GUARDIAN AD LITEM (Name, Address, &amp; Phone No.)</b>  Phone: <b>FOR MINOR CHILD/CHILDREN: NAME(S)</b>	
<p>Good cause appearing, IT IS ORDERED that pursuant to Hawaii Revised Statutes Sections 587A, 571-8.5(a) (8) and HFCR 17 (c), the person indicated above be appointed guardian ad litem to protect and promote the needs and best interests of the minor child/children named above, until final disposition of the case or unless sooner discharged by the court, subject to "The Duties of a Guardian Ad Litem (GAL)" set forth on the reverse of this Order Appointing Guardian Ad Litem for Minor Child/Children and incorporated herein.</p> <p>IT IS ALSO ORDERED that said guardian ad litem shall serve effective: throughout the pendency of the child protective proceedings, unless sooner discharged by the court. The guardian ad litem shall serve without bond and</p> <p><input type="checkbox"/> as a volunteer of the CASA/Volunteer Guardian Ad Litem Program, said Program having the authority to act on behalf of the volunteer;</p> <p><input type="checkbox"/> without compensation but shall receive reasonable costs; or</p> <p><input checked="" type="checkbox"/> shall receive reasonable fees and costs.</p> <p>Fees and/or costs may be paid by the court, unless the party for whom counsel is appointed has an independent estate sufficient to pay such fees and costs. The court may order the appropriate parties to pay or reimburse the fees and costs of the guardian ad litem.</p> <p>IT IS FURTHER ORDERED that the guardian ad litem shall:</p> <ol style="list-style-type: none"> <li>(1) Be allowed access to the child;</li> <li>(2) Have upon presentation of this order to <b>any</b> agency, hospital, organization, school, individual or office, including but not limited to the Clerk of this Court, human services and/or child caring agencies, public or private institutions and/or facilities, medical and mental health professionals, law enforcement agencies and the Attorney General, the authority to inspect and receive copies of any records, notes, and electronic recordings concerning the child that are relevant to these child protective proceedings, even without the consent of the child or individuals and authorized agencies who have control of the child;</li> <li>(3) Hold <b>any</b> information received from any such source as confidential, and shall not disclose the same except to the court and where allowed by the court, to other parties to this case, and where provided by law;</li> <li>(4) Be given notice of <b>all</b> hearings and proceedings including but not limited to administrative, family, civil, criminal, grand juries or appellate; and <b>all</b> conferences including but not limited to multi-disciplinary team meetings, individual educational program meetings or interagency cluster meetings, involving the child and shall protect the best interests of the child therein, unless otherwise ordered by the court;</li> <li>(5) Have face-to-face contact with the child in the child's family or resource family home at least once every 3 months;</li> <li>(6) Report to the court and all parties, in writing, at six-month intervals, or as ordered by the court, regarding such guardian ad litem's actions taken to ensure the child's best interests, and recommend how the court should proceed in the best interests of the child;</li> <li>(7) Inform the court of the child's opinions and requests; and</li> <li>(8) Appear at <b>all</b> court hearings to advocate for the child's best interests, providing testimony when required.</li> </ol>			
<b>DATE</b>  Kapolei, Hawai'i		<b>Judge of the above-entitled Court</b>	
<b>cc:</b> DAG/DHS— Gay Tanaka, Esq. GAL for Child/Children- Kevin Adaniya, Esq. Parent(s) <b>Court Officer:</b> Suzanne Ikeda—954-8184			

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Attorneys for Department of  
Human Services

FAMILY COURT  
FIRST CIRCUIT COURT  
STATE OF HAWAII  
FILED  
29 o'clock, P M  
DEC 22 2020  
L. Fukushima  
Clerk

IN THE FAMILY COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

In the Interest of

Born on

FC-S No

ORDER RE: CONFIDENTIAL  
INFORMATION

JUDGE: Hon.

DATE: December 16, 2020  
10:00 a.m.

ORDER RE: CONFIDENTIAL INFORMATION

The following parties were present:

<input checked="" type="checkbox"/>	_____	, mother	;
<input checked="" type="checkbox"/>	_____	, father	;
<input type="checkbox"/>	_____		;
<input type="checkbox"/>	_____		;
<input checked="" type="checkbox"/>	_____ (webex)	, DHS social worker	;

Also present were:

<input checked="" type="checkbox"/>	_____	, counsel for mother	;
<input type="checkbox"/>	_____	, counsel for father	;
<input type="checkbox"/>	_____		;
<input type="checkbox"/>	_____		;
<input checked="" type="checkbox"/>	_____ (webex)	, guardian ad litem	;
<input checked="" type="checkbox"/>	_____	, deputy attorney general	.

All providers of services, treatment, or care of the child and family, even if not specifically referred to in this order, are ordered to provide information to the Department of Human Services ("DHS"), the Guardian Ad Litem ("GAL"), and each other to the extent needed to ensure the safety of the child, prevent further abuse or neglect, and to provide appropriate treatment to the child and family. The DHS and the GAL are authorized to share information to any of the service providers and to each other. The findings upon which this order is based are as follows:

- [x] There is reasonable cause to believe the child has been abused or neglected.
- [x] Safety of the child must be ensured and treatment of the child and family must be provided.
- [x] Information must be shared among those providing services, treatment, and care to the child and family.
- [x] The need to share information to provide safety to the child and treatment to the family takes priority over the right to privacy of the family members.

This order is in compliance with the provisions of the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F.R. §164.512(e)(1)(i).

DEC 22 2020

DATED: Kapolei, Hawaii, \_\_\_\_\_

SEAL

\_\_\_\_\_  
JUDGE OF THE ABOVE-ENTITLED COURT

**[\$587A-22] Unavailability of specified privileges.** The following privileges shall not be available to exclude evidence of imminent harm, harm, or threatened harm in any proceeding under this chapter:

- (1) The physician-patient privilege;
- (2) The psychologist-client privilege;
- (3) The spousal privilege; and
- (4) The victim-counselor privilege. [L 2010, c 135, pt of §1]

[Previous](#)

[Chapter 587A](#)

[Next](#)

**[\$587A-40] Court records.** [(a)] The court shall keep a record of all child protective proceedings under this chapter. Written reports, photographs, x-rays, or other information that are submitted to the court may be made available to other appropriate persons, who are not parties, only upon an order of the court. The court may issue this order upon determining that such access is in the best interests of the child or serves some other legitimate purpose.

[(b)] As set forth in rules adopted pursuant to chapter 91 by the department of human services and consistent with applicable laws, the department may disclose information in the court record without order of the court, unless otherwise ordered by the court. [L 2010, c 135, pt of §1]

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**421 P.3d 1267**

**IN the INTEREST OF FG, AG, PG**

**SCAP-17-0000639**

**Supreme Court of Hawai'i.**

**JUNE 28, 2018**

Jeffrey E. Foster, Kealakekua, for appellants

Ian T. Tsuda for appellee

RECKTENWALD, C.J., NAKAYAMA, McKENNA,  
POLLACK, AND WILSON, JJ.

OPINION OF THE COURT BY RECKTENWALD,  
C.J.

## **I. Introduction**

This case arises from a Hawai'i Revised Statutes (HRS) Chapter 587A Child Protective Act (CPA) proceeding. Parents and their children have been under the supervision of the Department of Human Services (DHS) since 2016. In July 2017, Parents' three-year-old child, FG, died while in foster care.

Parents shared information related to the foster placement and FG's death on social media and with a local news organization. The family court thereafter issued an order which prevented all parties to the CPA proceeding from: disclosing the names of the two children still in foster custody to the general public, and, pursuant to HRS § 587A-40,<sup>1</sup> releasing reports or other information that "have been or will be" submitted to the family court relating to the case or the Parents' two surviving children. On appeal, Parents challenge both portions of the family court's order.

First, we hold that the family court failed to make the findings required to establish that the prohibition against disclosure of the children's names survives a First Amendment challenge.

Second, we hold that the family court abused its discretion in entering the portion of the order

prohibiting disclosure of records that have or will be submitted to the family court. The family court failed to adequately

[421 P.3d 1270]

explain the basis for the order, and the record was insufficient to support its issuance.

## **II. Background**

In January 2016, the family court awarded DHS family supervision<sup>2</sup> of Parents and their children, based on DHS's petition asserting that Parents had substance abuse issues and that there were "hazardous and dangerous" physical living conditions on Parents' property. In July 2016, the family court awarded DHS foster custody, based on DHS's representations that Parents were not complying with the family court ordered service plan. Parents' three children were eventually placed in a general licensed foster home.

On July 26, 2017, three-year-old FG died while in foster care. DHS and the Hawai'i Police Department initiated an investigation, and DHS removed Parents' two surviving children from the home, and placed them in a different DHS licensed foster home.

On July 31, 2017, DHS filed an "Ex-parte motion for TRO to prevent unauthorized disclosure of confidential information." DHS moved to prevent Parents from disclosing confidential information "relating to the subject children and this court case" to the general public without prior court authorization. DHS based its motion on HRS §§ 587A-40 and 350-1.4<sup>3</sup> and Hawai'i Administrative Rule (HAR) 17-1601-4,<sup>4</sup> which provide for the confidentiality of CPA and DHS records. DHS included with its motion the declaration of a DHS social worker who declared that Mother had posted confidential information on Facebook. She attached Mother's posting, which identified FG and one of Parents' surviving children, then age one and a half, by name. The posting provided that the children were in DHS custody, that FG had died while in foster care, and that one of the two surviving children had been injured while in

foster care, and also included the names of the social workers and foster parents. Father was interviewed by KHON2 News and the interview was broadcast on the evening news and posted on the KHON2 website. Father did not disclose the names of Parents' surviving children, but mentioned that they were still in foster custody. The social worker declared that DHS was concerned that Parents would continue to release confidential information unless the family court issued an order "that clearly prohibited [Parents] from engaging in that type of activity."

On August 1, 2017, the family court granted the ex parte motion and entered a temporary restraining order (TRO). The family court's August 1 TRO provided that, pending a hearing on the matter, Parents were prohibited from disclosing confidential information relating to the CPA case and the subject children to the general public without prior court authorization. The confidential information which the TRO prohibited Parents from disclosing included, but was not limited to, information relating to: the children's foster custody status, the children's resource care

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givers, the involvement of DHS, the involvement of service providers, and any administrative or law enforcement investigation into FG's death.

Parents filed a memorandum in opposition to the TRO, arguing that it was an unlawful prior restraint of their First Amendment rights, and that there was no evidence that Parents had released family court or DHS records.

On August 8, 2017, the family court held a hearing. The family court agreed that the TRO "should somehow be changed" and explained to the parties its role of balancing the confidentiality of the case with the rights of Parents in the hopes of reaching a "happy medium."

Counsel for Parents argued that the TRO was an unconstitutional prior restraint. He argued that the TRO had resulted in serious practical

consequences for the investigation into FG's death, explaining that Parents had been unable to talk to police detectives about the death. Counsel for Parents further argued that the TRO violated Hawai'i Family Court Rules (HFRCR) Rule 65<sup>5</sup> because the State did not submit evidence that Parents had released family court records. He argued further that Parents did not intend to release records.

Counsel for DHS requested that the TRO be drawn more narrowly by preventing Parents from releasing only the records and "the names." DHS argued that such a revised order, narrowly drawn, would be constitutional. Counsel for DHS argued that the new order it requested "merely tracks the language of section [ HRS §] 587A-40."

The court asked whether there was anything "in statute or rule or case law that precludes one from disclosing the names of children," and counsel for DHS responded, "not that I'm aware of[.]"

The court asked whether, if it were to issue a revised order which tracked the language of HRS § 587A-40, Parents would abide by the statute. Counsel for Parents confirmed that Parents would abide by HRS § 587A-40, and reiterated that Parents had not released records. Counsel for DHS clarified that it was not claiming that Parents had released any records, but that, based on the Facebook posting and the KHON2 interview, DHS had a concern that Parents might release records, and so, were "asking for this order to remind the parents not to release those records." Counsel for DHS further argued that the foster parents named in Mother's Facebook posting had received death threats.

After hearing the parties' arguments, the family court rescinded the TRO and entered a new order that prohibited from disclosure only the records of the proceedings pursuant to HRS § 587A-40, and the names of Parents' two other children. Disclosure of the names of the social workers, guardian ad litem, and the resource parents would no longer be enjoined. The family court explained:



Everything that we do in these type of cases are in the best interest or should be in the best interest of children. That's paramount in everything. And so the Court's order today is in the best interest of the children. Of these children. These three

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children, one who has unfortunately passed away.

The Court will grant the—I'm sorry, will sustain the objection in part as follows. The Court order will be modified to say as follows, and the Court really is tracking 587A-40. All of these proceedings are confidential. And so the Court will order that all records of these proceedings, these protective proceedings, shall be kept confidential. Written reports, photographs, X-rays, or other information that are submitted to the Court will only be made available to the Parties in this case. And not anyone else unless there is an appropriate motion or request or stipulation submitted to the Court. The Court makes this order that access to these records or prohibiting access to these records is in the best interest of the children involved in this case.

Unfortunately the Court does not have any further information on why the guardian ad litem's names or name, or the social workers' names on why that would be detrimental to the best interest of these children. Certainly the guardian ad litem, or the parents' attorneys, or DHS may submit a motion if there is any concern and we'll deal with it at that time. But at

this point it doesn't have sufficient information.

Finally—but with regards to the children that are the subject, the remaining two children, I have to find that it's in their best interest that their names not be disclosed only because there is a pending case. I'm concerned about the impact that it may have upon these two children if their names were disclosed. But certainly that wouldn't preclude the parents, if they wish to, to talk about "we have two other children." But just the names, for their protection, should not be disclosed. So that would be the order of the Court.

Counsel for Parents requested that the court issue an order with specific findings to support the imposition of the injunction, pursuant to HFCR 65(d). The family court agreed, and asked DHS to draft the order.

On August 25, 2017, the family court entered its Findings of Fact, Conclusions of Law, Decision and Order ("Order"):

Finding of Fact/Conclusions of Law:

1. This is a proceeding under Chapter 587A, Hawaii Revised Statutes.

2. It is in the best interest of children and their families that Chapter 587A proceedings are kept confidential[.]

3. "The court shall keep a record of all child protective proceedings under this chapter. Written reports, photographs, x-rays, or other information that are submitted to the court may be made available to other appropriate persons, who are not parties, only upon an order of the court." Hawaii Revised Statutes



§ 587A-40.

4. The imposition of a protective order, ensuring that all parties comply with § 587A-40 is granted. Pursuant to § 587A-40, the Court will consider releasing information about this case to non-parties, if there is a showing that the release of said information is either in the best interests of the child or serves some other legitimate purpose.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

A. ALL PARTIES in this case are hereby prohibited and restrained from releasing, disclosing, disseminating, and broadcasting written reports, photographs, x-rays, or other information that have been or will be submitted to the court relating to the subject children and this court case to the general public without prior court authorization, pursuant to HRS § 587A-40.

B. ALL PARTIES in this case are hereby prohibited and restrained from disclosing the names of the two children still in foster custody to the general public, including but not limited to the media, social media or internet postings.

On September 19, 2017, the parties stipulated to revoke foster custody over the surviving children, and the family court ordered family supervision over the children, concluding that Mother could provide a safe home with the assistance of a service plan.

Parents timely appealed to the ICA and applied for transfer, which this court granted. On appeal, Parents argue that the portion

of the family court's Order prohibiting Parents from disclosing their surviving children's names is an unconstitutional prior restraint that infringes their right to freedom of speech. Parents also challenge the portion of the Order that prohibits them from releasing records, arguing that the statute on which the Order is based, HRS § 587A-40, is vague and ambiguous.<sup>6</sup>

### III. Standards of Review

#### A. Constitutional Law

"We review questions of constitutional law *de novo*, under the right/wrong standard." *Jou v. Dai-Tokyo Royal State Ins. Co.*, 116 Hawai'i 159, 164-65, 172 P.3d 471, 476-77 (2007) (quoting *Onaka v. Onaka*, 112 Hawai'i 374, 378, 146 P.3d 89, 93 (2006) ) (internal quotation marks omitted). Thus, this court "exercises its own independent constitutional judgment, based on the facts of the case." *State ex rel. Anzai v. City & Cty. of Honolulu*, 99 Hawai'i 508, 514, 57 P.3d 433, 439 (2002) (citing *State v. Jenkins*, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000) ).

Whether speech is protected by the first amendment [to the United States Constitution], as applied to the states through the due process clause of the fourteenth amendment, is a question of law which is freely reviewable on appeal. Correlatively, [o]ur customary deference to the trial court upon essentially a factual question is qualified by our duty to review the evidence ourselves in cases involving a possible infringement upon the constitutional right of free expression.

*State v. Viglielmo*, 105 Hawai'i 197, 203, 95 P.3d 952, 958 (2004) (citations and quotations omitted).

#### B. Injunctive Relief

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"Generally, the granting or denying of injunctive relief rests with the sound discretion of the trial court and the trial court's decision will be sustained absent a showing of a manifest abuse of discretion." Sierra Club v. Dep't of Transp. of State of Hawai'i, 120 Hawai'i 181, 197, 202 P.3d 1226, 1242 (2009) (quoting Hawai'i Pub. Employment Relations Bd. v. United Pub. Workers, Local 646, AFSCME, AFL-CIO, 66 Haw. 461, 467-68, 667 P.2d 783, 788 (1983)).

The relief granted by a court [in] equity is discretionary and will not be overturned on review unless the [circuit] court abused its discretion by issuing a decision that clearly exceeds the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of the appellant.

Pelosi v. Wailea Ranch Estates, 91 Hawai'i 478, 487, 985 P.2d 1045, 1054 (1999) (internal quotations omitted).

#### IV. Discussion

##### A. The Family Court did not Properly Apply the Required First Amendment Analysis in Issuing the Prohibition Against Disclosure of the Children's Names

Parents argue that the portion of the Order prohibiting Parents from disclosing their surviving children's names, Part B, is an unconstitutional prior restraint of their First Amendment rights to free speech. DHS does not dispute that part B of the Order constitutes a prior restraint, but argues that the restraint meets the three-prong test in Levine v. U.S. District Court for the Central District of California, 764 F.2d 590, 593 (9th Cir. 1985). Parents agree with DHS that the Levine test is the appropriate test, but contend that Part B of the Order fails the test.

We agree with the parties that the Levine test applies to the prohibition against disclosure of the children's names, and we hold that the family court failed to make findings required to establish

that the restraint met the test. "Prior restraints are subject to strict scrutiny because of the peculiar dangers presented by such restraints." Levine, 764 F.2d at 595. Quite simply, the family court did not engage in the required constitutional analysis before impinging on Parents' right to free speech by entering part B of the Order.

The Levine test provides that a prior restraint on the First Amendment right to free speech of a trial participant may be

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upheld if "(1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest," "(2) the order is narrowly drawn," and "(3) less restrictive alternatives are not available." Levine, 764 F.2d at 595 (citations omitted). DHS correctly argues that this court followed the Levine test in Breiner v. Takao, 73 Haw. 499, 504-05, 835 P.2d 637, 640-41 (1992). There we reiterated that the trial court must make specific findings that the Levine test has been satisfied before imposing a prior restraint on the free speech of trial participants. See Breiner, 73 Haw. at 505-07, 835 P.2d at 641-43.

The first prong of the Levine test requires a court to make specific findings that: the competing interest is compelling; the competing interest will be harmed or threatened absent the court's imposition of a restraint; and, in balancing the competing interest with First Amendment rights, that the competing interest deserves greater protection. See id. at 505, 835 P.2d at 641 ("the record must contain specific findings by the trial court which demonstrate that the conduct is a serious and imminent threat"); Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 843, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) ("the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression").

DHS argues that protecting the confidentiality of children involved in child proceedings is an "overwhelmingly important governmental interest." It argues that the Hawai'i legislature has enacted several statutes under the CPA to preserve confidentiality, and that this court has issued rulings to safeguard information contained in CPA proceedings. In response, Parents argue that the family court did not make findings that disclosure of their children's names constituted a threat to a protected competing interest.

The United States Supreme Court has recognized the states' compelling interest in protecting confidentiality of child abuse information. See Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).<sup>2</sup> This court cited Ritchie with approval in State v. Peseti, 101 Hawai'i 172, 65 P.3d 119 (2003), in holding that the family court's decision to seal a complainant's Child Protective Services (CPS) file did not violate the defendant's due process rights:

To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child-abuse information. If the CYS records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know

that their identities will be protected. Recognizing this, the Commonwealth—like all other States—has made a commendable effort to assure victims and witnesses that they may speak to the CYS counselors without fear of general disclosure. The Commonwealth's purpose would be frustrated if this confidential material had to be disclosed[.]

Id. at 185-85, 65 P.3d at 132-33 (quoting Ritchie, 480 U.S. at 56-67, 107 S.Ct. 989 ) (emphasis added).<sup>8</sup>

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In, Ritchie the Court also noted that "[t]he importance of the public interest at issue in this case is evidenced by the fact that all 50 States and the District of Columbia have statutes that protect the confidentiality of their official records concerning child abuse." 480 U.S. at 60 n.17, 107 S.Ct. 989. Indeed, the states' maintenance of the confidentiality of child abuse records is required as part of their compliance with the federal Child Abuse Prevention and Treatment Act (CAPTA). CAPTA provides federal grants to states for the purpose of assisting them in improving the child protective services of the state. See 42 U.S.C.A. § 5106a(a). In order to receive funding, states must submit plans which include how the state will "preserve the confidentiality of all records in order to protect the rights of the child[.]" Id. at (b)(1)(A), (b)(2)(B)(viii).

This compelling state interest in protecting the confidentiality of child abuse information is reflected in numerous Hawai'i statutes and regulations. The purpose of the CPA is to serve the best interests of children. See HRS § 587A-2 (Supp. 2016) ("This chapter shall be liberally construed to serve the best interests of the children[.]"). The CPA provides for the confidentiality of records, and requires that its proceedings be closed to the general public and held without a jury. HRS § 587A-40 ; HRS § 587A-25 (Supp. 2016). Further, family court

records in many types of cases involving children are not available for public inspection. HRS § 571-84 (Supp. 2016). Hawai'i also provides for the confidentiality of DHS records regarding reports and investigations of child abuse or neglect, and the intentional unauthorized disclosure of a report or record of a report to DHS constitutes a misdemeanor. HRS § 350-1.4 (Supp. 2016).

Thus, as recognized by the United States Supreme Court, and as reflected in the extensive state and national statutory protection of the confidentiality of child abuse records, there is a constitutionally recognized compelling state interest in keeping child abuse records confidential.

However, as DHS conceded at the family court hearing on the Order, there is no statutory protection in Hawai'i against parents disclosing their children's names to the public. Thus, we must apply the Levine test to assess the validity of the family court's prohibition on Parents' disclosure of their children's names. That test requires that courts make specific findings that there is a threat to a competing interest before entering a prior restraint. See Levine, 764 F.2d at 595 ; see also Care & Prot. of Edith, 421 Mass. 703, 706, 659 N.E.2d 1174, 1177 (1996) ("A general rule that bars any parent from directly or indirectly revealing the names of children subject to a care and protection proceeding will not do. There must be evidence and findings as to what effect the disclosure of the names of the particular children will or might have on them.")

Here, the family court's findings in its written Order were limited to stating, "It is in the best interest of children and their families that Chapter 587A proceedings are kept confidential[.]" The Order did not explicitly find that confidentiality would serve the best interest of Parents' children. The family court also failed to make findings that Parents' conduct posed a serious and imminent threat to the best interests of their children. See Breiner, 73 Haw. at 505, 835 P.2d at 641 ("the record must contain specific findings by the trial court which demonstrate that the conduct is a serious and imminent threat[.]") (quotation omitted). Finally, the family court did

not identify or assess Parents' First Amendment interests. See Levine, 764 F.2d at 595.<sup>9</sup>

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In short, the family court failed to make sufficient written findings that the first prong of the Levine test was met, and accordingly, it did not discharge its duty to find that there was a "clear and present danger or a serious and imminent threat to a protected competing interest[.]" See Levine, 764 F.2d at 595.

Further, the family court did not find that the Order met the second and third prongs of the Levine test—i.e., it did not find that the Order was narrowly drawn or that less restrictive alternatives were available. See id. Here, the family court's Order prohibits Parents from disclosing their children's names to the general public. The family court did not make clear what it meant by including the term "general public" in its Order. Further, the family court did not explicitly consider whether its Order was narrowly drawn to ensure that it was no more restrictive than necessary to protect the State's interests. See id.

In summary, the family court did not engage in the requisite constitutional analysis to support a prohibition against disclosure of Parents' children's names.

Accordingly, the family court's Order must be vacated. However, we provide that the Order will remain in effect for forty-five days after the filing of the judgment for this opinion to provide DHS with an opportunity to renew its request for a restraint on remand. The family court's Order will automatically vacate at the end of the forty-five-day period.<sup>10</sup>

If DHS moves on remand to enter a new restraining order, it shall present evidence, and the family court must make specific findings, that the requirements of the Levine test are met prior to issuing a new order. The Levine test states in the first prong that the prior restraint may be upheld if the activity restrained poses either a

clear and present danger or a serious and imminent threat to a protected competing interest. So, the family court would determine on remand whether the release of the children's names poses a clear and present danger or serious and imminent threat to the children's best interests from the disclosure of the family court records.<sup>11</sup> See Levine, 764 F.2d at 595 (the court must determine whether "the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest[.]" (citations omitted)). The family court must also make findings that the second and third prongs of the Levine test are met. See id.

### **B. The Family Court Abused its Discretion in Ordering an Injunction that Prohibits the Release of CPA Records**

The other portion of the family court's order presents a distinct issue: whether the family court abused its discretion in ordering Parents not to disclose records that are already protected from release by HRS § 587A-40.

As a threshold matter, the family court has the power to issue injunctive relief under HRS § 571-8.5(a)(10) (Supp. 2016).<sup>12</sup> See In re Guardianship of Carlsmith, 113 Hawai'i 211, 228, 151 P.3d 692, 709 (2006). "[A] restraining order is an extraordinary writ subject to contempt for failure to comply[.]"

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Wahba, LLC v. USRP (Don), LLC, 106 Hawai'i 466, 475, 106 P.3d 1109, 1118 (2005)(quotations omitted).

However, we hold that the family court abused its discretion in entering the injunction prohibiting parties from releasing family court records because the record is insufficient to support the issuance of the Order.<sup>13</sup> At the hearing, counsel for Parents argued that the State did not submit evidence that Parents released family court records, and that Parents did not intend to release records. The court asked whether, if it were to

issue an order tracking HRS § 587A-40, Parents would abide by the statute. Counsel for Parents confirmed that they would abide by HRS § 587A-40, and reiterated that Parents had not released records. Counsel for DHS conceded that it was not claiming that Parents had released records, but based on the Facebook posting, had a concern that they may do so.

While parents are statutorily required by HRS § 587A-40 not to release records, the concerns raised by DHS are too speculative to support the issuance of an injunction, an extraordinary remedy which would subject Parents to contempt for failure to comply.<sup>14</sup> See Wahba, 106 Hawai'i at 475, 106 P.3d at 1119. Accordingly, we vacate the portion of the order prohibiting the parties from releasing CPA records.

### **V. Conclusion**

For the foregoing reasons, we vacate the family court's August 25, 2017 Order, effective forty-five days following the filing of the judgment on appeal, and the case is remanded to the family court for further proceedings consistent with this opinion.

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Notes:

<sup>1</sup> HRS § 587A-40 provides:

The court shall keep a record of all child protective proceedings under this chapter. Written reports, photographs, x-rays, or other information that are submitted to the court may be made available to other appropriate persons, who are not parties, only upon an order of the court. The court may issue this order upon determining that such access is in the best interests of the child or serves some other legitimate purpose.

As set forth in rules adopted pursuant to chapter 91 by the



department of human services and consistent with applicable laws, the department may disclose information in the court record without order of the court, unless otherwise ordered by the court.

HRS § 587A-40 (Supp. 2016).

<sup>2</sup> " 'Family supervision' means the legal status in which a child's legal custodian is willing and able, with the assistance of a service plan, to provide the child with a safe family home." HRS § 587A-4 (Supp. 2016). When DHS or another authorized agency has family supervision, it has the duty to monitor and supervise the children and the children's family members who are parties to the CPA proceeding. HRS § 587A-15 (Supp. 2016).

<sup>3</sup> HRS § 350-1.4 (Supp. 2016) provides, in relevant part:

All reports to the department concerning child abuse or neglect made pursuant to this chapter, as well as all records of such reports, are confidential. The director may adopt rules, pursuant to chapter 91, to provide for the confidentiality of reports and records and for the authorized disclosure of reports and records. Any person who intentionally makes an unauthorized disclosure of a report or record of a report made to the department shall be guilty of a misdemeanor.

<sup>4</sup> HAR § 17-1601-4 provides, in relevant part:

(a) All records and information shall be confidential and unauthorized disclosure or re-disclosure shall be a violation. Records shall not be accessible for public inspection except as provided by this chapter. Disclosure of records shall be provided in accordance with departmental procedures; provided, however, that when the record

contains information that the person is not authorized to receive, that information shall not be provided.

(b) Recipients of confidential information shall be bound by the same confidentiality restrictions as the department and shall maintain confidentiality and prevent unauthorized re-disclosure.

<sup>5</sup> HFCR Rule 65 provides, in relevant part:

(b) Restraining Order; Notice; Hearing; Duration. A restraining order may be granted without notice to the adverse party when it clearly appears from specific facts shown by affidavit or declaration or by the verified complaint or cross-complaint that immediate relief to the applicant is appropriate. Every restraining order granted without notice shall be filed forthwith in the clerk's office and entered of record, shall be accompanied by an appropriate application for further relief, shall be set for a prompt hearing, and shall be served forthwith upon any party or parties affected by the order. It shall continue in effect until further order of the court. Upon notice to the party who obtained the restraining order without notice, the adverse party may move to advance the hearing.

....

(d) Form and Scope of Restraining Order. Every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is

binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

<sup>6</sup> Because we vacate the Order, we do not address Parents' challenge to HRS § 587A-40.

<sup>7</sup> In Barnard v. State of Hawai'i, No. 05-00599 SPK-LEK, 2007 WL 954303, (D. Haw. Mar. 27, 2007), the United States District Court for the District of Hawai'i noted that the United States Supreme Court characterized a state's interest in protecting information about child abuse as compelling. Id. at \*4 (citing Ritchie, 480 U.S. at 60, 107 S.Ct. 989 ).

<sup>8</sup> The Peseti court, in not allowing full disclosure, indicated that the defendant's due process rights to a fair trial were protected because the family court conducted an in camera review of the complainant's CPS file and thereafter produced redacted relevant portions of the file to the defendant. Id. at 187, 65 P.3d at 134.

<sup>9</sup> In assessing Parents' First Amendment rights, we note that this is a case in which a child has died while in foster care. State statutes which provide for review of child deaths that occur in state custody demonstrate that Hawai'i has an interest in ensuring accountability in the foster care system. See HRS § 321-341 (Supp. 2016) (providing that the Department of Health (DOH) may conduct multidisciplinary and multiagency reviews of child deaths); HRS § 321-345.5 (Supp. 2016) (requiring the DOH to submit an annual written report to the legislature on the status of child death reviews conducted by the department, and the report must include the number of children in state custody and the cause of those deaths).

<sup>10</sup> If DHS elects not to file a request for a restraint on remand, it shall immediately notify the family court, which shall forthwith rescind the Order.

<sup>11</sup> We recognize that some cases may require less detailed, specific factual findings that the children would suffer harm from disclosure of their names, for instance, in cases involving allegations of sexual abuse. See, e.g., In re J.S., 267 Ill.App.3d 145, 150, 204 Ill.Dec. 30, 640 N.E.2d 1379, 1383 (1994) (holding that the court did not need to make specific findings that disclosure of confidential information would cause a child harm before entering a nondisclosure order in a case where the mother had physically abused the minor for the purpose of attempting to prove that the father sexually abused the minor).

<sup>12</sup> HRS § 571-8.5(a)(10) provides:

(a) The district family judges may:

....

(10) Make and award judgments, decrees, orders, and mandates, issue executions and other processes, and do other acts and take other steps as may be necessary to carry into full effect the powers that are or shall be given to them by law or for the promotion of justice in matters pending before them[.]

<sup>13</sup> We note that the Order's failure to set forth the reasons for its issuance provides an additional basis for vacating the Order. In Wahba, this court invalidated a restraining order that failed to state the reasons for its issuance and the factual basis that would support the enjoinder. 106 Hawai'i at 476, 106 P.3d at 1119. We explained, "Because a restraining order is an extraordinary writ, subject to contempt for failure to comply, it must be set out in specific terms." Id. at 475-76, 106 P.3d at 1118-19 (citations omitted). Because the order failed to state the reasons for its issuance, the injunction "accordingly was procedurally defective, and thus, void." Id. at 476, 106 P.3d at 1118-19. Here, similarly, the family court's Order did not set forth the factual basis of the Order or sufficiently state the reasons for the Order's issuance, and accordingly, is procedurally defective. See id.

<sup>14</sup> Further, part B of the order prohibits disclosure of "information that "will be submitted to the court relating to the subject children[.]" This prohibition is unclear and, accordingly, provides an additional basis for invalidating the order. See Wahba, 106 Hawai'i at 475-76, 106 P.3d at 1118-19 ("Because a restraining order is an extraordinary writ, subject to contempt for failure to comply, it must be set out in specific terms") (citations omitted).

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**[\$587A-20] Inadmissibility of evidence in other state actions or proceedings.** The court may order that testimony or other evidence produced by a party in a proceeding under this chapter shall be inadmissible as evidence in any other state civil or criminal action or proceeding if the court deems such an order to be in the best interests of the child. [L 2010, c 135, pt of §1]

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