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FIRST CIRCUIT
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EXHIBIT "1"

MR v. TR

Intermediate Court of Appeals of Hawai'i

January 29, 2019, Decided; January 29, 2019, Filed

NO. CAAP-17-0000230

Reporter

2019 Haw. App. LEXIS 38 *; 144 Haw. 6; 433 P.3d 664; 2019 WL 351209

MR, Plaintiff-Appellee, v. TR, Defendant-Appellant

vacated in part. Case remanded.

Notice: SUMMARY DISPOSITIONAL ORDERS OF THIS COURT DO NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED. SEE HAWAII RULES OF APPELLATE PROCEDURE FOR GUIDELINES RESTRICTING PUBLICATION AND CITATION OF SUMMARY DISPOSITIONAL ORDERS.

PUBLISHED IN TABLE FORMAT IN THE HAWAII REPORTER.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Prior History: [*1] APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT. FC-D NO. 10-1-0543.

Case Summary

Overview

ISSUE: Whether a parent was entitled to designate a Family Court file as confidential. HOLDINGS: [1]-Based upon the parties' apparent agreement to seek protection of personal information, and in light of the public policies reflected in Haw. R. Ct. Rec. 9's objective to protect personal information, the proper relief was to order that all documents that contained personal information, including the record on appeal, be sealed; [2]-The record of the divorce proceeding pertaining directly to a determination of custody of the parties' children fell within the scope of Haw. Rev. Stat. § 571-84(a) and had to be withheld from public inspection pursuant to the statute's mandate. Thus, the copies of earlier, protected records, which were attached to the parent's motion to seal and as an attachment to the exhibit to the parent's notice of appeal, had to be withheld from public inspection.

Outcome

Order denying motion to seal affirmed in part and

Counsel: On the briefs: Ronald P. Tongg, for Defendant-Appellant.

MR, Plaintiff-Appellee, Pro se.

Judges: By: Fujise, Presiding Judge, Leonard and Hiraoka, JJ.

Opinion

SUMMARY DISPOSITION ORDER

Defendant-Appellant TR (**Husband**) appeals from a February 22, 2017 order (**Order Denying Motion to Seal**) entered by the Family Court of the Second Circuit (**Family Court**). The Order Denying Motion to Seal denied [Husband's] Ex Parte Motion for Order to Designate the File as Confidential (**Motion to Seal**).¹ Husband also challenges, in part, the Family Court's May 15, 2017 Findings of Fact and Conclusions of Law (**FOFs & COLs**).

Husband raises two points of error on appeal, contending that the Family Court: (1) clearly erred in finding that neither Husband nor Plaintiff-Appellee MR (**Wife**) nor any other interested party "has filed a request that Personal Information as defined by [Hawaii Court Records Rules (**HCRR**)] Rule 2.19 be removed from the public record and filed under seal in compliance with Rule 9 of the HCRR; rather, the request is that the entire case file be sealed;" and (2) erred in denying the motion to seal.

Upon careful review of the record and the Opening Brief submitted [*2] by Husband,² and having given due consideration to the arguments advanced and the issues raised, we resolve Husband's points of error as

¹ The Honorable Lloyd A. Poelman presided.

² No other briefs were filed.

follows:

(1) Husband argues that his request to seal the entire file also constituted a request to seal the parts of the record that contain Personal Information under HCRR Rule 2.19, and therefore, the Family Court's above finding is erroneous.

HCRR Rule 2.19 (2012) defines Personal Information:

2.19. Personal information means social security numbers, dates of birth (except for traffic citations), names of minor children, bank or investment account numbers, medical and health records, and social service reports. To the extent a social security or account number is required in an accessible document, the last 4 digits may be displayed, provided that no more than half of the social security or account digits are disclosed. To the extent a birthdate is required in an accessible document, the birth year may be displayed. Except as provided in Rule 9.1, to the extent the name of a minor is required in an accessible document, the initials of the minor may be displayed. To the extent a complete social security number, account number, birthdate, or name of a minor child is required [*3] for adjudication of a case, the complete number or birthdate shall be submitted in accordance with Rule 9.1 of these rules.

HCRR Rule 9 requires that parties submit documents that contain Personal Information separately, using a sealed Confidential Information Form. See HCRR Rule 9; see also Oahu Publ'ns Inc. v. Takase, 139 Haw. 236, 242-43, 386 P.3d 873, 879-80 (2016).

HCRR Rule 9.1 (2012) provides, in relevant part:

(a) Except as provided in this Rule 9 and notwithstanding any other rule to the contrary, a party shall not include personal information in any accessible document filed in any state court or with ADLRO. Required personal information shall be submitted by means of a Confidential Information Form that substantially conforms to HCRR Form 2 of these rules The Confidential Information Form shall be designated confidential, protected, restricted, sealed, or not accessible.

HCRR Rule 9.1(a).

HCRR Rule 9.3 (2012) further provides:

9.3. Fly Sheet. A fly sheet that substantially complies with HCRR Form 1 shall be submitted

with the completed confidential information form. The flysheet shall be filed in the accessible record, whether the record is maintained on paper or electronically. The fly sheet shall be captioned in accordance with the rules governing the proceeding, titled "CONFIDENTIAL INFORMATION," [*4] and shall include the following: (a) the case name and number; (b) the title of the form; (c) a brief description of the submitted information; (d) the name, address, and telephone number of the individual submitting the personal information; and (e) the statement "confidential information submitted pursuant to Rule 9 of the Hawai'i Court Record Rules" and any other statute(s), rule(s), or order(s) that make the information confidential.

Here, as stated in the Family Court's finding, Husband only requested that the entire record in this divorce action be sealed, because it contained "sensitive financial and other personal and private information," and Husband has not requested that Personal Information be redacted from the documents filed with the Family Court, in accordance with HCRR Rule 9. Husband neither informed the Family Court that Personal Information, as defined in HCRR Rule 2.19, was included in the record nor did he otherwise specify any particular information warranting protection as confidential. Husband did not comply whatsoever with HCRR Rule 9.3. Therefore, we conclude that Husband's argument is without merit.

Nevertheless, it appears that the record on appeal in this case contains Personal Information [*5] as defined in HCRR 2.19, *i.e.*, the names of minor children and dates of birth of the parties, as well as of the minor children. We note that some of the accessible documents including Personal Information were submitted prior to the September 1, 2012 effective date of HCRR Rule 9. We further note that, in 2017, with the Motion to Seal, Husband filed *pro se* an attachment that included such Personal Information, without complying with HCRR Rule 9. In addition, with his Opening Brief, Husband submitted Appendices that again included such Personal Information, without complying with HCRR Rule 9, even though Husband is now represented by counsel and arguing that the Personal Information should be kept confidential.³

³ Husband, as well as Husband's appellate attorney, Ronald P. Tongg, Esq., are cautioned that HCRR Rule 9.5 provides that "appropriate monetary or other sanctions [may be imposed]

The Hawai'i Supreme Court has held that "[p]rotecting the safety and security of personal identifying information and ensuring the privacy of complainants, minors, and others are of paramount importance." Takase, 139 Haw. at 246, 386 P.3d at 883 (establishing procedures to remedy an improper disclosure of personal information under HCRR Rule 9). HCRR Rule 9 does not expressly apply to all documents containing Personal Information filed by the parties in this case because some such documents were filed prior to HCRR Rule 9's effective date. Nevertheless, [*6] based upon the parties' apparent agreement to seek protection of Personal Information,⁴ and in light of the important public policies reflected in HCRR Rule 9's objective to protect Personal Information,⁵ subject to our resolution of Husband's second point of error, we conclude that the proper relief would be to immediately order that all documents that contain Personal Information, including the record on appeal, be sealed; the sealing order should state the reasons for sealing and provide notice of the right to object to the sealing, and the sealing order should direct that redacted versions be filed as publicly accessible documents. See Takase, 139 Haw. at 246-49, 386 P.3d at 883-86.

(2) Husband argues that the Family Court erred in denying his request to seal the entire Family Court record because it contains false allegations that are libelously damaging to his reputation. Husband submits that the false allegations are so egregious that the damage he would suffer if the allegations remain publicly accessible override the public's right to access it, citing Oahu Publ'ns Inc. v. Ahn, 133 Haw. 482, 496, 331 P.3d 460, 474 (2014). Husband also argues that, as the custody of the parties' two minor children was at issue, the entire case file should have been sealed pursuant to HRS §§ 571-11(3) (Supp. 2017) and [*7] 571-84 (2006). Finally, Husband argues that the Family Court erred in not granting in part Husband's Motion to Seal and not *sua sponte* directing Husband to provide the court with redacted versions of the documents

upon parties or attorneys who do not comply with this Rule 9, where the parties or attorneys have not shown good cause for failure to comply, or a good faith attempt to comply with this rule."

⁴ Wife filed a declaration in support of the Motion to Seal stating, *inter alia*, that the parties had reconciled and that she requested that the records and files in these proceedings be designated as confidential.

⁵ See Takase, 139 Haw. at 244-45, 386 P.3d at 881-82.

containing the Personal Information and the false allegations.⁶

We first address Husband's argument that the Family Court's record in this case should have been sealed pursuant to HRS §§ 571-11(3) and 571-84, which provide, in relevant part:

§ 571-11 Jurisdiction; children. Except as otherwise provided in this chapter, the court shall have exclusive original jurisdiction in proceedings:

....

(3) To determine the custody of any child or appoint a guardian of any child[.]

§ 571-84 Records. (a) The court shall maintain records of all cases brought before it. Except as provided in section 571-84.6,⁷ in proceedings under section 571-11 and in paternity proceedings under chapter 584, the following records shall be withheld from public inspection: the court docket petitions complaints motions and other papers filed in any case; transcripts of testimony taken by the court; and findings, judgments, orders, decrees, and other papers other than social records filed in proceedings before the court. The records other than social records shall be open to inspection: [*8] by the parties and their attorneys, by an institution or agency to which custody of a minor has been transferred, and by an individual who has been appointed guardian; with consent of the judge, by persons having a legitimate interest in the proceedings from the standpoint of the welfare of the minor; and, pursuant to order of the court or the rules of court, by persons conducting pertinent research studies, and by persons, institutions, and agencies having a legitimate interest in the protection, welfare, treatment, or disposition of the minor.

....

(c) No information obtained or social records prepared in the discharge of official duty by an employee of the court shall be disclosed directly or indirectly to anyone other than the judge or others entitled under this chapter to receive the

⁶ Based on his prior argument, it appears that Husband also seeks the use of pseudonyms or initials to maintain the anonymity of the parties' children.

⁷ HRS § 571-84.6 (2006) provides that proceedings and records related to certain minor law violator adjudications under HRS § 571-11(1) are not confidential.

information, unless and until otherwise ordered by the judge.

(Emphasis added).

The Family Court referenced HRS §§ 571-11(3) and 571-84 in its FOFs & COLs and then stated, "[t]here is no restriction on the public's right to access of divorce filings and hearings except as outlined above." The Family Court then concluded that "[b]ut for custody issues and upon compliance with Hawaii Court Records Rules, the public should [*9] have unfettered access to court records and proceedings regarding divorces," citing the First Amendment to the United States Constitution, article I, section 4 of the Hawai'i Constitution, and Takase. With no further consideration of HRS § 571-84, based primarily on the parties' failure to comply with HCRR Rule 9 and the supreme court's guidance in Takase, the Family Court declined to "scour all pre-HCRR filings and remove all Rule 9 Personal Information documents" and denied the Motion to Seal. However, as acknowledged by the Family Court, Husband's request was made pursuant to HRS §§ 571-11 and 571-84, as well as HCRR Rule 9.⁸

HRS § 571-84 is a duly-enacted statutory provision applicable to the record-keeping in Hawai'i's family courts. As the supreme court has often stated:

Our construction of statutes is guided by the following rules:

First, the fundamental starting point for statutory-interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when [*10] there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.

First Ins. Co. of Haw. v. A & B Props., 126 Hawai'i 406, 414, 271 P.3d 1165, 1173 (2012) (citation omitted).

⁸ In the Motion to Seal, Husband also cited, without explanation or argument, Hawai'i Family Court Rules Rule 26, which concerns depositions and discovery. Husband makes no argument or reference to this rule on appeal.

Thus, we begin with language of HRS § 571-84 itself. The confidentiality mandate in HRS § 571-84(a) clearly and unambiguously applies to all proceedings under HRS § 571-11, which includes proceedings to determine child custody.⁹ HRS § 571-84(a) clearly and unambiguously mandates that, in such proceedings, "the following records shall be withheld from public inspection: the court docket, petitions, complaints, motions, and other papers filed in any case; transcripts of testimony taken by the court; and findings, judgments, orders, [and] decrees." (Emphasis added). We detect no "doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression" in the legislative intent to withhold these family court records from public inspection. See First Ins. Co. of Haw., 126 Hawai'i at 414, 271 P.3d at 1173.

There is, however, uncertainty as to the intended scope of "proceedings . . . [t]o determine the custody of any child" as is found in HRS § 571-11(3) and incorporated into HRS § 571-84(a). The first sentence of HRS § 571-84(a) uses the term "all cases" to define the scope of the family courts' record-keeping duties, whereas the second sentence uses the term "proceedings," which at least [*11] suggests the two were not intended to be synonymous and that perhaps particular proceedings might be a subset of a case. Additionally, as alluded to by the Family Court, child custody proceedings most frequently arise in the context of actions for divorce, which are primarily governed by HRS chapter 580, and we find no support for the proposition that HRS § 571-84 is intended to apply to all parts of a divorce action that involves child custody.

Hawai'i appellate courts have recognized that HRS § 571-84 and other Hawai'i statutes are intended to protect the anonymity and well-being of children that are the subject of various family court proceedings. See, e.g., In re FG, 142 Hawai'i 497, 505, 421 P.3d 1267, 1275 (2018) (discussing the "compelling state interest" in protecting the confidentiality of child abuse information and recognizing that family court records in many types of cases involving children are withheld from public inspection, citing HRS § 571-84); Kema v. Gaddis, 91 Hawai'i 200, 203, 205-06, 982 P.2d 334, 337, 339-40 (1999) (rejecting the Star-Advertiser's request for family court records pursuant to HRS § 571-84(b) and prioritizing the best interest of children that

⁹ As noted in n.7 above, HRS § 571-84(a) is subject to certain exceptions provided by HRS § 571-84.6; these exceptions are not relevant to this case.

would be potentially harmed by publication of court records and files about their family); Doe v. Roe, 6 Haw. App. 629, 630 n.1, 736 P.2d 448, 450 n.1 (1987) (maintaining the anonymity of the parties (and thereby the subject child) pursuant to HRS §§ 571-84 and 584-20 (1985) in a paternity [*12] proceeding). These cases have not, however, addressed the scope of the family courts' directive under HRS §§ 571-84 and 571-11(3) in divorce proceedings involving custody.

Nor do the Ahn and Takase cases, cited by the Family Court, provide clarity as to this issue. Ahn, Takase, and a more recent case, Grube v. Trader, 142 Hawai'i 412, 420 P.3d 343 (2018), explicate important constitutional principles implicating the public's qualified right of access to court records and proceedings, as well as the general public's competing right to personal and informational privacy, but in the particular context of adult criminal trials. See, e.g., Takase, 139 Haw. at 244-46, 386 P.3d at 881-83 (discussing the right to privacy in the context of HCRR Rule 9; acknowledging special protection afforded to minors). In a footnote, Ahn quotes In re Estate of Campbell, 106 Hawai'i 453, 462, 106 P.3d 1096, 1105 (2005), for the proposition that "[t]he reasons underlying openness in the criminal context . . . are equally compelling in the civil context." 133 Haw. at 496 n.18, 331 P.3d at 474 n.18. However, in Campbell Estate, the supreme court specifically "express[ed] no opinion as to the applicability of the balancing test in situations where a specific statute or rule mandates confidentiality or where such an approach may be inappropriate, as might be the case, for example, in certain family court matters." 106 Hawai'i at 465 n.26, 106 P.3d at 1108 n.26.¹⁰

Notwithstanding the ambiguity in the [*13] scope of the applicability of HRS § 571-84(a) in divorce actions involving child custody generally, in the narrow circumstances of this case, we conclude that HRS § 571-84(a) is sufficiently clear to apply it to the Family Court record in this case.¹¹ The primary record in this

case, created between November 8, 2010, and December 16, 2011, is limited to the docket (index sheet), a complaint, a motion and affidavit for pre-decree relief related to, *inter alia*, temporary custody, an order regarding pre-decree relief, a stipulation and order dismissing the complaint and dissolving the temporary orders in the order regarding pre-decree relief, and associated certificates of service and papers.¹² As later averred, the parties reconciled. These 2010-2011 records of proceedings pertained directly to a determination of custody of the parties' children, and therefore fall within the scope of HRS § 571-84(a), and must be withheld from public inspection pursuant to the statute's mandate.¹³

The further record begins on February 22, 2017, with the Motion to Seal, and ends with the Family Court's May 15, 2017 FOFs & COLs stating the reasons that the Motion to Seal was stamped denied. This part of the record does not constitute proceedings to determine the custody of any child, but includes copies of the earlier, protected records, and contains Personal Information, as well as other information that fails to protect the

burdens, modified rules, policies, or practices involving bifurcated custody proceedings, along with all participants' strict compliance with HCRR Rule 9, might prove to be the most efficient way to strike the proper balance.

¹² Such papers include the Clerk's Minutes, Matrimonial Action Information, and a Kids First Information Sheet.

¹³ Regarding records that fall within the scope of HRS § 571-84(a) and are therefore withheld from public inspection, we note that the best practice still may be to file those records in compliance with HCRR Rule 9. HRS § 571-84(a) provides that records withheld under that section, other than social records, remain open to inspection by

the parties and their attorneys, by an institution or agency to which custody of a minor has been transferred, and by an individual who has been appointed guardian; with consent of the judge, by persons having a legitimate interest in the proceedings [*14] from the standpoint of the welfare of the minor; and, pursuant to order of the court or the rules of court, by persons conducting pertinent research studies, and by persons, institutions, and agencies having a legitimate interest in the protection, welfare, treatment, or disposition of the minor.

Accordingly, even though records may be withheld from public inspection pursuant to HRS § 571-84(a), those records may still be available to numerous persons who have no right to access Personal Information, including, *inter alia*, social security numbers, bank account numbers, *etc.*

¹⁰ As yet, no one has challenged the application of HRS § 571-84(a) in this case, and therefore, the issue is premature.

¹¹ We acknowledge that, in the FOFs & COLs, the Family Court requested appellate guidance regarding, *inter alia*, whether entire case files should be sealed where child custody is at issue or whether divorce proceedings involving both custody and non-custody issues should be bifurcated. We decline to reach beyond the scope of this case, but note (obviously in *dicta*) that notwithstanding the associated

anonymity of the parties' children. Thus, we conclude that the copies of the earlier, protected records, which were attached to Husband's Motion to Seal and as an attachment to the exhibit to Husband's Notice of Appeal, must be withheld from public inspection pursuant to HRS § 571-84(a). We further conclude, pursuant to our inherent powers, that it is appropriate for this court to issue an order that the violations of the HCRR resulting from the inclusion of Personal [*15] Information in the 2017 portion of the Family Court record, as well as the appellate docket, be remedied. See Takase, 139 Haw. at 246-48, 386 P.3d at 883-85. In addition, pursuant to HRS § 571-54 (2006), the record on appeal must be given a fictitious title to protect the anonymity of the parties' children.¹⁴

Finally, in light of our determination that the 2010-2011 portion of the Family Court record in this case must be withheld from public inspection pursuant to HRS § 571-84(a), we need not address Husband's argument that the Family Court erred in denying his request to seal the entire Family Court record because it contains false allegations that are libelously damaging to his reputation.

Accordingly, the Family Court's February 22, 2017 Order Denying Motion to Seal is affirmed in part and vacated in part, and this case is remanded to the Family Court for compliance with the following order, to the extent applicable to the Family Court. IT IS HEREBY ORDERED THAT:

1. The appellate clerk shall seal the Notice of Appeal (Intermediate Court of Appeals (ICA) docket 1), the Civil Appeal Docketing Statement (ICA docket 4), the Record on Appeal (ICA docket 10), the Jurisdictional Statement (ICA docket 16), the Opening Brief (ICA docket 18), and Exhibit A [*16] (ICA Docket 20), and, *to the extent practicable*, delete references to the parties' first and last names from the electronic record in this case and replace them with the parties' first and last initials or otherwise make the parties' full names inaccessible to the public.

2. Any individual may file, within ten days of the entry of this Summary Disposition Order, a motion objecting to

the sealing of the aforementioned appellate records.

3. Husband shall, within thirty days of the entry of this Summary Disposition Order, redact all Personal Information, delete references to the parties' first and last names and replace them with the parties' first and last initials, and withhold and substitute exhibits, attachments, and appendices that must be withheld from public inspection pursuant to HRS § 571-84(a), as set forth above, with a single sheet of paper including the reason for the substitution and the number of pages withheld,¹⁵ from the Notice of Appeal (ICA docket 1), the Civil Appeal Docketing Statement (ICA docket 4), the Jurisdictional Statement (ICA docket 16), the Opening Brief (ICA docket 18), and Exhibit A (ICA Docket 20). Husband shall then publicly file in CAAP-17-0000230 each of these redacted [*17] documents and, in each docket entry, indicate in the "Notes" section that the filing is a redacted submission in compliance with this Summary Disposition Order. Husband shall also submit to the appellate clerk a Fly Sheet (that substantially conforms to HCRR Form 1) and Confidential Information Form (that substantially conforms to HCRR Form 2) containing the information required by HCRR Rules 9.1 and 9.3, in the manner prescribed by HCRR Rule 9.4.

4. The Family Court clerk shall withhold the following from public access: that portion of the record in the Family Court case created between November 8, 2010, and December 16, 2011, including the docket (index sheet), a complaint, a motion and affidavit for pre-decree relief related to, *inter alia*, temporary custody, an order regarding pre-decree relief, a stipulation and order dismissing the complaint and dissolving the temporary orders in the order regarding pre-decree relief, and associated certificates of service and papers.¹⁶ In addition, the Family Court clerk shall seal the entire Family Court record (subject to the further order of the Family Court), pending the Family Court's entry of an order on the motion that Husband is directed to file in accordance [*18] with paragraph 5 below.

5. Husband shall, within forty-five days of this Summary Disposition Order, file in the Family Court, a motion to seal that portion of the record created in the Family

¹⁴ HRS § 571-54 provides, in relevant part: "In cases under section 571-11, the record on appeal shall be given a fictitious title, to safeguard against publication of the names of the children or minors involved." See also Doe, 6 Haw. App. at 630 n.1, 736 P.2d at 450 n.1.

¹⁵ For example, "Pursuant to HRS § 571-84(a), [xx] number of pages are withheld from public inspection."

¹⁶ Such papers include the Clerk's Minutes, Matrimonial Action Information, and a Kids First Information Sheet.

Court case between February 22, 2017, and May 15, 2017, and concurrently file a redacted version of each document that redacts all personal information, deletes references to the parties' first and last names and replaces them with the parties' first and last initials, and withholds and substitutes exhibits, attachments, and appendices that must be withheld from public inspection pursuant to HRS § 571-84(a), as set forth above, with a single sheet of paper including the reason for the substitution and the number of pages withheld.¹⁷ Husband shall also submit to the Family Court clerk a Fly Sheet (that substantially conforms to HOAR Form 1) and Confidential Information Form (that substantially conforms to HCRR Form 2) containing the information required by HCRR Rules 9.1 and 9.3, in the manner prescribed by HOAR Rule 9.4.

6. Husband shall, within sixty days of this Summary Disposition Order, file in the appellate court a declaration attesting to the date that the following documents were filed: (a) the redacted documents, along with [*19] the fly sheet(s) and confidential information form(s), to be filed in the appellate court; (b) the motion to be filed in the Family Court, as described in paragraph 5 above; and (3) the redacted documents, along with the fly sheet(s) and confidential information form(s), to be filed in the Family Court.

7. Any individual may file, within ten days of the entry of this Summary Disposition Order, a motion objecting to the sealing of the aforementioned Family Court records.¹⁸

8. Within ten business days of the entry of an order of the Family Court on Husband's motion (described in paragraph 5 above), the Family Court clerk will certify and file in CAAP-17-0000230 the redacted record on appeal (which will not include the 2010-2011 portion of the record on appeal) as a publicly-accessible document, which will be identified as an Amended/Redacted Record on Appeal.¹⁹

¹⁷ For example, "Pursuant to HRS § 571-84(a), [xx] number of pages are withheld from public inspection."

¹⁸ Any person may file an objection to Husband's motion in the Family Court, notwithstanding any failure to file a motion with this court.

¹⁹ The Family Court clerk shall delete references to the parties' first and last names and replace them with the parties' first and last initials. In addition, the Family Court clerk shall bookmark all documents, consistent with HRAP Rule 11(b)(3). We note

9. The appellate clerk shall serve a copy of this Summary Disposition Order on the Family Court clerk.

DATED: Honolulu, Hawai'i, January 29, 2019.

/s/ Alexa D.M. Fujise

Presiding Judge

/s/ Katherine G. Leonard

Associate Judge

/s/

Associate Judge

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that, in this particular case, it is unnecessary for the Family Court clerk to re-file the earlier, 2010-2011, portion of the record on appeal.

EXHIBIT “2”

Attorney for ISAAC KALUA III

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IN THE FAMILY COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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1FFM-24-0000018

ISAAC KALUA'S MEMORANDUM IN
OPPOSITION TO MOTION TO
UNSEAL ADOPTION RECORDS OF
ISABELLA P. KALUA, FKA ARIEL
SELLERS; DECLARATION OF
FRANCIS T. O'BRIEN; EXHIBITS
"A" --"C"

Comes now ISAAC KALUA III (hereinafter referred to as "Respondent"), in his capacity as Father/Respondent in a [REDACTED] and as one of the parents who adopted Isabella Kalua and her siblings, and states his opposition to the Motion to Unseal Adoption Records of Isabella P. Kalua, fka Ariel Sellers filed by Civil Beat Law Center for the Public Interest (now known as Public First Law Center). Counsel's appearance in this matter is limited to Respondent's status as a party to the [REDACTED] and Respondent's status as the adoptive father of Isabella P. Kalua. Respondent's counsel does not represent Respondent in his capacity as Defendant in a pending criminal action, nor does he represent Respondent in his

capacity as a Defendant in a pending civil proceeding. Respondent's counsel was not counsel for Respondent at the time that the adoption in question was granted by the Court.

While this Court has issued an Order that documents in this proceeding shall be filed under seal and may not be released to third parties, Respondent has no confidence that matters submitted in this proceeding will remain confidential. Respondent has specific reasons for this concern. Attached hereto as Exhibit "A" is a true and correct copy of an article authored by Stephen W. Lane, the former Special Master, that was published on February 6, 2024, in the Hawaii Free Press. Mr. Lane's only official contact with the [REDACTED] was during his appointment as Special Master. He was not and is not a party to the [REDACTED]. Mr. Lane was not and is not a party involved in the adoption proceeding. Mr. Lane was discharged from his position as Special Master before [REDACTED]. Mr. Lane is not related to the child. He has no right to information about the [REDACTED] [REDACTED] since he was discharged from his position as Special Master. Nevertheless, in his article, Mr. Lane makes reference to the content of [REDACTED] [REDACTED]. I am informed and believe that [REDACTED] would be confidential and that Mr. Lane, who is not a party to that case, has no right to access to that information. In addition, however Mr. Lane may have obtained that information, and assuming for the sake of argument that the information that he included in his article was correct, divulging such information would constitute a criminal violation pursuant to HRS § 346-11. Given that he has shown no respect for the laws regarding confidentiality to date, there is no reason to

believe that he will do so with regard to information that might be disclosed in response to the current motion.

In addition, Civil Beat has seen fit to trumpet the filing of this Motion to the public and to use it as a means to raise money. Attached hereto as Exhibit "B" is a true and accurate copy of an article that was written by John Hill and published by Civil Beat on February 1, 2024. That article contains quotes from Mr. Lane and also quotes from Mr. Creps, one of the attorneys representing the moving party herein. The article authored by Mr. Hill starts off with the following quote: "Well, we tried doing this the easy way. Now comes the hard way." As noted above, at the end of the article is a request for contributions to support the work of Civil Beat. It should be obvious that Movant has no interest in preserving any confidentiality that may exist with regard to the records of this case and no interest in looking out for the best interests of any of the children involved.

Given that Mr. Creps, Mr. Lane, and Civil Beat have chosen to drag all of this into the public view for their own personal and financial reasons, there is no reason to believe that anything that is said in response to the motion would be treated any differently. Therefore, in spite of the Court's Order in this case, Respondent's comments will be kept generic and will not deal with the specifics of any of the allegations that are directed against Respondent in this or any other matter. As Respondent's attorney in the 
, counsel is obligated to follow the statutory rules regarding confidentiality in spite of the demands made by movants.

I. ARGUMENT

A. HRS § 578 DOES NOT SUPPORT MOVANT'S POSITION

HRS §578-15(b) provides:

(b) Upon the entry of the decree, or upon the later effective date of the decree, or upon the dismissal or discontinuance or other final disposition of the petition, the clerk of the court shall seal all records in the proceedings; provided that upon the written request of the petitioner or petitioners, the court may waive the requirement that the records be sealed. The seal shall not be broken and the records shall not be inspected by any person, including the parties to the proceedings, except:

- (1) Upon order of the family court upon a showing of good cause;
- (2) After the adopted individual attains the age of eighteen and upon submission to the family court of a written request for inspection by the adopted individual or adoptive parents;
- (3) After the adopted individual attains the age of eighteen and upon submission to the family court of a written request for inspection by the natural parents;
- (4) Upon request by the adopted individual or adoptive parents for information contained in the records concerning ethnic background and necessary medical information; or
- (5) Upon request by a natural parent for a copy of the original birth certificate.

As used in this subsection, "natural parent" means a biological birthing parent or non-birthing parent, or a legal parent who is not also the biological parent.

The language relied upon to support Movant's request for access to the records of the adoption proceeding is HRS §578-15(b)(1). However, Respondent would submit that the first requirement that should be read into that section is that a person seeking access to adoption should be a "proper person," the term used in HRS § 578-15(a) when describing who might be granted access to an adoption before the adoption has been granted. It is Respondent's position that the Movant in this case should not be considered a proper person. There is no "relationship" between Movant and the children involved. Movant is not a relative of any of the children, nor has it been appointed as a representative of the children's best interests. Movant was not a party to the adoption proceeding. If, as they claim, they are representing the public interest, there is nothing in the statute to suggest that such an entity should be considered a proper person to be seeking access to that file. See: In the Matter of the Adoption of a Male Child, CAAP-23-

0000290 (S.D.O.) (February 9, 2024), a copy of which is attached hereto as Exhibit "C." Just as the Court read into the law that a party challenging an adoption must be a "proper person" it is submitted that anyone seeking access to these records must first satisfy the requirement of being a proper person. If Movant is not a proper person then the Motion should be denied. See, also, In re Adoption of Watson, 45 Haw. 69, 361 P.2d 1054 (1961).

With regard to the issue of what constitutes "good cause" the Court's attention is directed to Chen v. Mah, 146 Hawai'i 157, 178, 457 P.3d 796, 817 (2020), quoting Doe v. Doe, 98 Hawai'i 144, 154, 44 P.3d 1085, 1095 (2002) (discussing Hawaii Family Court Rules, Rule 59(a)). The Hawaii Supreme Court has stated:

It is not possible to provide one definition of "good cause," as standards governing whether "good cause" exists depend not only upon the circumstances of the individual case, but also upon the specific court rule at issue. This is because in addition to HRCP [Hawai'i Rules of Civil Procedure] Rule 55(c) at issue in this case and HFCR [Hawai'i Family Court Rules] Rule 59(a) referenced above, there are numerous court rules in which the phrase "good cause" appears. Many of these rules use the phrase "good cause" in contexts that differ from the "good cause" required to set aside an entry of default pursuant to HRCP Rule 55(c), and address different policy considerations dictating stricter or more lenient definitions of "good cause" or differing approaches on how to determine whether "good cause" exists depending on the court rule and circumstances at issue.(footnotes omitted).

It is submitted that if the Court is going to determine "good cause" under the particular facts of this case, the appropriate standard for determining whether Movant has shown good cause should be the "best interests of the child" standard. Unless Movant is able to show that the disclosure of the information being requested is in the best interests of all the children who were adopted, he has not shown good cause and the Court would be justified in denying the Motion.

B. KEMA V. GADDIS SUPPORTS RESPONDENT'S POSITION

In the companion motion to release records in the Chapter 587A case, Movant cites Kema v. Gaddis, 91 Hawai'i 200, 982 P.2d 334 (1999), in support of their position. It is Respondent's position that the decision in Kema supports Respondent's position that information regarding the adoption should not be released. In Kema, the family court granted a newspaper access to a redacted version of a closed CPS file after the child disappeared. The child's father filed a Petition for a Writ of Prohibition or Mandamus to direct the family court judge to withhold release of the files and to vacate the order allowing access to the files.

The Hawai'i Supreme Court stated:

We agree with Judge Gaddis's conclusion that providing information to the media, under certain circumstances, might serve a legitimate purpose under HRS chapter 587. In this case, for example, the first release of information regarding Peter Boy's history was clearly in Peter Boy's best interest because it could have resulted in the acquisition of intelligence regarding Peter Boy's disappearance, which could potentially have enabled the family court to provide services to Peter Boy that would safeguard him. Moreover, the first release of information did not infringe upon the best interests of Peter Boy's siblings. Nonetheless, although we acknowledge that the release of further family court documents to the media might serve some legitimate purpose, the overriding concern of the Child Protective Act in determining whether to release such information remains the best interest of the children involved. Under the Child Protective Act, the interests of other parties or non-parties seeking information are not as compelling as the interests of the children involved. (Emphasis added).

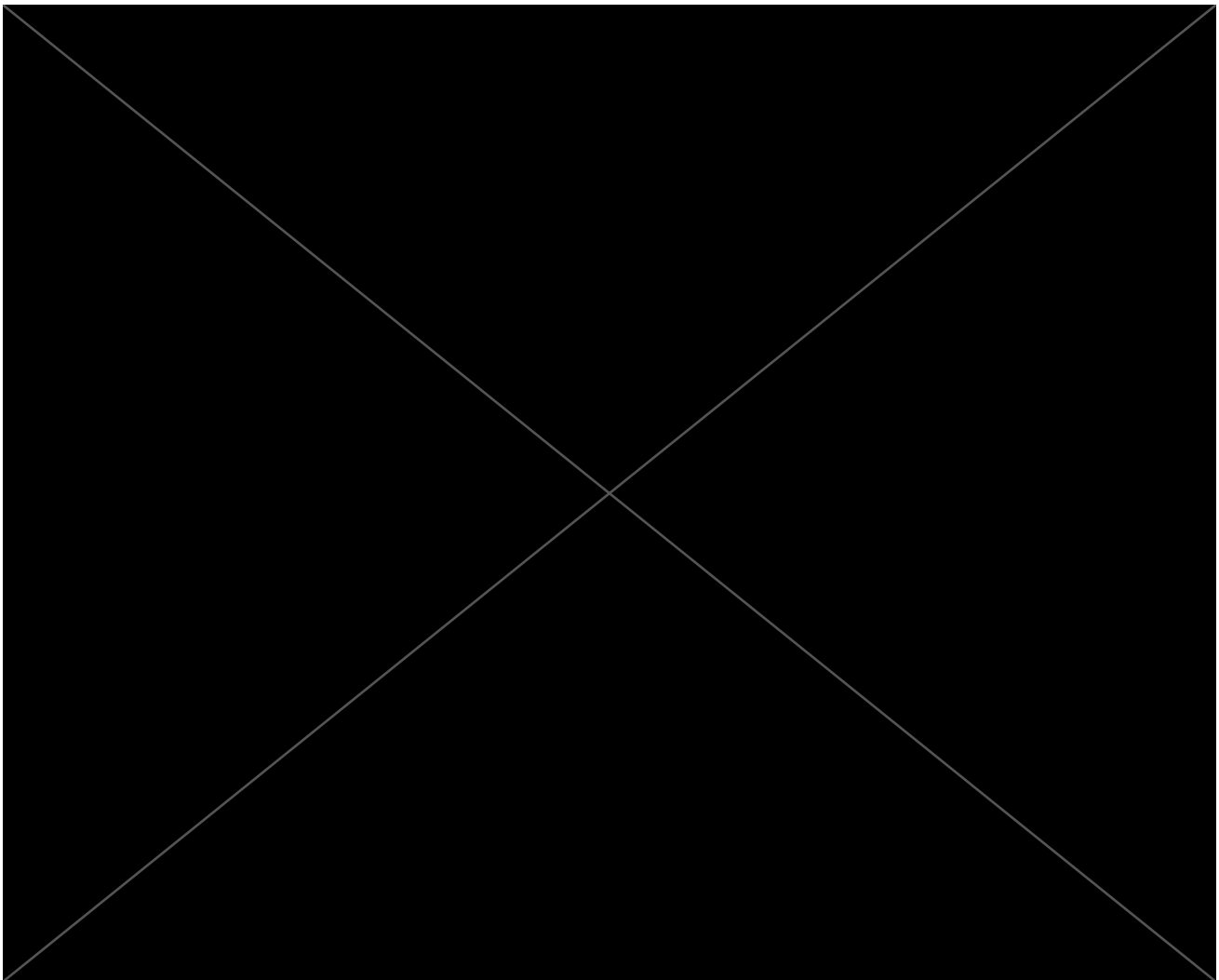
91 Hawai'i, at 206, 982 P.2d at 340.  involving the Kalua children and the effect of the release of the requested information, which involves all of the Kalua children, should be taken into consideration when making any decision regarding the adoption proceeding. Also, there is nothing in the statute to suggest that a claimed "public interest" should even be given consideration when the issue involves records of an adoption.

The Kema Court found that further disclosure of information would be harmful to the other children involved because the information requested about the children was so intertwined with that relating to the missing child that it would not be possible to release the information without affecting all the children. It is Respondent's position that the information that is contained in the files regarding the children is so intertwined and interrelated that disclosure undoubtedly would be harmful to the other children involved. Movant has articulated no facts that would support the position that release of the information would benefit the remaining children and be in their best interests. Under such circumstances, the information sought should not be made public. It is important to emphasize that the Supreme Court found that the overriding concern when presented with a request to release information that otherwise would be confidential remains the best interests of the children involved in the particular case and not foster children generically or anyone else. In this case, Movant concedes that the test to be applied is whether the disclosure of the information would be harmful to the other children and Respondent believes that makes the Kema decision particularly relevant.

C. THE INTERESTS OF THE CHILDREN INVOLVED ARE BEING PROTECTED

There are three actions currently pending that involve the Kalua children. In the criminal case, Respondent and his wife have been charged with murder and are presently being held in pretrial confinement pending a trial that now is scheduled to take place in October of this year. Respondent has entered a plea of Not Guilty to the charges, as has his wife. Constitutionally they are presumed to be innocent, a fact that seems to be lost on Movant, Mr. Hill, and Mr. Lane. In order to obtain a conviction, the prosecution must prove its case beyond a reasonable doubt. As of the present date, that has not happened.

Also, attempts to sensationalize matters surrounding this case may make it difficult if not impossible for Respondent and his wife to get a fair trial in the criminal proceeding. And sensationalization of the facts of the adoption could affect the testimony of witnesses in the other cases currently pending. If the Court were to consider releasing documents that might affect the criminal case, because there is already a protective order in place, it is submitted that the Prosecutor, HPD, and Mr. (and Mrs.) Kalua's defense counsel would be necessary parties to this matter so that their position could be heard. In the criminal case, the prosecution represents the interests of the people of the State of Hawai'i.



The third action currently pending is the claim for civil damages that is being pursued in Circuit Court on behalf of the Kalua children. In that case, the Plaintiff, who is the Guardian Ad Litem appointed by the Court on behalf of the Kalua children after Mr. Lane was discharged, is seeking monetary damages for injuries allegedly caused to the children by Respondent, his wife, and others. The claims of all three children are being represented in this matter.

The three proceedings referenced above all involve the interests of the Kalua children and their parents. In each of the three proceedings there is a judge who is assigned to the case and it is the responsibility of that judge to see to it that the rights of all parties are protected under applicable rules. Since the various interests of the parties in each case are different, it should be left to each judge to decide how to protect those interests. Counsel is informed and believes that there is a Stipulated Protective Order Regarding Discovery that has been ordered in the criminal case and a similar Order in the civil case. Obviously, the [REDACTED] are confidential by statute.

Disclosure of the records requested would not benefit the Kalua children. Their interests are being protected in each of the three proceedings. Movant ignores the rights of the Kalua children and seeks to get access to this information based upon a claim that release of this information would somehow benefit other foster children generally. It is submitted that Movant and/or the public already have all the information that they need if they wish to bring about a change to the foster care system. All statutes and regulations that pertain to the operation of the child protective system and adoptions here in Hawaii are public and are easily accessible to anyone interested in the subject. Nobody who is

serious about formulating a position about whether the existing statutes and regulations are sufficient to protect children who come within the jurisdiction of the family court needs access to the information being requested. Movant has failed to show how making the requested information public is going to benefit any of the Kalua children. What Movant has showed is a desire to sensationalize these matters without regard to the interests of any of the parties involved. Further, release of the information requested by Movant might be inconsistent with the orders that have been issued in the other cases and have a significant impact on the outcome of each of these cases.

D. THERE IS NO BASIS FOR THE SPECIAL MASTER'S REPORT TO BE RELEASED

Mr. Lane was appointed Special Master by the Court in a proceeding that was filed by his attorney. He sought appointment as Special Master in a separate proceeding. He was never a party to the Chapter 587A case. To counsel's knowledge, he did not have access to the documents filed in the adoption case. His appointment was opposed by Respondent based upon the statutory provisions relating to confidentiality of the records in Chapter 587A proceedings. With regard to Mr. Lane's involvement in this matter, the Court's attention is directed to Coal. of Clergy, Laws., & Professors v. Bush, 310 F.3d 1153, 1161 (9th Cir. 2002), where the Court stated:

the supreme court addressed the limitations on third-party "next friend" standing, and explained that "[h]owever friendly" and "sympathetic" a petition may be, and however concerned the petitioner is that "unconstitutional laws [are being] enforced," a petitioner without a significant relationship does not suffer a sufficient grievance for standing purposes. Whitmore, 495 U.S., at 166, 110 S. Ct. 1717. Otherwise, "however worthy and high minded the motives of "next friends" may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case." Lenhard v. Wolff, 443 U.S. 1306, 1312, 100 S. Ct. 3, 61 L.Ed.2d 885 (1979) (Rhenquist, Circuit Justice).

The Special Master's Report, such as it was, has been made available to the Guardian Ad Litem appointed by the Court to oversee the civil case, and she has filed a civil suit against the Kaluas and others on behalf of the children, as recounted above. Respondent is informed and believes that the Plaintiff in that case is represented by three separate law firms, so the children's interest in that case appears to have adequate protection and the children's representative has plenty of legal talent available to obtain whatever documents they believe to be relevant to the claims that are being made.

Counsel is informed that Mr. Lane was to return all documents in his possession to the Department of Human Services when he was discharged as Special Master and counsel is further informed and believes that Mr. Lane was instructed that he was not to discuss the matters within his report with anyone not a party to the Chapter 587A case. It is submitted that there is another judge who would control the release of Mr. Lane's report, and that would be Judge Hall, who handled that entire proceeding involving the Special Master. Counsel is informed and believes that Judge Hall continues to supervise the actions of the Guardian Ad Litem in the civil proceeding since she was the Judge who appointed that Guardian Ad Litem.

It should be noted that Movant makes two requests that involve Mr. Lane. Movant requests release of his Report, and if the Court is not willing to do that it requests the Court to "order Special Master Lane to prepare, for public disclosure, a synopsis of the factual and legal record presented to the Court for Isabella's adoption placement with the Kaluas and any other information relevant to understand how this case was handled by government authorities." (Emphasis added). It is Respondent's position that the report submitted by Mr. Lane is significantly flawed as a result of Mr. Lane's refusal to follow the

Court's instructions as to the scope of his role as Special Master. The Court's lack of faith in Mr. Lane is reflected in the appointment of someone other than Mr. Lane to retain counsel and oversee any litigation. The request that the "summary" should contain any other information that Mr. Lane considers relevant to how the case was handled by government authorities is an invitation for speculation and opinion that would not be appropriate in this matter. It would be an invitation to air grudges. Thus, it is Respondent's position that the only thing that would be worse than releasing Mr. Lane's report would be to have him prepare a "summary" of that document for public release. Mr. Lane's brief as Special Master was to determine whether there was a basis for a civil claim. In that regard, Mr. Lane was given access to DHS records. With the filing of that report, his involvement in matters affecting the Kalua children should have ended. However, Mr. Lane appears to have an agenda in this matter that extends far beyond his role as Special Master, and it would serve no public interest to have his report made available to the general public in full or in a "summarized" form unless the Court that appointed him approves such an action. Respondent is informed and believes that it is unlikely that Judge Hall would approve release of this report.

E. THIS COURT IS NOT FAMILIAR WITH THE FACTS OF THE FIVE CASES THAT ARE INVOLVED IN MOVANT'S REQUEST AND SHOULD NOT ENTER ORDERS THAT AFFECT THE OTHER ONGOING CASES

There are five cases that are involved in this matter. Each one has different issues and each has a judge that is responsible for protecting the rights of the various parties involved. Movant is asking this court to review the entire adoption file and pick out things that would be "sufficient to understand the factual and legal record on which the Court approved Isabella's foster placement" with the Kaluas. It also requests the Court to review

the entire record in the case and pick out things “sufficient to understand the factual record presented to the Court by the Department of Human Services (DHS) and any other person or party regarding the Kaluas’ fitness as parents.” The information requested is so broad that it lacks any clear boundaries. Further it makes the Court responsible for deciding, not whether requested evidence is relevant, but instead to go into the mind of the Movants to decide what they actually want, whether it exists, and then decide whether it is relevant and whether release of the information would potentially be harmful to the children. The Court also would be responsible to redact any information in the files that was not to be released. They are asking this Court to do something that is truly akin to the labors of Hercules. The process would also be horribly complicated. Once the Court had made its determination, the documents and information in question would need to be reviewed by the parties to determine whether there were specific objections based upon the Court’s determinations and then there would need to be hearings on those issues. During all this time, the cases would be proceeding and the various interests concerned would be changing as those cases progressed. As noted above, Movant has failed to provide any evidence that would support a claim that public disclosure of what is being sought is would not be harmful to the other Kalua children involved.

II. CONCLUSION

All the people listed in the Court’s order already have access to the records or have had access to records in the Chapter 587A case. They have no need for public disclosure of any of the requested information in light of this access. All the people listed are either bound by statutory provisions relating to confidentiality not to make public what is going on in the proceedings and/or by protective orders in both the civil and criminal

case that regulates disclosure of information relating to the case. All of the people listed have access to a Judge familiar with their case to request relief if they are unhappy with the manner in which the particular case is proceeding or if they believe that records relating to the issues in the particular case should be released. And, as noted above, Respondent is informed and believes that in addition to being subject to the rules relating to confidentiality, Mr. Lane is subject to a court Order that prohibits him from disclosing matter relating to his work as a Special Master to third parties not involved in the case.

If Movant wants access to records in the adoption case, it is submitted that the appropriate procedure would be to file a motion in that case seeking the release of information. While Respondent would still oppose release of the information, at least at that point the matter would be before a judge familiar with the facts and posture of the case. All that Movants seek here is publicity for themselves as they seek to advance an agenda that has nothing to do with the particular rights of the parties involved in each case. Likewise, with regard to the request to release Mr. Lane's report, that request should be filed in the case where he was appointed so that the Judge who appointed him can rule on his request in light of the entire record in that case. It is Respondent's position that the facts in that case will not favor release of Mr. Lane's report.

Finally, it is Respondent's position (1) that Movant is not a "proper party" to be seeking release of adoption documents; (2) that the cases of all the children are so intertwined that it is impossible to release information pertaining only to the missing child; and (3) that the harm that would be done to the other children by the public disclosure of the requested documents shows that disclosure is not in their best interests.

Under the circumstances of this case, Respondent submits that the Motion should be denied in its entirety.

Dated: Honolulu, Hawaii, March 4, 2024.

/s/ Francis T. O'Brien
FRANCIS T. O'BRIEN
Attorney for Respondent

IN THE FAMILY COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SPECIAL PROCEEDING TO UNSEAL ADOPTION RECORDS

1FFM-24-0000018

DECLARATION OF FRANCIS T.
O'BRIEN; EXHIBITS "A" – "C"

DECLARATION OF FRANCIS T. O'BRIEN

I, FRANCIS T. O'BRIEN, hereby declare as follows:

1. I am the attorney for ISAAC KALUA III (hereinafter "Respondent") in the

[REDACTED]. I do not represent Respondent in any of the other actions currently pending against him. I make this declaration in support of Respondent's Memorandum in Opposition to the Motion to Unseal Adoption Records, filed January 12, 2024. Except where stated to the contrary, I have personal knowledge of the matters stated herein and I am competent to testify as to said matters.

2. Attached hereto as Exhibit "A" is a true and accurate copy of an article that appeared in the Hawaii Free Press on February 6, 2024. Upon information and belief, the article was authored by Stephen W. Lane.

3. Attached hereto as Exhibit "B" is a true and accurate copy of an article that was published by Civil Beat on February 1, 2024. Upon information and belief, the article was authored by John Hill.

4. Attached hereto as Exhibit "C" is a true and accurate copy of the Summary Disposition Order entered by the Intermediate Court of Appeals in In the Matter of the Adoption of a Male Child, CAAP-23-0000290 (S.D.O.) (February 9, 2024)

I, FRANCIS T. O'BRIEN, hereby declare under penalty of law that the foregoing is accurate and correct.

Dated: Honolulu, Hawaii, March 4, 2024.

/s/ Francis T. O'Brien
FRANCIS T. O'BRIEN

Monday, February 12, 2024

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Tuesday, February 6, 2024

Family Court Secrets: Two Years After Ariel Sellers Murder, Kaluas Still Retain Parental Rights

By Selected News Articles @ 1:45 PM :: 851 Views :: [Family](#), [Judiciary](#)

Family Court Secrets: Two Years After Ariel Sellers Murder, Kaluas Still Retain Parental Rights

Editor's Note: On February 21, 2024, Senior family Court Judge Matthew J Viola is set to hear arguments: [Murder of Ariel Sellers: Motion to Unseal Kalua Family Court Records](#)

by Stephen W Lane

I was the court appointed Special Master in the Kalua case.

(Isaac and Lehua) Kalua still retain their parental rights of all the children who were in their care, years after their arrest for murdering one of them.

I know that, because they were able to secure a order through their attorney from Judge Costa baring any contact between me and one of the surviving siblings just as I was about to secure admission for her to one of Hawaii's most distinguished private schools that offered special counselling services for her as part of the admission package.

As long the Kaluas are permitted to maintain their parental rights of these children it will seriously frustrate the efforts of those concerned with their safety and stability, such as the search for permanent "forever" foster or adoptive families and educational opportunities, to say nothing of the emotional harm to the children.

One of the surviving siblings was forced to spend more than a year in detained custody, not because she had done anything wrong but because the State of Hawaii was unable to secure a suitable foster family for her, largely due the running objections of the imprisoned Kaluas asserting their parental rights through counsel.

Judge Jessi Hall, the family court judge who approved the placement of the children with the Kaluas suddenly recused herself in the case without explanation.

The case has now been assigned to Family Court Judge Brian Costa.

I can think of no defensible explanation as to why the State of Hawaii hasn't moved to terminate the parental rights of the Kaluas long ago.

---30---

Star-Adv: [Couple accused of murder retain parental rights](#) -- "Attorney Francis O'Brien, who specializes in family law, told the Honolulu Star-Advertiser he has been retained to represent Isaac Kalua in family court, and made clear he is not court-appointed, which means someone other than the state is paying O'Brien's legal fees."

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EXHIBIT A

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Let The Sunshine In

John Hill: The State Will Need To Explain To A Judge Why It Won't Reveal Its Actions In A Notorious Child Abuse Case

The Public First Law Center has filed motions to unseal foster and adoption records showing why the state placed Ariel Sellers with parents accused of murdering her.

By John Hill

February 1, 2024 · 6 min read

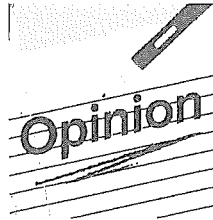


10



EXHIBIT B

Well, we tried doing this the easy way. Now comes the hard way.



For more than two years, the Department of Human Services has stonewalled in accounting for its actions in the horrific death of Ariel Sellers, the 6-year-old Waimanalo girl whose adoptive parents are accused of murdering her.

This, despite federal law and state regulations that require disclosure of at least minimal information when children die or nearly die as the result of abuse and neglect.

Now DHS can explain itself to a judge.

The Public First Law Center has filed motions to unseal the foster and adoption records in the most notorious child abuse case in recent Hawaii history.

The law center is asking the Family Court to release the case dockets in the foster and adoption proceedings.

It also seeks records that would show the court's factual and legal basis for placing Ariel with Isaac and Lehua Kalua, who renamed the girl Isabella. That would include the input the judge got from DHS and others.

Lastly, the law center wants to get any reports filed by a special master in the case. The special master, Steve Lane, was appointed by the court to ascertain whether Ariel's estate or her surviving siblings had grounds to file a civil lawsuit.

The motions — one for the foster records and one for the adoptive — make a compelling case that the privacy interests that protect most child welfare records are moot here because Ariel, tragically, is dead.

And the public has a compelling interest in getting answers.



A Special Commentary Project

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“What remains hidden from public view are the connecting facts that explain how this happened — how did a state-sponsored adoption place a young girl in the custody of a couple that murdered her ...?” according to the motion.

“Only by critical examination of what happened can our community ensure that no other child meets Isabella’s fate and start to restore public trust in an adoption process that from all appearances went horribly awry.”

‘Legitimate Purposes’ That Override Confidentiality

The law center undertook the motion on its own, but staff attorney Ben Creps said attorneys were motivated by a series of columns I wrote pointing out the state’s pigheadedness, as well as sustained public interest in the case.

While working on a different case, the law center delved into the standards for when Family Court cases can be unsealed.

In foster cases, for instance, records can be unsealed for “legitimate purposes.” A 1999 Hawaii Supreme Court case held that this includes furthering “the best interests of the children who come within the jurisdiction of the family court ... i.e. purposes that will safeguard, treat, and provide services and plans for children in need of protection.”

This standard should be looked at through the lens of federal law and state regulation meant to reveal the circumstances of child abuse deaths, the law center says. The federal law was meant to allow the public to assess whether the child protection agencies they fund with their tax dollars fail to protect children.

Yet DHS has adamantly insisted that it has no obligation to release these records in the Kalua case.

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John Hill: A Baby’s ‘Bizarre’ Death Exposes Hawaii’s Penchant For Secrecy In Child Welfare Cases

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OCTOBER 18, 2023



John Hill: Hawaii Should Come Clean About Its Actions In A Notorious Child Abuse Case

SEPTEMBER 14, 2023

Shifting Justifications

When I started reporting on this last year, DHS told me that it wouldn't release the required information because, even though Ariel had been missing for almost two years, she had not officially been declared dead.

When a judge finally did that, DHS then said it hadn't gotten the paperwork from the court. I got it myself and emailed it to them.

Then DHS told me that it didn't need to comply with federal law because the court had not officially declared that her death resulted from abuse or neglect.



Isaac and Lehua Kalua were charged with second-degree murder in connection with the death of their adoptive daughter, who they renamed Isabella. (Courtesy: Honolulu Police Department/2022)

Multiple witnesses — doctors, teachers and others — reported that Ariel was being abused by her adoptive parents, Isaac and Lehua Kalua, according to a civil lawsuit. One of her sisters told police that they kept her in a dog cage in the bathroom, nose and mouth covered with duct tape to prevent her from seeking food at night. And a court found that Ariel died about a month before the Kaluas reported it.

But that suspicious behavior was not enough for the child welfare bureaucrats.

So what's left when a public agency refuses to comply with the clear language of the law?

The courtroom.

"Something clearly went wrong here," Creps said. "The public interest is understandably why and how and how that can be fixed."

The motions raise the question of whose privacy is being protected by DHS's continued refusal to release records. The basic facts of the foster placement and adoption have long ago been reported, as have the allegations and criminal charges against the Kaluas.

The surviving siblings do retain a privacy interest, but the motions stress that they are not seeking personal information about the siblings, the names of people who were required by law and did report their suspicions of Ariel's abuse or other witnesses.

But this can all be handled quite easily by redacting any of that sensitive information.

Steve Lane, the special master in the Kalua case, has long pressed for greater transparency in Family Court.

"I'm delighted and I'm thrilled" by the law center's motions, Lane said. "For too long, too many of the proceedings in Family Court have been held in secret, to the detriment of the people they're supposed to be serving."

A Family Court hearing is scheduled for Feb. 21.

The Public First Law Center, formerly the Civil Beat Law Center for the Public Interest, is an independent organization created with funding from Pierre Omidyar, who is also a co-founder of Civil Beat. Civil Beat Editor Patti Epler sits on its board of directors.

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About the Author



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Newest

— tiredVoter 5 hours ago

I'm wondering why it's taking so long to bring the Kaluas to trial. Is it possible that release of the information sought could hinder the prosecution?

👍 Respect ↻ Reply ⚙ Share

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— LKG 5 hours ago

Mahalo Civil Beat for continuing to follow up on this situation. So much is wrong with this situation and community cannot heal until the root of the problem is identified and addressed. This is one of the most vividly egregious abuse cases against a helpless child, and perhaps just the tip of the iceberg, of situations, in an agency where staff is overwhelmed, understaffed, and probably undersappreciated, acknowledged, and rewarded (and I don't mean monetarily). For the sake of the children in our Hawai'i, dependant of the social welfare system for their protection, let's continue as a community, to hold our State officials and Social Agency personnel accountable.

 Respect  Reply  Share

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— **Chris** 5 hours ago

If so many saw this abuse going on and reported it....Would like to see those responsible in DHS who failed this child also charged with criminal neglect in their duty to protect the child who was a ward of the state. This is why they don't want records unsealed - because they know people in DHS are also at fault. Seems this situation should cause a restructuring overhaul of DHS.

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 Report

— **jusbecuz** 5 hours ago

My subscription to child welfare news nationwide shows that other states get the facts when there is a child death for the purpose of prevention. My experience of 10 years with advocacy for parents in the system is that caseworkers are severely lacking in training of their own laws and procedures that govern their jobs. We need transparency from tax funded agencies, all of them.

 Respect 3  Reply  Share

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— **Augustus** 5 hours ago

Time to do more than demand.....I know, can the Feds come in and push? Surely there are some federal monies involved in that department ?

 Respect 4  Reply  Share

 Report



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IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

IN THE MATTER OF THE ADOPTION OF A MALE CHILD
by C.C. and J.C., Petitioners-Appellees

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(CASE NO. 1AD221000013)

SUMMARY DISPOSITION ORDER

(By: Hiraoka, Presiding Judge, Nakasone and McCullen, JJ.)

C.C. and J.C. (together, **Adoptive Parents**) adopted **Child**. Child's natural father **A.M.** moved to overturn the adoption. The Family Court of the First Circuit denied A.M.'s motion by order entered on April 4, 2023.¹ A.M. appeals. We affirm.

Child was born in 2016. In re A.A., 150 Hawai'i 270, 273, 500 P.3d 455, 458 (2021) (**AA I**), cert. denied sub nom. McCoy v. Haw. Dep't of Human Servs., No. 21-1467, 143 S. Ct. 94 (U.S. Oct. 3, 2022) (mem.). One week later, DHS filed a petition for foster custody (the **CPS Case**). The family court defaulted the then-unknown natural father for failing to appear after service by publication. The family court gave DHS foster custody of Child. Child was placed with Adoptive Parents. The family court eventually terminated the parental rights of Child's natural

¹ The Honorable Andrew T. Park presided.

mother and then-unknown father and awarded DHS permanent custody of Child. The family court approved adoption as the permanency plan for Child on August 14, 2018.

On October 9, 2018, A.M. contacted DHS about "the process of legally bringing [Child] home." AA I, 150 Hawai'i at 274, 500 P.3d at 459. A.M. had been adjudicated as Child's natural father in a separate paternity case. A.M. moved to intervene in the CPS Case. He was ordered to first move to set aside his default and the termination of his parental rights. After trial, the family court denied A.M.'s motion to set aside his default and his motion to intervene. Id. at 278, 500 P.3d at 463. A.M. appealed.

The supreme court held that service by publication did not violate A.M.'s constitutional rights, AA I, 150 Hawai'i at 285, 500 P.3d at 470, and the family court did not err by declining to vacate A.M.'s default or the termination of his parental rights, id. at 285-86, 500 P.3d at 470-71. But it also held that A.M. wasn't required to set aside his default or the termination of his parental rights before proceeding with his motion to intervene. Id. at 286, 500 P.3d at 471. The CPS Case was remanded to the family court.

On February 7, 2022, DHS initiated the case below (the **Adoption Case**) by petitioning the family court to let Adoptive Parents adopt Child.

On February 17, 2022, A.M. renewed his motion to intervene in the CPS Case. In re A.A., No. CAAP-22-0000427, 2023 WL 3619865, *2 (Haw. App. May 24, 2023) (mem.) (AA II), cert. rejected, No. SCWC-22-0000427, 2023 WL 5400092 (Haw. Aug. 22, 2023). The family court heard and orally denied the motion on March 14, 2022. Id.

On March 22, 2022, in the Adoption Case, the family court heard and orally granted the petition for adoption.

On April 27, 2022, the family court revoked DHS's custody of Child and terminated its jurisdiction over the CPS Case given Child's adoption. AA II at *2.

The Adoption Decree was entered in the Adoption Case on April 28, 2022.

On May 5, 2022, in the CPS case, A.M. moved for reconsideration of the denial of his motion to intervene. AA II, 2023 WL 3619865, at *2. The family court denied reconsideration. Id. A.M. appealed. We held that A.M.'s appeal from the denial of his motion to intervene was moot. The supreme court affirmed the termination of A.M.'s parental rights, so A.M.'s only remaining interest was in visitation. But Adoptive Parents' adoption of Child extinguished A.M.'s visitation interest. Id. at *3 (citing HRS § 587A-33(d)). We also held that the family court's jurisdiction in the CPS Case terminated upon Child's adoption. Id. (citing HRS §§ 587A-4, 578-16(b)). We affirmed the family court's order denying A.M.'s motion for reconsideration. The supreme court rejected A.M.'s petition for writ of certiorari on August 22, 2023. No. SCWC-22-0000427, 2023 WL 5400092.

In the Adoption Case, A.M. moved to overturn Child's adoption on February 28, 2023. The family court entered an order denying A.M.'s motion on April 4, 2023. This appeal followed.

(1) HRS Chapter 578 governs adoptions. HRS § 578-12 (2018) governs setting aside or modifying adoption decrees. Revised Laws of Hawaii, 1955 (RLH) § 331-12 was the predecessor to HRS § 578-12. In In re Adoption of Watson, 45 Haw. 69, 361 P.2d 1054 (1961), the supreme court held that under RLH § 331-12, the family court may consider "a petition or motion filed by any *properly interested person* to . . . show good cause why a decree of adoption previously entered should be set aside or modified." Id. at 78, 361 P.2d at 1059 (emphasis added). The dispositive issue in this appeal is whether A.M. was a person "properly interested" in setting aside or modifying Child's adoption.

In the CPS Case, the supreme court affirmed the family court's termination of A.M.'s parental rights. AA I, 150 Hawai'i

at 285-86, 500 P.3d at 470-71. A.M. is precluded from relitigating that issue.² The order terminating A.M.'s parental rights stated:

13 Pursuant to HRS § 587A-33(b)(5) Mother and [A.M.] are excluded from participating in adoption or other subsequent proceedings and he/she/they shall not be noticed of future hearings and he/she/they shall not appear at future hearings unless he/she/they receive further legal notice requiring such appearance[.]

Under these circumstances, A.M. was not a person "properly interested" in setting aside or modifying Child's adoption. The family court did not err by denying A.M.'s motion to overturn Child's adoption.

(2) A.M.'s argument that there was structural error in the CPS Case because the family court did not appoint counsel for the unidentified father, who was properly served and defaulted, AA I, 150 Hawai'i at 285-86, 500 P.3d at 470-71, is without merit. See In re JH, 152 Hawai'i 373, 380, 526 P.3d 350, 357 (2023) (noting that without a client, "what's an attorney to do?" because counsel would be "hard-pressed to understand the parent's present objectives, and is challenged to provide sound, ethical representation"). It is also an impermissible collateral attack on the family court's orders in the CPS Case. See In re Hawaiian Elec. Co., 149 Hawai'i 343, 358, 489 P.3d 1255, 1270 (2021) (discussing collateral attack doctrine).

(3) A.M.'s argument that he was not given notice of the Adoption Case also lacks merit. "[N]otice need not be given

² Issue preclusion, also referred to as collateral estoppel, applies when: (1) the fact or issue in the present action is identical with the one decided in the prior adjudication; (2) there was a final judgment on the merits in the prior adjudication; (3) the parties to the present action are the same or in privity with the parties in the prior action; and (4) the fact or issue decided in the prior action was actually litigated, finally decided, and essential to the earlier valid and final judgment. Dannenberg v. State, 139 Hawai'i 39, 60, 383 P.3d 1177, 1198 (2016). Adoptive Parents were allowed to intervene in the CPS case on May 29, 2019. AA I, 150 Hawai'i at 276, 500 P.3d at 461. Thus, A.M., Child, Adoptive Parents, and DHS – the parties to the CPS Case – are also the parties to this case.

to any parent whose parental rights have been legally terminated[.]” HRS § 578-2(e). A person “who does not have any legal interest or custodial right in and to the child, cannot assail an adoption decree on the basis that he was not made a party to or given notice of the adoption proceedings.” Watson, 45 Haw. at 74, 361 P.2d at 1057. Cf. In re AG1 and AG2, ___ Hawai‘i ___, ___ P.3d ___, 2024 WL 299417 (App. Jan. 26, 2024) (holding that HRS § 587A-13 does not require that a parent whose parental rights have been terminated be summoned if a subsequent petition concerning the child is filed).

We need not consider A.M.’s other points of error (concerning good cause to overturn the adoption). The family court’s April 4, 2023 “Order Denying Natural and Biological Father’s Motion to Overturn Adoption” is affirmed.

DATED: Honolulu, Hawai‘i, February 9, 2024.

On the briefs:

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Presiding Judge

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Associate Judge

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