SCPW-24-0000464

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

PUBLIC FIRST LAW CENTER, Petitioner, vs. THE HONORABLE MATTHEW J. VIOLA, Senior Judge of the Family Court of the First Circuit, Respondent.	ORIGINAL PROCEEDINGS 1FFM-24-0000018 1FFM-24-0000019 PETITION FOR A WRIT OF PROHIBITION AND WRIT OF MANDAMUS FAMILY COURT OF THE FIRST CIRCUIT, STATE OF HAWAI'I The Honorable Matthew J. Viola, Family Court of the First Circuit, State of Hawai'i

FATHER ISAAC KALUA III'S RESPONSE TO PETITION FOR A WRIT OF PROHIIBITION AND WRIT OF MANDAMUS

CERTIFICATE OF SERVICE

FRANCIS T. O'BRIEN 1337
820 Mililani Street, Suite 701
Honolulu, Hawai'i 96813
Telephone: 808-543-1810
Email: fobrien@lawctr.net

Attorney for Father
ISAAC KALUA III

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MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

Comes now Father ISAAC KALUA III (hereinafter "Father"), through counsel, and submits his Memorandum in Opposition to the Petition for Writ of Prohibition and Writ of Mandamus, filed herein by Public First Law Center (hereinafter "Petitioner").

I. APPLICABLE AUTHORITIES

This case is distinct from most of the cases cited by Petitioner because it involves information contained in files relating to adoption pursuant to HRS §578, et seq., and to abused and neglected children who fall within the jurisdiction of Chapter 587A, HRS. Chapter 578, HRS, speaks of the "secrecy" of records (HRS §578-15), while DHS records are considered "confidential." (HRS §346-10). With regard to records relating to both adoption and child protective proceedings, release of any records requires an order of the court. In the case of adoption cases, there must be a showing of good cause and in child protective proceedings there must be a showing that the release is in the children's best interests. (HRS §578-15(b)(1); HRS §587A-40(a)).

HRS §587A -2 provides a statement of the purposes of the Child Protective Act (hereinafter "CPA"):

> This chapter creates within the jurisdiction of the family court a child protective act to make paramount the safety and health of children who have been harmed or are in life circumstances that threaten harm.
> ...
> This chapter shall be liberally construed to serve the best interests of the children affected and the purpose and policies set forth herein.

HRS §587A-40(a) 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. (Emphasis added).

The Hawaii Supreme Court and the United States Supreme Court have recognized the constitutionally protected liberty interest of parents in maintaining a relationship with their children. In Re Jane Doe, Born on December 15, 1982, 99 Haw. 522, 57 P.3d 447 (2002); Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L.Ed.2d 599 (1981). Because of this constitutionally protected interest, Hawaii has long recognized that termination of parental rights is an issue of constitutional dimensions and has thus required that the quantum of proof necessary to terminate is that of clear and convincing evidence. Woodruff v. Keale, 64 Haw. 85, 637 P.2d 760 (1981). However, other matters relating to the children are decided using the best interests standard. Thus, HRS §587A-21(d) states:

> A child may be directed by the court to testify under circumstances deemed by the court to be in the best interests of the child and the furtherance of justice. (Emphasis added).

Likewise, HRS §587A-30(b)(7) regarding periodic review hearings says that at each hearing the court is empowered to:

> Issue such further or other appropriate orders as it deems to be in the best interests of the child. (Emphasis added).

HRS §587A-28(e)(5) provides that contact with family and siblings shall take place unless there is a determination that such visits would not be in the best interests of the child. In the section dealing with Permanency Hearings, HRS §587A-31(c)(2), the court must determine whether continuing the existing placement is in the child's best interests. In order to terminate parental rights under HRS §587A-33(a)(3), the court must conclude by clear and convincing evidence that the Permanent Plan is in the child's best interests.

And, pursuant to HRS §587A-34(h)(1), parental rights may only be reinstated if it is in the child's best interests.

The definition and application of "best interests" is a matter that has received significant discussion in the Hawai'i appellate courts. It is clear that the Hawai'i Supreme Court continues to bring this concept to the fore in dealing with issues related to children. In custody proceedings, the Court has said that the "guiding principle" and the "paramount consideration" in awarding custody is the best interests of the child. A.C. v. A.C., 134 Haw. 221, 230, 339 P.3d 719, 728 (2014) (quoting Doe v. Doe, 98 Haw. 144, 44 P.3d 1085 (2002)). When discussing best interests in the context of a guardianship proceeding the Court has stated that best interest test focuses solely on the interest of the child; that the legal status of the putative custodians is "largely irrelevant"; and that it is the role of the court to compare the "total package" of the competing custodians, their homes, their larger environments, and their relationships with the child. In re Guardianship of Doe, 93 Haw. 374, 384, 4 P.3d 508, 518 (App. 2000). In its decision setting aside the necessity for showing material change of circumstance before considering the best interests of a child in custody disputes the Court reaffirmed that the "general rule" was that the welfare of the child has "paramount consideration" and once again turned to the best interests of the child standard as the primary consideration in lieu of the material change of circumstance test. Waldecker v. O'Scanlon, 137 Haw. 460, 469, 375 P.3d 239, 248 (2016) (quoting Dacoscos, v. Dacoscos, 38 Haw. 265, 267 (1948)). The Court has said that in making a best interest determination the family court is given "broad discretion" to weigh the various factors involved with no single factor being given presumptive paramount weight. Fisher v. Fisher, 111 Haw. 41, 50, 137 P.3d 355, 364 (2006). In child protective

proceedings the Court has held that it is the responsibility of the trial court to ascertain the custodial arrangements that are in the best interests of a child (i.e., the best physical, mental, moral, and spiritual well-being of the child) and has stated that the range of permissible choices available to the family court is "virtually unlimited."

Consider also that the confidentiality that attaches to proceedings under the CPA makes the disclosure of any information about the proceeding by parties to the proceeding, or their lawyers, or any person coming into possession of that information, a criminal violation. HRS §346-11. Thus, while those actually involved in the CPA case cannot comment publicly about the proceedings and evidence, or even this proceeding, the Petitioner asks that this Court sanction the public disclosure of information relating to the case "in the public interest." It is submitted that Petitioner should not be considered a "proper party" to seek access to adoption proceedings, having never been a party to the proceeding. If the Court were to consider Petitioner to be a "proper party" that would be contradictory to the requirement that the adoption records be "secret."

II. PERTINENT FACTS

Petitioner characterizes itself as the torch-bearer for the public interest. However, there are three matters currently pending that deal with the public interest in this matter. First, there is the pending CPA case that is directly concerned with the children's welfare and the parental rights of Father and Mother. That case will determine whether parental rights are to be terminated. In that case, the Department of Human Services must prove by clear and convincing evidence (1) that a child's parent whose rights are subject to termination is not presently willing and able to provide the parent's child with a safe family home, even with the assistance of a service plan; (2) that it is not reasonably foreseeable

that the child's parent whose rights are subject to termination will become willing and able to provide the child with a safe family home, even with the assistance of a service plan, within a reasonable period of time, which shall not exceed two years from the child's date of entry into foster care; and (3) The proposed permanent plan is in the best interests of the child. No trial has yet taken place. Second, there is a criminal case pending against the parents, charging them with having murdered one of the children in their care. In that case, the State will have to prove their guilt beyond a reasonable doubt. No trial has yet taken place. Third, there is a civil lawsuit that has been brought against the adoptive parents and others on behalf of the children seeking civil damages for injuries that they claim were caused by Father, his wife, and others. In that case, the plaintiffs will be required to prove their case by a preponderance of the evidence. No trial has yet taken place in that case.

Thus, there are three cases, none of which have been concluded, each dealing with some aspect of the children's welfare, the State's interest in criminally charging those who violate the law, and the children's interest in being compensated for any injuries that they have suffered. Those cases collectively serve and define the public interest in this matter. Each case has its own judge presiding over it and each case will be decided based upon evidence presented in court. In none of these cases has information about the records been made available to the general public. Petitioner in this matter seeks to be appointed judge and jury with regard to what may, or may not, have occurred between the parents and these children and wishes to display and characterize whatever information it can obtain before the public without regard to its content, its completeness, its accuracy, or the effect that release of this information would have upon the rights of

the children or their parents in the ongoing proceedings. Those proceedings, of necessity, will have immense effects upon the lives of the parties involved. And it is submitted that in matters of this nature, disclosure of inaccurate information serves no public interest whatsoever.

III. ARGUMENT

A. PETITIONER MISCHARACTERIZES THE BASIS OF THE COURT'S DECISION

The foundation of the Court's decision regarding release of documents was a determination of what would be in the best interests of the siblings of the child who has been determined to be deceased. The Court found that information relating to the siblings should not be released because it would not be in their best interests for that information to be made public. Interestingly, Petitioner agrees with that finding. The Court has stated that the best interests of the surviving siblings are "paramount." The Court also said that if allowing access to the court records would be contrary to the siblings' best interests, then that access must be denied.

The Court determined that determined: (1) that the cases involving all three children are intertwined; and (2) that after making a determined effort to redact information regarding the siblings, what remains presents a distorted picture of what was done by the Department of Human Services and the family court. Thus, the driving interest behind the Court's decision was a desire to protect the best interests of the siblings and not, as Petitioner has characterized it, a desire to protect the DHS or the family court. Also, while the Court stated that the information remaining after the Court redacted the documents presented a distorted picture of the actions of the Department of Human Services and the family court, the Court did not say whether the distorted picture presented those actions

in a manner that was favorable or unfavorable to the DHS and the family court. However, it is submitted that the release of a distorted picture of what was done by the DHS and the family court in these cases would be as damaging, if not more damaging, to the siblings of the deceased child as the information that the court chose to redact. Petitioner seems determined to splash whatever it receives in the public eye and the very fact of that publicity will be harmful to the children. And while the Petitioner has chosen to imply that Judge Viola had an ulterior motive to somehow protect the DHS and the family court by ruling the way that he did, such implications should be rejected out of hand by this Court. In essence, such an implication accuses the Judge of being corrupt. Judges are appointed to make just the sort of decision that was made in the case, and the fact that Petitioner did not get what it wanted does not in any way imply that the Judge was acting with some improper ulterior motive or purpose. As noted above, the decision was driven by a concern for the best interests of the children and that is a decision that judges in the family court make every day.

B. THE DECISION IN KEMA V. GADDIS SUPPORTS NON-DISCLOSURE OF THE RECORDS BEING REQUESTED

Both sides have cited Kema v. Gaddis, 91 Hawai'i 200, 982 P.2d 334 (1999) in support of their positions. However, the language of the decision supports the Court's decision that the information 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 CPS 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.

The Court in Kema 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 the other children. Id. The siblings involved in this matter were taken into care at the same time and the information that is contained in the files of the Chapter 587A case regarding the Kalua children is so interrelated and interwoven that disclosure undoubtedly would be harmful to the siblings involved in the FC-S proceeding. The same is true of the adoption proceeding.

If the records are disclosed Petitioner clearly intends to create significant publicity regarding whatever is made available to it. The fact that the information that they seek is incomplete to the point that it presents a distorted picture of the actions taken by the DHS and the family court shows clearly that Petitioner is not seeking accuracy or the truth. Petitioner is seeking something that it can trumpet as a "victory" for the "public interest" in order to generate more publicity for itself, and therefore more subscriptions for Civil

Beat. The publicity that would be generated by the disclosure would put the siblings back in the spotlight, and that fact alone would be harmful to those children. Petitioner has articulated no facts that would support an argument that that release of the information, even after redactions, would benefit the other Kalua children. Indeed, Petitioner does not even make the argument that release of this information would benefit the other Kalua children. Under such circumstances, the information sought should not be made public. In Kema, this 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 the public at large. If release of the documents is not in the best interests of the Kalua children, then that interest outweighs any claim made by Petitioner that its claim is based upon the public interest.

The Court in these matters determined that the information contained in the file that related to the allegedly deceased child was inextricably linked with information relating to the siblings. It also determined that what was left over after information relating to the siblings had been deleted did not present an accurate picture of what had happened. If the information remaining after the Court's redactions painted an unfair picture of the family court and the Department of Human Services and an inaccurate record of what has happened, it also therefor must paint an inaccurate picture that is unfair to the siblings who are still a part of the existing CPA case. The argument that releasing bits and pieces that present a distorted picture of what has happened would better inform the public or provide a basis for the legislature to take action that would protect future foster children rings hollow. The interests of the non-parties seeking

information at this point are nowhere near as compelling as the interests of the children involved. The request that is being made has nothing to do with what is best for the siblings.

C. PETITIONER IS ABLE TO APPEAL THE DECISION

The Hawai'i Supreme Court stated in Kema, supra, that in order for a party to prevail in a Petition for a Writ of Prohibition, the Petitioner must show "a clear and indisputable right to the relief requested and a lack of other means to redress adequately the alleged wrong or to obtain the requested action." 91 Hawai'i, at 204, 982 P.2d at 338. Based upon the arguments set forth above, it is first submitted that Petitioner has not shown that clear and indisputable right to the relief requested.

It is also submitted that they have not shown a lack of other means to address the alleged wrong or to obtain the requested action. None of the proceedings in this matter below were filed in the pending FC-S case. These cases were brought as FFM cases, pursuant to Rule 1.3(a)(18), Hawai'i Family Court Rules, which is for miscellaneous actions over which the family court has jurisdiction. Pursuant to Rule 81(a)(16), Hawai'i Family Court Rules, those rules apply to any other civil action over which the family court has jurisdiction. Rule 81(f), Hawai'i Family Court Rules, states that Rule 4 of the Hawai'i Rules of Appellate Procedure shall apply to appeals from a family court in proceedings listed in subdivision (a) of this Rule 81. Thus, it appears that Petitioner had a means that would permit it to address the alleged wrong through the usual appellate process. Kema states that writs seeking prohibition or mandamus "are not meant to supersede the legal discretionary authority of the lower court, nor are they meant to serve as legal remedies in lieu of normal appellate procedures." 91 Hawai'i, at 204, 982 P.2d at 338. (citing Straub

Clinic & Hospital v. Kochi, 81 Haw. 410, 414, 917 P.2d 1284, 1288 (1996). The Orders issued by the family court in the two FFM proceedings were final orders. There was nothing that would have prevented the Petitioner from filing an appeal from those orders. The Orders issues by the Court assumed that the ordinary appellate process was available to Petitioner. Under the circumstances, it is respectfully submitted that this petition is an attempt to get a quick decision without following the normal appellate process. There is no showing that there is such urgency attending this issue that the normal appellate process should be ignored, particularly where the information now being so urgently sought does not present an accurate picture of what may have taken place in this case. Under such circumstances, it is submitted that the Petitions for a Writ of Prohibition and Mandamus should be dismissed on procedural grounds.

IV. CONCLUSION

The argument that disclosure of distorted, incomplete information somehow serves the public interest makes no sense. Also, consider the potential consequences of such a ruling. It would render meaningless the confidentiality/secrecy conferred upon these proceedings by the Legislature. Obviously, Petitioner is not the only entity/person who then would have standing to seek disclosure of information "in the public interest." Parties in one confidential proceeding could seek access to documents and information in a different confidential proceeding on the ground that it would be in the public interest to use that information in their case. It is a step down a slippery slope that this Court should not take. Additionally, granting the request under these circumstances would effectively repeal HRS §587A-20, which states:

> 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.

Proceedings involving children are different than any other kind of hearing. The stated purpose of the CPA is to reunite families if that is possible, and if it is not, then to provide the children involved with prompt placement with substitute families so that they may get on with their lives. Just because elements of the press choose to publicize certain cases does not, in and of itself, make them special. All of these cases are special. And the interests involved are unique. In most of these cases, parents resent the intrusion into their lives. In addition to having been harmed, children almost universally dislike the notoriety that is associated with proceedings that allow the Department of Human Services to come to their school and speak to them under circumstances that are hugely embarrassing to the children. In its wisdom, the Legislature has chosen to make these matters confidential in order to protect the interests of those involved. It is submitted that any decision that attacks and weakens the confidentiality that attends these proceedings contravenes the purpose of the statutes and harms all concerned.

For all the reasons set forth above, Father respectfully submits that the Petition filed by Petitioner should be dismissed.

Dated: Honolulu, Hawaii, August 30, 2024

/s/ Francis T. O'Brien
FRANCIS T. O'BRIEN
Attorney for Father
ISAAC KALUA III

CERTIFICATE OF CONVENTIONAL SERVICE

Counsel for the parties were duly notified of the filing of this document by notice of electronic filing at the electronic address provided in the court record.

/s/ Francis T. O'Brien
FRANCIS T. O'BRIEN
Attorney for Father
ISAAC KALUA III

SCPW-24-0000464; PUBLIC FIRST LAW CENTER v. VIOLA; 1FFM-24-0000018; 1FFM-24-0000019; CERTIFICATE OF CONVENTIONAL SERVICE.