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Supreme Court
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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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AC, Respondent/Plaintiff-Appellee,

vs.

AC, Petitioner/Defendant-Appellant,

and

CHILD SUPPORT ENFORCEMENT AGENCY, STATE OF HAWAIʻI,
Respondent/Defendant.

SCWC-12-0000808

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-12-0000808; FC-P NO. 11-1-6307)

November 28, 2014

CONCURRING OPINION BY POLLACK, J.

Few cases come before our courts with more important and long-lasting repercussions than child custody cases involving allegations of physical violence by a parent. A court's decision determining custody of the child has an

incalculable effect on the future life of the family. The fact that the children in a custody case do not have standing to be parties to the litigation increases the importance of the role of the family court in such cases. The children's lack of standing is compensated by requiring that the custody determination be decided in the child's "best interests." Hawaiʻi Revised Statues (HRS) § 571-46(a)(1) (2011). When the court has determined that abuse has been committed by a parent, the law mandates "a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence." HRS § 571-46 (a)(9).

Arbitrary time limits set before trial undermine the integrity of the trial proceedings through which a court must determine the best interests of the child. Particularly when the matter involves allegations of physical violence, time limits on the presentation of evidence create an unacceptable risk that an incomplete record will be presented to the court, compromising the evaluation of parental fitness. Without a complete record, a court cannot make an informed judgment in compliance with the statutory mandates of HRS § 571-46(a) that the best interests of a child are determinative.

I. Background

In the trial of this case to determine the custody of two children, Father and Mother each accused the other of domestic violence. Both alleged the other was not fit as a parent, and each sought sole custody of the children. The evidence at trial regarding the abuse consisted of testimony by Father, Mother, and witnesses called by Mother to support her contentions of physical violence by Father. A Custody Investigation Unit (CIU) report also contained allegations of domestic violence by both parties against the other, as well as reports from Father of abuse by Mother's eldest son from a previous relationship. The CIU report did not contain important information that would typically be gained from home visits and interviews with the children, as Father improperly removed the couple's children outside of Hawaiʻi.[1]

Despite the serious allegations of abuse, the family court imposed a strict three-hour limitation on the June 25, 2012 trial, four months prior to trial and well in advance of the parties' exchange of their respective witness lists. The record does not reflect a rationale for imposing the limitation,

[1] The family court subsequently approved the Father's motion to allow the children to remain out-of-state.

nor whether the parties had an opportunity to voice concerns regarding the time limit.[2]

During the three-hour bench trial, the court repeatedly reminded the parties of the time limit: "According to my recordkeeping, you've used 25 minutes. And . . . dad has used approximately 50 minutes." "We're going to finish this case at 4:30 today, so, Counsel, use your time wisely. Because if we don't get to an opportunity to hear from your client, that will be based upon your choice." "Okay. By my count you guys are about equal on time. . . . Because we will end and make a decision by 4:30, so you have 32 minutes. That includes cross-examination."

During the direct examination of Mother, the court informed her counsel, "you have two minutes left." Counsel moved for an extension of time and the following exchange took place:

> COUNSEL: Your Honor, I'm going to move for an extension of time. Um, the reason is -- -
>
> COURT: Throughout – okay. Tell me why because I know that each and every step of this trial I told you it was going to be equal amount of time. We started at 4:04, and breaking down the remainder of time into 4:30, which the court said we would be done, that split equally.

[2] The time limit for trial is noted on a document entitled "CIU Report Return," that also ordered "Father to return minor children to Hawai'i within 30 days, unless an order allowing relocation pending trial is granted," and provided Skype and phone visitation rights for Mother. The document was signed by both parties' attorneys as to form and content.

> Now if he finishes his cross-examination early, then you have the balance of that time. But each and every of the other witnesses I said we're running on a time crunch. Um, you know, I gave you that opportunity. You still decided to call the other witnesses. . . .
>
> COUNSEL: I understand.
>
> COURT: -- we're gonna –
>
> COUNSEL: I understand, Your Honor. But each witness was important, and that witness has something to say about domestic violence.[3]
>
> COURT: I understand. But you still, -- we still have the time constraints that we do have. You knew about them. So, as counsel, you were permitted to use time as you felt, uh, you needed to use them best. So I allowed you to do that. So continue. Use the rest of your time wisely.
>
> COUNSEL: Um, so what is – is the motion – you're not ruling at this time?
>
> COURT: Well, I cannot go beyond 4:30.

(Emphases and footnote added). Later, the court halted Mother's direct examination.

> COURT: Okay, Counsel, you're over your time. You have one more question.
>
> . . . [Counsel asked one more question] . . .
>
> COURT: That was your last question.
>
> . . .
>
> COURT: Okay. Hold on, ma'am. Now -- I mean we went -- you had to 4:17 and were given three minutes to 4:20.

Mother's motion to extend time was later renewed and was again denied.

[3] It is unclear whether this grammatically awkward sentence is a defense of the testimony already provided, or an offer of proof supporting the extension of time. The majority seems to conclude that it is the former; the ICA concluded the latter. Majority at 28; AC v. AC and Child Support Enforcement Agency, No. CAAP-12-0000808, 2013 WL 3927738 at *6 (App. July 30, 2013) (SDO).

> COURT: Okay, that's it.
>
> . . .
>
> COURT: Wait. Hold on. Testimony is over.
>
> . . .
>
> COURT: It's 4:30. Please have a seat, ma'am.
>
> COUNSEL: Your Honor –
>
> COURT: Yes.
>
> COUNSEL: -- again I would renew my motion for an extension of time. Three hours is not enough for this trial. This trial involved complex issues.
>
> . . .
>
> COURT: Why -- why didn't -- why wasn't that motion done prior to today? . . .
>
> . . .
>
> COURT: So we -- I mean this is something that is we were going to go and expand this for more than the time allotted today, that's why I kept on trying to tell you get -- you know, to the -- I wanted to hear about the two parents. I wanted to hear from dad. I wanted to hear from mom. I wanted to hear from the custody evaluator. Unfortunately the other three witnesses took up time that otherwise could have been allocated to mom.

(Emphases added).

Mother was prevented from completing her testimony and from calling additional witnesses. Reflective of the time limitations that had been imposed, the transcript of Father's direct examination is 51 pages. In contrast, the transcript of Mother's direct examination is 14 pages, which included her unsuccessful request for additional time. Consequently,

Father's direct examination was approximately four times as long as Mother's.

Immediately following closing arguments, despite acknowledging that the case was "very complex" and the court-imposed time limits had prevented the court from hearing additional evidence that it "wanted to hear," the court awarded full physical and legal custody of both children to Father.

II. Discussion

The paramount consideration in a custody case is "the best interests of the child." HRS § 571-46(a)(1). While courts generally have "inherent power to control the litigation process before them," Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawaiʻi 494, 507, 880 P.2d 169, 182 (1994), the trial court's "discretion is not unlimited . . . and must be balanced against the rights of the parties to present their cases on the merits." Doe v. Doe, 98 Hawaiʻi 144, 155 n.12, 44 P.3d 1085, 1096 n.12 (2002) (hereinafter Doe).

In the context of the court's authority to control litigation versus the rights of the parties to present their cases, this concurrence initially examines the constitutional underpinning of a parent's right to custody of their children. Next, the legal basis for imposing time limitations at trial is addressed, and assuming a court has such authority, the requisite procedures for setting a time restriction are

considered. The factors that a court may properly review when an extension of that time limit is requested during trial are then discussed. Finally, the advantages of time restrictions are weighed against their resultant risks.

A.

"[T]he interest of parents in the . . . custody . . . of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel v. Granville, 530 U.S. 57, 65 (2000). This fundamental liberty interest in custody is "guaranteed . . . by the Fourteenth Amendment." Meyer v. Nebraska, 262 U.S. 390, 399 (1923); see also Prince v. Massachusetts, 321 U.S. 158, 166 (1944). "[I]ndependent of the federal constitution, . . . parents have a substantive liberty interest in the care, custody, and control of their children protected by the due process clause of article 1, section 5 of the Hawaiʻi Constitution." In re Doe, 99 Hawaiʻi 522, 533, 57 P.3d 447, 458 (2002); accord In re T.M., 131 Hawaiʻi 419, 421, 319 P.3d 338, 340 (2014); see also Doe v. Doe, 116 Hawaiʻi 323, 334, 172 P.3d 1067, 1078 (2007).

A parent's fundamental interest in the custody of their children is inextricable from the fundamental right to due process because parental custody rights "would mean little if parents were deprived of the custody of their children without a fair hearing." In re Doe, 99 Hawaiʻi at 533, 57 P.3d at 458.

"[T]he state may not deprive a person of his or her liberty interest [in child custody] without providing a fair procedure for the deprivation." In re T.M., 131 Hawaiʻi at 434, 319 P.3d at 353.

A fair procedure includes, at a minimum, the right to present probative evidence. It is well established that the "fundamental requis[i]te of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). The opportunity to be heard includes the opportunity to present testimony and other evidence.

"As a general rule, evidence may not be excluded solely to avoid delay." Gen. Signal Corp. v. MCI Telecomms. Corp., 66 F.3d 1500, 1509 (9th Cir. 1995). Exclusion of evidence is limited by the evidence's probative value: "If the evidence is crucial, the judge would abuse his [or her] discretion in excluding it." Sec'y of Labor v. DeSisto, 929 F.2d 789, 794-95 (1st Cir. 1991); see also Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987) (holding that "it may be an abuse of the trial court's discretion to exclude probative, non-cumulative evidence simply because its introduction will cause delay[.]").

In regards to the time limits that are the focus of this case, "arbitrary, inflexible time limits can impose a serious threat to due process principles. Justice cannot always

be achieved within the orderly environment of an assembly line." In re Marriage of Ihle, 577 N.W.2d 64, 68 (Iowa Ct. App. 1998). Therefore, "arbitrary, inflexible time limits are disfavored. They will, in many instances, support a finding of abuse of discretion, and require a new trial." Id. A court should "not adhere so rigidly to time limits as to sacrifice justice in the name of efficiency." Gen. Signal Corp., 66 F.3d at 1509.

In deference to the intertwined fundamental liberty interests in child custody and due process, judicial discretion should be constrained "by due process principles requiring all litigants in the judicial process to be given a fair opportunity to have their disputes resolved in a meaningful manner." Ihle, 577 N.W.2d at 67. Therefore, time limits in child custody trials that prevent a party from presenting admissible probative evidence to the court for consideration is an unacceptable encroachment on a party's fundamental right to procedural due process.

B.

The majority asserts that "a trial court has discretion to set reasonable time limits for trial," citing to Doe as authority and, generally, the Hawaiʻi Rules of Evidence (HRE) Rule 611 (1993). Majority at 20.

1.

The rules of evidence authorize a court to control the pace of trial but do not expressly authorize time limits prior to trial.[4] HRE Rule 611 states, in relevant part:

> Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.[5]

HRE Rule 611(a) (1984) (emphasis and footnote added). The plain language of HRE Rule 611(a) suggests that the rule "does not provide an independent ground for excluding otherwise admissible evidence. The rule only empowers the district court to control the mode and order of presenting evidence." 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 611.02[2][a][i] (Joseph M. McLaughlin, ed., 2d ed. 2014). Thus, while "[t]ime limits on the presentation of evidence may be imposed to avoid wasting time and to ensure that a case is speedily and efficiently heard," HRE Rule 611 does not empower the court to use those restrictions to limit non-cumulative, probative evidence. Id. at § 611.02[2][b][ii].

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[4] The rules of evidence apply to all courts of the State of Hawaiʻi, except as provided. HRE Rule 1101(a) (1980; Doe, 98 Hawaiʻi at 155 n.11, 44 P.3d at 1085 n.11. The HRE are inapplicable to specified proceedings that are not relevant here. See HRE Rule 1101(d).

[5] Mode means "[a] manner of behaving, living, or doing something[.]" Black's Law Dictionary 1156 (10th ed. 2014).

The plain language of HRE Rule 611(a) indicates that the rule is focused upon the management by the court of the ongoing proceedings before it: "The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence . . . ." (Emphasis added). The Commentary to HRE Rule 611 indicates that the rule is identical to Federal Rules of Evidence (FRE) 611.[6] HRE Rule 611 Commentary. The Advisory Committee Notes states that FRE 611(a)

> covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, McCormick §5, the order of calling witnesses and presenting evidence, 6 Wigmore §1867, the use of demonstrative evidence, McCormick §179, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

FRE 611, Advisory Committee Notes (1972 Proposed Rules) (emphases added). Thus, HRE Rule 611 authorizes the court to control the litigation during trial, but provides no express authorization for a broad exercise of control prior to trial.

HRE Rule 403 (1993) authorizes the exclusion of evidence to advance the policies described in HRE Rule 611. However, HRE Rule 403 confers the power to exclude relevant evidence based on a balancing test: "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

[6] Nonsubstantive stylistic changes were made in 2011 to FRE 611(a). See FRE 611, Advisory Committee Notes (2011 Amendments).

jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id. This balancing test is incompatible with a policy of setting of time limits prior to trials, which by its very nature would bypass the deliberate evaluation prescribed by HRE Rule 403 to weigh the probative value of evidence against countervailing considerations.

2.

The use of HRE Rule 611 as a source of authority to set pretrial time limits is referenced in Doe, which the majority characterizes as "instructive." Majority at 21. Doe presents a similar fact pattern as this case. In Doe, both parents made allegations of abuse against the other. Doe, 98 Hawaiʻi at 146-47, 44 P.3d at 1087-88. Father presented witnesses, but mother was not able to call witnesses and her testimony was cut off by a court-imposed three-hour time limit. Id. at 147, 44 P.3d at 1088. Therefore, the present case and Doe are similar: in both cases the parents alleged abuse of the children by the other; and in both, one parent was able to present their case on the merits but the other was prevented from presenting all their evidence by a court-imposed time restriction. Although Doe does not prevent the family court's use of time limits, at best it offers such use faint praise.

Doe relies primarily upon the inherent power of the court to control the litigation process before it as the "authority to set a reasonable time limit for trials and hearings." Id. at 154, 44 P.3d at 1095. Doe cites to HRE Rule 611 as "additional[]" authority to control the proceeding before it, but also tempers such authority, stating that the discretion vested by HRE Rule 611 in a trial court "is not unlimited, however, and must be balanced against the rights of the parties to present their cases on the merits." Id. at 155, 155 n.12, 44 P.3d at 1096, 1096 n.12. Doe observes that the Advisory Committee Notes to FRE 611, "which is substantially similar to HRE Rule 611," emphasizes this balancing of interests. Id. "The discretion of the trial judge in controlling the proceedings [is] also limited by other considerations." Id. The Doe court therefore cautioned that the court's powers to control the proceedings under the rules of evidence are limited by the parties' rights to present their case on the merits. Accordingly, Doe suggests that HRE Rule 611 tempers the authority of the court to use time limits as much as it supports their use.[7]

[7] Doe did not rule on the use of the time limits set prior to trial, finding instead that there was no objection during trial to the time restriction and that the appeal had not raised plain error in regard to the restriction. Doe, 98 Hawai'i at 154, 44 P.3d at 1095. The Doe court noted that if counsel believed that relevant evidence must be heard after the time set for the hearing has expired, counsel must move for an extension of time.

(continued. . .)

3.

In contrast to the family court, when the setting of time limits prior to the start of trial is appropriate in circuit court, the authority to do so is provided by the Hawaiʻi Rules of Civil Procedure (HRCP or Civil Procedure Rules). The Civil Procedure Rules affirmatively allow a trial court to issue "an order establishing a reasonable limit on the time allowed for presenting evidence" after a pretrial conference. HRCP Rule 16(c)(15) (2000); see also Fed. R. Civ. P. (FRCP) Rule 16(c)(2)(O) (also permitting a court in a pretrial conference to set a reasonable limit on time allowed for the presentation of evidence).

The authorization to set time limits prior to trial was added to the federal rules in 1993: one "primary purpose[] of the changes . . . [is] . . . to eliminate questions that have occasionally been raised regarding the authority of the court to make appropriate orders designed either to facilitate settlement

(. . .continued)
Id. However, the Doe court did rule that the family court erred in its denial of a motion for a new trial, as that "ruling resulted in the exclusion of testimony of witnesses bearing upon the issue of family violence and inferentially, the best interests of the Child." Doe, 98 Hawaiʻi at 155, 44 P.3d at 1096. Consequently, Doe did not address the distinction between the setting of time limits during a trial based upon trial developments and the setting of time limits at a pretrial conference.

or to provide for an efficient and economical trial."[8] FRCP Rule 16, Advisory Committee Notes (1993 Amendment).

The authority of the court to set time limits for the presentation of evidence at a pretrial conference was noted as "new" and "supplement[ing] the power of the court to limit" the presentation of evidence when the federal rule was adopted in 1993:

> [FRCP Rule 16(c)(2)(O)] is also new. It supplements the power of the court to limit the extent of evidence under Rules 403 and 611(a) of the Federal Rules of Evidence, which typically would be invoked as a result of developments during trial.

Id. (emphases added). Thus, the rule adopted in the FRCP in 1993 and the Hawaiʻi equivalent adopted in 2000 established express authority in the circuit courts to set time limits at a pretrial conference for the presentation of evidence during trial.

The FRCP Advisory Committee Notes acknowledge the power of the court under evidentiary rules 403 and 611 to limit evidence, but observes limitations of these rules as well. The

[8] The 2000 amendment to the Civil Procedure Rules intended that the Hawaiʻi rule should match its federal counterpart and the notes to the proposed 2000 amendment indicate that the Advisory Committee Notes to the federal rule is applicable to the newly adopted Hawaiʻi rule. See Memorandum from Virginia Lee Crandall, Judge, Ninth Division and Chair of the Permanent Committee on Rules of Civil Procedure and Circuit Court Civil Rules, to Ronald T.Y. Moon, Chief Justice, Hawaiʻi Supreme Court (September 28, 1998) (on file with the Supreme Court of the State of Hawaiʻi Law Library) (recommending that the court "adopt the federal version [of rule 16]" and, under "Suggested Commentary," stating "see [Federal Rules of Civil Procedure] Rule 16 commentary and notes."). Therefore, the Advisory Committee Notes for the federal rule is cited here as an aid in interpreting the intent of the Hawaiʻi rule.

Advisory Committee Notes state that the evidentiary rules would "typically . . . be invoked as a result of developments during trial," suggesting that the power granted to the court under the evidence rules to impose time limits does not become available to the court until trial. Id. (emphasis added). Under such a reading, the authority granted by HRE Rule 611 cannot vest in a court a source of authority to set time limits in a pretrial conference. Instead, the express authority to set times limits at a pretrial conference is provided by the civil procedure rule.[9]

4.

The Hawai'i Family Court Rules (HFCR or Family Court Rules) do not grant the family court the authority to set time limits at a pretrial conference. Rule 16 of the Family Court Rules, which covers similar pretrial issue-formulating activities as Rule 16 of the Civil Procedure Rules, does not contain an express grant of authority to the family court to set time limits on trial. HFCR Rule 16 (2000).

The lack of an express grant of authority under Rule 16 of the Family Court Rules to set time limits in pretrial conference may be interpreted as a denial of that authority under that rule, when it is compared to its counterpart in the

[9] The Civil Procedure Rules are not applicable to family court proceedings. HRCP Rule 81(a)(4) (2006).

Civil Procedure Rules. Prior to 2000, Rule 16 of the Civil Procedure Rules was essentially identical to the current Rule 16 of the Family Court Rules. Compare HRCP Rule 16 (1972) and HFCR Rule 16 (2000) (neither providing express authority to set time limits on the presentation of evidence at a pretrial conference).

In 2000, Rule 16 of the Civil Procedure Rules was amended to include the authority to set time limits on the presentation of evidence. HRCP Rule 16. Rule 16 of the Family Court Rules was also last amended in 2000, becoming effective the same day as the amendment to Rule 16 of the Civil Procedure Rules that granted a trial court the express power to set time limits on the presentation of evidence. See HRCP Rule 16 (2000); HFCR Rule 16 (2000). Thus, in comparison with the Civil Procedure Rules, the lack of an express grant of authority under the Family Court Rules creates an inference that the family court is not empowered under the Family Court Rules to set time limits on the presentation of evidence prior to the commencement of trial.

If the Family Court Rules were intended to provide the family court with the authority at a pretrial conference to limit the presentation of evidence during trial, the rules would have so stated. For example, the Family Court Rules expressly grant the family court the authority to utilize a pretrial

conference to set limits on "the number of expert witnesses." HFCR Rule 16(5). The Family Court Rules could have provided similar authority for time restrictions as well. Correlatively, the Civil Procedure Rules expressly allow both the setting of "limitations or restrictions" on the use of expert testimony and issuance of orders "establishing a reasonable limit on the time allowed for presenting evidence." HRCP Rule 16(c)(4), (c)(15).

The majority also reasons that Rule 16 of the Family Court Rules provides a "catch-all" provision that empowers the family court to use time limits.[10] Majority at 37-38 n.5. However, the Civil Procedure Rules contain a similar catch-all provision.[11] HRCP Rule 16(c)(16). If the catch-all provision were sufficient to permit the setting of time limits in a pretrial conference, then the express provision permitting use of time limits in Rule 16(c)(15) of the Civil Procedure Rules would be superfluous. Such a reading of this rule would be in violation of the principle that "[c]ourts are bound to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or

[10] "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider: . . . (7) Such other matters as may aid in the disposition of the action." HFCR Rule 16(7).

[11] "At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . (16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action." HRCP Rule 16(c)(16).

insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." Ass'n of Condo. Homeowners of Tropics at Waikele ex rel. Bd. of Dirs. v. Sakuma, 131 Hawaiʻi 254, 256, 318 P.3d 94, 96 (2013).[12] Thus, the omission of an equivalent authority in the Family Court Rules remains significant.[13]

5.

This court has recognized that a trial court's power to set reasonable time limits for a trial also stems from its

[12] When interpreting rules promulgated by the court, principles of statutory construction apply. State v. Lau, 78 Hawaiʻi 54, 58, 890 P.2d 291, 295 (1995).

[13] The majority also reasons that the Family Court Rules omit other powers included in the Civil Procedure Rules that would not be denied by implication, citing as an example Rule 16(c)(11) of the Civil Procedure Rules, authorizing the court to "take appropriate action, with respect to . . . disposition of pending motions" in pretrial conference, which is not included in the equivalent family court rule. Majority at 37-38 n.5; compare HRCP Rule 16(c)(11) and HFCR Rule 16. However, Rule 16(c)(11) of the Civil Procedure Rules is a targeted rule "enabl[ing] the court to rule on pending motions for summary adjudication that are ripe for decision at the time of the conference." FRCP Rule 16, Advisory Committee Notes (1993 Amendment). There is no reason to conclude that Rule 16 of the Family Court Rules implicitly provides such authority. See HFCR Rule 56(c), (d) (referring to "the hearing," suggesting that a hearing is required). Additionally, Rule 16 of the Family Court Rules concludes:

> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel . . . .

HFCR Rule 16. Thus, Rule 16 of the Family Court Rules only allows limits on the issues for trial to those "not disposed of by admission or agreements," not summary adjudication. It follows that the disposition of pending motions ripe for summary adjudication is therefore not a power that "clearly [is] not denied by implication based on [its] exclusion from [Rule 16 of the Family Court Rules]." Majority at 37-38 n.5.

"inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them." Doe, 98 Hawaiʻi at 154-55, 44 P.3d at 1095-96 (quoting Sport Shinko, 76 Hawaiʻi at 507, 880 P.2d at 182).[14] However, setting time limits on trials based on inherent judicial power should be distinguished from the preferred method of controlling the duration of the trial via assessment of particular evidence for relevance, materiality, unfair prejudice, undue delay, or needless presentation of cumulative evidence, in accordance with the rules of evidence.

Unlike the inherent power to set time limits on trial, the rules of evidence are structured such that the "parties may present to the court or jury all the evidence that bears on the issues to be decided. . . . unless there is some . . . distinct ground for refusing to hear the evidence." 1 George E. Dix, et al., McCormick On Evidence § 184 (Kenneth S. Broun, ed., 7th ed. 2013) (emphasis added). For example, the rules of evidence require a balancing test prior to excluding relevant evidence under HRE Rule 403, and authorize reasonable control "for the ascertainment of the truth, [and to] avoid needless consumption of time." HRE Rule 611 (emphasis added).

[14] The majority apparently relies on the inherent authority of the family court to set time limits, as no other source is specifically indicated. See Majority at 37-38 n.5.

Inherent powers require no such particularized deliberation, and run the risk of arbitrariness that should be avoided in the face of fundamental liberty interests. Therefore, the "trial court may abuse its discretion when it excludes non-cumulative, probative evidence because its introduction would take longer than the court had set aside for trial." Weinstein's Federal Evidence § 611.02[2][b][ii].

> [T]he possibility of confusion through the exposition of a mass of details is not in itself sufficient reason for refusing to hear those details, where complication is inherent in the issue. . . . It is where the complication and confusion are substantially unnecessary, or the small value of the evidence is overwhelmed by its disadvantages, that a rule of evidence may properly intervene in prohibition.

6 John Henry Wigmore, Evidence in Trials at Common Law § 1907 at 749-50 (James H. Chadbourn rev. 1976) (emphasis added). Time limits "by their very nature . . . can result in courts dispensing with the general practice to evaluate each piece of offered evidence individually." Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 609-610 (3d Cir. 1995).

Use of inherent authority of the court raises the additional problem that clear procedural protections are not provided to litigants. Under the civil rules, procedural protections are generally integrated into the rules themselves and often noted in the commentary. For instance, Rule 16 of the Family Court Rules requires the court, at a minimum, to attempt to seek agreement with the parties in setting orders in pretrial

conference regarding trial: "The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered . . . ." Thus, if the use of time limits was prescribed by the Family Court Rules, procedural protections would likely have been supplied within the rule. In contrast, proceeding upon inherent authority means that time limits will be imposed on a court-by-court, case-by-case application without the benefit of expressed procedural provisions.

Therefore, reliance upon the inherent authority to set time limits in family court cases involving child custody determinations should be disfavored, and the court rules and the rules of evidence should be applied instead.

C.

If the family court is authorized to set time limits on the presentation of evidence prior to trial under the inherent power of the court, then the court must follow procedures that ensure the parties' right to present their case fully on the merits is not infringed upon.

1.

The Advisory Committee Notes to the FRCP indicate that, under ordinary circumstances, parties are owed procedural protections when a court issues a pretrial order to place time

limits on the presentation of evidence. "Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination." FRCP Rule 16, Advisory Committee Notes (1993 Amendment) (emphases added).[15]

Thus, "a district court should impose time limits only when necessary, after making an informed analysis based on a review of the parties' proposed witness lists and proffered testimony, as well as their estimates of trial time." Duquesne Light Co., 66 F.3d at 610; see also Majority at 27 (acknowledging Duquesne Light Co.'s requirements). Without such a process, time limits would inherently be arbitrary; at a minimum, the setting of time restrictions requires a case-by-case approach.

Rule 16 of the Family Court Rules similarly indicates that the parties must be given procedural protections.

> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

[15] Such procedural protections would also be applicable to Rule 16 of the Civil Procedure Rules. See note 8, supra.

HFCR Rule 16 (emphasis added). That is, Rule 16 of the Family Court Rules, which governs the family court's use of pretrial procedure and which, under the majority's interpretation allows for pretrial orders setting time limits on the presentation of evidence during trial, requires that the order should "recite[] . . . the agreements made by the parties as to any of the matters considered." Id. (emphasis added). Thus, the court must hear the parties on the subject matter of the order and at least attempt to obtain the parties' agreement.

Therefore, in accordance with the Advisory Committee Notes to FRCP Rule 16, which is incorporated into the Civil Procedure Rules, and the dictates of Rule 16 of the Family Court Rules (the order must "recite[] . . . agreements"), a court may not issue a pretrial order to impose time restrictions on the presentation of evidence at trial without providing the parties an opportunity to be heard on the evidence they intend to present. Such an evaluation must consider the number of witnesses the parties intend to present and elicit counsel's estimation of the expected duration of direct- and cross-examination of each witness to ensure that adequate opportunity is provided to present that evidence to the court. The time restriction should also consider other matters and circumstances that may affect the duration of the trial, such as the testimony of child witnesses, use of interpreters, presentment of audio or

video recordings, motions in limine, trial motions, and opening statements and closing arguments.

There is no indication in the record of this case that the court imposed the three-hour time limit after hearing from the parties as to the evidence they intended to present at trial. The time limit was set four months before the parties exchanged their list of witnesses. Without such information, it would not have been feasible for the court or the parties to reasonably estimate the time needed for trial.[16] Thus, the family court's time limits in the present case would be arbitrary if those limits were set without the requisite information and without an attempt to gain agreement of the parties as to the time restriction.

2.

Where authorized, reasonable time limits established before the presentation of evidence has commenced may serve a useful purpose in some types of trials. However, unlike imposing a mere three-hour limit on private parties in a child custody determination involving accusations of family violence, the leading cases cited in favor of overall time limits are

[16] Subsequently, Mother's witness list indicated she intended to call nine lay witness and two expert witnesses. At trial, Mother called five of the witnesses on her list, including herself, in the time allotted. The record does not indicate whether Mother intended to call all six remaining witnesses.

generally large, complex civil trials.[17] These cases frequently entail longer time limits. Even in jurisdictions in which time limits have been affirmed in family court cases, those time limits are much longer than three hours, and it is frequently dispositive in such cases whether the party seeking review objected before or at trial, because a timely objection would have given the court the opportunity to prevent error.[18]

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[17] The following cases are cited in Weinstein's Federal Evidence: In re City of Bridgeport, 128 B.R. 589, 592 (Bankr. D. Conn. 1991) (in a municipal bankruptcy, providing twenty-six hours for presentation of evidence per side); Tabas v. Tabas, 166 F.R.D. 10, 13 (E.D. Pa. 1996) (in a civil suit involving distribution of partnership assets, each side provided 30-hours for presentation of evidence); Deus v. Allstate Ins. Co., 15 F.3d 506, 520 (5th Cir. 1994) (in a suit by a former employee against an employer, each side provided three days to present their case); United States v. Reaves, 636 F. Supp. 1575, 1577 (E.D. Ky. 1986) (in criminal tax fraud, state limited to ten days to present its case in chief); Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 608-611 (3d Cir. 1995) (280-hour time limit not found unreasonable in a civil breach of contract and warranty case brought by a large electric utility against a supplier of nuclear steam supply systems); United States v. Midgett, 488 F.3d 288, 300 (4th Cir. 2007) (time restrictions were announced only after lengthy interrogation had drifted into areas of less obvious relevance; in subsequent recross-examination, the defense lawyer was permitted to ask questions without restriction); MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1170-72 (7th Cir. 1983) (26-day time limit found reasonable in an antitrust action between telephone companies); Gen. Signal Corp., 66 F.3d at 1508 (14-day time limit not found unreasonable in a breach of contract and fraud case brought by telecommunications device developer against a long-distance telephone company); see also FDIC v. W.R. Grace & Co., 691 F. Supp. 87, 94 (N.D. Ill. 1988) (in a suit by a federal agency to recover damages resulting from fraud, defendant prevented from re-reading certain depositions that had already been introduced into evidence by plaintiff, no limits on time imposed); United States v. Bonanno, 852 F.2d 434, 439 (9th Cir. 1988) (in criminal trial, defense counsel limited by court as to subject matter after eight days of cross examination, time limits not imposed); Elgabri v. Lekas, 964 F.2d 1255, 1259 (1st Cir. 1992) (in an antitrust action between physicians court set subject matter limits, not time limits).

[18] The cases cited by the majority in support of the pretrial imposition of time limits on the presentation of evidence are distinguishable from the present case. See Varnum v. Varnum, 586 A.2d 1107, 1114-15 (Vt. 1990) (upholding the decision from a five-day trial with a "time limit . . . set at eleven hours for each side;" counsel "indicated no objection when the evidence was terminated by the court.") (emphasis added); see also In re ARF, (continued. . .)

The time limits must be justifiable, because "every litigant has a right to introduce competent evidence supporting his or her case." Gray v. Pearson, 797 So. 2d 387, 394 (Miss. Ct. App. 2001). Time "limits must be reasonable and sufficiently flexible to ensure that important evidence is not excluded due to artificial time constraints." Varnum v. Varnum, 586 A.2d 1107, 1115 (Vt. 1990), accord State v. Streich, 658 A.2d 38, 53-54 (Vt. 1995); see also Holland v. Scallon, 1 CA-CV 12-0210, 2013 WL 557219 (Ariz. Ct. App. Feb. 14, 2013) ("[U]nder our state and federal constitutions, any time limits imposed by the court must provide a litigant with a reasonable opportunity to be heard."); Torres v. Ryan, CIV 10-2205-PHX-NVW, 2011 WL 3799691 (D. Ariz. Aug. 5, 2011) (constitutional rights are violated by limits on cross-examination when relevant testimony is excluded to the prejudice of the defendant); Lentz v. Cincinnati Ins. Co., 1:01CV599, 2006 WL 2860974 (S.D. Ohio Oct. 4, 2006) (trial court repeatedly extended nominal time limits and allowed presentation of evidence planned for five days to extend to nine days).

(. . .continued)
307 P.3d 852, 859 (Wyo. 2013) (no allegations of abuse, limits were set in pretrial with the parties, no new information at trial, party seeking review did not object in pretrial or at trial); Goodwin v. Goodwin, 618 So. 2d 579, 584 (La. Ct. App. 1993) (same, but eight-day trial); Young v. Pitts, 335 S.W.3d 47, 61 (Mo. Ct. App. 2011) (each side given 7.5 hours, additional evidence was properly excluded as duplicative or irrelevant); Moore v. Moore, 757 So. 2d 1043, 1046 (Miss. Ct. App. 2000) (party seeking review never objected to the time limits at trial).

"Rigid time limits without flexibility, depending on what takes place at trial, are 'inappropriate.'" Weinstein's Federal Evidence § 611.02[2][b][ii] (citing Ashby, 808 F.2d at 678). Thus, time limits that are "unrelated to the nature and complexity of the case or the length of time consumed by other witnesses" may constitute an abuse of discretion. Barksdale v. Bert's Marketplace, 797 N.W.2d 700, 703 (Mich. Ct. App 2010).

D.

When deciding whether to extend a court-imposed time limit in a trial determining custody, a single standard should guide the family court: whether the evidence is probative to determining the best interests of the child. In other words, the fact that the time restriction was imposed in a pretrial conference should be of no consideration in determining the admissibility of noncumulative probative evidence that would require an extension of the time limit.

While courts must frequently evaluate offers of proof against the objection to the proposed evidence by an adverse party, the "adverse party" in a motion for extension of time is the court-imposed time restriction. The court's evaluation of an offer of proof to support a motion for extension must be properly calibrated to consideration of the best interests of the child. If the evidence is admissible and probative to the determination of the custody of the child, then there would

appear to be no valid basis to not allow an extension of the time deadline.

Additionally, a party's right to present probative evidence should not be judged by efficiency standards. When time restrictions have not been imposed, the court's determination of whether to admit further evidence does not depend on counsel's performance as measured by the court. In this context, counsel's efficiency is irrelevant.

However, Doe and this case demonstrate that the use of time limits on the presentation of evidence at trial creates a significant danger that the court will evaluate a request to extend time by evaluating the efficiency of the attorney's presentation. In the present case, the family court repeatedly evaluated the efficacy of counsel's performance in order to maintain its arbitrarily imposed time limit: "We're going to finish this case at 4:30 today, so, Counsel, use your time wisely. Because if we don't get to an opportunity to hear from your client, that will be based upon your choice." Later, when the motion for an extension of time was made, the court disparaged counsel's efficiency:

> COURT: . . . Counsel, you have two minutes left.
>
> COUNSEL: Your Honor, I'm going to move for an extension of time. Um, the reason is -- -
>
> COURT: . . .

> . . . But each and every of the other witnesses I said we're running on a time crunch. Um, you know, I gave you that opportunity. You still decided to call the other witnesses. . . .
>
> . . .
>
> COUNSEL: I understand, Your Honor. But each witness was important, and that witness has something to say about domestic violence.[19]
>
> COURT: I understand. But you still, -- we still have the time constraints that we do have. You knew about them. So, as counsel, you were permitted to use time as you felt, uh, you needed to use them best. So I allowed you to do that. So continue. Use the rest of your time wisely.

(Emphases and footnote added). When the motion was later renewed, the Court again ignored the potential probity of the evidence sought to be introduced and continued to focus on counsel's use of time.

> COUNSEL: -- again I would renew my motion for an extension of time. Three hours is not enough for this trial. This trial involved complex issues.
>
> . . .
>
> COURT: [T]hat's why I kept on trying to tell you get -- you know, to the -- I wanted to hear about the two parents. I wanted to hear from dad. I wanted to hear from mom. I wanted to hear from the custody evaluator. Unfortunately the other three witnesses took up time that otherwise could have been allocated to mom.

(Emphases added). Thus, prompted by its self-imposed time restriction, the family court analyzed the efficiency of counsel's performance, rather than the probative nature of the evidence sought to be presented.

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[19] See note 3, supra, for discussion of this grammatically awkward sentence.

The Intermediate Court of Appeals' (ICA) majority opinion in this case also exemplifies how a reviewing court may evaluate counsel's strategic decisions for efficiency. See AC v. AC and Child Support Enforcement Agency, No. CAAP-12-0000808, 2013 WL 3927738 (App. July 30, 2013) (SDO). The ICA majority held that there was no error in the family court's denial of Mother's motion to extend time. Id. at *4. The holding emphasized Mother's strategic decisions, suggesting that when "the family court warned Mother's counsel that time was running out," Mother's counsel ineffectively used the remaining time because "counsel did not question Mother regarding any alleged violence, but instead, asked . . . other questions unrelated to the issue of family violence." Id. at *3. The ICA majority further criticized Mother's counsel for "provid[ing] no offer of proof or specifics as to the type of further testimony that would be expected of Mother or the testimony of Mother's remaining witnesses, only that they had 'something to say about domestic violence.'" Id. Thus, rather than viewing the potential evidence through the lens of the best interests of the children, the ICA majority's opinion is guided by enforcement of the court-imposed deadline.

Although the majority vacates and remands this case for further proceedings, it is not clear as to the appropriate standard that a court should apply when a request for an

extension of the time restriction is made during trial. The majority states that

> [n]one of [the] factual distinctions override the critical similarity between Doe and the instant case: that "the family court's ruling resulted in the exclusion of testimony of witnesses bearing upon the issue of family violence and, inferentially, the best interests of [the children]." . . . Here, as in Doe, the main issue is whether the excluded testimony was pertinent to the best interests of the children.

Majority at 23-24 (emphasis added). This may suggest that the family court must limit its consideration of a motion to extend time to the probity of the evidence sought to be presented and whether the determination of the best interests of the child would be furthered by the presentation of such evidence. Similarly, the majority states that "[i]mportant constitutional interests provide additional reason to providing parents a full and fair opportunity to present their case in custody decisions." Id. at 33. This may indicate that the family court should liberally construe a motion for extension of time in favor of the party making the request.

However, the majority states that the probity of evidence is one factor in the family court's decision to extend time; one that is required but not determinative. Majority at 34-36. Thus, the majority establishes the probative nature of the evidence as a mandatory but not necessarily dispositive consideration in the family court decision as to whether or not to grant an extension of time. The majority also looks at other

elements of the trial to conclude that the family court's "enforcement of its time limit was not reasonable." Id. at 34. First, the majority finds that "[n]o offer of proof was thus necessary [to support an extension of time] in the instant case." Id. at 25-26. An offer of proof is not necessary if "the substance of the evidence" is "apparent from the context." HRE Rule 103(a)(2) (2013).[20] Here, the context was apparent because Mother would have had personal knowledge of any domestic violence. See Majority at 25. However, it is not clear whether the majority's conclusion applies to Mother only or includes any remaining witnesses, or whether the standard the majority has applied in order to find an offer of proof was unnecessary is based on the court's inquiry into the best interests of the child or Mother's personal knowledge of domestic violence.

Further, it is noted that the family court in this case did not seek an offer of proof from counsel. The court did state, "Tell me why," but then did not pause to allow counsel to explain. In cases where the court is required to decide custody "in the best interests of the child" and the child is not represented, if an offer of proof is not included in counsel's motion seeking an extension of time, the court should

[20] HRE Rule 103 states that a ruling excluding evidence is not in error unless a substantial right of the party was affected and "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." HRE Rule 103(a)(2).

affirmatively request an offer because it is the court-imposed time restriction that has created the need for the extension.

Second, the majority notes that the procedural protections required under Duquesne were not followed. Majority at 27-28. However, whether procedural protections were provided in setting the original time restrictions should not bear on whether a party needs additional time to present probative evidence. The only standard that should be applied is whether the evidence sought to be introduced is probative and admissible and would further the court's determination of the best interests of the child.

Finally, the majority also analyzes counsel's performance for efficiency, concluding that each of the witnesses' testimony related to the two critical issues and therefore counsel's presentation was sufficient to garner extra time. Majority at 29 (disagreeing with the family court's decision to deny the motion to extend time because Mother's witness provided "relevant testimony on two critical issues"). It is unclear what would have been the disposition of this case if the testimony of one of the witnesses had not related to the critical issues, or if the testimony of Mother's witness had only been partially relevant. As stated above, the family court is statutorily mandated to decide the case based on the best interests of the children, and therefore the efficiency of

counsel should not be a factor if additional evidence would further the resolution of the children's best interest.

Thus, the majority's decision requires the family court to "consider whether the proposed testimony is pertinent to the best interests of the child" in an evaluation of a motion to extend time. Majority at 36. However, it is unclear whether the majority's decision also permits the family court, in determining whether to extend a time restriction to assess the efficiency of counsel, consider whether the procedural protections of Duquense were sufficiently followed, or require a detailed offer of proof. Id. at 25-28.

Parties in family court should not be disadvantaged in presenting their case because time restrictions were set prior to trial. Regardless of whether time limits have been set, the introduction of evidence in custody proceedings in family court should be governed by the same test: whether the evidence is probative for determining the best interests of the child, and whether any rule of evidence would exclude it.

E.

Custody cases involving allegations of abuse present special concerns that vastly outweigh any efficiency gained by

imposing time limits on the presentation of evidence.[21] Many of those concerns have already been addressed. To briefly reiterate, this court must protect the fundamental constitutional liberty interests involved in a child custody case: the procedural right to present one's case fully on the merits, and the right to retain custody of one's child. Second, there is no express authority for the family court, in a pretrial conference, to set time limits on the presentation of evidence during trial. The court's use of its inherent authority should be disfavored because inherent powers do not have prescribed balancing limitations and risk arbitrary infringement on fundamental liberty interests. Third, in setting time limits prior to trial based on the inherent power of the court, a court is required to provide procedural protections when the time requirement is set, basing any restriction on sufficient information regarding the particular circumstances of the case and providing the parties an opportunity to be heard on the proposed restriction. Finally, there is a risk that a trial court evaluating a motion to extend time will decide the motion based on the efficiency of the counsel's presentation, the adequacy of the offer of proof, or

[21] The arguments against the use of time limits in custody trials involving allegations of physical abuse would apply equally to custody trials involving allegations of sexual abuse.

the degree of miscalculation made at the pretrial conference, rather than on the probity of the evidence.

Additional concerns should also be recognized. The harm of a trial court's erroneous determination in a child custody decision is magnified in its effect. Placement of a child with the wrong parent can potentially subject the child to continued abuse, and the right of appeal is insufficient to protect against the potential results of a flawed trial court custody decision while a reviewing court determines whether a time limit was reasonable in its application. A trial court's child custody decision leaves the non-party child in an especially vulnerable position; therefore, it is crucial that the court be fully informed of all admissible probative evidence propounded by a party when making the determination of custody.

Further, time limits distract the court's attention from the administration of justice.

> [W]e disapprove of the practice of placing rigid hour limits on a trial. The effect is to engender an unhealthy preoccupation with the clock, evidenced in this case by the extended discussion between counsel and the district judge . . . over the precise method of time-keeping—a method that made the computation of time almost as complicated as in a professional football game.

Flaminio v. Honda Motor Co., Ltd., 733 F.2d 463, 473 (7th Cir. 1984) (emphasis added); accord Monotype Corp. PLC v. Int'l Typeface Corp., 43 F.3d 443, 450-51 (9th Cir. 1994). The precise danger described in Flaminio of "preoccupation with the

clock" occurred in this case; the trial judge placed himself in the role of a timekeeper, providing numerous updates to advise counsel of the impending time limit expiration, and calculating the minutes used by counsel on direct and cross-examination.

Imposing time limits on trial presents an additional danger of inducing counsel, in an attempt to meet court-imposed deadlines, to decline to present probative evidence that could, in the absence of time limits, otherwise help the trier of fact identify the child's best interest. "[V]igorous and zealous advocacy is a necessary component of our judicial system." Office of Disciplinary Counsel v. Breiner, 89 Hawaiʻi 167, 171, 969 P.2d 1285, 1289 (1999). Appellate courts must ensure that trial judges . . . are not chill[ing] effective advocacy." See id. at 172, 969 P.2d at 1290 (quoting In re Dellinger, 461 F.2d 389, 398 (7th Cir. 1972). Asking counsel to select only a portion of the probative, non-cumulative evidence in order to satisfy a court-imposed time restriction, impairs "vigorous and zealous advocacy."[22] Id. at 171. When, as in this case, the client's interests serve as a proxy for the paramount interests of the non-party child, the countervailing interest in judicial efficiency should bow to the fundamental need for vigorous

[22] For instance, counsel may, in an effort to comply with a court-imposed time limit, choose between witnesses to satisfy the time restriction, rather than according to the probity of the evidence.

advocacy on behalf of the client and full presentation of probative evidence.[23]

Finally, child custody cases are uniquely decided according to the best interests of the child. HRS § 547-61(a)(1). Our courts should exercise the utmost caution in excluding evidence that may be material to establishing the best interest of the non-party child. The court's legitimate interest in judicial efficiency must be weighed against the paramount consideration, determining the best interest of the child. This consideration is heightened when there are allegations of domestic violence because of the concerns for the physical and emotional well-being of the child.

In light of these considerations, I would preclude the family court in custody trials involving allegations of family violence from setting time limits in a pretrial conference or pretrial hearing.[24] The family court's ability to function

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[23] Relatedly, domestic violence is often difficult to prove. The setting for this crime—in the victim's home and by the person nominally responsible for their well-being—may make victims reticent to testify about their abuse. There may be no non-party witnesses to the abuse, forcing counsel to present circumstantial evidence or expert testimony. Similarly, witnesses will frequently be other members of the household who may feel similar conflicting loyalties. Under such circumstances, a party should not face the additional burden of ensuring that the proof is presented in the time allotted before trial begins, without having had a full opportunity to collect enough information to make a reasonable estimate in setting limits at the pretrial conference.

[24] "The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law." HRS § 602-4 (1993); see State v. Fields, 67 Haw. 268, 276, 686 P.2d 1379, 1386 (1984) (continued. . .)

efficiently will not be unduly burdened by this preclusion. The rules of evidence remain in effect; the court's ability to limit cumulative evidence or prevent waste of time is firmly established. Further, the evidence rules are designed to exclude evidence under appropriate circumstances without unjustly imposing upon fundamental rights, which they effectively accomplish in felony trials in our circuit courts without the imposition of time limits.

III. Conclusion

Given the enormity of the effects of child custody decisions upon the child, the family, and the community, the risk that time limits on trial may exclude probative evidence and hinder the ascertainment and just determination of truth does not warrant the potential savings in judicial resources. See HRE Rule 102 (1980).[25] Society's concern for the quality of custody decisions and public confidence in the judicial system also argue against the imposition of time limits in child custody trials involving allegations of physical violence.

(. . .continued)
(invoking supervisory power in regulating searches of probationers); Gannett Pac. Corp. v. Richardson, 59 Haw. 224, 227-235, 580 P.2d 49, 53-57 (1978) (invoking supervisory power to require courts to undertake procedures to protect a defendant's right to a public trial when considering whether to close a preliminary hearing to protect the defendant's right not to have potential jurors prejudiced by evidence subsequently determined to be inadmissible).

[25] "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." HRE Rule 102.

Therefore, time limits should be limited to the category of cases in which the need for efficiency does not hinder the search for truth. Child custody cases involving allegations of family violence do not fall within this category.

I would vacate and remand this case for a new trial, and preclude the use of time limits on the presentation of evidence in cases determining the custody of children when there have been allegations of family violence by a party. Given the unique liberty interests present in such cases and the inability of appellate review to provide meaningful relief to a child placed with an abusive parent, the family court's decision must be based upon its consideration of all the admissible probative evidence that bears on the paramount concern—the best interest of our children.

/s/ Richard W. Pollack