

CONCURRING OPINION OF ACOBA, J.

I believe that the family court's evaluation of the facts and circumstances prompting it to make an award of fees and costs against Petitioner-Appellant the State of Hawai'i Department of Human Services (DHS) under Hawai'i Family Court Rules (HFCR) Rule 68 was well reasoned and supported by the record. As the DHS points out, however, Rule 68 would have a "chilling effect" on state efforts to protect children.

HFCR Rule 68 provides:

Offer of Settlement. At any time more than 20 days before any contested case hearing held pursuant to HRS sections 571-11 to 14^[1] (excluding law violations and criminal matters) is scheduled to begin, any party may serve upon the adverse party and offer to allow judgment to be entered to the effect specified in the offer . . . If the judgment . . . is patently not more favorable than the offer, the offeree must pay the costs, including reasonable attorney's fees incurred after the making of the offer, unless the court shall specifically determine that such would be inequitable in accordance with the provisions of HRS section 580-47 or other applicable statutes, as amended.

(Emphases added.) Although chapter 587 is referenced, under HRS § 571-11, the court must refer to HRS § 580-47 or "other applicable statutes" in deciding the appropriate amount to be awarded. Thus, fees and costs awarded under chapter 587 should be measured against "HRS [§] 580-47 or other applicable

¹ In pertinent part HRS § 571-11 states:

Jurisdiction; children. Except as otherwise provided in this chapter, this court shall have original jurisdiction in proceedings:

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(2) Concerning any child living or found within the circuit:
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(9) For the protection of any child under chapter 587.

statutes." HFCR Rule 68. But HRS § 580-47 plainly applies only to division of property and matrimonial matters, and not child protection matters.² The DHS maintains that there are no "other

² HRS § 580-47 falls under Part III, entitled "Divorce," of chapter 580, involving "Annulment, Divorce, and Separation," and provides in pertinent part:

Part III. DIVORCE

Support orders; division of property. (a) Upon granting a divorce, or thereafter if, in addition to the powers granted in subsections (c) and (d), jurisdiction of those matters is reserved under the decree by agreement of both parties or by order of court after finding that good cause exists, the court may make any further orders as shall appear just and equitable

In addition to any other relevant factors considered, the court, in ordering spousal support and maintenance, shall consider the following factors:

- (1) Financial resources of the parties;
- (2) Ability of the party seeking support and maintenance to meet his or her needs independently;
- (3) Duration of the marriage;
- (4) Standard of living established during the marriage;
- (5) Age of the parties;
- (6) Physical and emotional condition of the parties;
- (7) Usual occupation of the parties during the marriage;
- (8) Vocational skills and employability of the party seeking support and maintenance;
- (9) Needs of the parties;
- (10) Custodial and child support responsibilities;
- (11) Ability of the party from whom support and maintenance is sought to meet his or her own needs while meeting the needs of the party seeking support and maintenance;
- (12) Other factors which measure the financial condition in which the parties will be left as the result of the action under which the determination of maintenance is made; and
- (13) Probable duration of the need of the party seeking support and maintenance.

. . . .

(f) Attorney's fees and costs. The court hearing any motion for orders either revising an order for the custody, support, maintenance, and education of the children of the parties, or an order for the support and maintenance of one party by the other, or a motion for an order to enforce any such order or any order made under subsection (a) of this section, may make such orders requiring either party to pay or contribute to the payment of the attorney's fees, costs, and expenses of the other party relating to such motion and

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applicable statutes[,]” with respect to HFCR Rule 68, except, perhaps, for the Uniform Parentage Act which, by its terms, would not apply to the protection of children.³ In addition, as DHS points out, the parentage act specifically states that “[t]he action may be joined with an action for divorce, annulment, separate maintenance, or support.” HRS § 584-8(a) (Supp. 1996).⁴ There is no such provision in chapter 587 for either costs or attorney’s fees or for joining a CPS case with a divorce or paternity action.

In light of the foregoing circumstances, I believe the failure to exclude child protective contested case hearings from

²(...continued)
hearing as shall appear just and equitable after consideration of the respective merits of the parties, the relative abilities of the parties, the economic condition of each party at the time of the hearing, the burdens imposed upon either party for the benefit of the children of the parties, and all other circumstances of the case.

³ The Uniform Parentage Act contains a section regarding fees and costs similar to the divorce statute HRS § 580-47, and which thus qualifies as an “other applicable statute” for the purpose of measuring costs under HFCR Rule 68:

Costs. The court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pre-trial proceedings, including genetic tests, subject to the provisions of section 584-11(f), to be paid by the parties in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid by the State, or such person as the court shall direct.

HRS § 584-16 (Supp. 1997).

⁴ HRS § 584-8(a) states:

Jurisdiction; venue. (a) Without limiting the jurisdiction of any other court, the family court has jurisdiction of an action brought under this chapter. The action may be joined with an action for divorce, annulment, separate maintenance, or support.

HFCR Rule 68 was an oversight, especially in view of the Rule's exclusion of "law violations and criminal matters" which similarly are initiated by the State. In that regard, an amendment of the Rule is imperative.