

CONCURRENCE AND DISSENT BY ACOBA, J.

I respectfully concur in part and dissent in part.

I.

I believe that grandparents have standing, in their own right, based on cognizable legal interests, to assert a constitutional right under the Hawai'i Constitution for placement of their grandchildren with themselves. Cf. Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977) (contrasting the asserted liberty interest in the foster care relationships, which is a creation of state law, with "the liberty interest in family privacy that has its source . . . in intrinsic human rights, as they have been understood in 'this Nation's history and tradition'" (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)); Moore, 431 U.S. at 500-01 (plurality opinion) (rejecting the contention that Supreme Court precedent limited substantive due process rights to "the nuclear family," noting that "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice [grandmother living with her grandsons] involved in this case"); Moore, 431 U.S. at 511 (Brennan, J., concurring) ("[T]he choice of the 'extended family' pattern is within the 'freedom of personal choice in matters of . . . family life (that) is one of

the liberties protected by the Due Process Clause of the Fourteenth Amendment." (Quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974). (Ellipses in original.))).

Such standing is also implicated by the statutory right of grandparents to sue for custody of a minor grandchild. See In re Guardianship of Doe, 93 Hawai'i 374, 385, 4 P.3d 508, 519 (App. 2000) (the provision for awards of custody to persons other than the father or mother whenever the award serves the best interest of the child in Hawai'i Revised Statutes (HRS) § 571-46(2) indicates that "our jurisdiction is similar to the majority of jurisdictions which adopt a custody presumption in favor of parents subject to rebuttal"); Camerlingo v. Camerlingo, 88 Hawai'i 68, 76, 961 P.2d 1162, 1170 (App. 1998) ("Visitation rights for grandparents do not hinge on visitation rights of a [non-custodial] parent, since HRS § 571-46.3 recognized that a grandparent may file an independent action for his or her own visitation with a grandchild." (Emphasis added.)); Id. at 72, 961 P.2d at 1166 (holding that under HRS § 571-47(7), "reasonable visitation rights are to be granted [to grandparents] subject to the court's properly exercised discretion").

II.

However, I cannot conclude as a matter of law that the family court's findings of fact that the best interests of the children do not lie in placing them with grandparents are clearly erroneous. The only factual finding challenged by the Appellants is the court's determination that "no appropriate family

placement [was] available at the time of the trial."¹ Given the multitude of facts found by the court, which Appellants have not challenged, the court's finding that there was no appropriate placement within the family, including with Appellants, was not clearly erroneous.



¹ In their Opening Brief, Appellants cite to the court's seventh conclusion of law, which, in full, declares that the question of whether the children have a constitutional right to family placement is hypothetical and thus need not be resolved because no appropriate family placement is available. In their points of error, however, Appellants frame the issue as a factual one, contending that "[t]he [c]ourt erred in concluding that no appropriate family placement was available" The court expressed the same sentiment as Finding of Fact No. 241, which states, "Given their normal and additional needs, an appropriate family placement for the children is not available." Thus, Appellant's objection is most accurately construed as raising a factual error, and should be treated as such.