E ‘Onipaʻa i Ke Kulāiwi
A Legal Primer for Quiet Title & Partition Law in Hawaiʻi

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with
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OHA
OFFICE OF HAWAIIAN AFFAIRS
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Though more work remains to be done, through this primer, individual informational assistance for pro se defendants in quiet title and partition cases, and legal clinics at the William S. Richardson School of Law, we hope that the A‘o Aku A‘o Mai Initiative will have a lasting legacy that will benefit our community into the future.

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I. INTRODUCTION

_He lani i luna, he honua i lalo._

_Heaven above, earth beneath._¹

Aloha kākou!

This primer is designed to offer readers a better understanding of the legal processes associated with quiet title and partition lawsuits in Hawai‘i and to provide a foundation for those who wish to protect their ancestral land interests using the legal system.

We hope that the information in this primer is helpful to those who would like to learn more about Hawai‘i land law. None of this information, however, is legal advice. We highly encourage consultation with an attorney for specific advice related to a particular situation; we recognize, however, that this may not be an option for everyone. Anyone who decides to participate in a lawsuit as a _pro se_ (is representing him or herself in a lawsuit) defendant is ultimately responsible for reading and applying any and all applicable rules.

Part II of this primer traces the history of land tenure and ownership in Hawai‘i. The impact of partition by sale cannot be understood without a discussion of the importance of ‘āina and traditional Native Hawaiian land tenure. This section also touches on several foundational events, which set the stage for or greatly contributed to modern day land law in Hawai‘i such as the Māhele, the Kuleana Act, the hui movement, the rise of agricultural plantations, the 1895 Land Act, annexation, and statehood. The amount of land held by Native Hawaiians rapidly declined after Western contact. Quiet title and partition lawsuits, or actions, are other mechanisms by which Native Hawaiians continue to be divested of their interests in ancestral lands.

Part III explores the concept of co-tenancy as the basis for the rights and remedies involved in quiet title and partition actions. Co-tenancy occurs whenever more than one person has an unidivided interest in an entire parcel of land. In Hawai‘i, this is a very common form of land ownership and is analogous to a marriage, as it implies certain rights and responsibilities. The ultimate remedy for the dissolution of a marriage is divorce and in a co-tenancy it is partition or division of the property.

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Part IV provides an introduction to quiet title law in Hawai‘i, including steps in a quiet title action and the importance of proper notice. This section also discusses the doctrine of adverse possession and its relationship to quiet title law. Similar to Part IV, Part V provides an introduction to partition law in Hawai‘i, including steps in a partition action and a description of the powers of a court in these lawsuits.

Part VI discusses some policy impacts of quiet title and partition actions. This section examines the prevalence of partition by sale in Hawai‘i, the disparate impact that partition by sale has on the Native Hawaiian community, and the quiet title and partition systems’ disruption of traditional Native Hawaiian notions of ‘ohana and kuleana.

Part VII provides potential legal handles for people who are involved in a quiet title and/or partition action but who are representing themselves without the help of an attorney. This section discusses pro se representation and directs readers to Appendix B, a CD at the end of this primer, which contains materials that may be useful for a quiet title and/or partition action pro se defendant. Some people find themselves involved in a quiet title and/or partition action without the help of an attorney; for different reasons, these people have no choice but to participate pro se. A main goal of this primer is to provide useful materials for a pro se defendant involved in a quiet title and/or partition action so that he or she can more effectively represent him or herself. In addition to introducing readers to the materials contained in Appendix B, part VII examines genealogical research and translation of important legal documents, both important steps for anyone who wants to defend ancestral lands. This section also looks at other mechanisms by which Native Hawaiian families can preserve land for future generations and manage a pending lawsuit, such as with the creation of a family land trust or limited liability corporation.

A glossary of terms is included at the end of the primer, as is a list of resources and references that can be found in Appendix A. As previously mentioned, Appendix B is a CD which contains materials that may be useful for a pro se defendant in a quiet title and/or partition action. The CD includes frequently asked questions, excerpts from the Hawai‘i Rules of Civil Procedure and Rules of the Circuit Courts of the State of Hawai‘i, informational sheets, and sample legal documents and forms. This information has proven useful for pro se defendants involved in quiet title and partition actions and we encourage readers to make use of it.

Native Hawaiians are undoubtedly faced with many challenges in attempting to protect and maintain ancestral lands. This primer seeks to shed light on the confusing legal processes of quiet title and partition law in Hawai‘i. Education and empowerment are important steps in the battle to preserve and maintain Native Hawaiian-held ancestral lands for future generations. E ‘onipa‘a i ke kulāiwi: take a stand for ancestral lands!
II. HISTORICAL BACKGROUND

He ali‘i ka ʻāina; he kauwā ke kanaka.

The land is a chief; man is its servant.  

This section provides readers with an overview of the incalculable importance of ʻāina to the Native Hawaiian community as well as an introduction to traditional land tenure in Hawai‘i. Some major historical events that drastically altered the traditional system of land tenure, and contributed to the overall diminution of Native Hawaiian-held lands, are also discussed. We hope to provide readers with enough background so that each person can better appreciate the disparate impact that Western legal tools, such as quiet title, partition, and adverse possession continue to have on the Native Hawaiian community. First we look at ʻāina and traditional land tenure in Hawai‘i before Western contact in 1778.

A. ʻĀina & Traditional Land Tenure

For Native Hawaiians, the ʻāina is more than an object to be used and possessed, it is a member of the ʻohana (family) that must be cared for. The Kumulipo, one of Hawai‘i’s great cosmogonic chants, explains the familial relationship between Wākea (the sky-father) and Papa (the earth-mother), the ʻāina (land), kalo (taro), and Kānaka Maoli (the Native Hawaiian people). This deep relationship gives rise to the responsibility of Native Hawaiians to mālama (protect and care for) the ʻāina and all it produces.

Prior to Western contact, land management in Hawai‘i looked little like it does today. Each moku (island) was divided into large ʻokana or kalana (districts) generally made up of ahupua’a, or pie-shaped areas of land stretching from the mountains out into the sea. Often ahupua’a contained ʻili or smaller sections of land that might have a lele, a small area in another ahupua’a, to allow residents the ability to cultivate and gather resources that were not available within their own ʻili or ahupua’a. Maka‘āinana (people of the land) farmed, fished, gathered, and labored on the land. Konohiki (land stewards) coordinated the activities of maka‘āinana in growing and gathering food and other products, that were then given to the various ali‘i (chiefs), including the ali‘i nui (high chief), for their sustenance. Ali‘i were responsible for caring for maka‘āinana by maintaining pono

2 Puku‘i, supra note 1, at 62 (no. 531).

3 For a more thorough explanation of Hawai‘i’s history as well as specific historical events, see NATIVE HAWAIIAN LAW BOOK [hereafter Law Book, Historical Background Chapter] (Historical Background) (Melody Kapilialoha MacKenzie et al. eds., forthcoming 2013).
(harmony) with the akua (gods) and honoring the ‘āina. Under this model of land usage, no one person owned the land. Instead, the land was collectively cared for and used by all.

Fast-forward now to the rise of Kamehameha I who united the Hawaiian Islands under his rule, the fall of the kapu system, and the introduction of Christianity. Next we briefly examine some of the events that led Kamehameha III (Kauikeouli) to divide and privatize land in Hawai‘i during the Māhele. Ownership of land can often be traced back to this time period and Māhele documents are commonly relied upon in quiet title and partition lawsuits.

**B. From Unification of the Kingdom to the Māhele**

After European contact, Kamehameha I used new Western resources and, later, negotiation to unite all of the Hawaiian Islands by 1810. Because of his long reign, the ali‘i overseeing and controlling land under Kamehameha I enjoyed a long tenure. When Kamehameha I died in 1819, his successor, Kamehameha II (Liholiho), generally left the same ali‘i in control. Later that same year, Kamehameha II abolished the kapu system, the intricate system of religious and social laws by which Native Hawaiians lived. Calvinist missionaries arrived five months later in 1820 and introduced Christianity along with capitalism and the concept of land as a commodity. The struggle between competing traditional and Western understandings of land led to the Māhele (division and privatization of land) and the rise of a Western-style system of land tenure.

Prior to the Māhele, several important events occurred that laid the foundation for this drastic change in the land tenure system. In 1839, Kamehameha III (Kauikeouli), Kamehameha II’s successor, issued a Declaration of Rights that established certain protections for maka‘āinana independent of their ali‘i and also recognized property rights. The next year, he promulgated the Constitution of 1840 that explained:

Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property.

Thus, Kamehameha III emphasized the trust relationship that had existed between ali‘i and maka‘āinana for the ‘āina, and its continuation in the new Hawaiian government.

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5 Kame‘elehiwa, supra note 4, at 74.
6 Kame‘elehiwa, supra note 4, at 138.
The Māhele, as viewed by modern scholars, is not one specific event but consists of several laws and actions that legally changed land tenure and ownership in Hawai‘i. The term māhele, meaning to divide or share, describes both the physical division and the process of partitioning legal interests in the ‘āina. Kamehameha III intended the Māhele to divide the ‘āina equally among the mō‘ī (highest, most supreme ali‘i), ali‘i, and maka‘ainana.

The first step in the Māhele was the establishment of the Board of Land Commissioners to Quiet Land Titles (“Land Commission”) in 1845 to address the claims of individuals for specific pieces of land. The Land Commission examined and awarded titles to claims for land, thereby helping to convert the communal system to a private one. Many maka‘ainana, however, did not support this idea and circulated petitions against this new system that would create competition with foreigners for the ‘āina that maka‘ainana had cultivated. Maka‘ainana were gravely concerned that many foreigners had the financial resources to obtain land while maka‘ainana often did not.

In 1846, the Land Commission examined the contemporary system of land tenure and established seven principles to guide its work. These principles proclaimed that three classes had interests in the land: the government, ali‘i, and Native tenants. The principles established guidelines for the land distribution process and how land disputes would be resolved. The principles also included the proportion of compensation that a claimant would give to the government for extinguishing the king’s interest in the parcel. The last principle established that all claims were to be brought before the Land Commission by February 14, 1848.

In January 1848, Kamehameha III and the ali‘i began to separate out their interests in all of the lands in Hawai‘i. Kamehameha III claimed about two-thirds of the land of the Kingdom and the ali‘i received the remaining one-third. Kamehameha III then divided his lands into two and reserved a portion for his own use (Crown Lands). The larger portion, approximately 1.5 million acres of land, he “set apart forever to the chiefs and people” as part of the Government Lands. The ali‘i and konohiki lands were awarded through Konohiki Awards that generally identified the lands by name only and followed the ancient boundaries. All of these lands—Crown, Government, and Konohiki Lands—were still subject to the rights of Native tenants.

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8 Kame‘eleihiwa, supra note 4, at 193.
9 Kame‘eleihiwa, supra note 4, at 193.
10 Jon M. Van Dyke, Who Owns the Crown Lands of Hawai‘i 35 (2008). Originally, maka‘ainana had two years to file and prove their claims. Although the deadline to prove claims was extended until 1854, the deadline for maka‘ainana to file claims was not extended. The date for konohiki or their heirs to file their claims was eventually extended until January 1, 1895.
11 Van Dyke, supra note 10, at 41-42.
12 Law Book, Historical Background Chapter, supra note 3.
13 See Law Book, Historical Background Chapter, supra note 3.
The final part of the Māhele, carried out through the Kuleana Act, was to distribute land to makaʻāinana. Some quiet title and partition actions in Hawaiʻi involve precious Kuleana parcels.

C. The Kuleana Act

In August 1850, the Kuleana Act was passed. The Kuleana Act allowed a Native tenant to claim a house lot of no more than a quarter acre and the land that the tenant had actually cultivated, provided that the tenant paid for a survey and had two witnesses verify the claim. Less than thirty percent of Native Hawaiian males received Kuleana Awards, which totaled 28,658 acres, less than one percent of the land area of Hawaiʻi.14 Several reasons, including makaʻāinana’s unfamiliarity with the new system of private land and property ownership, contributed to this extremely low figure.15 In addition, the short time allotted to file claims (especially for those living in the country), the inconsistency of, and expense for, obtaining land surveys are also possible factors.16 Moreover, makaʻāinana may have been intimidated by aliʻi not to make claims, which would diminish aliʻi lands; or, they may have felt that claiming land was an act of betrayal to the aliʻi.17

Since not all Natives would be able to claim kuleana parcels, the Kuleana Act also provided makaʻāinana with the option to purchase government lands at a minimum of fifty cents per acre.18 Recent scholarship suggests that makaʻāinana received more land through this provision of the Kuleana Act than was previously thought.19 In any case, although the actual number of Kuleana Awards may have been low, scholars generally agree that, “these lands were the most fertile and productive.”20

Next, we examine some key events that contributed further to the loss of Native Hawaiian-held lands and the rise of agricultural plantations, which had a profound effect on land in Hawaiʻi. It is important to recognize the difference between traditional Native Hawaiian concepts of land tenure and plantation uses of land as a commodity to be bought and sold. Though large-scale agricultural production has declined, today, former plantations initiate many quiet title and partition actions as way to gain title to and develop land.

14 Kameʻeleihiwa, supra note 4, at 295.
15 Law Book, Historical Background Chapter, supra note 3.
16 See Law Book, Historical Background Chapter, supra note 3.
18 Law Book, Historical Background Chapter, supra note 3 (citing Act of Aug. 6, 1850, 1850 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 202 § 4).
D. The Continued Loss of Hawaiian Lands

In the years following the Māhele, Western influence over land continued to increase. By 1864, Westerners had purchased over 320,000 acres of Government Land and by 1893, the Kingdom had sold 613,233 acres of Government Land at an average price of 92 cents per acre.21 Moreover, it has been argued that, “although Hawaiians made the largest number of purchases, the bulk of the acreage went to non-Hawaiians.”22

Large agricultural plantations became significant landholders in Hawai‘i, often at the expense of maka‘āinana. This acquisition of land was not immediate; at first, plantation owners preferred leasing land to buying it. The motivation for leasing was to protect the plantation’s investments in the event that certain areas were not productive. Once plantations discovered the most profitable and productive areas, they began to purchase land. Plantations also used other means to accumulate larger land bases, such as adverse possession, discussed in more detail below in Adverse Possession & Its Relationship to Quiet Title Law in Hawai‘i. Because many families sought employment in urban areas and migrated out of the country, land was often left unattended and vulnerable to adverse possession.

In the years after the Māhele, Native Hawaiians sometimes banded together to form large hui (groups) that held land “communally.”23 Forming hui, often on purchased Government Land or even whole ahupua‘a purchased from ali‘i, was a common practice especially on Maui and Kaua‘i. Large land hui sometimes owned thousands of acres, with memberships of more than a hundred people. Over time, as hui members died, the land interests became more fractionated with numerous heirs, some of whom sold their interests to plantations. Today, hui lands are sometimes involved in quiet title and partition actions.

In 1895, after the 1893 illegal overthrow of Queen Lili‘uokalani and the Hawaiian Kingdom, the Republic of Hawai‘i enacted the Land Act of 1895. This Act merged the Crown Lands and Government Lands into Public Lands, and allowed the Crown Lands to be sold.24 The 1895 Land


22 Law Book, Historical Background Chapter, supra note 3 (referencing Neil M. Levy, supra note 18, at 859).

23 Law Book, Historical Background Chapter, supra note 3 (citing Robert H. Stauffer, Kahana: How the Land Was Lost 108-11. 125-27 (2004). Stauffer suggests that the hui movement was viewed by hui members as a “counter-revolt to gain some of what was taken in the Great Māhele.” Id. at 125. See also Leslie J. Watson’s five-part series on Hawaiian Land Huis, Honolulu Star-Bulletin, December 12–16, 1932.

24 Law Book, Historical Background Chapter, supra note 3.
Act also established a homesteading program on the Public Lands. It is estimated that “more than 40,000 acres of public land were alienated under this program,” and one report suggests that almost a quarter of those acres were from the Crown Lands.

After the rise in the political power of the agricultural plantations, the illegal overthrow in 1893, and the 1895 Land Act, Hawai‘i land law changed further when Hawai‘i was made a territory of the United States in 1898. Next, we look at annexation and its aftermath.

**E. Annexation & Its Aftermath**

Land tenure in Hawai‘i experienced yet another change when the Republic of Hawai‘i was annexed by the United States in 1898. Because the votes necessary to secure a treaty could not be obtained, the United States Congress passed a Joint Resolution that attempted to cede sovereignty over Hawai‘i to the United States. The Joint Resolution also ceded all Public, Government, or Crown Lands to the United States. In 1900, the Organic Act established a government and political structure for the Territory of Hawai‘i, which included administration of the Public Lands (Crown and Government Lands). The Organic Act, however, emphasized that these lands were to be held in “trust” and any funds from the sale of these lands were to be applied “for the benefit of the inhabitants of the Territory of Hawaii.” Thus, the Crown and Government Lands of the Kingdom of Hawai‘i were transferred to the United States without compensation to, or the consent of, Native Hawaiians.

In the early years of the Territory of Hawai‘i, homesteading was encouraged but did not reach the level that the government had hoped for. Many maka‘āinana also lost Kuleana lands during this period because: (1) many Native Hawaiians could not afford the various costs associated with maintaining land, and (2) kuleana parcels leased to sugar plantations changed so much in appearance that they literally could not be found.

In 1921, in recognition of the deteriorating economic and social conditions of Native Hawaiians, Congress passed the Hawaiian Homes Commission Act (“HHCA”), to “provide ninety-nine-year...”

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27 “Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States,” 30 Stat. 750 (1898).


29 Van Dyke, *supra* note 10, at 223.
homestead leases of land at a nominal fee for residences and farm lots for Native Hawaiians.”\(^{30}\) The HHCA made about 203,500 acres of Public Lands (Crown and Government Lands) available to Native Hawaiians, defined as persons of not less than fifty-percent Hawaiian ancestry.\(^{31}\) Although the HHCA was meant to provide an opportunity for Native Hawaiians to farm and sustain themselves, the execution of the program has not lived up to this goal.

Next, we fast-forward to another major event when Hawai‘i went from a territory to becoming a state. Hawai‘i land law experienced serious changes during this time as the Public Lands previously held by the federal government were transferred to the new state government.

**F. Statehood & Its Effects on Hawai‘i Land Law**

Public land law in Hawai‘i changed again in 1959 with statehood. Most of the Public Lands (Crown and Government Lands) held by the United States were transferred to the state government through the Admission Act.\(^{32}\) The 1959 Admission Act also transferred control of the HHCA lands and program to the state, but the federal government retained oversight authority over the program.\(^{33}\) In addition, Section 5(f) of the Admission Act established that the Public Lands, as well revenues from those lands, would be held by the state for five express purposes, including the benefit of Native Hawaiians.

In 1978, the people of the State of Hawai‘i amended the State Constitution to address concerns over the proper use of Section 5(f) lands and revenues in relation to Native Hawaiians. One amendment to the Constitution clarified that the majority of the Public Lands are held in a Public Trust for Native Hawaiians and the general public. In addition, the Office of Hawaiian Affairs was established and tasked with using a portion of the revenues from the Public Trust lands for the betterment of the conditions of Native Hawaiians.\(^{34}\)

Hawai‘i land law has repeatedly undergone massive changes, most often to the detriment of Native Hawaiians. Keeping in mind all of the events just discussed, we now turn to today where

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31 Local sugar growers, fearful that large numbers of Native Hawaiians would demand homestead lands, promulgated the fifty percent blood quantum requirement in an effort to reduce the number of people eligible for the program. For more information on the HHCA, see *Law Book, Historical Background Chapter,* *supra* note 3.


34 See *Law Book, Historical Background Chapter,* *supra* note 3.
quiet title, partition, and adverse possession law contribute to the further diminishment of Native Hawaiian-held ancestral lands.

G. Today

Though Hawai‘i land law has experienced drastic changes, many Native Hawaiians still have a strong connection to ancestral lands. For some ‘ohana this bond is both spiritual and physical; coming together to find a way to preserve this relationship for future generations is invaluable.

Unfortunately, many Native Hawaiian ʻohana who were fortunate enough to have received land during or after the Māhele were unable to hold onto the land. Often, the causes were economic. But, adverse possession by large landholders and legal actions to quiet title and partition interests in land that resulted in a determination, division, and/or sale of those interests have contributed to the decrease in lands held by Native Hawaiian families. Native Hawaiians have struggled to maintain ʻāina as a source of cultural and physical sustenance, as well as political authority and self-governance, in a Western system that does not incorporate or recognize the communal land values of traditional Native Hawaiian culture.

Next, we look at the doctrine of co-tenancy, which is a key legal concept that underlies many aspects of land law in Hawai‘i, including quiet title and partition law. Though the basic concept of co-tenancy is not directly at odds with traditional Native Hawaiian notions of land tenure, the legal rights that accompany it are and provide the backdrop for many of the issues discussed in this primer.
III. A Key Legal Concept: Co-Tenancy

He honu ka ‘āina he mea pane’e wale.

Land is like a turtle: it moves on.\(^{35}\)

Co-tenancy is a legal doctrine that underlies many aspects of land law in Hawai‘i, including quiet title and partition law. Co-tenancy occurs where two or more people own interests in the same parcel of land at the same time. There are two basic types of co-tenancy: joint tenancy and tenancy in common. A joint tenancy occurs when two or more people own an interest in property in equal shares at the same time and by the same written legal document, such as a deed or will. Joint tenancies are unique in that they include a right of survivorship, which means that one co-owner automatically inherits the interest of the other co-owner upon his or her death. A tenancy in common exists where two or more people have separate, undivided interests in the whole property. It does not include a right of survivorship; therefore, when one co-owner dies (without first having conveyed the interest, and without a will), that person’s interest passes to his or her heirs, and not to the other co-owners.

It can be helpful to think of co-tenancy as a marriage because co-tenants have certain duties, rights, remedies, and defenses available under Hawai‘i law in the event that things do not work out. For example, a co-tenant has the duty not to commit waste or destruction as well as to contribute to the payment of taxes and maintenance of the property. A co-tenant has the right to reimbursement for improvements made to the property as well as not to have his or her interest negatively impacted by the actions of another co-tenant.

The duties and rights that accompany the Western concept of co-tenancy are not completely at odds with traditional Native Hawaiian ideas about land tenure, but the right of a co-tenant to dissolve his or her co-tenancy relationship with others and sever his or her interest from that of the whole is a distinct departure from traditional resource management concepts.

The right to sever one’s interest from his or her co-tenants is called partition. In the context of a co-tenancy, the remedy of partition is like a divorce in a marriage. It is the ultimate remedy that a co-tenant has to sever his or her ties to the other co-tenants. The concept of partition is discussed below in Introduction to Partition Law in Hawai‘i, but generally speaking, there are two basic ways to partition: (1) partition in kind, or physical division of the land, where the co-tenants receive portions of the land according to their interests, and (2) partition by sale.

\(^{35}\) Puku‘i, supra note 1, at 68 (no. 589).
where the property is typically sold at a court-ordered public auction and the proceeds are divided among the co-tenants according to their interests. A co-tenant’s right to partition is absolute, no matter how small his or her interest in the property. In a partition, the co-tenant seeking the partition has the responsibility to properly notify each and every potential interest holder; it is the constitutional right of a co-tenant to receive notice of an action that might affect his or her property. The importance of notice is discussed below in *Steps in a Quiet Title Action* and *Notice & Hustace v. Kapuni*. Where a co-tenant is trying to adversely possess the interest of another co-tenant, the notice requirements are even stricter. This is discussed below in *Adverse Possession of a Co-Tenant’s Interest*.

The defenses available to a co-tenant who opposes partition of a property are to argue for partition in kind, ask a court to order an open-market sale of the property, or partition by appraisal. These defenses do not prevent the property from being partitioned, but instead are different ways of getting a court to divide the property. Partition by appraisal is essentially a buy-out by one of the co-tenants. Other defenses that might prevent or delay a partition from taking place would be fact-specific to each case, and could include asserting that: (1) a plaintiff does not have good title or title to all of the property, (2) service was improper, or, (3) notice was insufficient. Please see *Overturning a Judgment On the Basis of Improper Notice in a Quiet Title Action*.

For the historical reasons discussed above and because of the great economic and intangible value of land, many unique Hawai‘i issues often prevent a co-tenant from successfully asserting the defenses just listed. These issues are discussed further in the *Policy Impacts of Quiet Title & Partition Actions* section below.

The rights, remedies, and defenses that accompany co-tenancy are essential to understanding quiet title and partition law in Hawai‘i. Quiet title law and typical steps in a quiet title action are discussed next. This section is meant to provide readers with a foundation for understanding the complicated field of quiet title law in Hawai‘i.
IV. Introduction to Quiet Title Law in Hawai‘i

*I luna no ka ua, wehe ‘e ke pulu o lalo.*

While the rain is still in the sky, clear the field below.36

A quiet title action is often used to determine legal ownership of land. A quiet title action is normally filed when a landowner must prove that he or she has good title, but where he or she cannot do so because there are clouds or breaks in the chain of title (defined below). The need to prove good title typically arises when a landowner wishes to sell, lease, mortgage, or develop his or her land. To prepare the sale, lease, or mortgage documents, the landowner must usually get a title report. A title report is like a genealogy of the property. It is prepared by a title company, which reviews records and comes up with a history of ownership called a chain of title. Each link in the chain is a recorded transfer of some interest in the property or other act that affects title to the property, such as: a deed, lease, mortgage, and/or probate order distributing the property to heirs. A probate order is an order from a judge validating a deceased person’s will and authorizing distribution of that person’s property. A break in the chain occurs when one or more of the links listed above is missing and cannot be located.

An example of a situation where a break in the chain of title exists is where A has received a recorded deed to property. A never conveys the property to anyone else. A then dies without a will. The next link in the chain of title is a deed from B, who is not related to A, to a third party C. The chain of title will have broken at A, since there is no link between A and B. In this instance, both A’s heirs and C and C’s heirs might have a claim to the property. A’s heirs may claim that A’s

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36 *Puku‘i, supra note 1, at 133 (no. 1231).*
interest passed by intestate succession (a conveyance that occurs by law where there is no will), while C and C’s heirs (if C has passed away) will claim that C obtained a valid interest through the deed from B.

A cloud on title exists when an act has occurred or a document or encumbrance has been recorded on title to property that impairs a landowner’s title or that makes title questionable. An example of clouded title is if three brothers (A, B, and C) each owned one-third of a piece of property as joint tenants, but brother A later sells the whole property to a developer without any record indicating that brothers B and C had given up their interests. Recall that joint tenancy comes with a right of survivorship—if brother A dies, his interest will automatically pass to brothers B and C. In this instance, title would be considered clouded because brothers B, C, and their respective heirs might still be able to prove that they have a valid interest in the property. Other examples of clouds on title are mortgages that have been recorded against the property but have already been paid off, or recorded easements or restrictions that have expired or been terminated; in each instance, these documents are clouds on title until they are removed because they technically impair a landowner’s title. Property with broken or clouded title generally must have the title quieted, or determined, before it can be partitioned.

**Example of Clouded Title**

- **A**
  - brother A sells entire property to D, a developer, without telling brothers B & C
  - D developer D might have a claim to the property as long as he bought it in good faith

- **B**
  - brother B might still have a claim to the property
  - B’s Heirs could have a claim to the property

- **C**
  - brother C might still have a claim to the property
  - C’s Heirs could have a claim to the property

- **D**

A landowner may also file a quiet title action to secure ownership of lands created by accretion. **Haw. Rev. Stat. § 669-1(e).** Accretion refers to the process by which an area of land is increased by
the gradual deposit of soil or sand due to the action of a boundary river, stream, lake, pond, or tidal waters. *Maunalua Bay Beach Ohana 28 v. Hawai‘i*, 222 P.3d 441, 443 (Haw. Ct. App. 2009). This is most commonly seen in Hawai‘i when the ocean deposits soil or sand on adjacent upland property.

In addition, a landowner may file a quiet title action where he or she has reason to believe that another person may be claiming title to the landowner’s property by adverse possession, and where the landowner wishes to get a court to declare that the person has no right, title or interest in the landowner’s property. The doctrine of adverse possession and its requirements are discussed below in *Adverse Possession & Its Relationship to Quiet Title Law in Hawai‘i*.

The basic purpose of a quiet title action is to get a court determination of legal ownership of property, and in doing so, to clear all breaks or clouds in the chain of title. Some observe as a matter of policy that the public interest is served when clouds on title to property are removed so that land may be used to its full potential. A successful quiet title action creates marketable title. So, on a practical level, clearing broken or clouded title facilitates the sale, development, and/or financing of property. Because litigation is expensive, a quiet title action is not usually filed unless it is needed for this purpose. In the history of Hawai‘i landholding and development, large tracts of land have frequently been acquired by agricultural plantations, ranches, estates, developers, and other users who have had broken chains of title. Often, the breaks have occurred where a Native Hawaiian was the last holder of all or a portion of the interests. Quiet title actions have had a profound effect on Native Hawaiians’ ability to retain ancestral lands.

Next, we look at typical steps in a quiet title action. It is important to keep in mind that each quiet title action is different and may not include all of the steps discussed below. Alternatively, a quiet title action may include more steps at the discretion of the judge who is overseeing the case.

### Basic Case Timeline

- **Complaint filed**
- **Summons issued**
- **Plaintiff serves Defendant with Complaint and Summons (in person, via mail, or by publication)**
- **Motion to Dismiss Complaint**
- **Entry of Default**
- **Return Date Hearing** (answer must be filed or defendant must appear in court)
- **Various Motions filed such as Motion to Join, Motion to Continue, etc. Some of these motions require hearings.**
- **Discovery**
- **Motion for Summary Judgment and Hearings on Motion**
- **Trial**
A. Steps in a Quiet Title Action

There can be many steps in a quiet title action. Included below is a roadmap of steps that are common in a quiet title action in Hawai‘i, including filing the lawsuit, required participation, service of process, answering, entry of default, discovery, motions for default and summary judgment, and trial. First we look at who can file a quiet title action.

1. Who Can File?

Hawai‘i Revised Statutes § 669 governs quiet title actions in Hawai‘i. Any person may file a quiet title action against another person who claims, or may claim, an interest in land that is at odds with the person filing the action. Haw. Rev. Stat. § 669-1(a). In a quiet title action, as in any lawsuit, the individual or entity who files the action is the plaintiff. A plaintiff brings suit against a defendant. Each person involved in a case is a party. Each party may be referred to as a claimant if the party is claiming an interest in the property in question. Next, we look at who is required to participate in a quiet title action.

2. Who Has to Participate?

Hawai‘i Revised Statutes § 669-1 details who should participate in a quiet title action. Any person who should be present in the lawsuit for a court to completely determine or settle the issues may participate. Haw. Rev. Stat. § 669-2(a). Parties who have potential claims or interests, or who are necessary to complete determination or settlement of the issues in a case, typically include co-tenants (or their heirs or takers), heirs of or takers from persons in the chain of title who were the last holders before a break in the chain of title, the grantee under a stray deed, adjoining landowners, the state, the county in which the property is located, and/or OHA. Haw. Rev. Stat. § 669-2(c)(1), -2(d), -2(e). A taker is a person who receives property after someone passes away. For example, if widow A has three children B, C, and D, and A dies without a valid will, B, C, and D will each take a percentage of A’s property. A stray or wild deed is one that shows up in the chain of title, but is from a grantor who has no recorded interest in the property. A grantor is the person who grants the deed to a grantee who receives it.

An adjoining landowner is often named as a defendant in a quiet title lawsuit “to insure against or resolve any potential boundary disputes” that may arise during the course of the quiet title action.37 Under Hawai‘i Revised Statutes § 669-2(d), the State of Hawai‘i may be joined as a party in a quiet title action if a plaintiff can show either that the state is an adjoining property owner or

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or, if a plaintiff can show, through a title search, that the state has an interest in the property in question. A plaintiff must provide the title search to the state along with the complaint. Haw. Rev. Stat. § 669-2(d). Although the state may be named in a quiet title action, a plaintiff cannot assert an adverse possession claim against the state. Kahoomana v. Moehonua, 3 Haw. 635, 640 (1875) (citing Gibson v. Chouteau, 80 U.S. 92, 99 (1871) (explaining the rule that “statutes of limitation do not run against the State”)).

In addition, unknown persons may also be parties where a plaintiff has reason to believe that there are or may be persons who may claim an interest in the land through a named defendant, and where the plaintiff does not yet know the identity of those persons. These unknown persons may include the potential or unknown heirs of a defendant.

Also, in any quiet title action brought under Hawai‘i Revised Statutes § 669-1, OHA must be joined as a defendant, by service upon OHA when: (1) the land claimed by a plaintiff is kuleana land, and (2) a plaintiff has reason to believe that an owner of a kuleana parcel died without a will and without heirs. Haw. Rev. Stat. § 669-2(e). In an adverse possession case, every person known to have a claim as well as landowners and occupants of bordering property must be included. Haw. Rev. Stat. § 669-2(c)(1). In practice, it is uncommon for a plaintiff to file a quiet title action against only some of the potentially interested parties. This is because title to the property would still be unclear and then it would be difficult to sell, insure, or mortgage.

Next, a plaintiff must file the appropriate documents with a court and must provide notice of the lawsuit to those who potentially have an interest in the land. This is called service of process.

3. Service of Process

   a. The Complaint & Summons

   A quiet title action starts when a plaintiff files a complaint and serves a defendant with the complaint and summons. A complaint is the initial pleading that starts a lawsuit and must explain why a court can hear a case, what the plaintiff is claiming, and what the plaintiff is asking the court to do. A summons is a document that requires a defendant to appear in court and to answer or respond to the complaint. Please see the sample complaint in Appendix B.

   A complaint and summons are filed together in the circuit court where the property is located. Haw. Rev. Stat. § 669-1(d). The Hawai‘i circuit courts are trial courts of general jurisdiction, which allows them to hear quiet title and partition actions. In a complaint, a plaintiff must identify any and all potentially interested parties who might have a claim to the land.
To determine who might have a claim to the property, a plaintiff typically hires a company to do a title search, which goes back to the Māhele. Three main companies perform title searches in Hawai‘i: Title Guaranty, First American Title Company, and Old Republic. It can take six months or more to get a search done and can cost thousands of dollars.

Once a plaintiff has properly filed a complaint and summons, a defendant may be notified in different ways, which is known as service of process. The way notice happens depends on whether or not a defendant is known or unknown, lives in Hawai‘i, or can be found.

Under Hawai‘i Rules of Civil Procedure Rule 4, when a defendant is known and is in Hawai‘i, the complaint and summons must be served together by having a sheriff or person over 18 years of age deliver it to the defendant or to an authorized agent. Haw. R. Civ. P. 4(c), (d)(1). An authorized agent is someone who may legally accept things on someone else’s behalf. A secretary, for example, is often authorized to sign for packages on behalf of his or her employer. If a defendant is a business, the complaint and summons are delivered to an officer or other agent who is authorized to receive them. Haw. R. Civ. P. 4(d)(3).

Hawai‘i Revised Statutes § 669-3 governs service of process when a defendant is not known, or is known but does not live in Hawai‘i. In the case of a known out-of-state defendant, a court may allow service by certified mail. Haw. Rev. Stat. §§ 669-3, 634-24. If a plaintiff proves that service cannot be made by certified mail to an out-of-state defendant, a court may allow the plaintiff to serve the defendant by publishing the summons in a newspaper. Haw. Rev. Stat. §§ 669-3, 634-23, -26. The newspaper must be of general circulation in the circuit where the property is located once per week for four successive weeks. Haw. Rev. Stat. §§ 669-3, 634-23, -26. If a defendant is served through publication, he or she can contact the plaintiff’s attorney to ask for a copy of the complaint. Service by publication for an unknown defendant is discussed next.

b. Providing Notice to an Unknown Defendant

The original quiet title statute of 1890 applied only to a known or named defendant. In 1959, however, the Hawai‘i legislature added three sections to the quiet title statute, which permitted a claimant to bring a quiet title action to determine ownership of real property and to use publication as a means of serving an unknown person. If a plaintiff properly employs the notice provisions, a court presumes that all parties with actual or potential interests in the property received notice of the quiet title action. Therefore, failure to appear in court is viewed as relinquishing any claims to the land, and allows for a court-ordered entry of default against an absent and/or unknown party. Haw. Rev. Stat. § 669-2(c)(2); Haw. R. Civ. P. 17(d). A defaulted party essentially loses his

38 See Law Book, Title Chapter, supra note 37.
or her right to participate in a case.

Because the consequences of default are so severe, it is extremely important that a plaintiff attempts to identify, locate, and provide notice to each defendant. A plaintiff must use due diligence to try to figure out a defendant’s identity and find him or her. If figuring out a defendant’s identity and location is not possible, a plaintiff must file either a declaration or an affidavit stating what measures were taken to try to find the defendant. Haw. Rev. Stat. § 634-23(2); Haw. R. Civ. P. 17(d). Both declarations and affidavits are sworn statements. The main difference between the two is that a notary public notarizes an affidavit.

If a court is satisfied with a plaintiff’s declaration or affidavit, it may permit the plaintiff to notify a defendant through publication. Haw. Rev. Stat. §§ 669-3; 634-23(2). Again, service by publication is not allowed unless a plaintiff convinces a court that he or she has exercised due diligence in attempting to identify and locate a defendant.

If a court authorizes service by publication, the service must be made in an English language newspaper published, and having general circulation, in the circuit where the lawsuit is taking place. Haw. Rev. Stat. § 634-23(3). If the lawsuit is filed outside the First Circuit (O‘ahu), the publication must also be made in an English language newspaper having general circulation in Hawai‘i, such as the Honolulu Star Advertiser. Haw. Rev. Stat. §§ 669-3; 634-23(3). General circulation means that the newspaper contains news and is distributed to the general population. Publication must occur at least once in each of four successive weeks. The last publication should occur not less than twenty-one days before a defendant is required to respond. Haw. Rev. Stat. §§ 669-3; 634-23(3).

A summons may be directed generally to all unknown defendants and those known defendants not located in Hawai‘i or who could not otherwise be served in Hawai‘i, and if service has been made on the known and unknown defendants as required, a court has jurisdiction to proceed as though all interested parties were personally served. Haw. Rev. Stat. § 669-2(c)(2).

In addition, a copy of the summons must be posted on the land that is the subject of the lawsuit. Haw. Rev. Stat. § 669-3. The notice procedures for a quiet title action are the same as those for a partition action. Please see the INTRODUCTION TO PARTITION LAW IN HAWAI‘I section below for more on noticing an unknown or absent defendant.

After a plaintiff completes service of process and provides notice to a defendant, the defendant must file an answer if he or she wants to participate in the case. Filing an answer is discussed next.
4. Filing an Answer

A defendant responds to a plaintiff’s complaint by filing an answer, which is a formal document that responds to each of the statements in the complaint, and asserts any defenses. If a defendant claims an interest that is adverse to a plaintiff, the defendant may also file a counterclaim against the plaintiff asserting that he or she has a superior claim to all or to a portion of the property, and a cross-claim against other defendants.

A defendant who is personally served must file an answer to a complaint within twenty days, unless otherwise specified by the court. Haw. R. Civ. P. 12(a)(1). If a defendant is served by mail, the defendant is given two extra days to file an answer. Haw. R. Civ. P. 6(e). When a court allows notice by publication, a defendant must respond by the deadline in the published summons, which will be no less than twenty-one days from the last publication. Haw. Rev. Stat. § 669-3. The published summons will require a defendant to either appear in person in court on the specified date (called the return date), or to file an answer by the return date. Please see Appendix B for more information and a sample answer and answer form.

The next step in a typical quiet title action is for a plaintiff to ask the court to enter the default of a defendant who did not answer the complaint or appear in court on the return date. Entry of default is discussed next.

5. Entry of Default

If, after being properly served with a complaint and summons, a defendant does not answer the complaint on time (or show up in court on the return date in the case of service by publication), a plaintiff will request that a court clerk default that defendant under Hawai’i Rules of Civil Procedure Rule 55(a). This usually means that defendant cannot participate in a case from that point on, unless he or she files a motion later to set aside the default. Haw. R. Civ. P. 55(a).

To set aside a default, a defendant must show good cause under Hawai’i Rules of Civil Procedure Rule 55(c), which could consist of not having been properly served, or in some instances, personal circumstances that made it impossible to respond on time. Haw. R. Civ. P. 55(c). A defendant should be diligent in seeking to set aside an entry of default.

It is important to note that an entry of default is different from a default judgment, which may occur later in a case. A default judgment is a final and binding judgment against a defendant who has failed to respond or otherwise defend against a plaintiff’s claims. Haw. R. Civ. P. 55(b). A quiet title defendant who receives a default judgment could lose any interest that he or she possesses in the land.
After the participants, or parties, in the quiet title action are determined, the discovery process begins. Discovery is the phase of a case where parties exchange information in preparation for settlement or trial.

6. Discovery

After a complaint, a defendant’s answer, and any other claims have been filed, a case proceeds to the next step, which is called discovery. This is the fact-finding phase of a quiet title lawsuit, where all parties have the opportunity to request information from each other, through documents, and through oral testimony at depositions. See Haw. R. Civ. P. 26. A plaintiff often uses this time to ask a defendant to produce any deeds, maps, Native testimonies, probate documents, genealogies, and other documents that the defendant has that supports the defendant’s claim to title.

Native testimonies are written records from the Māhele of peoples’ recollections of who owned or farmed land, who was part of whose family, who died when, who the konohiki were in the area, what land was used for, who paid commutation, where boundaries were located, what landmarks were nearby, etc. These testimonies can sometimes be helpful today where, for example, there are questions regarding which “Kahea” owned a parcel when there may have been multiple “Kaheas” in the area and the census information is incomplete. Native testimonies can also help determine the names and number of a Land Commission Award recipient’s children where the available information conflicts. These testimonies can be used to locate parcels that were not mapped or to help determine the boundaries of a parcel of land when the old survey cannot be located.

Discovery helps to determine whether a defendant has any valid claims or defenses to a plaintiff’s claims. A plaintiff may also send out what is known as interrogatories, which is a set of written questions to a defendant. Haw. R. Civ. P. 33. The interrogatories will typically ask a defendant to provide all of the facts on which his or her claim of title, if any, is based. A defendant is also free to perform his or her own discovery. This can be very important in a case where a defendant has proof that a plaintiff’s claim is based on incomplete or incorrect information. The discovery deadline is sixty days before the trial date. Haw. R. Cir. Ct. 12(r). Please see Appendix B for more information on discovery and sample interrogatories.

Usually towards the end of discovery, and sometime before settlement or trial, a plaintiff will file a motion for default judgment, which asks the court to issue a final and binding judgment against a defendant who has had his or her default entered and who has failed to overturn it. Motion for default judgment is discussed next.
7. Motion for Default Judgment

As previously discussed, if a defendant fails to file an answer or otherwise defend against a complaint, a plaintiff may ask a court clerk or the court for entry of default against that defendant. Haw. R. Civ. P. 55(b). An entry of default usually happens fairly early in a case and prevents a defendant from participating in the action unless he or she can show good cause to set aside the default.

After a defendant receives an entry of default, a plaintiff may then file a motion for default judgment against that defendant. A motion for default judgment is common in a quiet title and/or partition action and is sometimes filed in conjunction with a motion for summary judgment. If a judge grants a motion for default judgment, a defaulted defendant is bound by the court’s decisions regarding the case. Haw. R. Civ. P. 55.

A default judgment may be set aside by filing a motion for any of the reasons enumerated in Rule 60 of Hawai’i Rules of Civil Procedure including: mistake, newly discovered evidence that should have been uncovered through due diligence, fraud or misrepresentation, etc. Overturning a default judgment can be complicated and a motion must be filed within a reasonable time and not more than one year after a judgment was entered if based on a mistake, newly discovered evidence, or fraud. See Haw. R. Civ. P. 60(b). A defendant seeking to overturn a default judgment should therefore act quickly. A motion for summary judgment, discussed next, is also often filed towards or at the end of discovery, and can be filed at the same time as a motion for default judgment.

8. Motion for Summary Judgment

If no defendant files an answer and plaintiff is unopposed; or, if a defendant files an answer and the plaintiff is satisfied that he or she has enough proof to move forward, then a plaintiff will usually file a motion for summary judgment. This is a request to the court that it decide a case without going to trial. A motion for summary judgment must be filed and served no less than fifty days before the trial date. Haw. R. Civ. P. 56(a); Haw. R. Cir. Ct. 7(f).

In a quiet title action, for example, a motion for summary judgment would be appropriate if the ownership percentages in the land are not in dispute. If the parties agree on who owns what percent of the parcel; or, if a plaintiff has clear proof of ownership, he or she could file a motion for summary judgment because there would be no need for determination of that particular issue at trial.

In that instance, the plaintiff would also be the movant because he or she is moving or asking a court to do something. A movant must provide a court with all of the documents and testimony
needed to prove his or her claim of title to the property. A movant’s argument is outlined in his or her memorandum in support of the motion. That memorandum sets out the rule of law allowing a court to do what a movant is requesting and provides the argument for why a court should grant the movant’s request.

If a defendant believes that a plaintiff is not correct, that defendant can file a memorandum in opposition to the motion, with his or her own documents and testimony. If a defendant chooses not to respond to the motion for summary judgment by filing any memoranda, he or she may lose the opportunity to argue at the hearing. This is to insure that all parties have proper notice of the issues and arguments that will be addressed at the hearing.

At a hearing on any motion for summary judgment, any party who filed a memorandum may explain its position to the judge who will then rule or take the matter under advisement. If a motion is granted in full in favor of a plaintiff, a written order quieting title to the plaintiff will be filed in court. If there are no other claims in the lawsuit, then a written judgment will also be filed in court. A judgment is also usually recorded in the Bureau of Conveyances or Land Court, so that anyone doing a title search of the property later will have notice of the judgment quieting title. Please see Appendix B for an introduction to motion practice, further discussion of summary judgment, as well as a sample motion for partial summary judgment including a memorandum in support of the motion. Appendix B also includes a sample order granting a motion for partial summary judgment, a form motion for summary judgment, a sample memorandum in opposition, and a form memorandum in opposition. If a quiet title action is not resolved by motion for summary judgment, or if only part of a case is resolved, the lawsuit will proceed to trial. Trial and burdens of proof are discussed next.

9. Trial & Burdens of Proof

More often than not, a quiet title action will be resolved on summary judgment or by settlement. If no motion for summary judgment is filed, or if one is filed but the plaintiff does not prevail, then typically at around ten months to a year into the lawsuit, a court will set a case for trial. At trial, all of the parties participating in the lawsuit appear in person to provide a court with testimony and documents to support their positions. A judge or jury will then rule on the quiet title claims. Parties may request a jury trial in a quiet title and/or partition action as long as title to the property is still in dispute. Haw. Rev. Stat. § 669-3.5.

While quieting title, the burden is on a plaintiff to prove either: (1) that he or she has good paper title to the property, or (2) that he or she holds title by adverse possession, by a preponderance of the evidence. Preponderance of the evidence means that a plaintiff’s evidence is more convincing than a defendant’s, or more likely to be true than not true. For example, a plaintiff must convince
a judge or jury that there is at least a fifty-one percent likelihood that he or she has good paper title to the land, or has met the requirements of adverse possession. If a judge and jury are only convinced that a plaintiff has a fifty percent chance of actually owning the property, the plaintiff will have failed to meet the preponderance of the evidence standard.

Initially, a plaintiff must bring forth enough evidence at trial to prove that he or she owns the land in dispute either through paper title or adverse possession. This is usually done via evidence of the initial land grant award and then tracing ownership forward to a plaintiff. *Alexander & Baldwin, Inc. v. Silva*, 248 P.3d 1207, 1213 (Haw. Ct. App. 2011). Ownership is typically traced through conveyances made by a landowner during his or her lifetime, devise, which happens through a landowner’s will, or descent. *Alexander & Baldwin*, 248 P.3d at 1213. Descent refers to the distribution of a person’s property to his or her heirs when that person dies without first conveying it and without a will. Another way of tracing ownership is through evidence of adverse possession, as provided in the quiet title statute. Haw. Rev. Stat. § 669-1.

A defendant need not bring forth any evidence if a plaintiff fails to prove ownership of the land in dispute. *Maui Land & Pineapple Co. v. Infesto*, 879 P.2d 507, 512 (Haw. 1994). If a plaintiff fails to prove ownership, a case is subject to dismissal, which means that the plaintiff is “not entitled to have its title quieted by the court, and the case ends without a determination of title.” *Alexander & Baldwin*, 248 P.3d at 1213.

If a plaintiff succeeds in proving ownership of the land in question, a defendant must rebut or contradict the evidence presented by the plaintiff. A defendant can bring forth evidence such as land grants, deeds, wills, testimony, etc., to help contradict a plaintiff’s proof.

If a plaintiff and defendant both “bring forward evidence supporting their claims of title, then the court must decide, based on the evidence presented, which party has superior title.” *Alexander & Baldwin*, 248 P.3d at 1213. To be successful in a quiet title action, a plaintiff must at least prove that he or she “has a substantial interest in the property” and that his or her “title is superior to that of the defendants.” *Maui Land & Pineapple*, 879 P.2d at 513. A defendant may prevent a plaintiff from quieting title by demonstrating that his or her title is superior to the plaintiff’s. A defendant, however, may not prevent a quiet title action by relying on the interests of a third party not involved in the action. See *Alexander & Baldwin*, 248 P.3d at 1213. The final judgment in a case will be entered in favor of the party that has proven its title by a preponderance of the evidence despite the claims and defenses of the other parties. Please see Appendix B for more information on trial preparation.

Sometimes a quiet title action will proceed through the motion for summary judgment, settlement, or trial phases without the participation of a defendant who should have received notice.
of the case but did not. If a defendant can prove that he or she was identifiable and locatable and
that a plaintiff did not exercise due diligence, the defendant may have grounds to overturn a final
judgment. The seminal case on the issue of proper notice in a quiet title action is Hustace v. Kapuni,
a 1986 Hawai‘i Intermediate Court of Appeals case. Overturning a judgment on the basis of
improper notice and Hustace v. Kapuni are discussed below.

B. Overturning a Judgment On the Basis of Improper Notice in a Quiet Title Action

Notice is a necessary part of every quiet title action, and must be provided to any person who
claims, or may claim, an interest in the property that is adverse to a plaintiff. Haw. Rev. Stat. §§
669-2, -3. A known defendant who fails to appear in court after receiving proper notice of a quiet

In contrast, a known or unknown defendant who is not properly served, and who fails to
appear in court, may be able to overturn a judgment at a later date if he or she submits a motion
to overturn the default judgment in accordance with Hawai‘i Rules of Civil Procedure Rules 55(c)
and 60(b) on the basis that he or she did not receive proper notice. This could be accomplished by
asserting that a plaintiff did not exercise due diligence. Hustace v. Kapuni, a case described below,
illustrates the level of diligence required of a plaintiff. According to that decision, if a defendant
can clearly show that a plaintiff did not exercise due diligence in identifying and locating him or
her, the defendant could be successful in overturning a default judgment.

1. Notice & Hustace v. Kapuni

Hustace v. Kapuni defined and heightened the notice requirements for a quiet title action in
Hawai‘i. In Hustace, the court held that the test of “due diligence,” required by Hawai‘i’s notice
statute is not satisfied by declarations or affidavits that do not contain facts demonstrating the
1986). In other words, a plaintiff may not simply claim that due diligence was exercised.

A plaintiff’s declaration or affidavit must specify which sources were used to locate and provide
personal service to a defendant. The consequences of a quiet title action can be severe and a plaintiff
must follow proper notice standards to protect the interests of those who have rights to the land.

According to the Hustace decision, there are primary and secondary sources of information
to identify a potential defendant. Some primary sources to locate the identity and address of
a defendant are tax rolls, deed records, judicial, and other official records. Hustace, 718 P.2d
at 1114. Secondary sources include telephone directories, city directories, or some other similar
The court also noted that the Hawai‘i State Archives provides genealogical information from the State library, Bishop Museum, churches, courts, Mission House, Hawai‘i Sugar Planter’s Association, Department of Health, Department of Immigration and Naturalization, and the Hawai‘i State Archives itself. *Hustace*, 718 P.2d at 1115.

Genealogical and property information have also become widely available through the Internet. Though proper notice is extremely important, it is unclear how many of these sources a plaintiff must exhaust before a court will determine that due diligence has been exercised. Due diligence is “a relative term and each case must be determined upon its own circumstances.” *Hustace*, 718 P.2d at 1114.

Notice protects an individual from deprivation of property without due process of law. A defendant’s right to notice of an action is fundamental and stems directly from the United States Constitution’s Fifth Amendment Due Process Clause. Problems arise when a plaintiff uses the ambiguity of the statutes and case law with regard to an individual who is not easily identifiable.

Take for instance the case of Doug Weber who lives on Maui. He was the first in his immediate family to find out about a quiet title and partition action brought by Surety Kohala. Surety Kohala sought to sell property, including the Webers’ ancestral land, to a developer. Surety Kohala’s attorneys performed genealogical research that omitted the Weber’s family line. A cousin who had received notice as a result of Surety Kohala’s genealogical research, but who was found not to have an interest, contacted Doug Weber about the case. The only way that Doug Weber’s family was apprised of the action, and subsequently able to defend the family’s ancestral land in court, was through the actions of a cousin whom the family had never met.

This illustrates the great importance of ‘ohana in a quiet title action, which is a primary reason that the Weber family now holds title to six acres of ancestral land in Hāwī, Hawai‘i. Doug Weber relayed the story of how he received notice of the case—basically by chance and the goodwill of a cousin:

> It was February 13, 2003, and this lady out of the blue called me up. It was one of my cousins, cousin Monica. She said, “Are you related to Anita Beckley?” I said, “Yeah that’s my mom.” She said, “Well there’s some land on the Big Island that wasn’t designated to us . . . the judge ruled against us, we were not in the lineage. But we believe that your mom is part of the lineage.”

Doug Weber realized that luck played a major role in his family receiving title to ancestral land in Hāwī:

You know, we got lucky here, and I’m glad I had a cousin who was forthright and said, “You know what, this land belongs to our family somehow, someway, and I got a cousin or cousins out there that should be entitled to this land.” And I mean, she did her part, she went through the phone books and called people and finally got a hold of me.40

In the Weber family’s case, had cousin Monica not notified the family of the quiet title action, an entry of default and subsequent default judgment would likely have been issued. ‘Ohana and genealogical research allowed the Weber family to reclaim ancestral land. Even if Doug Weber found out about his interest at a later date, he would have faced the difficulty of overturning an entry of default, or if the case had already finished, a default judgment. Andrew Sprenger, Staff Attorney at the Native Hawaiian Legal Corporation (“NHLC”), explained that the current requirements for providing proper notice are minimal, and that a party is rarely able to overturn a final judgment on the basis of faulty notice:

The way the state of the law is now, I would argue that the requirements for proper notice are quite lax. As long as the moving party can show basically their good faith attempt to provide notice, which frankly is quite low, the court is free to render a default and subsequently a default judgment against that person. Short of any bad faith by the moving party, it’s likely that those default judgments will hold and the individual wanting to come forward will not be able to make that challenge. Because of the low threshold that courts impose upon moving parties to provide notice, I think really opens up the vulnerability or shows that once a default is rendered, it’s typically very difficult to overturn and then proceed with participating in the case.41

The lack of a clear definition of due diligence allows a plaintiff’s attorney to easily fulfill a court’s requirements before a court will accept an application for notice by publication. Once a court approves such notice, and a defendant does not appear in court, it is unlikely that he or she will be able to overturn an entry of default and subsequent default judgment.

Next, we switch gears to examine the doctrine of adverse possession as it relates to quiet title law in Hawai‘i. This introduction is meant to illustrate the role that adverse possession can play in a quiet title action as well as to give readers an understanding of the law behind the Western legal concept.

40 Interview with Doug Weber, supra note 39.
41 Interview with Andrew Sprenger, Staff Attorney, NHLC, in Honolulu, Haw. (Feb. 9, 2011) (transcript on file with author).
C. Adverse Possession & Its Relationship to Quiet Title Law in Hawai‘i

Adverse possession is important to the discussion of quiet title law because it is an element in some quiet title cases. A plaintiff will sometimes assert ownership of a property through both paper title and adverse possession. Because the doctrine of adverse possession can play a role in quiet title law, it is important to understand its elements.

Adverse possession is a legal means by which a person, who is otherwise not entitled to land, can get ownership of the property by satisfying the elements of actual, open, notorious, hostile, continuous, and exclusive possession of the land for the statutory period of time of twenty years. An adverse possessor could be a trespasser, or someone who believes that he or she has a valid interest in the land but who cannot prove it through paper title. A co-tenant could also adversely possess the property of his or her other co-tenants, but he or she must meet a more stringent standard of notice. This is discussed in more detail below in *Adverse Possession of a Co-Tenant's Interest*.

Actual, open, and notorious possession is established when a person uses the land in a way that puts the world on notice of his or her claim to the property. An example would be the construction of a house on or fence surrounding the property, or the posting of signs to keep out. To show actual possession, an adverse possessor does not necessarily need to live on the land. Instead, he or she must use the property in a way that a normal owner would. Normal or typical use of a parcel of land can depend on location and zoning, e.g., residential or agricultural.

It is, however, unlikely that an adverse possessor would be successful in his or her claim if he or she only infrequently visits the property. For example, using the property to occasionally pick and gather fruits has been held to be insufficient to meet the requirement of actual and continuous possession. *Okuna v. Nakahuna*, 594 P.2d 128, 132 (Haw. 1979).

An individual who lives on the property but hides whenever the true owner appears would not be in actual, open, and notorious possession. *See Petran v. Allencastr_e, 985 P.2d 1112, 1124 (Haw. Ct. App. 1999)*. The reason behind "the actual and open and notorious possession requirements is to give the true owner notice, thereby putting the true owner on guard of a competing claim for the land, and enabling the true owner to take preventive action to protect the true owner’s property interest within a reasonable time."42

The hostility requirement is met if an adverse possessor claims the property in opposition to a defendant. *See Petran*, 985 P.2d at 1124. The requirements of continuity and exclusivity are similar

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to those of actual and open possession of the land. Again, an adverse possessor must use the disputed property over the minimum time period in a manner similar to that of an average owner. Continuous possession does not require constant possession. For example, an adverse possessor does not have to possess the land “every minute of the day.” In determining what constitutes continuous use, a court will consider circumstances particular to each case such as the location and condition of the land. A court will then look at an adverse possessor’s claim to the property in light of those particular circumstances.

Tacking refers to the ability of successive claimants to add their collective adverse possession of a property to meet the required amount of time. Tacking may only be used if there is some type of agreement or relationship between the claimants. An individual may not use the adverse possession of another without his or her knowledge or without having privity of estate or title. Wailuku Agribusiness Co., Inc. v. Ah Sam, 145 P.3d 784, 795 (Haw. Ct. App. 2006) aff’d in part, rev’d in part, 155 P.3d 1125 (Haw. 2007).

Privity of estate or title is a relationship between two parties who each have an interest in the property. Privity exists between successive adverse possessors of property where there was an understanding between them. This understanding may be evidenced through written documents or oral testimony. For example, a son who acquired land from his father may use his father’s adverse possession of the property to fulfill the statutory time period.

If an adverse possessor is able to show that he or she meets these elements, he or she may acquire title to the property in question, thereby extinguishing the title of the prior owner.

A person who files a quiet title action based on adverse possession must show that he or she has acted in good faith. Haw. Rev. Stat. § 669-1(b). Good faith means that, under all the facts and circumstances, a reasonable person would believe that an adverse possessor has an interest in the land in question, and that such belief is based on inheritance, a written instrument of conveyance, or a court order. Haw. Rev. Stat. § 669-1(b). This good faith requirement, added in 1983, was an effort to curtail abuse of the doctrine of adverse possession in Hawai‘i. Since 1983, a complete stranger cannot simply go onto land and adversely possess; rather, an adverse possessor must believe that he or she possesses an interest in the property.

The Hawai‘i quiet title statute differentiates properties of five acres or less from those greater than five acres. Haw. Rev. Stat. § 669-1(b). Any adverse possession case involving property greater than five acres is not allowed unless the statutory period for claiming adverse possession took

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43 See Law Book, Adverse Possession Chapter, supra note 42.
44 See Law Book, Adverse Possession Chapter, supra note 42.

The doctrine of adverse possession is based on the Western idea that title to property should not remain uncertain or in dispute for long periods of time. Some Native Hawaiian rights advocates have argued that the doctrine of adverse possession should be abolished, as it is a legal concept foreign to Native Hawaiians. Though debate still surrounds the doctrine of adverse possession, the doctrine has been limited through constitutional amendment and statute to attempt to curb its abuse.

In its current version, adverse possession can sometimes be used by Native Hawaiians to gain clear title to kuleana lands. Kuleana land refers to land granted to Native tenants pursuant to the Kuleana Act of 1850, which was briefly discussed in the Historical Background section of this primer. In addition, Native Hawaiians can sometimes use the doctrine of adverse possession to clear title to other ancestral lands. For example, cases dealing with Hawaiian titles that may never have been properly transferred may be solved through adverse possession.45 Because land was not always conveyed through paper title, some families may be living on ancestral lands without good paper title. These families may be able to use the elements of adverse possession to their benefit in order to secure title. Next we look at the heightened requirements for adversely possessing a co-tenant’s interest.

1. Adverse Possession of a Co-Tenant’s Interest

In some quiet title cases, a co-tenant will assert a claim to property based on adverse possession of another co-tenant’s interest. Because co-tenants are co-owners of land, the occupation of property by one co-tenant is presumed to be permissive.46 For example, a co-tenant would not automatically assume that the co-tenant living in the ‘ohana’s house was trying to adversely possess the property. For this reason, there are heightened requirements for a co-tenant adverse possessor.

A party who is trying to adversely possess a co-tenant’s interest must still show by clear and positive proof that he or she has met all of the elements of adverse possession: actual, open, notorious, hostile, continuous, and exclusive possession of the land for the statutory period of time of twenty years. Because possession of land by one co-tenant is presumed to be permissive, however, a co-tenant adverse possessor is held to a higher standard to prove hostility. Morinoue v. Roy, 947 P.2d 944, 950 (Haw. 1997) (citing City and County of Honolulu v. Bennett, 552 P.2d

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45 Law Book, Adverse Possession Chapter, supra note 42.
46 Law Book, Adverse Possession Chapter, supra note 42.
Generally, and especially in cases where co-tenants are related by blood, a court will require proof that an adverse possessor: (1) clearly intended to adversely possess the property, (2) satisfied all the elements of adverse possession, and (3) provided notice to the other co-tenants. *Yin v. Midkiff*, 481 P.2d 109, 111-12 (Haw. 1971).

To provide notice, a court requires that an adverse possessor act in “good faith” to actually notify other co-tenants of his or her claims to the property. *Bennett*, 552 P.2d at 1382. The requirement of actual notice to co-tenants in an adverse possession case, however, has three exceptions.

First, good faith is satisfied by less than actual notice if an adverse possessor has no reason to suspect that a co-tenancy exists. *Bennett*, 552 P.2d at 1390. A court will apply a “reasonableness test” to determine whether or not an adverse possessor was reasonable in believing that a co-tenancy did not exist. *Bennett*, 552 P.2d at 1391. For example, the Hawai’i Supreme Court has held that it is not reasonable for an adverse possessor to believe that a co-tenancy does not exist where a document referencing several co-tenants has been recorded in the Bureau of Conveyances. *Petran*, 985 P.2d at 1123.

The second exception to providing actual notice is where an adverse possessor made reasonable efforts to notify his or her co-tenants but was unable to locate them. *Bennett*, 552 P.2d at 1390. The *Hustace* decision, discussed above, illustrates the higher standard for notice to co-tenants in adverse possession cases by suggesting that an adverse possessor needs to “offer evidence of his or her diligence in attempting to notify absent cotenants.”47 The *Hustace* court further suggested “that it might require a claimant to visit the state archives to look for genealogical information on the identities of absent cotenants before it would allow notice by mere publication.”48 Courts regularly enforce the *Hustace* requirements to guarantee that proper notice is given to all parties where a lawsuit may result in deciding their property interests.

The third exception to the general rule that an adverse possessor must provide actual notice to other co-tenants is where the co-tenants already know about the claim for adverse possession. *Bennett*, 552 P.2d at 1390. In this instance, there is no need to provide further notice to those co-tenants who are already aware of an adverse possessor’s claims to the land.

Therefore, a person who is trying to adversely possess a co-tenant’s interest in land must demonstrate good faith by showing either: (1) that he or she provided actual notice of his or her intent to adversely possess the property, or (2) that he or she meets one of the three exceptions to the general rule that an adverse possessor must provide actual notice to other co-tenants. *Bennett*,

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If an adverse possessor does not demonstrate good faith, a court can find that he or she acted in bad faith, which will affect the date or time period when the adverse possession started. For example, if a co-tenant adverse possessor meets all the elements of adverse possession but is found to have acted in bad faith in attempting to provide notice to the other co-tenants, then the adverse possessor will have failed to meet the required time period of twenty years.

As mentioned above, the doctrine of adverse possession is sometimes involved in a quiet title action. An adverse possessor must satisfy the elements of actual, open, notorious, hostile, continuous, and exclusive possession of the land for the statutory period of time of twenty years. In cases of adverse possession by one co-tenant against another co-tenant, a court will require more than if the parties were strangers. By becoming familiar with the relevant quiet title and adverse possession laws, Native Hawaiians can defend their kuleana or ancestral lands from individuals abusing adverse possession claims.

Adverse possession is one way in which a person can establish an interest in a parcel of land. Often, after a person establishes his or her interest in land, he or she will file a lawsuit to separate out that interest from the whole. This process is known as partition. The next section of the primer provides an introduction to partition law in Hawai‘i, including an explanation of typical steps in a partition action. This section is meant to provide readers with a foundation in basic principles of partition law.
V. INTRODUCTION TO PARTITION LAW IN HAWAIʻI

ʻĀina koi ʻula i ka lepo.

Land reddened by the rising dust. 49

A partition is an action filed by a co-tenant to separate his or her interest in property from the whole. A co-tenant’s right to do so is absolute. Kimura v. Kamalo, 107 P.3d 430, 437 (Haw. 2005) (citation omitted). Historically, lawsuits were divided into two categories: those in equity and those in law. Courts of equity could hear cases only in which payment from one party to another would have been an inadequate remedy, and courts of law heard everything else. Examples of equitable remedies include injunctions, or stopping someone from doing something, and specific performance, or forcing someone to do something. Partition also originated in courts of equity where only partition in kind, or physical division of property was allowed. Chuck v. Gomes, 532 P.2d 657, 661 (Haw. 1975) (Richardson, C.J., dissenting).

Today, courts of equity and courts of law have merged. Distinctions are still made, however, between lawsuits historically brought in courts of equity as opposed to those brought in courts of law. Judicial discretion, for example, a key element in courts of equity, is still given great weight in quiet title and partition proceedings today. To overturn the decision of a trial court, a person has to show that a judge abused his or her discretion. Kimura, 107 P.3d at 437.

Though partition in kind used to be the only available remedy for a co-tenant wishing to separate his or her interest in land from the whole, statutes have been enacted in every state to allow for partition by sale where partition in kind is either impracticable or would cause injury. Chuck, 532 P.2d at 661-62 (Richardson, C.J., dissenting) (citation omitted). Impracticability can be based on a number of factors including the topography of the land, the number of co-tenants, county zoning ordinances, and the wishes of the parties involved in a case. Injury is usually determined by whether a party would suffer financially if a partition in kind were ordered. For a number of reasons, namely the difficulty of parceling out land to many co-tenants, and county zoning ordinances, many argue that partition by sale is the only practical remedy.

In a partition by sale, the entire property, or part of it, is either sold at private sale or auctioned off at a public sale typically conducted by a court-appointed commissioner. See Haw. Rev. Stat. §§ 668-13, -14. The property generally goes to the highest bidder and the cash proceeds are distributed among the co-tenants according to each co-tenant’s interest in the property. Haw. Rev.

49 Pukuʻi, supra note 1, at 11 (no. 80).
A co-tenant must also bear a portion of the costs of the proceeding in proportion to his or her interest. Because judicial discretion is given such great weight, a judge has the power to reject a winning bid that is below market value. See *Sugarman v. Kapu*, 85 P.3d 644 (Haw. 2004) (holding that a judge could reopen the bidding after a public auction where the highest bid was below market value).

Next we look at some of the typical steps in a partition action. Just as in a quiet title action, the steps in a partition action do not always look the same and are dependent on the particular circumstances of each case and the discretion of the presiding judge.

**A. Steps in a Partition Action**

Just as in a quiet title action, there can be many steps in a partition action. Included below is a roadmap of steps that are common in a partition action in Hawai‘i, including filing the lawsuit, required participation, service of process, and filing an answer. First, we look at who can file a partition action.

1. **Who Can File?**

Any co-tenant may bring an action for partition of property against his or her co-tenants, and may seek a sale of the property, or a part of the property, if partition in kind would cause great prejudice. Haw. Rev. Stat. § 668-1. The test of whether “partition in kind would result in great prejudice to the owners is whether the value of the share of each case of a partition would be materially less than the share of the money equivalent that could probably be obtained for the whole.” *Pioneer Mill Co. v. Ward*, 37 Haw. 74, 87 (Haw. Terr. 1945). Next, we look at who has to participate in a partition action.

2. **Who Has to Participate?**

The first step for a plaintiff in a partition action is determining who has an interest in the property. A plaintiff must join every potential interest holder as a party. Haw. Rev. Stat. § 668-2. A potential interest holder is someone who may possess an interest in the property.

To begin a partition action, a plaintiff must file the appropriate documents in court and must provide those who potentially have an interest in the land with notice of the lawsuit. Sometimes, the court documents for a quiet title and partition action are combined and are filed at the same time. In this instance, a plaintiff would provide notice of an action to quiet title and partition the land to each person who potentially has an interest. Again, this is called service of process.
3. Service of Process

a. The Complaint & Summons

The next step for a plaintiff is filing a complaint in court and serving a defendant with a summons. See Appendix B for a sample complaint and summons. A complaint is the initial court document that starts a partition action. A complaint explains why a court can hear a case, what a plaintiff is claiming, and what the plaintiff is asking the court to do. In a partition action, a complaint must describe the property and provide the title and the rights of all the interested parties (see the sample complaint in Appendix B). Haw. Rev. Stat. § 668-3. As a practical matter, partition is often asserted as a claim in a quiet title action to insure that: (1) the land will have clear title making it saleable at market levels, and (2) the judgment for partition will not be set aside later due to a dispute over title.

A summons is a legal document that orders a defendant to appear in court to respond to a plaintiff’s complaint. In a partition action, a summons must be directed to all persons named in the complaint or joined as parties. Haw. Rev. Stat. § 668-5. A summons must include a copy of the complaint and a return date. Recall that a return date is the deadline by which a defendant must submit an answer or appear in court. If a plaintiff is unsure as to who a defendant is, he or she must say so in the complaint. Haw. Rev. Stat. § 668-3. Also, a plaintiff must state in the complaint whether there is any uncertainty as to how much of an interest a defendant has. Haw. Rev. Stat. § 668-3.

If a summons has been directed generally to all unknown defendants, and if service has been made on known and unknown defendants as required, a court has jurisdiction to proceed as though all interested parties were personally served. Haw. Rev. Stat. § 668-5.

Sometimes a plaintiff will know the identity and address of a defendant who does not live in Hawai‘i. Hawai‘i Revised Statutes § 634-24 details the steps a plaintiff must take to serve a known defendant who is not in Hawai‘i. In this instance, a defendant must be personally served wherever he or she is found. Haw. Rev. Stat. § 634-24. Alternatively, the out-of-state defendant may be served by registered or certified mail with a request for a return receipt. Haw. Rev. Stat. § 634-24. A plaintiff must serve each defendant a certified copy of the order, summons, and complaint. Haw. Rev. Stat. § 634-24.

Just as in a quiet title action, sometimes there is an unknown defendant in a partition action. An unknown defendant receives notice of the lawsuit through a process that is described below.
b. Providing Notice to an Unknown Defendant

In cases where a defendant is unknown or absent, a plaintiff must refer to Hawai‘i Revised Statutes § 668-5, which provides that a summons must be directed generally to all unknown persons who may have an interest in the property. This ultimately gives a court the power to proceed as though all the interested parties were personally served. *Haw. Rev. Stat.* § 668-5; *Haw. R. Civ. P.* 17(d).

Hawai‘i Revised Statutes § 634-23 governs when a plaintiff is unsure who a defendant is, or if a defendant is absent. Under this statute, an unknown or absent defendant may be made a party in a partition action. *Haw. Rev. Stat.* § 634-23(1); *Haw. R. Civ. P.* 17(d). Similar to a quiet title action, a plaintiff in a partition case must exercise due diligence in attempting to identify a defendant.

The *Hustace* case discussed above in *Notice & Hustace v. Kapuni*, notes that due diligence is “a relative term and each case must be determined upon its own circumstances.” *Hustace*, 718 P.2d at 1114. Again, places useful for searching for information concerning a defendant include the State library, Bishop Museum, churches, Hawai‘i circuit and supreme courts, Mission House, Hawai‘i Sugar Planter’s Association, Department of Health, Department of Immigration and Naturalization, and the Hawai‘i State Archives. *Hustace*, 718 P.2d at 1115.

If, after exercising due diligence, a plaintiff is unsuccessful in identifying a defendant, the plaintiff must submit a declaration or affidavit to the court explaining the measures taken to find the defendant. *Haw. Rev. Stat.* § 634-23(2); *Haw. R. Civ. P.* 17(d). A plaintiff must provide facts, based on personal knowledge, in the declaration or affidavit. *Haw. Rev. Stat.* § 634-23(2); *Haw. R. Civ. P.* 17(d). If the court approves the declaration or affidavit, a plaintiff may serve through publication. *Haw. Rev. Stat.* § 634-23(2).


Publication must occur at least once in each of four successive weeks, the last publication not less than twenty-one days prior to the return date. *Haw. Rev. Stat.* § 634-23(3). These publications can typically be found in small print at the end of the newspaper. They are often short and difficult to find and read. In a case involving land, such as a partition action, a court will also order a copy of the summons to be posted on the property. *Haw. Rev. Stat.* § 634-23(3). Just as in a quiet title action, the next step in a partition action, after service of process, is for a defendant who wants to participate in a case to file an answer.
4. Filing an Answer

The third step in a partition action is for a defendant to file an answer. Each party must describe the source of his or her title, right, interest, or claim. Haw. Rev. Stat. § 668-4. A defendant’s answer must state the nature and extent of his or her interest or claim. Haw. Rev. Stat. § 668-4. Please see the sample answer in Appendix B. If a party has died, his or her heirs must be joined as parties. Haw. Rev. Stat. § 668-4. Next we look at what a court can do in a partition action.

B. What a Court Can Do in a Partition Action

According to Hawai‘i Revised Statutes § 668-7, a court can hear, investigate, and determine any questions relating to disputes or claims over title to the whole property or to any particular share or interest. Haw. Rev. Stat. § 668-7(1). A court may do so with or without a jury. Haw. Rev. Stat. § 668-7(1). Recall that if legal title of any particular share or interest in the property is disputed, any party to that dispute has the right to a jury trial on the issue. Haw. Rev. Stat. § 668-8.

This statute also provides that a court has the power to remove clouds on title to the property in question. Haw. Rev. Stat. § 668-7(2). Though a court can decide issues relating to title in a partition action, most often a partition action is combined with an action to quiet title so that there is a complaint to quiet title to, and partition, the property. If a plaintiff brings both an action to quiet title and partition the property, a court may decide who owns what interests. If title to the property is not in dispute, a court may vest, or confer, title to the people to whom it belongs. Haw. Rev. Stat. § 668-7(3).

There are two main ways in which a court typically partitions a parcel of land: partition in kind and partition by sale. Recall that a judge is given great discretion in a partition case to achieve an equitable outcome. Therefore, it is possible for a judge to fashion a unique remedy for a particular case, such as partitioning part of the property in kind and ordering a sale of the rest, or ordering a buy-out of the property by one of the co-tenants. Partition in kind is discussed next.

1. Partition in Kind

A court can partition property in kind, dividing it between the parties according to their proportionate interests. Haw. Rev. Stat. § 668-7(4). The physical division of the property can be by agreement between the parties. Haw. Rev. Stat. § 668-7(4). If a party has occupied a portion of the land or improved it in some way, that party may be entitled to it as a matter of fairness. Haw. Rev. Stat. § 668-7(5). A court has the power to set aside those portions of land. Haw. Rev. Stat. § 668-7(5).
It is easiest to visualize a partition in kind as a division of property similar to the process of cutting a pie. Based upon the court-determined interests, a court may cut the property into pieces of various sizes. In general, the larger a party’s proportional interest, the larger his or her piece will be, although a court has the ability to make adjustments to ensure that the division of the property is fair. When partition in kind is not feasible or would cause financial injury to one or more of the parties, a court will usually order a partition by sale, which is discussed next.

2. Partition by Sale

If for any reason partition in kind is not possible or would be greatly prejudicial to a party, a court may order a partition by sale. Haw. Rev. Stat. § 668-7(6). In doing so, a court can either divide and allot portions of the property to some or all of the parties and order a sale of the remainder; or, sell the whole parcel. Haw. Rev. Stat. § 668-7(6). Recall that great prejudice occurs when the value of the physically divided shares of land would be materially less than the money equivalent that could probably be obtained by sale of the whole property. See Pioneer Mill, 37 Haw. at 87.

Factors that a court will consider in deciding whether or not a partition by sale is more appropriate than a partition in kind include: (1) the location of the land, (2) topographical or physical features, (3) the quantity of property, and (4) the value of land when divided. 67 C.J.S. Partition § 113 (1998). Fractionalization, or too many interests in the commonly held property, is also frequently cited to demonstrate impracticability.

In contrast to a partition in kind, a partition by sale divides the proceeds, if any, derived from the sale of all or part of the property among those a court deems to have an interest. Rather than physically dividing the property, a court sells all or part of the property and divides the proceeds in accordance with the parties’ proportional interests.

The prevalence of partition by sale has had, and continues to have, disparate impacts on the Native Hawaiian community. These impacts are discussed below in Policy Impacts of Quiet Title & Partition Actions. When a judge orders a partition by sale, it is generally done by public auction. This is discussed next.

a. Sale, Auction, & Notice

Hawai‘i Revised Statutes § 668-14 requires that a partition by sale be made at a public auction. Haw. Rev. Stat. § 668-14. An auction can occur after publication of notice, with a brief description of the property to be sold, in at least one newspaper in the state and having general circulation in each circuit within which the property is located. Haw. Rev. Stat. § 668-14. Publication must occur at least once in each of four successive weeks, with the first publication not less than thirty days prior to the date

Next, we look at other things that a court can do in a partition action such as entering a default and granting motions for default and summary judgment. In a partition action, the entry of default, motion for default judgment, and motion for summary judgment processes are the same as those for a quiet title action.

3. Entry of Default, Motion for Default Judgment, and Motion for Summary Judgment

A party who has failed to formally respond will have a default entered against him or her. Haw. Rev. Stat. § 668-16; Haw. R. Civ. P. 55(a). A defaulted party, including an absent and/or unknown defendant who never responded or appeared in court, will be treated as though he or she consented to the partition in kind or sale, or other disposition of the property. Haw. Rev. Stat. § 668-16; Haw. R. Civ. P. 55(b).

The processes for a motion for default judgment and a motion for summary judgment are the same as those for a quiet title action, which were previously discussed in Steps in a Quiet Title Action. In short, after a defendant has received an entry of default, a plaintiff can seek a default judgment, which is final and binding. Haw. R. Civ. P. 55(b). A motion for default judgment might be filed around the same time as, or in conjunction with, a motion for summary judgment. See Haw. R. Civ. P. 56. Recall that motions for summary judgment are appropriate when there is no need for trial because there are no material facts in dispute. Next, we look at the protection provided by law for an unknown or absent owner’s interest.

4. What Happens to an Unknown & Absent Owner’s Interest?

According to Hawai‘i Revised Statutes § 668-9, a court must always protect the interests of an unknown owner and other owners served under Hawai‘i Revised Statutes §§ 634-23 or 634-24 (discussed above) who do not appear in the action. Haw. Rev. Stat. § 668-9. After deducting all costs and expenses, a court holds any proceeds of sale for the absent owners’ benefits. Haw. Rev. Stat. § 668-9. This applies even where a defendant has had his or her default entered and has received a default judgment under Hawai‘i Rules of Civil Procedure Rule 55. If the property is partitioned in kind, a court has the power to set apart a portion of property to which the absent owner would be entitled to receive in the partition if he or she was known and had appeared in the action. Haw. Rev. Stat. § 668-9.

To help a court determine whether partition in kind or partition by sale is appropriate, a court sometimes appoints a commissioner in partition. The role of a commissioner in partition is discussed next.
5. Commissioner in Partition


Sometimes, in a partition action, legal title to a particular share or interest in the property is disputed. In this instance, the parties are entitled to a jury trial to determine title. Trial of title is discussed below.

6. Trial of Title

When legal title to a particular share or interest in a parcel of land is in dispute, Hawai‘i Revised Statutes § 668-8 gives a party the right to a jury trial to determine title. Haw. Rev. Stat. § 668-8. If no other share or interest in the property is affected by the dispute, a court may set apart a portion of the property, or the proceeds from the sale of the property, that the real owner would be entitled to if there were no dispute. Haw. Rev. Stat. § 668-8. The portion of land set apart will then be a subject of controversy between the disputants and will leave the remaining interests and parties unaffected. Haw. Rev. Stat. § 668-8. A court can then proceed with the general partition, and the dispute will be heard and decided separately. Haw. Rev. Stat. § 668-8.

Sometimes in a partition action, a claimant will not be able to prove that he or she has an interest in the land. A court has the power to set aside a portion of land; or, proceeds from the sale of land, when title has not been properly established. This is discussed next.

7. Allotments for Shares When Ownership Has Not Been Proven

Sometimes in a partition action, a claimant will not be able to prove title to a particular share or interest in the property to the satisfaction of a court even though he or she has “color of title” and even though the claimant is not opposed. Haw. Rev. Stat. § 668-10. Color of title refers to a person believing that he or she has good title to property based on some evidence. For example, A received a deed to her property, which was not valid when it was conveyed to her. A was unaware that the deed was invalid. A has color of title because she believes that she has good title to the property when, in reality, she may not.
If a claim is not disputed by any of the other parties, a court may set apart that portion of the property for the benefit of the legal owner(s) of the share. Haw. Rev. Stat. § 668-10. In the case of partition by sale, a court may set aside a corresponding portion of the proceeds. Haw. Rev. Stat. § 668-10. In either case, a court can then proceed with partition of the remainder of the property. Haw. Rev. Stat. § 668-10.

If a partition action is not resolved on motion for summary judgment and is not settled, the case will proceed to trial. The way in which a partition trial proceeds can differ and depends on the circumstances of each case.

C. Trial

As previously discussed, it is more common for a plaintiff to file an action to both quiet title and partition land where there are breaks in, or clouds on, the chain of title. A plaintiff might not want to spend the money to partition land when it would be difficult to sell the property, or when the resulting sale price of the land would be greatly diminished, due to problems with the title.

It is possible, however, for a plaintiff to file an action for partition only. A plaintiff might do so if he or she is certain of his or her percentage interest in the land. Another instance in which a plaintiff might file an action for partition only is if he or she is unconcerned about a break in, or cloud on, the chain of title. A plaintiff might be unconcerned if he or she considers the break or cloud to be insignificant and is relatively certain that it will not have a negative impact on the marketability of the land.

If a plaintiff seeks to partition land that has broken or clouded title, and does not quiet title to the land, the plaintiff can only sell what she or he has. In other words, if a plaintiff is trying to sell land that does not have clear title, a buyer can buy the land only with the unclear title. For this reason, it is more common for a plaintiff to seek a court determination of the parties who possess an interest in the land (by quieting title) before asking a court to partition the property. Otherwise, the results of a partition action may be unmarketable title, making it very difficult to sell the land at anywhere close to market price.

A buyer might still be willing to purchase property with unclear title if he or she believes that the break occurred so long ago that it is either: (1) not likely to surface and cause problems, or (2) reasonably easy and inexpensive to clear up in court through a quiet title action.

A partition trial typically involves: (1) a determination of the percentage interests of the co-tenants in the land followed by (2) an order that the land either be partitioned in kind by physical subdivision or sold in its entirety at a partition auction. In a partition action, a court may also
order a partition in kind for a portion of the land and a sale of the rest. Haw. Rev. Stat. § 668-7(6). In this instance, a portion of the land would be subdivided and would go to one co-tenant or to a set of co-tenants. The remainder of the land would be sold at a judicial auction and the proceeds would be distributed among the co-tenants. Haw. Rev. Stat. § 668-7(6). The method of partition is determined by: (1) a commissioner in partition who is appointed by and makes recommendations to the court, (2) the court after an evidentiary hearing, or (3) agreement between the parties.

Once a property is sold at a partition auction the parties then return to court to determine what fees and costs the parties can assess against the partition sale's gross proceeds, along with how the net proceeds should be divided among the co-tenants in proportion to their title interests and any improvements they might have made to the property. See Haw. Rev. Stat. § 668-17. A court is given wide latitude to do justice in a partition action and so results may vary widely based on the land, facts, and parties involved in each case. See Haw. Rev. Stat. § 668-17.

One of the last steps in some partition actions is the distribution of fees and costs among all of the parties involved in the case under Hawai‘i Revised Statutes § 668-17. As previously explained, a partition action is often filed in conjunction with an action to quiet title. At first a plaintiff must pay for costs associated with the lawsuit, but he or she is later free to seek contribution from all those who arguably benefited from having their interests determined and divided out. This is discussed next.

**D. Costs**


In addition to costs of the proceedings, a judge may allow parties, including a plaintiff, to recoup attorney’s fees from another party according to his or her percentage interest in the property. Haw. Rev. Stat. § 668-17. A judge will decide what is equitable in light of the services performed and the benefits derived from those services by the parties. Haw. Rev. Stat. § 668-17. Attorney’s fees and costs can become substantial, particularly in a case that involves many co-tenants or potential co-tenants. Significant title or boundary issues or difficulties in partitioning in kind can also drive up a lawsuit’s fees and costs. Especially in a case where there are many co-tenants who would each end up with a very small fractional share, a co-tenant's share of the fees and costs of the action may be larger than the value of the interest or the amount of the sale proceeds the co-tenant will end up with.

The thought process behind the law is that each party “benefits” from having his or her interest determined and divided out. A plaintiff reasons that each party wants to see the process conducted
in a way that maximizes the value of the land in question. Therefore, any fees and costs that result from the wealth-maximizing process are viewed as conferring a benefit on each party involved in the case: “The idea is that all parties to the [law]suit are presumed to be proportionately benefitted by all of the steps in which costs are incurred.” Lalakea v. Lapahoehoe Sugar Co., 35 Haw. 262, 298 (1939). Accordingly, each party is held responsible for a percentage of those fees and costs. The possibility of having to contribute to an unknown final amount of fees and costs associated with a partition action often acts as a deterrent to a defendant who would otherwise participate in a case.

The next section addresses certain policy impacts of quiet title and partition actions and is meant to give readers a better understanding of the disparate impacts that these lawsuits have on the Native Hawaiian community.
VI. Policy Impacts of Quiet Title & Partition Actions

Ho‘i hou i ka iwi kuamo‘o.

Return to the backbone. 50

Quiet title and partition actions contribute to the diminution of Native Hawaiian-held ancestral lands by, among other things, disrupting traditional notions of ‘ohana and kuleana. Partition by sale in particular is highly problematic for the Native Hawaiian community because it severs a family’s connection to ancestral land. In many cases, the parcel of land that a Native Hawaiian family might have an interest in is quite small, and therefore, the loss of such parcels and interests through forced judicial sale may seem inconsequential. However, the impact of the loss of these lands to Native Hawaiian families is immeasurable. Unfortunately, and despite the wording of Hawai‘i’s partition statute, partition by sale has become extremely common. See Haw. Rev. Stat. § 668-7(6). Many factors contribute to the prevalence of partition by sale. For example, the burden of showing impracticability or great prejudice that would result from partition in kind is easily overcome by showing that a party would lose money from a partition in kind. See Pioneer Mill, 37 Haw. at 87. The increased fractionalization of land in Hawai‘i, as well as county zoning ordinances that mandate minimum lot sizes, may also be used to justify a judge’s order to partition by sale rather than in kind.

Fractionalization of property interests among Native Hawaiian families is prevalent for a number of reasons. One reason is that some Native Hawaiians have limited financial resources and thus limited access to legal representation. 51 Lack of adequate legal representation leads to a decrease in validly executed wills, which in turn results in fractionalization of land. In the absence of a valid will, a court will follow a set of rules to distribute property among a person’s family. This process is known as intestate succession. The more that property is transferred from one generation to the next in this fashion, the more likely it is for an increasingly large number of people to acquire an interest in the property.

In the past and to some extent even now, lack of adequate legal representation has also caused property to be invalidly conveyed, either because people created homemade deeds that were defective to the point of being invalid, or they just did not convey the property through paper at

50 Puku‘i, supra note 1, at 109 (no. 1024).
all. Both of these scenarios eventually result in interests being lost completely or subject to the quiet title process, which many people cannot afford.

If the interests in a parcel of property are heavily fractionated, it is likely that a court will decide that partition in kind is impracticable. Evidence of judicial preference for partition by sale in these instances lies in the treatment of kuleana lots, which are similar to other fractionalized parcels of land in which Native Hawaiian families have interests: “[W]here kuleana lots are concerned, because of their small size and the fact that there are often several claimants, the court orders a partition by sale, where the land goes to one party, and the fractional interests are bought for cash.”52

County zoning ordinances are another major contributor to the high incidence of court-ordered partitions by sale. County zoning ordinances could preclude partition in kind of the property even in cases where physical division of the property is otherwise feasible. Haw. Rev. Stat. § 668-7. This is especially true in the case of fractionalized properties. Alan Murakami, NHLC’s Litigation Director, explains the effect that Hawai‘i’s land use regulations have on heavily fractionalized parcels of land:

[L]and use regulations governing Hawai‘i require a certain minimum acreage for a specific lot to be carved out for a set of co-owners to hold. If you are so fractionated in terms of interest, and you can only accumulate a certain percentage of that interest, that may not be sufficiently large enough to carve out a separate parcel just for that Hawaiian family group. You come up against the legal barrier of the county’s minimal lot size requirements that preclude you from being able to get a parcel of land separate and apart just for your ‘ohana.53

After determining that partition by sale is the only appropriate remedy, courts “typically order the property sold at auction utilizing forced sale procedures that are notorious for yielding sales prices well below market value.”54 This is because, in many partitions by sale, the co-tenant initiating the action is often the only party who possesses the financial resources necessary to purchase the property at auction. As previously discussed, Native Hawaiian families are often precluded from purchasing an entire parcel outright at auction due to limited resources.55

53 Interview with Alan Murakami, Litigation Director, NHLC, in Honolulu, Haw. (Feb. 25, 2011) (transcript on file with author).
54 Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works.
55 Kana‘iapuni, supra note 51, at 3.
When there is only one bidder who is able to purchase the property, it is often sold at below market value: “The forced sale conditions under which partition sales occur virtually guarantees that wealth will not be maximized for tenants in common even though judges frequently order partition sales because they claim that a partition sale will be wealth maximizing for the cotenants.”

In many of these judicial proceedings for sale, Native Hawaiian co-tenants do not even receive fair-market value for lands which hold immeasurable familial and cultural importance.

In addition, many states, including Hawai‘i, allow partition-seeking co-tenants to recoup attorney’s fees and costs from co-tenants who unsuccessfully resisted the partition, “forcing them in effect to pay for the deprivation of their property rights and their resulting loss of wealth.” Of course, these fees and costs are in addition to their own attorney’s fees and/or self-representation costs.

Quiet title and partition actions contribute to the diminution of Native Hawaiian-held ancestral lands by disrupting traditional notions of ‘ohana and kuleana. Native Hawaiians’ understanding of the importance of land goes beyond its practical resources by extending the concept of ‘ohana to include ancestral lands themselves. To help to preserve this unique relationship, Native Hawaiians should be aware of the potential consequences of quiet title and partition actions. The next section discusses potential legal handles, especially for those seeking to defend ancestral lands against these lawsuits.

56 Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works.
57 Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works.
VII. Potential Legal Handles

_Ako 'e ka hale a pa'a, a i ke komo ana mai o ka ho'oilo, 'a'ole e kulu i ka ua o Hilinehu._

_Thatch the house beforehand so when winter comes it will not leak in the shower of Hilinehu._\(^{58}\)

**A. Defending Against Quiet Title & Partition Actions**

Defending one's interest in ancestral land is undoubtedly important for Native Hawaiian individuals, families, and culture. For many, there is no amount of money that could compensate for the loss of familial lands. Despite the invaluable nature of ʻāina for Native Hawaiians, it is important to be realistic about the positive and negative aspects of participating in a quiet title and/or partition action.

The major benefit of participating in a quiet title and partition action is preserving the right to speak on behalf of ancestral lands. By participating in a lawsuit, a person's voice will be heard. There is no guarantee, however, that anyone will receive the remedy that he or she is seeking. Participation merely ensures that a person is kept in the loop of any and all happenings and correspondences with a court, hearings and trial dates, settlement dates, and has the right to respond to documents filed by other parties and appear in court.

Other benefits of participating in a quiet title and/or partition action could include discovering information about genealogy and family history or forming a family land trust or a limited liability corporation ("LLC") to manage the lawsuit and preserve the land for future generations. This is discussed below in _Other Options for Preserving Land & Managing Litigation_.

There are also negative aspects to participating in a quiet title and/or partition action. Participating in a lawsuit can be very time consuming and can cost a significant amount of money, even if a person is participating _pro se_. As explained in the INTRODUCTION, _pro se_ means that a person is representing him or herself in a lawsuit without the help of an attorney. It is not uncommon for a defendant in a quiet title and/or partition case to participate _pro se_. A _pro se_ defendant can be successful, especially if he or she educates him or herself about the process and makes sure to file all required documents on time. Recognizing that many people either cannot afford an attorney or cannot find one who will represent them, a major goal of this primer is to provide information and some of the tools necessary for effective self-representation.

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\(^{58}\) _Puku'i, supra_ note 1, at 13 (no. 100).
Deciding to participate in a lawsuit is a big commitment, and one that should be carefully thought through. Appendix B contains a list of frequently asked questions, informational sheets, excerpts from the Hawai’i Rules of Civil Procedure and the Rules of the Circuit Courts of the State of Hawai’i, as well as sample legal documents and forms that are designed to serve as resources for a pro se defendant in a quiet title and/or partition action.

The informational sheets are meant to provide a pro se defendant with a foundation so that he or she can effectively use the forms in Appendix B. The informational sheets in Appendix B include:

- Accessing Case Information Using Ho’ohiki
- Hawai’i Court Rules for Filing and Serving Documents
- Instructions and Information Regarding the Form and Filing of Your Answer
- An Introduction to Discovery
- An Introduction to Motion Practice
- An Introduction to Pretrial and Trial Practice
- Disclaimer and Quitclaim Information

The sample legal documents are included to give a pro se defendant an idea of what is expected in court. The sample legal documents included in Appendix B are:

- Sample: Complaint
- Sample: Answer
- Sample: Motion for Partial Summary Judgment
- Sample: Order Granting Motion for Partial Summary Judgment
- Sample: Memorandum in Opposition
- Sample: Motion to Continue
- Sample: Disclaimer of Interest

Appendix B also includes forms that may be helpful to a pro se defendant such as:

- Form: Answer
- Form: Request for Answers to Interrogatories and Request for Production of Documents
- Form: Motion for Summary Judgment
- Form: Memorandum in Opposition
- Form: Motion to Dismiss Complaint
- Form: Motion to Amend Service Requirements
- Form: Motion to Continue
- Form: Responsive Pretrial Statement
- Form: Exhibit List
• Form: Witness List
• Form: Disclaimer of Interest
• Form: Disclaimer of Interest (With Quitclaim Deed)

These forms need to be modified to fit each particular case and feature highlighted areas where a pro se defendant would fill in his or her information. A pro se defendant needs to make sure to delete the highlighting before filing these forms in court and serving them on other parties. Also, please note that each court document needs to be numbered consecutively at the bottom of each page. A pro se defendant must carefully read through all of the relevant court rules and each document before filling in information and filing and serving. By signing at the bottom a pro se defendant will be held responsible for the document and its contents.

The materials in Appendix B are not intended to encourage anyone to enter into a lawsuit without fully considering every aspect of a case as well as individual circumstances such as time, financial resources, and percentage claim to the property. Important questions for a pro se defendant to consider include:

• Are you prepared to fully participate in the lawsuit by preparing, filing, and properly serving your own court documents and reading any and all applicable court rules?

• Are you prepared to perform thorough land and genealogical research and to go to the various government agencies to get authenticated copies of documents?

• Are you willing to read the court documents filed by other parties and respond within the time periods required by the Hawai‘i Rules of Civil Procedure and the Rules of the Circuit Courts of the State of Hawai‘i? It is critical that a pro se defendant consider whether he or she can afford to cover the costs of filing, copying, and mailing court documents to the other parties involved in a case. Note that under Rules of the Circuit Courts of the State of Hawai‘i Rule 2.2(19), a court can waive filing fees if a litigant can show good cause.

• What do you want out of the case? A pro se defendant should decide early on what outcome he or she would like from a case; this can help a pro se litigant avoid unnecessary steps in the legal process. A pro se defendant should use his or her ultimate goal to guide his or her next steps.

• Do your goals for the land necessitate your individual participation in the lawsuit? For example, if a family land trust or LLC has already been formed, and its goal is to preserve the land for future generations, a pro se defendant might consider joining instead of participating as an individual. The trust agreement or articles of organization and breakdown of the sharing of costs associated with the lawsuit, trust/LLC formation, and land maintenance must be carefully examined.
• If your ultimate goal is partition in kind, are you prepared to pay the property taxes? If a person is unable to pay the property taxes, he or she could end up losing the land anyhow.

Partition in kind can be a difficult remedy to seek if a person’s interest in the land is small. It is a good idea to complete genealogical research and make a realistic assessment of the likelihood of success of arguing for partition in kind. If, after researching, a person decides that a court is not likely to grant a partition in kind, it is a good idea to focus on another course of action. A person should consider forming a land trust, LLC, or quitclaiming and disclaiming his or her interest to another family member who wants to continue.

• If your ultimate goal is to participate in the lawsuit even if it results in a partition by sale, are you prepared to potentially pay for fees and costs associated with the case?

The charge-back phase of a case occurs at the end of a quiet title and partition action where each party shares in the attorney’s fees and costs that can be argued to have “benefitted” all participants in the case. See Costs above for more information. Costs can include charges associated with boundary surveys, archaeological surveys, subdivisions, genealogical research, title reports, etc. Court costs are also deducted from the sale price before the proceeds can be distributed to the parties.

Each party is responsible for his or her proportionate share of the fees and costs. Similarly, each party receives his or her proportionate share of the proceeds from the sale of the property, if any exist after deduction of fees and costs including court expenses.

• Have you spoken with an attorney or are you financially able to hire one to represent you? Ideally, each person defending his or her interest in ancestral land would have an attorney. The legal process can be very complicated and uncertain and an attorney who has experience in quiet title and partition law can be extremely helpful. But, an attorney can also be extremely expensive so make sure to get an estimate of what it would cost to finish the case before retaining an attorney.

If a person has questions about how the legal process will unfold or whether or not he or she will be able to adequately explain and/or defend his or her interest, the person should consider hiring an attorney. The Hawai‘i State Bar Association has an attorney referral service, which can be reached at: (808) 537-9140. Please see Appendix A for additional legal resources. Sometimes an attorney will agree to do work for a reduced rate or even for free in certain instances. Though this is never a guarantee, it is worth asking about if a person’s circumstances warrant doing so.
This list of questions is by no means exhaustive and anyone considering participating in a quiet title and/or partition action as a pro se defendant should consult with his or her ‘ohana, and then weigh the positive aspects of participating in a case against the negative.

The rules excerpts, informational sheets, and sample legal documents and forms included in Appendix B are not legal advice. The A‘o Aku A‘o Mai Initiative provides general information only, not individualized legal advice or representation. We cannot advise anyone to take a particular course of action, but hope that the background information and forms assist those who elect to proceed. We encourage everyone to consult an attorney for specific advice regarding a particular situation; we recognize, however, that this may not be an option for everyone. Anyone who decides to participate in a lawsuit as a pro se litigant is ultimately responsible for reading and applying any and all applicable laws and rules.

For many Native Hawaiians, defending ancestral land against a quiet title and/or partition action that seeks to divide and sell land is more of an obligation than a choice. If, after considering the realities of litigation, a person decides to continue as a pro se defendant, we hope that this primer and the materials in Appendix B will provide some support.

To ensure that a person receives notice of a quiet title and/or partition action, to prevent litigation, or to prepare for it, it is extremely important to research one's genealogy. Familiarity with genealogy can mean the difference between recognizing an ancestor's name in the newspaper and being able to notify other family members of a pending lawsuit, and never knowing about a case and receiving a default judgment. Knowing one's genealogy can also prevent involvement in a lawsuit if, say, the person named in the newspaper was not actually an ancestor even though he or she had the same name as an ancestor. During a quiet title and/or partition action, being well versed in one's genealogy can prevent or correct errors on the plaintiff's part and will provide evidence to substantiate a defendant's claims. The immense importance of genealogical research is discussed next.

1. Genealogical Research

As time and technology have influenced modern Native Hawaiians, it can be easy to lose track of the history of a person's ‘ohana. Researching and compiling an accurate genealogy can be an invaluable resource to keep connections with history, the ‘āina, and the ‘ohana. For example, Doug Weber and his family conducted a genealogical search after a land issue arose:

[W]e have some nice information about our family, where we came from, pictures, a nice genealogy, what it all represents—and my recommendation is just for families to get more involved. [I]t brings a family together. You have more respect for your ancestors in most cases.
You stumble across some interesting articles about them or transactions that they’ve done—especially when it comes to land transfers . . . You also find some areas where people were manipulated . . . back in the 1800’s no one thought land was going to be so important as it is now.59

Mr. Weber’s family was forced to respond within a very short time to a quiet title and partition lawsuit, and without the thoughtfulness of a cousin who had done a partial genealogy, Mr. Weber’s family would not have been aware of the action and might have lost the land. By compiling a genealogy without the imminent pressure of a legal action, a family can take the time to discover its history. In some cases, lineage to ali‘i or an influential person may be found. The benefits of doing genealogical research are many and invaluable.

Conducting genealogical research, however, is not always simple. In fact it can be quite complicated. The Hustace decision listed various resources that can be used to find genealogical information. These sources include the “State library, Bishop Museum, churches, circuit and supreme courts, Mission House, Hawai‘i Sugar Planter’s Association, Department of Health, Department of Immigration and Naturalization, and the State Archives itself.” Hustace, 718 P. 2d at 1115. Today, the Internet also provides various resources to identify genealogical information from around the world. Often, it is helpful to have important pieces of information like the name, date of birth/death, marriage date, location, and occupation of the individual who you are researching. While the process may be tedious and often frustrating, the information learned and the value of knowing one’s history and connection to the ʻāina and documenting them for the benefit of future generations can be well worth the struggle. Please see Appendix A for a list of genealogical research resources.

In addition to the interesting historical facts and newly restored family connections, taking the time to trace one’s genealogy can also be beneficial in finding non-judicial solutions to potential land disputes. Addressing issues of fractionalization and the concerns of family members before a conflict arises can lead to results that a family is comfortable with.

Next, we look at the important role that ʻŌlelo Hawaiʻi plays in quiet title and partition actions. As a preemptive measure and to ease the burdens of litigation, it is a good idea for families to have important documents such as wills, deeds, etc., written in ʻŌlelo Hawaiʻi, translated into English. This is discussed next.

59 Interview with Doug Weber, supra note 39.
2. Translation of Documents

Hawaiian language is fundamentally inseparable from Native Hawaiian culture. But what exactly is ‘Ōlelo Hawai‘i’s impact on a quiet title and/or partition action? To answer this question it is important to note that English and Hawaiian are both official languages of Hawai‘i. HAW. REV. STAT. § 1-13. As previously discussed, both quiet title and partition actions are used to reconcile claims to the title of property. To determine title, a title search is typically done to track the ownership of a parcel of property from the initial land grant to the present. See e.g., Haleakala Ranch, No. 01-1-0202(2), slip op. at 2. The search process is extremely complex and time-consuming—in part because most of the original documents such as deeds or land grants are in the Hawaiian language.

The translation of these documents from Hawaiian to English illustrates the potential impact that ‘Ōlelo Hawai‘i can have on land and a corresponding quiet title and/or partition action. Because documents such as deeds and land grants were originally recorded and written in the Hawaiian language, an individual involved in a quiet title and/or partition action will need to translate these documents to prove certain interests in, or boundaries to, the property. Although Hawai‘i law does not consider the Hawaiian language to be foreign, Hawai‘i courts must possess expert “judicial knowledge” of the contents of the Hawaiian language documents to accept them as evidence without translation by the parties. See McCandless v. Waiahole Water Co., Ltd., 35 Haw. 314, 322 (Haw. Terr. 1940). Where that knowledge does not exist, Hawai‘i courts will leave the parties to prove what the documents say by way of translation.

Even though Native Hawaiian culture has experienced a renaissance, there are few people capable of translating Hawaiian land grants into their English equivalents. There are certain words and phrases used in Hawaiian land grants that do not necessarily correspond with their traditional uses. The Hawaiian language has many nuances depending upon its application. These nuances add even more difficulty to the translation of land documents.

Acknowledging the nuanced nature of the Hawaiian language highlights another potential problem for an individual seeking translation of documents. Land grants, deeds, wills, and other legal documents are objective documents; consequently, the translation of these documents should reflect their true meaning. The possibility of interpreting a legal document in a manner that goes beyond its original intent is a real problem. Documents should be translated with the intent of the original creator in mind. Land grants and titles were recorded with a certain intended boundary or description, while deeds were created to transfer a specific interest in property to another. Compare the following documents. The first two images are the original palapala sila nui (“PSN”) or royal patent written entirely in Hawaiian.60

60 These documents are re-printed with permission from the Lāna‘i Culture & Heritage Center and Hawai‘i State
These documents showcase yet another difficulty of translating older documents—poor legibility due to age. During a title search, obtaining a translation of previous deeds or transfers may be slowed depending on the quality of the documents on record. Translating documents before legal action is initiated can help insulate an individual from the pressures and time constraints of litigation. A complete translation may look like the following image and may also include a survey of the property. The document provides a complete description of the boundaries to the property, and the intent of the surveyor conveying the information is unmistakably clear.

The prevalence of ‘Ōlelo Hawai‘i has steadily grown because of renewed interest in Native Hawaiian culture, and Native Hawaiians must continue to support this revitalization. The need for people able to read, write, and translate Hawaiian is extremely important in quiet title and partition actions because many of the original documents are written in Hawaiian. A properly translated document can lead to the protection of ancestral lands for Native Hawaiians. For

example, translated documents related to property and genealogy can help an individual recognize the name of an ancestor in a pending legal notice, which ensures the opportunity to defend his or her legal interest in the land by participating in a case. A family can translate documents such as deeds, titles, and genealogical information and keep the documents in a form that they can easily refer to and use. Understanding property interests and genealogy allows an individual to recognize a newspaper notice of a quiet title and/or partition action even if his or her family is not explicitly named. During a legal action, these same documents may be used to disprove a plaintiff’s claim with regards to the property in question.

To be admissible in court as proof, or evidence of a claim, documents need to be authenticated, meaning that they need to be proved to be true and genuine. For example, a handwritten, unrecorded and un-notarized deed would typically require a declaration or affidavit of the grantor or the grantee of the deed attesting to the genuineness of the signatures to the deed. However, some documents are self-authenticating, meaning that their truth or genuineness is presumed because of where they were acquired. For example, under Hawai‘i Rule of Civil Procedure Rule 44(a)(1) and Rule 902(4) of the Hawai‘i Rules of Evidence, copies of any official record such as birth, marriage, or death certificates held at the Department of Health, transfers of title recorded at the Bureau of Conveyances, etc., that are certified as correct by the custodian of those records are self-authenticating and can be admitted into evidence. The Church of Jesus Christ of Latter-day Saints (“LDS”) can be a good starting point for genealogical research. However, genealogical records and documents obtained from LDS are not admissible in court without further authentication.

Nevertheless, the convenience of having these documents at hand will help to reduce the stress of obtaining translations under the pressure of legal deadlines. Further, these documents can provide an individual with knowledge that goes far beyond any potential legal benefit, such as discovering a previously unknown relative or interest in ancestral land.

Next, we examine some other strategies that a family can use to preserve ancestral land and ease the burdens of litigation. The family land trust and LLC are two tools that have been successfully employed by Native Hawaiian families to preserve lands for future generations and to manage litigation.

**B. Other Options for Preserving Land & Managing Litigation**

When properly formed and executed, both a family land trust and an LLC can be powerful litigation management and land preservation tools. Some families have enjoyed successful outcomes from creating either a land trust or an LLC to prevent divestment of ancestral lands through quiet title and partition lawsuits.
1. Family Land Trust

One solution to possible land disputes and the loss of fractionated interests is the establishment of a land trust where a family makes collective decisions concerning the future of the land. See Haw. Rev. Stat. § 558. A land trust is a relationship between parties in which a trustee has the power to hold and manage land for the benefit of the beneficiary. There can be one or more trustees and one or more beneficiaries. Because a trustee is a fiduciary of the beneficiary, any action that the trustee takes must be consistent with the established trust purpose and must be for the benefit of the beneficiary. A land trust requires that a trustee be responsible for, and accountable to, the beneficiary.

The success of a land trust depends upon a family’s willingness to work together, communicate effectively, and collectively come to agreements about the land. As Christopher Rothfus, whose family successfully formed a land trust, explains:

*It takes cooperation and respect, aloha for one another. These are all things that have been told to me by my kupuna . . . everyone has to be committed to following the kuleana and willing to discuss and decide and be respectful of everyone's mana'o. . . . Others have told me that everyone has to be committed—committed to preserving the land for the future and committed to respecting one another.*

This means that while a land trust provides some protection for the land and interest holders, it is not immune from the complications of differing opinions within the ‘ohana. If an ‘ohana is willing to take the time and figure out their collective goals however, together they may be able to preserve ancestral land. As Mr. Rothfus emphasizes, “The land is also a reminder of our cultural identity as Hawaiians because that's where we practice our traditions.”

A family land trust may be a viable option for some families because in a land trust, those with an interest in a parcel of property convert their interests into shares, which go into the trust to be managed by a trustee or board of trustees for the benefit of the beneficiary. Haw. Rev. Stat. § 558-4. A trustee is someone who has legal title to the property, but holds it in trust for the benefit of another (the beneficiary). Haw. Rev. Stat. § 558-4.

A trustee is responsible for making decisions based on the wants and needs of the beneficiary and does not act on his or her own. Though the trustee and beneficiary may change, the land remains the property of the trust. Each land trust is governed by a trust agreement that outlines

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61 Interview with Christopher Rothfus, in Honolulu, Haw. (Jan. 7, 2011) (transcript on file with author).
62 Interview with Christopher Rothfus, *supra* note 61.
the rules of the trust, which should include how shares are passed down upon the death of a beneficiary. A family may allow for inheritance of interests in the property or even to outline which descendants will be beneficiaries. When considering land management and preservation mechanisms, it is important to consider both the advantages and disadvantages.

There are many advantages to forming a land trust. The primary one is that a land trust allows a family to address its goals for the ʻāina and to be proactive in its own self-determination. Depending on the trust agreement, individual property rights are typically taken away from an individual and placed within the collective. A trustee holds legal title to the land while a beneficiary retains the power to direct the trustee, manage the property, and draw income from the trust, if any income is generated. Management and maintenance decisions are often easier because a trustee has the power to make decisions concerning the entire property, provided that those decisions are consistent with the trust purpose and are in the best interests of the beneficiary.

Notably, establishing and organizing a land trust can be a valuable litigation management tool (after a lawsuit is filed) because separate interests in the property are combined to form a larger percentage ownership of the land. A trustee who is charged with managing the land for the benefit of a beneficiary can make decisions about how and whether to proceed with litigation, can sign documents, and can speak on behalf of the trust. This can provide for a more efficient use of financial resources because a trustee can act as a representative of members of the trust in lieu of each individual having to attend court hearings and participate in other aspects of litigation.63 The concerted efforts of a unified entity such as a land trust can make the difference in a case where a co-tenant is seeking a partition by sale because greater percentage ownership can equal greater leverage.

Another major benefit of forming a land trust is that a family can avoid probate if the trust agreement defines to whom a beneficiary interest passes. By forming a land trust, property may be preserved for a longer period of time than if it were to be divided among the respective interest holders. This is because the land trust mechanism of land preservation typically takes away individual rights in the land, such as the right to file for partition, and vests them in the collective.

A family land trust also has disadvantages. Some view restrictions on land management or development, contained in the trust agreement, as a major drawback.64 Another constraint is that a trustee may be held personally liable if his or her decisions are not strictly consistent with the interests and purposes of the trust.65 The Business Judgment Rule (“BJR”), which provides a

63 Interview with Dawn Chang, Principal, Kuʻiwalu, in Honolulu, Haw. (Oct. 5, 2012).
64 Interview with Dawn Chang, supra note 63.
65 Interview with Bruce Graham, Partner, Ashford & Wriston LLP, Lecturer in Law, William S. Richardson School
measure of protection for a decision maker in some business arrangements, such as an LLC, generally does not apply to a trustee making decisions on behalf of a land trust. The BJR creates a presumption that those making decisions for an entity acted in good faith and in an informed manner in making a business judgment. As long as a decision maker acted in good faith and in an informed manner, a court will generally uphold those decisions. Without the benefit of the BJR, however, a trustee faces a greater burden in proving the validity of his or her decisions.

A family also needs an attorney to set up a land trust—there is no standard trust agreement; each agreement must be set up individually. Consequently, creating a trust can be expensive and time consuming. As mentioned above, a land trust can only avoid probate if the trust agreement defines to whom a beneficiary interest passes. Perhaps the biggest drawback is that a land trust is subject to the rule against perpetuities, meaning that a land trust cannot exist forever. Haw. Rev. Stat. § 525-1. Also, by law, if a trustee has any interest in a decision (i.e., a potential conflict of interest between a trustee and the trust), the dispute must be taken to probate court.

Despite these disadvantages, a family land trust can be used to preserve and maintain ancestral lands. Some Native Hawaiian families have successfully established a land trust to preserve land for future generations. For example, one family created a land trust to defend against a quiet title and partition action and to preserve its kuleana lands. This particular land trust has hundreds of beneficiaries from multiple family lines. To organize the trust, the family decided to name multiple trustees, one to serve as a representative for each of the family lines. For this particular family, the formation of a land trust was extremely positive and served as a powerful litigation management and land preservation tool.

Conflicts and disagreements can arise, however, between and among family members, who are often future beneficiaries. Perhaps most significantly, if title is unclear, it may be difficult to set up a land trust with the intent of preserving the property; the family may have to go through a quiet title action to clear title to the land.

It is important to seek legal assistance when forming a land trust to ensure that a family’s desires and concerns for the land are addressed. By taking this initial step, a family may be able to avoid an unnecessary and burdensome legal battle. This single action may allow a family to control the outcome and usage of ancestral land. Often there is a fear that the legal system does not adequately represent the needs of Native Hawaiians. But, by agreeing as an ‘ohana how to care for the ‘āina by forming a family land trust, the legal system can be used to protect and preserve Native


66 Interview with Bruce Graham, supra note 65.
67 Interview with Bruce Graham, supra note 65.
Hawaiians’ interests. Some Native Hawaiians may be able to find an option that works in both the traditional and modern understandings of land tenure. The formation of an LLC, discussed next, provides another option for Native Hawaiian families that seek to preserve ancestral lands.

2. Limited Liability Corporation

Although it may seem unusual to consider an LLC as a way of preserving ancestral lands, an LLC allows for easier management and more efficient use of resources held by numerous co-tenants. The different types of business forms that exist include a: partnership, limited partnership, limited liability partnership, limited liability corporation, and corporation. For the purposes of this primer, we focus on the LLC with a brief introduction to general corporation principles.

The main reasons that a business owner incorporates are: (1) to raise money by issuing public stock, and (2) to shield the business from liability to third parties. Legally, a corporation is viewed as its own separate entity or person. This is important because it means that a corporation’s owners (known as shareholders) will not be held personally responsible for any wrongs committed by the corporation. This means that when someone sues a corporation, the money that is paid to a successful plaintiff is money from the corporation’s pocket, and not from the pockets of its shareholders.

An LLC combines certain features of the corporate form with others more closely resembling a general partnership. An LLC in Hawai‘i is governed by Hawai‘i Revised Statutes Chapter 428 and does not need to be organized for profit. An LLC may be member-managed or manager-managed. A manager does not necessarily also have to be a member of the LLC. Under Hawai‘i Revised Statutes § 428-101, an LLC is simply a “limited liability company organized under this chapter.” An LLC has the “same powers as an individual to do all things necessary or convenient to carry on its business or affairs.” Haw. Rev. Stat. § 428-111(b). An LLC “is a legal entity distinct from its members.” Haw. Rev. Stat. § 428-201.

The primary benefits of choosing an LLC as a land and litigation management mechanism are: (1) an LLC is relatively easy and inexpensive to create, and (2) an LLC limits its member and manager’s liability to third parties. Limiting liability is always something that should be taken into consideration when one owns land. For example, if a person owns land that has some danger on it (perhaps a hole that is not easily visible, or some other hazard), and a third party enters the land and is injured, the landowner may be liable for the trespasser’s injuries if it was a hazard that the landowner knew about and did not mark with some kind of warning. In contrast

68 See Angela Schneeman, Law of Corporations and Other Business Organizations (Dave Garza et al. eds., 5th ed. 2010).
to a land trust trustee who may be personally liable for the decisions that he or she makes, Hawai‘i Revised Statutes Chapter 428 is clear that an LLC member and manager are not personally liable for the actions of the LLC. See Haw. Rev. Stat. § 428-303(a).

Generally, the only time that a member and manager can be held personally liable for an LLC’s actions are if the member and/or manager ignore or disrespect the company formalities, if the member and/or manager act outside of the scope of their authority, or if a provision of the articles of organization (defined below) say that a member will be held personally liable for a certain action and the member consented to the provision in writing. Haw. Rev. Stat. § 428-303(b)-(c). An LLC itself, however, may be liable to a third party for the wrongful acts of its member(s) or manager(s) acting in the ordinary course of business of the company or with the authority of the company. Haw. Rev. Stat. § 428-302. This means that in any legal action taken against an LLC, any monetary damages that a plaintiff seeks will be limited to the LLC’s assets (in this case, the value of the land).

Other benefits of choosing an LLC as a land preservation tool include: (1) lenders and other third parties may be more willing to lend to or work with an LLC because it is a familiar and reliable vehicle, (2) manager decisions are subject to the BJR and will generally be upheld, (3) an LLC can last as long as a member wants it to, and (4) an LLC interest is more freely transferable than a land trust interest.69

While an LLC can be an excellent land management and preservation mechanism, it is underutilized because of common misperceptions that one needs to be an entrepreneur to form an LLC. Many people do not think about a business structure as a potential solution for preserving and maintaining ancestral lands. Thus, family members may be apprehensive about investing their interests in an LLC simply because it is an unfamiliar form of land management and may sound complicated.

Like a family land trust, an LLC provides a more organized way of managing quiet title and partition litigation. An LLC can provide greater leverage because the LLC: (1) typically represents a larger interest than a litigant appearing individually would, and (2) allows for a more efficient use of financial resources relating to litigation. Next we look at some basic steps necessary to create an LLC.

3. How to Create a Limited Liability Corporation in Hawai‘i

An LLC is relatively easy and inexpensive to create—the “existence of a limited liability corporation begins when the articles of organization are filed.” Haw. Rev. Stat. § 428-202(b). The first step is to draft an LLC’s articles of organization (“articles”). Hawai‘i Revised Statutes § 428-
203(a) details what provisions the articles of organization must set forth, subsection (b) lists which provisions the articles may set forth, and subsection (c) provides that the articles may not vary the non-waivable provisions of Hawai‘i Revised Statutes § 428-103(b). The provisions required by subsection (a) are detailed in Form LLC-1. Please note that “LLC” or “A Limited Liability Corporation” or some language to that effect must be in the official name of the entity. If not, third parties are not put on notice of the limited liability of the corporation and the LLC member could be held personally liable.

Once the articles are drafted, they must be registered with the Hawai‘i Department of Commerce and Consumer Affairs (“DCCA”) Business Registration Division (“BREG”) by filing Form LLC-1 and paying the appropriate filing fees. All of the necessary forms can be found on DCCA’s website at http://hawaii.gov/dcca/breg/registration/dllc/forms. The schedule of filing fees can be found at http://hawaii.gov/dcca/breg/registration/dllc/fees. The fee to file an LLC’s articles is $50 and the fee to register the LLC’s name is $10. Thus, one can create an LLC for a total cost of $60 plus the time necessary to draft the articles.

Though creating an LLC is relatively simple, consulting with, and hiring, an attorney who specializes in this area of law is highly advisable because he or she can reasonably anticipate things that an ordinary person cannot. One benefit of creating an LLC as opposed to a family land trust is that Hawai‘i Revised Statutes Chapter 428, which governs an LLC, includes default rules that are already drafted, including form articles. The default rules govern an LLC once it is created, unless the LLC chooses to alter them or draft its own provisions. After a person receives confirmation that an LLC has been filed, he or she will obtain a federal tax identification number from the Internal Revenue Service.

A family land trust and LLC can both be effective land preservation and litigation management tools, but deciding to form a land trust or LLC is a personal decision that must be made by the affected ‘ohana. The next part of the primer provides a basic comparison between a family land trust and an LLC.

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70 Non-waivable provisions include, among other things, unreasonably restricting rights to information or access to records, unreasonably reducing the duty of care, and eliminating the obligation of good faith. Haw. Rev. Stat. § 428-103.


4. Choosing to Form a Family Land Trust or a Limited Liability Corporation

When deciding whether to hold family land in a land trust or in an LLC, the family’s ultimate goal should be to preserve the land for future generations. If this is indeed the ultimate goal, it is best to use some mechanism, be it a family land trust or an LLC, to get organized and craft shared visions and management plans. Employing either of these land management and preservation mechanisms can be a preemptive measure to ensure that an individual interest is not left vulnerable to dispossession via a quiet title and partition action. To decide which approach, if any, is right for a particular ‘ohana, the family should conduct extensive research, and meet with an attorney who specializes in the particular area of law if at all possible. Please see Appendix A for potential legal resources. Some factors to consider include cost, familiarity with the structure, the distribution of assets, dissolution procedures, voting procedures, whether or not default rules are in place, tax consequences, etc. Also, as previously mentioned, if title is unclear, a family may have to first go through a quiet title action before forming a land trust or LLC.

Setting up a land trust is typically more expensive than creating an LLC because of the need to hire an attorney. Family members may, however, be more amenable to the trust format because it is a familiar vehicle of land ownership in contemporary Hawai‘i.

Both the land trust and LLC governing documents should provide for the distribution of assets should parties want to dissolve the land management entity in the future. The details will depend on the specific provisions of the trust agreement or LLC articles. For both a family land trust and LLC, parties should detail in the governing documents how any income generated by the land will be distributed, and how a beneficiary or member will vote. Again, an LLC is beneficial in this aspect—if the articles do not specifically provide for distribution and voting, the default rules will apply. In the context of a family land trust, these provisions need to be included when the land trust agreement is drafted to avoid causing disputes between a beneficiary and trustee at a later date. Further, it is crucial that these provisions be included at the outset of the creation of the family land trust because in a land trust, the named trustee holds legal title to the land and is responsible for decisions pertaining to the land.

If the goal is to preserve land as a whole, or as whole as it can be, a defendant in a quiet title and/or partition action, and anyone who could potentially become a defendant in such an action, should consider using one of these land management and preservation mechanisms. Whether a family chooses a land trust or an LLC, a family can benefit from increased organization and management ease.74

74 Interview with Dawn Chang, supra note 63.
There are other potential community-driven solutions to combating some of the inequities involved in the quiet title and partition processes. Described below is one possible solution to the problem of people not receiving notice of quiet title and partition actions.

5. Clearinghouse

A community-driven solution could include an information clearinghouse responsible for searching newspapers and republishing notices for land actions. A common newsletter, website, or other regular publication aimed at Native Hawaiians might provide a greater chance of successful notice in quiet title and partition actions. Currently, notices are required to be published in one newspaper of general circulation, which may not be seen by an unknown defendant in a quiet title and/or partition action. The legal notice section is often small, confusing, and difficult to find in the newspaper. Further, many people prefer online news sources and do not read paper newspapers. The combination of all of these factors reduces the likelihood that an unknown defendant will actually receive notice of a legal action against him or her.

Ideally the clearinghouse would be an entity that would have a physical space as well as an online presence. The space would be used for counseling and education and in the instance where intra-familial disputes over what to do arose, perhaps even a mediation or ho'oponopono center where a third party facilitator could help resolve those disputes.
VIII. Conclusion

*Ka honua nui a Kāne i hō‘inana a ʻahu kīnohinohi.*

*The great earth animated and adorned by Kāne.*

ʻĀina is of incalculable importance to the Native Hawaiian community and culture. The history of land tenure in Hawai‘i has created unique challenges for Native Hawaiians seeking to preserve ancestral lands. The change from communally held land to a Western system of private ownership created many difficulties for Native Hawaiians. The concept of co-tenancy, and the rights associated with it, underlies many of the issues discussed in this primer, such as the right of any co-tenant to seek partition of land no matter how small his or her original interest is.

This primer is designed to increase understanding of quiet title and partition law in Hawai‘i and to provide some practical discussion of related issues such as the doctrine of adverse possession, critical policy considerations, the role of genealogical research, and the importance of ‘Ōlelo Hawai‘i. Other legal handles such as the creation of a family land trust or LLC are also addressed as land preservation and litigation management tools.

A major goal of this primer is to provide some of the tools necessary for people to effectively represent themselves in court without the help of an attorney through the glossary of terms, the list of resources and references in Appendix A, and the *pro se* materials and sample legal documents and forms in Appendix B.

Though this primer serves only as an introduction to the processes and many issues associated with quiet title and partition law in Hawai‘i, we hope that it will spark conversation and greater involvement of Native Hawaiians in cases involving ancestral lands. By protecting and caring for the land and ensuring that the entire ‘ohana benefits from its bounty, Native Hawaiians can maintain a connection to the past while safeguarding the future. E ʻonipaʻa i ke kulāwi!

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75 *Puku‘i*, *supra* note 1, at 143 (no. 1316).
## Glossary of Terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Accretion</strong></td>
<td>The process by which an area of land is increased by the gradual deposit of soil due to the action of a boundary river, stream, lake, pond, or tidal waters. <em>Maunalua Bay Beach Ohana</em> 28 v. <em>Hawai'i</em>, 222 P.3d 441, 443 (Haw. Ct. App. 2009).</td>
</tr>
<tr>
<td><strong>Action</strong></td>
<td>A lawsuit.</td>
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<tr>
<td><strong>Adverse Possession</strong></td>
<td>A legal means by which a person without good title can acquire ownership of land. For an adverse possession claim in Hawai'i, the person raising the claim must meet the following conditions: (1) actual possession of the property, (2) open and notorious use of the property, (3) exclusive use of the property, (4) hostile or adverse use of the property, and (5) continuous use of the property for the statutorily required period of twenty years.</td>
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<tr>
<td><strong>Affidavit</strong></td>
<td>A sworn statement notarized by a notary public.</td>
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<tr>
<td><strong>Ahupua'a</strong></td>
<td>“Land division usually extending from the uplands to the sea, so called because the boundary was marked by a heap <em>(ahu)</em> of stones surmounted by an image of a pig <em>(pua’a)</em>, or because a pig or other tribute was laid on the altar as tax to the chief. The landlord or owner of an <em>ahupua’a</em> might be a <em>konohiki.</em>” Mary Kawena Puku’i &amp; Samuel H. Elbert, <em>Hawaiian Dictionary</em> 9 (1986) [hereafter <em>Hawaiian Dictionary</em>].</td>
</tr>
<tr>
<td><strong>‘Aikapu</strong></td>
<td>“To eat under taboo; to observe eating taboos.” <em>Ai,</em> to eat, and <em>kapu,</em> forbidden. 1. To eat according to the restrictions of the kapu.” <em>Hawaiian Dictionary,</em> <em>supra,</em> at 10.</td>
</tr>
<tr>
<td><strong>Akua</strong></td>
<td>“God, goddess, spirit, ghost, devil, image, idol, corpse; devine, supernatural, godly.” <em>Hawaiian Dictionary,</em> <em>supra,</em> at 15.</td>
</tr>
<tr>
<td><strong>Ali‘i</strong></td>
<td>“Chief, chiefess, officer, ruler, monarch, peer, headman, noble, aristocrat, king, queen, commander; royal, regal, aristocratic, kingly; to rule or act as a chief, govern, reign; to become a chief.” <em>Hawaiian Dictionary,</em> <em>supra,</em> at 20.</td>
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</table>


Answer  A legal document responding to a complaint and/or counter-claim. An answer must be filed by a return date. Each party must describe the source of his or her title, right, interest, or claim in their respective answer. An answer also preserves a defendant’s right to appeal or contest any judgments in a case.

Authentication  The process by which evidence, or documents submitted to a court, are proven to be true and genuine.

Beneficiary  In the context of a family land trust, a person who has relinquished legal title to the land but who retains the power to direct a trustee, manage the property, and draw income from the trust if any income exists.

Broken Title  Where title was not passed down properly or where there is not sufficient documentation to show that title was passed down.

Business Judgment Rule (“BJR”)  Creates a presumption that those making decisions on behalf of an LLC acted in good faith. As long as this is true, a court will uphold those decisions.

Chain of Title  The history of ownership of a parcel of property.

Claimant  Any party who is claiming an interest in the property. This term can be used to refer to both a plaintiff and a defendant who are claiming an interest in the land.

Cloud (on title)  Exists when an act has occurred or a document or encumbrance (e.g., a mortgage) has been recorded on title to property that has the effect of impairing a landowner’s title or that makes title questionable.

Commissioner in Partition  A person appointed by a court to survey the land and to determine the feasibility of partition in kind (physical division of the land). In the event that partition in kind is not feasible, a court will typically direct the commissioner to publicly auction off the property.
Complaint

The initial pleading that starts a lawsuit. Explains why a court is allowed to hear a case, what a plaintiff is claiming, and what the plaintiff is asking the court to do.

Conflicted Out

When a lawyer is disqualified from representing one or more clients due to a conflict of interest.

Conflict of Interest

When a lawyer represents two or more clients whose interests are incompatible and the lawyer is disqualified from representing both clients.

Conservation Easement

A legally enforceable perpetual land preservation agreement between a landowner and a government agency or a qualified land protection organization (often called a “land trust”), for the purpose of conserving the land. A conservation easement is designed to: (1) preserve and protect land predominantly in its natural, scenic, forested, or open-space condition, (2) preserve and protect the structural integrity and physical appearance of cultural landscapes, resources, and sites that perpetuate Native Hawaiian culture, (3) preserve and protect historic properties and traditional and family cemeteries, or, (4) preserve and protect land for agricultural use. Haw. Rev. Stat. §§ 198-1, -2.

Conveyance

The process of transferring ownership of property. Conveyance can occur by deed, will, or intestate succession.

Corporation

A legal entity that can be used as a land preservation and litigation management tool.

Co-tenancy

A form of property ownership where more than one person has an interest in a parcel of land at the same time.

Co-tenant

A person who owns an interest in a parcel of property with someone else at the same time.

Counterclaim

A legal document and claim that a defendant can assert against a plaintiff. For example, in a quiet title action, a defendant can file a counterclaim against a plaintiff asserting that he or she has superior title to all or to a portion of the land. In this instance, if there are other defendants involved in a case, a cross-claim is typically filed against them as well. See “Cross-claim.”
Cross-claim: A legal document and claim that a defendant can assert against other defendants. In a quiet title action, for example, a defendant could file a cross-claim against the other defendants, asserting that he or she has a superior claim to all or to a portion of the property. Usually, if a defendant files a counterclaim against a plaintiff, he or she will need to file a cross-claim against the other defendants. See “Counterclaim.”

Declaration: A sworn statement that does not need to be notarized by a notary public.

Deed: A legal instrument, which conveys, affirms, or confirms, an interest in, or right to, property.

Default Judgment: A final and binding judgment against a defendant that is based on the merits of a plaintiff’s claims.

Defendant: A person or entity who is named in a quiet title and/or partition lawsuit by a plaintiff, and who is called upon to defend his or her interest in, or right to, the property.

Deposition: An out-of-court oral interview that is conducted under oath. A deposition can be an effective way to gain information that can help to determine the strengths and weaknesses of a person’s claims. This testimony can be useful if the person deposed is unable to testify at trial. Hawai’i Rules of Civil Procedure Rules 27 through 32 provide guidelines for depositions.

Descent: The distribution of a person’s property to his or her heirs when that person dies without first conveying it and without a will.

Devise: The distribution of a person’s property according to that person’s will.

Disclaimer: A written document voluntarily signed by a person with an interest in an estate or property, stating that the individual does not wish to retain his or her interest.
<table>
<thead>
<tr>
<th>Discovery</th>
<th>The fact-finding phase of a quiet title lawsuit, where parties have the opportunity to ask each other for information in writing, through documents, and through oral testimony at depositions.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Due Diligence</td>
<td>The standard that a plaintiff must meet to try to identify, locate, and personally serve all potentially interested parties in a quiet title and/or partition action.</td>
</tr>
<tr>
<td>Encumbrance</td>
<td>Something that impairs or affects title to property, e.g., a mortgage.</td>
</tr>
<tr>
<td>Entry of Default</td>
<td>The process by which a defendant, who is properly served but who does not respond to a complaint within the required amount of time, loses his or her right to participate in a case. This is not the same as a default judgment. See “Default Judgment.”</td>
</tr>
<tr>
<td>Exhibit</td>
<td>A document or object (may also be a photograph, map, genealogy/pedigree chart, etc.) that is introduced as evidence in a trial.</td>
</tr>
<tr>
<td>Exhibit List</td>
<td>A list of exhibits that a party intends to use at trial.</td>
</tr>
<tr>
<td>Genealogy</td>
<td>Family history. In a quiet title action, genealogical documents are required to be authenticated. See “Authentication.”</td>
</tr>
<tr>
<td>Great Prejudice</td>
<td>In a partition action, the term is invoked when partition in kind would result in a material decrease in the value of a co-tenant’s share as compared to what could be obtained by sale of the whole property.</td>
</tr>
<tr>
<td>Hānai</td>
<td>Foster child, adopted child; foster, adopt, or to raise, rear, feed, nourish, sustain. HAWAIIAN DICTIONARY, supra, at 56.</td>
</tr>
<tr>
<td>‘Ili</td>
<td>“Land section, next in importance to ahupua’a and usually a subdivision of an ahupua’a.” HAWAIIAN DICTIONARY, supra, at 97.</td>
</tr>
<tr>
<td>Impracticable</td>
<td>Not feasible; in the context of a partition action, the term usually refers to the inability of physically dividing property by virtue of the topography of the land, fractionalization of the property, county zoning ordinances, etc.</td>
</tr>
<tr>
<td><strong>Interest</strong></td>
<td>A legal share of the property.</td>
</tr>
<tr>
<td><strong>Instrument of Conveyance</strong></td>
<td>A legal document such as a deed or a will that conveys an interest in, or right to, property.</td>
</tr>
<tr>
<td><strong>Intestate Succession</strong></td>
<td>The legal process of distributing a person’s property where there is no will.</td>
</tr>
<tr>
<td><strong>Interrogatories</strong></td>
<td>A set of written questions from either a plaintiff or a defendant typically asking the receiving party to provide all of the facts on which his or her claim to title, if any, is based.</td>
</tr>
<tr>
<td><strong>Judgment</strong></td>
<td>A final, binding court decision.</td>
</tr>
<tr>
<td><strong>Jurisdiction</strong></td>
<td>A court’s ability to hear a case; a court must have jurisdiction over the individual or over the property in order to hear a case.</td>
</tr>
<tr>
<td><strong>Kālai‘aina</strong></td>
<td>“Lit., land carving.” HAWAIIAN DICTIONARY, supra, at 121.</td>
</tr>
<tr>
<td><strong>Kalana</strong></td>
<td>“Division of land smaller than a moku or district; county.” HAWAIIAN DICTIONARY, supra, at 121.</td>
</tr>
<tr>
<td><strong>Kalo</strong></td>
<td>“Taro (Colocasia esculenta), a kind of aroid cultivated since ancient times for food, spreading widely from the tropics of the Old World. In Hawai‘i, taro has been the staple from earliest times to the present, and here its culture developed greatly, including more than 300 forms. All parts of the plant are eaten, its starchy root principally as poi, and its leaf as lū‘au. It is a perennial herb consisting of a cluster of long-stemmed, heart-shaped leaves rising 30 cm. or more from underground tubers or corms. (Neal 157–60.) Specifically, kalo is the name of the first taro growing from the planted stalk.” HAWAIIAN DICTIONARY, supra, at 123.</td>
</tr>
<tr>
<td><strong>Kaukau Ali‘i</strong></td>
<td>“Class of chiefs of lesser rank than the high chief, the father a high chief and the mother of lower rank but not a commoner.” HAWAIIAN DICTIONARY, supra, at 135.</td>
</tr>
<tr>
<td><strong>Kō‘ele</strong></td>
<td>“Small land unit farmed by a tenant for the chief.” HAWAIAN DICTIONARY, supra, at 158.</td>
</tr>
</tbody>
</table>
### Konohiki
“Headman of an *ahu'pua'a* land division under the chief; land or fishing rights under control of the *konohiki*; such rights are sometimes called *konohiki* rights.” HAWAIIAN DICTIONARY, *supra*, at 166.

### Kuleana
“Right, privilege, concern, responsibility, title, business, property, estate, portion, jurisdiction, authority, liability, interest, claim, ownership, tenure, affair, province; reason, cause, function, justification; small piece of property, as within an *ahu'pua'a*; blood relative through whom a relationship to less close relatives is traced, as to in-laws.” HAWAIIAN DICTIONARY, *supra*, at 179.

### Kupuna
“Grandparent, ancestor, relative or close friend of the grandparent’s generation, grandaunt, granduncle. . . . Starting point, source; growing.” HAWAIIAN DICTIONARY, *supra*, at 186.

### Land Trust
A land-ownership arrangement where a trustee(s) holds legal title to the land for the benefit of the beneficiary(ies). The beneficiary(ies) retains the power to direct the trustee(s), manage the property, and draw income from the trust if any income exists.

### Lease
A legal right to use or remain on property for a certain period of time.

### Lele
“A detached part or lot of land belonging to one ‘ili, but located in another ‘ili.” HAWAIIAN DICTIONARY, *supra*, at 201.

### Limited Liability Corporation (“LLC”)
A legal entity that combines certain features of a corporation with others more closely resembling a general partnership. An LLC can be used as a land preservation and litigation management mechanism.

### Litigation
The process of bringing or contesting a case in court.

### Māhele
“Portion, division, section, zone, lot, piece, quota, installment, bureau, department, precinct, category, scene or act in a play; share, as of stocks; measure in music; land division of 1848 (the great *mahele*); part or organ, as of the body; section or wing (military, see *mokuna*); denominator,
in fractions; to divide, apportion, cut into parts, deal.”
Hawaiian Dictionary, supra, at 219.

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mālama</td>
<td>“To take care of, tend, attend, care for, preserve, protect, beware, save, maintain; to keep or observe, as a taboo; to conduct, as a service; to serve, honor, as God; care, preservation, support, fidelity, loyalty; custodian, caretaker, keeper.” Hawaiian Dictionary, supra, at 232.</td>
</tr>
<tr>
<td>Memoranda</td>
<td>Plural of “memorandum.” See “Memorandum.”</td>
</tr>
<tr>
<td>Memorandum</td>
<td>A memorandum sets out the rule of law allowing a court to do what a movant is requesting and provides the argument for why the court should grant the movant’s request.</td>
</tr>
<tr>
<td>Mesne Conveyance/ Assignment</td>
<td>A middle or intermediate transfer. An intermediate conveyance; one occupying an intermediate position in a chain of title between the first grantee and the present holder.</td>
</tr>
<tr>
<td>Moku</td>
<td>“District, island, islet, section, forest, grove, clump, severed portion, fragment, cut, laceration, scene in a play.” Hawaiian Dictionary, supra, at 252.</td>
</tr>
<tr>
<td>Mortgage</td>
<td>A loan from a bank, typically taken out by a buyer to purchase property or construct/remodel a house, which is attached to the property.</td>
</tr>
<tr>
<td>Motion</td>
<td>An application made by a party requesting a court to make a particular ruling or order.</td>
</tr>
<tr>
<td>Motion for Summary Judgment (“MSJ”)</td>
<td>A motion that asks a court to rule on an issue as a matter of law. A person seeking an MSJ must show that there is no genuine issue of material fact in dispute.</td>
</tr>
<tr>
<td>Motion in Limine</td>
<td>A motion filed by a party in a lawsuit, generally prior to the trial, to determine whether certain evidence may or may not be presented.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
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<td>-----------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Movant</td>
<td>The person or party filing a motion that is asking a court to do something.</td>
</tr>
<tr>
<td>Native Testimonies</td>
<td>Old or ancient written records of people's recollections of who owned or farmed land, who was part of whose family, who died when, who the konohiki were in the area, what the land was used for, who paid commutation, where boundaries were located, what landmarks were nearby, etc.</td>
</tr>
<tr>
<td>Notice</td>
<td>The process of making all potentially interested parties aware of a lawsuit that may affect their property interests.</td>
</tr>
<tr>
<td>‘Ohana</td>
<td>“Family, relative, kin group; related.” HAWAIIAN DICTIONARY, supra, at 276.</td>
</tr>
<tr>
<td>‘Okana</td>
<td>“District or subdistrict, usually comprising several ahupua’a.” HAWAIIAN DICTIONARY, supra, at 281.</td>
</tr>
<tr>
<td>‘Ōlelo Hawai‘i</td>
<td>The Hawaiian language.</td>
</tr>
<tr>
<td>Opponent</td>
<td>A person or party who argues against something, e.g., a movant’s motion.</td>
</tr>
<tr>
<td>Partition Action</td>
<td>A legal action that divides property either through physical division, or through a division of the proceeds from a sale of whole or part of the land.</td>
</tr>
<tr>
<td>Partition by Sale</td>
<td>A court-ordered sale of part, or all, of the property when partition in kind would be impracticable or would cause great prejudice to any of the parties. The proceeds are distributed among the co-tenants according to their respective interests.</td>
</tr>
<tr>
<td>Partition in Kind</td>
<td>Physical division of the property according to each co-tenant’s proportionate interest.</td>
</tr>
<tr>
<td>Party</td>
<td>A person or entity involved in a lawsuit.</td>
</tr>
<tr>
<td>Perpetuity</td>
<td>A restriction on land that lasts forever. In a conservation easement; an easement in perpetuity means that the conservation</td>
</tr>
</tbody>
</table>
### E ‘Onipa’a i Ke Kulāwi: A Legal Primer for Quiet Title & Partition Law in Hawai‘i

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Easement runs with the land</td>
<td>...</td>
</tr>
<tr>
<td>Plaintiff</td>
<td>A person (or entity) who initiates the lawsuit by filing a complaint.</td>
</tr>
<tr>
<td>Pleading</td>
<td>A formal legal document submitted to a court.</td>
</tr>
<tr>
<td>Pō‘alima</td>
<td>“Friday . . . Work on the chief’s plantations, so called because this work was done on Fridays; the chiefs’ plantation where the people worked on Fridays; to work thus.” HAWAIIAN DICTIONARY, supra, at 334.</td>
</tr>
<tr>
<td>Pono</td>
<td>“Goodness, uprightness, morality, moral qualities, correct or proper procedure, excellence, wellbeing, prosperity, welfare, benefit, behalf, equity, sake, true condition or nature, duty; moral, fitting, proper, righteous, right, upright, just, virtuous, fair, beneficial, successful, in perfect order, accurate, correct, eased, relieved; should, ought, must, necessary.” HAWAIIAN DICTIONARY, supra, at 340.</td>
</tr>
<tr>
<td>Preponderance of the Evidence</td>
<td>The legal standard where a party must show that something is more likely true than not true.</td>
</tr>
<tr>
<td>Prima Facie</td>
<td>“At first view” is a legal term that refers to evidence that, if not rebutted or contradicted, is sufficient on its face to prove a claim. Once a plaintiff presents evidence that establishes a prima facie case, the burden of proof then switches to the defendant, who must rebut or contradict the evidence presented in order to prevail.</td>
</tr>
<tr>
<td>Privity</td>
<td>The mutual or successive relationship to the same rights in a piece of property.</td>
</tr>
<tr>
<td>Probate Order</td>
<td>A court order that validates a deceased person's will and authorizes distribution of that person's property.</td>
</tr>
<tr>
<td>Pro Se</td>
<td>A person (or entity) who is representing him or herself in court without the help of an attorney.</td>
</tr>
<tr>
<td>Quiet Title Action</td>
<td>A lawsuit to determine legal ownership of a parcel of land especially where there is a cloud on, or break in the chain of title.</td>
</tr>
<tr>
<td><strong>Quitclaim Deed</strong></td>
<td>A real property (e.g., land) deed, which transfers only that interest in the property in which a grantor (person transferring the interest) has title.</td>
</tr>
<tr>
<td><strong>Request for Admissions</strong></td>
<td>A discovery tool that is used to establish facts and legal issues and to authenticate documents before trial, or prove that those documents are real. This is done to save time and expense at trial. Hawai‘i Rules of Civil Procedure Rule 36 provides further guidelines.</td>
</tr>
<tr>
<td><strong>Request for Production of Documents and Things</strong></td>
<td>A tool that is often used early in the discovery process to enable a party to inspect, examine, test, copy, and/or photograph documents or objects in the possession of another party. These requests will be granted only if good cause is shown; i.e., if it is important to the person's case and the document or thing is unavailable except from the other party. Hawai‘i Rules of Civil Procedure Rule 34 provides some guidelines.</td>
</tr>
<tr>
<td><strong>Return Date</strong></td>
<td>The date specified in the published summons by which a defendant must either file a written answer or appear in court.</td>
</tr>
<tr>
<td><strong>Right-of-Way</strong></td>
<td>Legally granted access to a parcel of land.</td>
</tr>
<tr>
<td><strong>Service by Publication</strong></td>
<td>The process by which a plaintiff is allowed to provide notice to an unknown and unidentifiable defendant. Service by publication must be made in an English language newspaper published, and having general circulation, in the circuit where the lawsuit is taking place for four weeks in a row.</td>
</tr>
<tr>
<td><strong>Service of Process</strong></td>
<td>The process of providing legal notice to people who potentially have an interest in property that is the subject of a lawsuit.</td>
</tr>
<tr>
<td><strong>Self-authenticating Document</strong></td>
<td>A document submitted to a court that is presumed to be true and genuine because of where it was acquired, e.g., any official record from the Department of Health, the Bureau of Conveyances, etc.</td>
</tr>
<tr>
<td><strong>Summons</strong></td>
<td>A document that orders a defendant to appear in court and requires the defendant to answer.</td>
</tr>
<tr>
<td><strong>Tacking</strong></td>
<td>“Tacking” can be used to meet the twenty-year statutory period required for adverse possession by adding together several successive claimants as long as there is privity of estate or title. <em>Wailuku Agribusiness Co., Inc. v. Ah Sam</em>, 145 P.3d 784, 795 (Haw. Ct. App. 2006) <em>aff’d in part, rev’d in part</em>, 155 P.3d 1125 (Haw. 2007).</td>
</tr>
<tr>
<td><strong>Testimony</strong></td>
<td>Oral or written evidence from a witness, under oath, based on facts.</td>
</tr>
<tr>
<td><strong>Title</strong></td>
<td>Legal ownership that gives a person the right to control and dispose of property.</td>
</tr>
<tr>
<td><strong>Transcript</strong></td>
<td>A written record of all proceedings, including testimony, in a trial, hearing, or deposition.</td>
</tr>
<tr>
<td><strong>Trial</strong></td>
<td>In a quiet title and partition trial, a court determines: (1) the interest holders and their percentage shares in the property, and (2) whether the property can be physically divided or partitioned in kind. If a partition in kind is not feasible or would cause great prejudice (for example, monetarily harm any of the parties), the court may order a partition by sale. See “Partition in Kind” and “Partition by Sale.”</td>
</tr>
<tr>
<td><strong>Trustee</strong></td>
<td>A person who holds legal title to the property in trust for the benefit of the beneficiary(ies). A trustee owes a fiduciary or legal duty to the beneficiary(ies).</td>
</tr>
<tr>
<td><strong>Witness List</strong></td>
<td>A list of witnesses that a party intends to use at trial.</td>
</tr>
</tbody>
</table>
APPENDIX A: RESOURCES

LEGAL RESOURCES

Ka Huli Ao Center for Excellence in Native Hawaiian Law
William S. Richardson School of Law
2515 Dole Street
Room 203
Honolulu, Hawai‘i 96822-2328
(808) 956-8411
Email: nhlawctr@hawaii.edu
http://www.kahuliao.org

Native Hawaiian Legal Corporation
1164 Bishop Street
Suite 1205
Honolulu, Hawai‘i 96813
(808) 521-2302
(808) 537-4268 (fax)
Email: info@nhlchi.org
http://nhlchi.org

Hawai‘i State Bar Association Lawyer Referral & Information Service
(808) 537-9140
Email: iris@hsba.org
http://www.hsba.org/findlawyer.aspx

RESEARCH RESOURCES

Hawai‘i State Archives
Kekauluohi Building
‘Iolani Palace Grounds
364 S. King Street
Honolulu, Hawai‘i 96813
Phone: (808) 586-0329
Fax: (808) 586-0330
Email: archives@hawaii.gov
Website includes a guide to genealogy. Some collections are accessible online. The Hawai‘i State Archives is open to the public. The “Historical Records Branch preserves and provides access to the State's government archives and special collections.” The records “date from the monarchy to the current legislative session, and also include the papers of individuals and organizations, photographs, maps, artifacts, rare books, [and] 19th century newspapers.”76 These records include vital statistics (birth, marriage, and death records), ship passenger manifests, probates/wills, divorce case files, obituary index, naturalization records, census records, and research aids. There are costs for copies and certain types of requests.

Bishop Museum
1525 Bernice Street
Honolulu, Hawai‘i 96817
Phone: (808) 848-4148
Open: Wednesday to Friday 12:00 p.m. to 4:00 p.m., Saturday 9:00 a.m. to 12:00 p.m.
Closed: Sunday, Monday, Tuesday
Email: library@bishopmuseum.org or archives@bishopmuseum.org
http://www.bishopmuseum.org/research/library/libarch.html
http://bishopmuseumlib.lib.hawaii.edu/

The Museum library and archives have extensive collections, some of which are searchable and accessible online. The library collection includes newspapers, books, and other periodicals that might offer relevant information regarding significant vital statistics dates or other events. The archives contain photos, sound recordings, artwork, and oral histories that may show the particulars of a specific family’s history. Both collections have online search options, but these searches may not cover the entire collection and a visit to the museum may be beneficial. However, hours are limited and there are costs for reproducing documents.

Bureau of Conveyances
Kalanikou Building
1151 Punchbowl St., Room 120
Honolulu, Hawai‘i 96813
Phone: (808) 587-0147
Fax: (808) 587-0136

Hours: Monday to Friday 7:45 a.m. to 4:30 p.m.
Instruments, e.g., deeds, recorded between 8:00 a.m. to 3:30 p.m.
http://hawaii.gov/dlnr/boc

The Bureau of Conveyances website offers searches by party name or by document number; records are available for purchase online and can be printed. These records will indicate whether a property has been transferred and what parties the state recognizes as having a current or former interest. Land Court documents can be obtained through the Bureau of Conveyances.

**Churches**
Family Search (A service provided by the Church of Jesus Christ of Latter-day Saints)
http://www.familysearch.org/eng/default.asp

May be a source of genealogical information for some families. The website offers searches by name and other information, and may lead to birth/death records. If a member of your family has done an extensive genealogy through the LDS Church there may be more detailed information available through this website. Also, check local churches for baptism, marriage, and death records of family members. Note that LDS family group sheets must be verified and may not be admissible in court.

**Circuit and Supreme Courts**
The courts have records of documents filed in various legal actions. Searching court records may offer insight about a family member or other interested party in a land dispute. This information may be helpful to determine if an interest remains or if another legal action may be required. Records may be easier to locate with the names of parties involved, date of the legal action, address or Tax Map Key (“TMK”) numbers, and case numbers.

Most records, filing, and other departments available to the public are open until 4:30 p.m. but close their doors as early as 4:00 p.m. Check with the location and department to verify hours of availability and costs for reproducing documents. Also be aware that some legal actions will have multiple filings with a range of document lengths. Be sure to allow enough time at the location to conduct a thorough search and accommodate the unpredictable demands of those working in the records and filing departments.

Hawai‘i Supreme Court
Ali‘iōlani Hale
417 South King Street
Honolulu, Hawai‘i 96813-2943
Hours: Monday to Friday 7:45 a.m. to 4:30 p.m.
Closed holidays
http://www.courts.state.hi.us/general_information/contact/courts_of_appeal.html
Intermediate Court of Appeals
Kapuāiwa Building
426 Queen Street
Honolulu, Hawai‘i 96813
Hours: Monday to Friday 7:45 a.m. to 4:30 p.m.
Closed Holidays

O‘ahu—First Circuit
Ka‘ahumanu Hale
777 Punchbowl Street
Honolulu, Hawai‘i 96813-5093
Hours: Monday to Friday 7:45 a.m. to 4:30 p.m.
Closed Holidays
Information - Court Concierge Desk: (808) 539-4767
http://www.courts.state.hi.us/general_information/contact/oahu.html

Website includes contact information and locations of district courts on O‘ahu. Contact information for various departments, like filing and document services, is also available through this website.

Maui—Second Circuit
Hoapili Hale
2145 Main Street
Wailuku, Hawai‘i 96793-1679
Hours: Monday to Friday 7:45 a.m. to 4:30 p.m.
Closed Holidays
Chief Court Administrator: (808) 244-2929
Fax: (808) 244-284
http://www.courts.state.hi.us/general_information/contact/maui.html

Website lists phone numbers for various services including legal documents and district courts on Maui.

Hawai‘i—Third Circuit
(Hilo Division)
Hale Kaulike
777 Kīlauea Avenue
Hilo, Hawai‘i 96720-4212
(Kona Division)
Keakealani Building
79-1020 Haukapila Street
Kealakekua, Hawai‘i 96750
Hours: Monday to Friday 7:45 a.m. to 4:30 p.m.
Closed holidays
Information: (808) 961-7440
http://www.courts.state.hi.us/general_information/contact/hawaii.html

Website includes contact information for both Hilo and Kona courts, as well as rural and district courts. Note that the Fourth Circuit was combined with the Third Circuit in 1943; records from the Fourth Circuit can be accessed there.

Kaua‘i—Fifth Circuit
3970 Ka‘ana Street
Līhu‘e, Hawai‘i 96766
Hours: Monday to Friday 7:45 a.m. to 4:30 p.m.
Closed Holidays
Information: (808) 482-2300
http://www.courts.state.hi.us/general_information/contact/kauai.html

Website includes contact information for the district court on Kaua‘i and legal documents department.

Ho‘ohiki Records Search
http://hoohiki1.courts.state.hi.us/jud/Hoohiki/connect.jsp
This link is to Ho‘ohiki online search for filings in Hawai‘i cases filed in the circuit courts and some district courts. Please see the section on Accessing Case Information using Ho‘ohiki in Appendix B for more information.

Please note that the information contained on Ho‘ohiki does not reflect cases filed prior to the data entry date, which varies for different courts (see website for more information). Go to the relevant courthouse to obtain certified paper copies of records; make sure to inquire about cost before ordering copies as they can be expensive, e.g., 50 cents per page.

Land Court:
Ka‘ahumanu Hale
777 Punchbowl Street
Honolulu, Hawai‘i 96813-5093
Hours: Monday to Friday 7:45 a.m. to 4:30 p.m.
Closed Holidays
The Land Court has jurisdiction over applications filed for title to lands in Hawai‘i. It is responsible for hearing and determining any questions regarding these applications. Applications for registering title to parcels of land and easements or rights in land can be filed at the Land Court. The Land Court will then make a determination on the application. These applications and determinations can be found at the Bureau of Conveyances.

**State Department of Health**  
Office of Health Status Monitoring  
Issuance/Vital Statistics Section  
P.O. Box 3378  
Honolulu, Hawai‘i 96801  
Located at: Room 103 (1st floor) of the Health Department building, 1250 Punchbowl Street  
Hours: Monday to Friday 7:45 a.m. to 2:30 p.m.  
Phone: (808) 586-4533  

Certain vital records (birth, death, marriage, and divorce certificates) can be requested if an individual is eligible to apply for it. To be eligible to request certificates you must often have a familial relationship, although that may not be necessary for those seeking certification of death for property co-tenancy verifications. A detailed list of those eligible to request forms is available through the website. There is a minimum cost of $10. Copies can be requested online, in person, or by mail.

**Hawai‘i State Library**  
478 S. King St.  
Honolulu, Hawai‘i 96813  
Phone: (808) 586-3500  
Open Monday to Saturday, various hours  
http://hawaii.sdp.sirsi.net/client/default

Website offers tips on researching and availability. Users can search Hawai‘i newspapers dating to the mid 1800s, which may be helpful in locating vital statistics announcements.

**Mission Houses Museum**  
553 S. King Street  
Honolulu, Hawai‘i 96813  
Phone: (808) 447-3910
The Mission Houses Museum library has correspondence of missionaries and Hawaiian pastors, many Hawaiian language publications, and some church records. These resources may be helpful if specific information about names or dates is unknown. Once this information is gathered, it can be used to obtain vital statistics and may lead to more information regarding legal actions. There are costs for copies, which may take up to 3 weeks for certain resources. Assistance with research is available for $60/hr but may take up to 4 weeks.

**Hawai‘i Sugar Planter’s Association Archives**
University of Hawai‘i at Mānoa Library
2552 McCarthy Hall
Honolulu, Hawai‘i 96822
Located in The Hawaiian & Pacific Collection Reading Room is located on the 5th Floor, Hamilton Library
Hours: Monday to Friday 9:00 a.m. to 5:00 p.m.
Closed Saturday, Sunday, and State Holidays
http://www2.hawaii.edu/~speccoll/hawaiihspa.html

The HSPA archives requires as much information as possible and a librarian should be consulted to see if this is the best source of information. Information must be requested and then an appointment scheduled to view information within the reading room. This resource should not be a first step because it cannot be browsed easily and requires quite a bit of work on the part of librarians in the Hawaiian & Pacific Collection at the University of Hawai‘i. Resources vary for different sugar plantations, from employment records to more detailed land records.

**Native Hawaiian Rights Handbook (1993), Melody Kapilialoha MacKenzie**
This book offers legal analysis and explanations of issues affecting the Native Hawaiian community and is an excellent resource for understanding the implications of the past on the lives of today’s Native Hawaiians. An updated version of the Native Hawaiian Rights Handbook, which will be known as the Native Hawaiian Law Book, is forthcoming and will include information that reflects current legal concepts relating to Native Hawaiians.

**Papakilo Database**
This online resource is a database created by the Office of Hawaiian Affairs that compiles records from other databases, many of which are provided in this document. Records are searchable by text, location, or source. The site is useful for those unable to search for information in person at the mentioned locations. Genealogy indexes and vital statistics records are just some of the sources in this database, but note that some may not be accessible because the site is still being
updated. To access this resource the user must first register with a valid email address, at no cost. Users may also print scanned copies of records from the site.

**Property Tax Offices**
The property tax offices on the various islands may be helpful in determining which interested party has paid the taxes on a parcel of property. This information may also help a family determine if maintaining the property is within their financial means. Most of the islands’ property tax offices websites do not allow searches by property owner name. Knowing the address or TMK numbers for a parcel is necessary.

**O'ahu**
Treasury Division
530 S. King Street, Rm 115
Honolulu, Hawai'i 96813
Hours: Monday to Friday 8:00 a.m. to 4:15 p.m.
Phone: (808) 768-3980
http://www.honolulupropertytax.com/Main/Home.aspx

Website offers the ability to search property by address, parcel ID # (TMK), and information directly related to the sale of the property. Parcel ID # should be entered without dashes as one, continuous twelve digit number. See the “help” tab for more information on correctly inputting the Parcel ID number.

**Maui**
County of Maui
Real Property Tax Division
70 E. Ka'ahumanu Avenue, Ste. A16
Kahului, Hawai'i 96732
Hours: Monday to Friday 8:00 a.m. to 4:00 p.m.
Phone: (808) 270-7297
http://www.mauipropertytax.com/

Website offers a link to search properties by location address, owner name, parcel number, map, sale search, or sale list. Parcel ID # should be entered without dashes as one, continuous twelve digit number. See the “help” tab for more information on correctly inputting the Parcel ID number.

**Hawai'i**
Hilo Office
Aupuni Center
Website allows searches by address, parcel ID, or information related to the sale of a particular property. Parcel ID # is a twelve digit number identifying the particular property, instructions can be found on the website.

Kaua‘i
Real Property Assessment Division
4444 Rice Street, Suite 454
Līhu‘e, Hawai‘i 96766
Phone: (808) 241-422
Hours: Monday through Friday 7:45 a.m. to 4:30 p.m.
http://www.qpublic.net/hi/kauai/

Website offers search by address, parcel ID, or information related to the sale of specific properties. Parcel ID # is an twelve digit number entered without dashes, instructions are available on the search site.

Ulukau: The Hawaiian Electronic Library
“A research manual on information access and retrieval of genealogical and land information from government repositories in the State of Hawaii”
http://www.ulukau.org/elib/cgi-bin/library?e=p-0hulu1-000Sec--11en-50-20-contact-contact--1-010escapewin&a=d&p2=book
Created, complied, and illustrated by the Reverend Joel Hulu Mahoe Resource Center, which is solely responsible for this product. Contains a detailed itemization and maps of various sources of genealogical information available in the State of Hawai‘i.

Hawai‘i Revised Statutes (from Hawai‘i State Legislature)
http://www.capitol.hawaii.gov/
This online resource offers text of statutes and is searchable by statute number or key word. Using the specific wording of Hawai‘i’s laws provides a better understanding of the relevant laws and may reduce the likelihood of incorrectly applied statutes.

Hawai‘i Rules of Civil Procedure
http://www.courts.state.hi.us/docs/court_rules/rules/hrcp.htm
This website offers a pdf document of the rules governing civil legal actions in Hawai‘i. Rule 4 is especially important regarding notice of parties to an action. These rules govern the timing, notice, and procedural aspects of legal actions in Hawai‘i courts.

Rules of the Circuit Courts of the State of Hawai‘i
http://www.courts.state.hi.us/docs/court_rules/rules/rcch.htm
This website offers a pdf document of the rules governing the Hawai‘i circuit courts. Recall that quiet title and partition actions are filed in the circuit court where the property is located. This website also contains sample legal forms, which may be useful for pro se litigants.

“Title Searching for the Non-Professional” Jackie Mahi Erickson
http://www.ulukau.org/elib/cgi-bin/library?c=ali1&d=en
Although published in 1980, this resource is a good summary of the title search process and offers information on how to conduct a title search. Some sources or processes are outdated and should be verified if you intend to use them.