I. INTRODUCTION

HILINA‘I PUNA, KÄLELE IA KA‘Ū.
(Said of one who leans or depends on another)
– Mary Kawena Pukui

There is a famous mo‘olelo\(^3\) passed down by many kupuna\(^4\) about the importance of family within the Hawaiian culture.\(^5\) Integrated in this story is the principle that Hawaiians


\(^3\) MARY KAWENA PUKUI AND SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 254 (University of Hawaii Press 1986) (1957) (defining mo‘olelo as “story, tale, myth, history,
believed they directly descended from the ‘Oha, the root of the taro plant. In fact, the Hawaiian creation chant, the *Kumulipo*, describes the creation of Wākea and Ho‘ohokulani’s first child, Wākea [a male], was not the first ancestor who came to Hawai‘i. Wākea was in the middle generation who lived in Hawai‘i, “and [his] ancestors are found farther back among the progenitors of the Hawaiian people. In the time of Wākea mā, the islands were already filled with people.”
Hāloa-naka, who was stillborn. Wākea and Hoʻohokulani buried Hāloa-naka in the earth and his body reemerged in the life form of the taro plant, sprouting shoots from the ground. Mary Kawena Pukui, a famous Hawaiian cultural scholar noted, “members of the ‘ohana, like taro shoots, are all from the same root.” Pukui explained that, “the family as a group was termed ‘oha-na, which literally means ‘all the offshoots.’” This story is passed down to younger generations to demonstrate that, “the members of the ‘ohana, having come forth from the same metaphorical root, have a duty to foster a harmonious relationship with each other.”

Within the Hawaiian culture, the concept of “an individual alone is unthinkable, in the context of the Hawaiian [familial] relationship . . . Everything relating to this individual is within

9 MELODY KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 16-1 (Feb. 8, 2007) (unpublished manuscript, on file with author).

10 NATIVE HAWAIIAN RIGHTS HANDBOOK, supra note 9, at 16-1.


12 NĀNĀ I KE KUMU, supra note 5, at 50-51, 166-167.

13 E.S. CRAIGHILL HANDY & MARY KAWENA PUKUI, THE POLYNESIAN FAMILY SYSTEM IN KA-ʻŪ, HAWAIʻI 198 (1958, reprinted 1998) (“Pulapula, which was applied to human offspring or descendants, literally means offshoots of a plant. Kupuna, or ancestor, is probably the substantive, formed by the suffix na affixed to the root kupu, to grow. Laupaʻi, which means specifically the first leaves put forth by the newly planted taro, is used figuratively to describe a family that is growing, producing many children.” Id.).

14 NATIVE HAWAIIAN RIGHTS HANDBOOK, supra note 9, at 16-1; see, Yuklin Aluli, Hawaiian Genealogy Puts Us Where We Are, Honolulu Advertiser, September 10, 2003, available at http://the.honoluluadvertiser.com/article/2003/Sep/10/op/op04aletters.html. (“With the right to practice Hawaiian culture comes the responsibility to care for its source, the ‘aina and hoa’aina. And it is our Hawaiian genealogy, not our race, that situates us in place and time in Hawai‘i, linking us to each other and through the millennia to creation.” Id.); Email from Davianna Pōmaika’i McGregor, Professor of Ethnic Studies at the University of Hawai‘i at Mānoa to author (April 16, 2007) (on file with author).
Family consciousness is a significant part of cultural identity and how you identified yourself. "You may be 13th or 14th cousins, as we define relationships today, but in Hawaiian terms, if you are of the same generation, you are all brothers and sisters." This historical assertion explains that ‘ohana meant more than the immediate or nuclear family.

This cultural practice of defining relationships in a familial sense is still widely practiced in Hawai‘i and it is not uncommon to be asked, “Who is your family?” Cultural values and traditions within the native Hawaiian family have been continually perpetuated, despite the arrival of foreigners and Anglo-Saxon law in 1778. With the dismantling of a population based on kinship and community, the Hawaiian people found it difficult to shift from a communal based society to one based on New England, secular laws.

Presently, Hawai‘i’s family laws reflect a burgeoning trend of decision-making that is in the “best interests of the child,” and fails to consider extrinsic circumstances such as the child’s cultural and communal background. This Article maintains that the “best interests” doctrine enumerated in HRS § 571-46 (2006) in Hawai‘i’s statutory guidelines is having a detrimental effect on the native Hawaiian community. This Article argues that the most important step in


15 THE POLYNESIAN FAMILY SYSTEM IN KA-‘Ū, HAWAI‘I, supra note 13, at 78.

16 NĀNĀ I KE KUMU, supra note 5, at 50-51, 166-167.

17 Id.


19 COLONIZING HAWAI‘I, supra note 18, at 44; see also, Paul M. Sullivan, Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai‘i, 20 U. HAW. L. REV. 99, 100 (1998). The mid-nineteenth century was a time of rapid change, almost immediately, from a “neolithic” society to a modern constitutional government. Id. Additionally, scholarly knowledge is limited, in part because Hawaii was a preliterate society; all traditions were passed on in an oral manner from generation to generation. Id. at 105, 106.

20 See infra Part III.B.
acknowledging traditional\textsuperscript{21} customary rights is for the Hawai‘i legislature to legally acknowledge customary adoption, more commonly known as hānai\textsuperscript{22}, and to implement this customary tradition into Hawai‘i’s current child custody laws.

This Article casts that because the native Hawaiian population is disproportionately represented in child custody proceedings, the State of Hawai‘i has an affirmative duty to undertake alternative strategies in order to serve the “best interests” of native Hawaiian children. Part II of this Article asserts that the State of Hawai‘i has an affirmative duty to acknowledge and adopt alternative strategies to resolve this current problem. In addition, this part argues for an immediate revision of Hawai‘i Revised Statute § 571-46 (2006)\textsuperscript{23}. This part also explores the junction between the Hawai‘i Judiciary and the legal context of customary adoption through current Hawai‘i case law. Part III discusses the important role of Hawai‘i’s Family Court and the jurisdiction it exercises over child custody disputes. Although this important role has many benefits for Hawai‘i, this part also examines how child custody disputes have impacted the

\begin{footnotesize}
\begin{enumerate}
\item Danielle Conway-Jones, Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Co-Modification of Culture, 48 How. L. J. 737, 743 (2005) (citing Stephen A. Hansen & Justin W. Can Fleet, AMERICAN ASSOCIATION FOR THE ADVANCEMENT SCIENCE, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY: A HANDBOOK ON ISSUES AND OPTIONS FOR TRADITIONAL KNOWLEDGE HOLDERS IN PROTECTING THEIR INTELLECTUAL PROPERTY AND MAINTAINING BIOLOGICAL DIVERSITY, 3 (2003)). “Traditional knowledge” is defined as “mental inventories of local biological resources, animal breeds, and local plant, crop and tree species, . . . practices and technologies, such as seed treatment and storage methods and tools used for planting and harvesting, . . . belief systems that play a fundamental role in people’s livelihood, health maintenance, and environmental protection and replenishment.”
\item NĀNĀ I KE KUMU, supra note 5, at 60, (“Hānai” means, “to foster, a foster child; to adopt, an adopted child. Hānai, as it is most often used means a child who is taken permanently to be reared, educated, loved by someone other than natural parents. This was traditionally a grandparent or other relative . . . Hānai as a cultural practice was precise and clearly understood.”).
\item See Appendix A.
\end{enumerate}
\end{footnotesize}
native Hawaiian community and Hawaiian children. Part IV discusses the affluent problems that are prevalent in the native Hawaiian family. In addition, this part explores utilizing ancient traditional customs, such as *ho'oponopono*\(^{24}\) and *hānai* to help alleviate such problems. Part V provides a brief conclusion to this paper.

II. **ALTERNATIVE LEGAL STRATEGIES IN NATIVE HAWAIIAN CHILD CUSTODY PROCEEDINGS**

The State of Hawai‘i’s failure to acknowledge and include customary adoption under HRS § 571-46 (2006) violates the State of Hawai‘i’s constitutional obligation to protect traditional and customary rights under Article XII, § VII as well as a violation of HRS § 1-1 (2006). This part argues that an expanded application of HRS § 571-46 (2006), “Hawai‘i’s criteria and procedures for awarding child custody,” must include customary adoption for native Hawaiian children. This part emphasizes that a viable alternative to the State mandated “best interests” doctrine under HRS § 571-46 (2006), is necessary to protect this valuable cultural and traditional practice, commonly known as *hānai*\(^ {25}\).

In addition, this part also examines three significant court decisions by the Hawai‘i Supreme Court and the Intermediate Court of Appeals and their interpretations of customary adoption and its impact on the native Hawaiian family.

\(^{24}\) *Nānā I Ke Kumu, supra* note 5, at 60, (“*Ho'oponopono*” means, “setting to right; to correct; to restore and maintain good relationships among family, and family-and-supernatural powers. The specific family conference in which relationships were ’set right’ through prayer, discussion, confession, repentance, and mutual restitution and forgiveness.”).

\(^{25}\) *Nā Kua‘aina, Living Hawaiian Culture, supra* note 7, at 15 (defining “*hānai*” as “the adoptive raising of children or large extended-family networks . . . Often those who move away send children home to be raised by the extended family during breaks from school and holidays. *Id.* Families often visit each other between islands and exchange food gather or raised through subsistence activities. *Id.*”).
A. Proposing a Legislative Resolution

Hawai‘i’s case law provides invaluable insight as to how the Hawai‘i Supreme Court and Intermediate Court of Appeals for the State of Hawai‘i interpret customary and traditional rights. However, the State of Hawai‘i’s legislature must also be held accountable for creating a proper solution to interpreting hānai as a customary and traditional right in Hawai‘i’s current child custody laws. It is essential that both the Hawai‘i legislature and the state judiciary acknowledge the importance of customary adoption in the Hawaiian culture, by mandating that family court judges consider the traditional practice, hānai, when determining the custody of a native Hawaiian child through the applicable statutory law, namely HRS § 571-46 (2006).


When determining child custody, oftentimes as part of a larger legal proceeding, family court judges are guided by a set of fourteen standards, considerations, and procedures under Hawai‘i Revised Statute § 571-46 (2006). Hawai‘i Revised Statute § 571-46 (2006) states in relevant part:

In the actions for divorce, separation, annulment, separate maintenance, or any other proceeding where there is at issue a dispute as to the custody of a minor child, the court, during the pendency of the action, at the final hearing, or any time during the minority of the child, may make an order for the custody of the minor child as may seem necessary or proper. In awarding the custody, the court shall be guided by the following standards, considerations, and procedures:

(1) Custody should be awarded to either parent or to both parents according to the best interest of the child, and the court may also consider the importance of frequent, continuing, and meaningful contact of each parent with the child unless the court finds that a parent is unable to act in the best interest of the child;

26 See infra Part II.C.

Custody may be awarded to persons other than the father or mother whenever the award serves the best interest of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall be entitled to prima facie to any award of custody.28

The prefix for the following fourteen criteria of Hawai‘i Revised Statute § 571-46 stating that the judge “may make an order for the custody of the minor child as may seem necessary or property,” allows him or her unfettered discretion to determine the child’s custodial future. Consequently, this proposition has serious costs for the many native Hawaiian children already placed in foreign environments with other families when the court considers their parents unfit.

Furthermore, this statute explains, the family court judge will initially balance the child’s best interests with the parent’s environment and consider whether granting custody is a viable option to either parent.29 However, if neither parent is available or the family court considers both parents unfit, then subjective judicial discretion will determine the custody of the native Hawaiian child.30

This paper proposes that the Hawai‘i legislature has an obligation to consider traditional and customary rights as applicable to the native Hawaiian population and amend the current law to reflect the importance of cultural practices and traditions. A close examination of HRS § 571-46 (1) (2006) indicates that the court, after considering the environment of the parents, “may also

28 Section § 571-46.
29 HAW. REV. STAT. § 571-46(1) (2006); See generally, Troxel v. Granville, 530 U.S. 57 (2000) (Justice O’Conner writing for Court emphasized the constitutional right of parents to rear their children. Id. Stating that, “we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” Id. at 66); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (Chief Justice Burger stated that, "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.").
30 HAW. REV. STAT. § 571-46(2) (2006);
consider the importance of frequent, and meaningful contact of each parent with the child.”

What the Hawai‘i Judiciary and State Legislature must recognize is that the practice of customary adoption satisfies the “best interests” requirement under HRS § 571-46 (2006). While the parents may be considered unfit to obtain child custody, allowing a family member (e.g., maternal grandparents) to have custody of a child will most likely continue frequent and meaningful contact between the parent(s) and the child, thereby satisfying the statutory requirement of HRS § 571-46 (2006) (1).

B. The Constitutional Mandate to Protect Native Hawaiian Traditional & Customary Rights

In addition to an amendment of HRS § 571-46 (2006), the State of Hawai‘i has an affirmative obligation to protect native Hawaiian traditional and customary rights under Article XII, Section VII of the Hawai‘i State Constitution and Hawai‘i Revised Statute § 1-1 (2006). This section discusses the duties of the State to take proactive measures to insure adequate protection of these ancient traditions and customs.

1. The State’s Duty under Article XII, Section VII of the Hawai‘i State Constitution


32 Section 571-46 (1).

33 See NĀNĀ I KE KUMU, supra note 5, at 49 (“The child knew and was usually visited by his natural parents.” Id.); HRS § 571-46(1) (2006) (emphasis added) states in relevant part:

Custody should be awarded to either parent or to both parents according to the best interest of the child, and the court may also consider the importance of frequent, continuing, and meaningful contact of each parent with the child.

34 HAW. REV. STAT. § 1-1 (2006) states as follows:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.
The State has an affirmative duty to preserve traditional and customary rights. Under the Hawai‘i State Constitution Article XII, Section VII states in relevant part, “the State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes . . . who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778.” Ultimately, the State of Hawai‘i should acknowledge both the legislature and judiciaries’ cultural insensitivity towards the traditional practices of Hawaiians and consider hānai as a viable alternative after determining a native Hawaiian child’s parents unfit.

It is often the case that Hawai‘i’s courts do not adequately take into consideration native Hawaiian cultural traditions and ancient practices. However, in 1982, the Hawai‘i Supreme Court decided Kalipi v. Hawaiian Trust Co., which heavily discussed the State’s obligation to preserve traditional gathering rights under article XII, section VII of the Hawai‘i Constitution. In this seminal case, the Hawai‘i Supreme Court fashioned a holding that allowed “lawful

35 HAW. CONST. ART. XII, § VII (emphasis added). HAW. CONST. ART. XII, § VII states:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua’a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

36 See, Oni v. Meek, 2 Haw. 87, 95 (1858) (holding that only those rights that are enumerated in § 7-1 are protected.); Pele Defense Fund v. Paty 73 Haw. 578, 837 P.2d 1247 (1992) cert. denied, 507 U.S. 918 (1993) (the Hawai‘i Supreme Court held that “material issues of fact as to whether native Hawaiians' rights under [the] constitutional provision extended beyond the ahupua’a in which they resided precluded granting summary judgment.”); State v. Hanapi, 89 Haw. 177, 970 P.2d 485 (1998) (holding that, “the defendant failed to establish a constitutionally protected native Hawaiian right to be on the subject property.’”); cf. Hawaii Park Rangers Trying to Stop Offerings at Volcano, http://www.foxnews.com/story/0,2933,267563,00.html (last visited April 22, 2007) (although this is not a court holding, this is a state actor disregarding a native Hawaiian traditional practice).

Occupants of an ahupua‘a to enter undeveloped lands within the ahupua‘a to gather those items enumerated in HRS § 7-1. More importantly, however, within the court’s opinion of Kalipi there is a discussion pertaining to native Hawaiian rights under HRS § 1-1 (2006). The court’s outlook is that the “Hawaiian usage exception in HRS § 1-1 may be used as a vehicle for the continued existence of those customary rights which continued to be practiced.” While the discussion of Kalipi pertained to the collection of those items such as thatch, aho cord, and ti leaves, the Court specifically announced that these laws, meaning HRS § 1-1 (2006), HRS § 7-1 (2006), and the Hawai‘i State Constitution, may be used as a vehicle for customary rights, such as hānai, that are still clearly practiced in present day Hawai‘i.

Clearly, through judicial precedent and traditional Hawaiian usage, hānai, as a customary and traditional practice, is a viable addition to HRS § 571-46 (2006) under the statutory guidelines of HRS § 1-1 (2006), HRS § 7-1 (2006), and must be protected by the State of Hawai‘i.

In 1992, the Hawai‘i Supreme Court continued its conversation about Hawaiian traditional and customary rights in yet another seminal case, Pele Defense Fund v. Paty. Here the Hawai‘i Supreme Court recognized that, “it is undisputed that the rights of native Hawaiians are a matter of great public concern in Hawai‘i.” In addition, the Court acknowledged the importance of courts being a forum for cases raising issues of broad public concern, and that the

38 Kalipi, 66 Haw. at 6-7, 656 P.2d at 749 (1982).
39 Id., at 11-12, 656 P.2d at 751-752 (emphasis added).
40 Id.
42 Id., 73 Haw. at 614-615, 837 P.2d at 1268-1269.
“judicially imposed standing barriers should be lowered when the ‘needs of justice’ would be best served by allowing a plaintiff to bring claims before the Court.”  

Perhaps, more importantly than the acknowledgement for lowering the standing requirement for “the needs of justice,” the Hawai‘i Supreme Court avowed, “HRS § 1-1’s ‘Hawaiian usage’ may establish certain customary Hawaiian rights beyond those found in HRS § 7-1.” In sum, the Court concluded that “Article XII, § VII reaffirm[s] customarily and traditionally exercised rights of native Hawaiians, while giving the State the power to regulate these rights . . . These rights were primarily associated with tenancy within a particular ahupua‘a, however the committee report explicitly states that . . . Article XII, § VII ‘reaffirms all rights customarily and traditionally held by ancient Hawaiians.’” The Court proceeded to recognize the broad scope of Article XII, § VII of the Hawai‘i Constitution by stating, “the Senate committee intended this provision to protect the broadest possible spectrum of native


44 Id., at 614-615, 837 P.2d at 1268-1269 (quoting HAW. REV. STAT. § 7-1 (2006)) which provides:

“Where the landlords have obtained, or may hereafter obtain, alodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.


46 Id., 73 Haw. at 619, 837 P.2d at 1271 (emphasis added).
rights.” The broadest spectrum of native Hawaiian rights must include the legal acknowledgement of customary adoption within the native Hawaiian community by Hawai‘i’s judiciary and legislature.

Under the provisions of Article XII, § VII of the Hawai‘i Constitution, the State has an affirmative duty to consider the broadest possible spectrum of native rights. These rights, as enunciated through Pele Defense Fund v. Paty, include all native traditional rights and customs not those strictly associated with land or tenancy. Therefore, as discussed above, the State must consider amending HRS § 571-46 (2006) to include a customary adoption provision, allowing for the child’s family to hānai (or customarily adopt them), because of the wide continual use of customary adoption by the native Hawaiian community.

2. The State of Hawai‘i’s Duty under Hawai‘i Revised Statute § 1-1 (2006)

Under the statutory provision of HRS § 1-1 (2006) the State of Hawai‘i is “guided by the common law of England [ascertained by American decisions] except as those laws fixed by Hawaiian judicial precedent or established by Hawaiian usage . . . ” To establish “Hawaiian usage,” the Hawai‘i Supreme Court in State v. Zimring acknowledged that a showing or establishment must be made which predated November 25, 1892, the date this specific law was adoption.

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48 Id., 73 Haw. at 618, 837 P.2d at 1271 (emphasis added).

49 HAW. REV. STAT. § 1-1 (2006) (emphasis added) states as follows:

The common law of England, as ascertained by English and American decisions, is otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.
enacted, to consider the traditional practice a “Hawaiian usage,” as defined under HRS § 1-1.\textsuperscript{50} However, Mary Kawena Pukui’s definitive works assert that the practice of \textit{hānai} is an ancient tradition that was practiced prior to the arrival of Captain James Cook in 1778.\textsuperscript{51} However, because HRS § 571-46 (2006) puts native Hawaiian traditional and cultural practices in a vulnerable and susceptible position, by lack of judicial and legislative recognition, the State of Hawai‘i has an affirmative duty to amend this statute and protect native Hawaiian traditional and cultural practices under article XII, section VII of the Hawaii Constitution and HRS § 1-1.

In order to fulfill it’s affirmative duty under these existing laws, the State of Hawai‘i must value this ancient traditional practice and allow native Hawaiian families the right to customarily adopt their family in child custody proceedings under HRS § 571-46 (2006). It should be recognized by the State that native Hawaiians have a right to participate in their traditional and customary exercises without being unduly burdened by the exact laws meant to afford them protection.

C. Conflicting Trends Toward Recognition of Traditional and Customary Hawaiian Familial Rights

The Hawai‘i courts in attempting to define and translate the traditional practice of \textit{hānai} have ignored the importance of this cultural concept that defines familial relationships within the Hawaiian community. All three court decisions examined; \textit{O’Brien v. Walker, Maui Pineapple v. Naupaka}, and \textit{Nihipali v. Apuakehau}, provide a glimpse of how Hawai‘i courts have dealt with customary adoption. The courts successful blending of \textit{hānai} into legal adoption


\textsuperscript{51} See generally NĀNĀ I KE KUMU, supra note 5, at 49. (“If the child was [an] ali‘i, his genealogy was known in detail for many generations back.” \textit{Id.}).

\textsuperscript{52} See NATIVE HAWAIIAN RIGHTS HANDBOOK, supra note 9, at 16-1.
without acknowledging the differences and intricacies of the latter have resulted in a complete abandonment of a timeless tradition.\textsuperscript{53} Interestingly, however, the examination of these case decisions will illustrate how the courts have begun to slowly acknowledge the importance of cultivating the Hawaiian culture and perpetuating the lifeblood of the people.

1. O’Brien v. Walker

In O’Brien v. Walker, the Hawai‘i Supreme Court had the unique opportunity to examine using the word “issue” for the purposes of issuing a trust to John A. Cummins and his wife who were part Hawaiian and of full Hawaiian blood, respectively.\textsuperscript{54} The paramount issue before the Hawai‘i Supreme Court was “whether the term ‘issue,’ short of any and all judicial constructions and taken in its ordinary and popular sense as used . . . is a general term synonymous with children, progeny, offspring, descendants, etc?”\textsuperscript{55} The court discusses the importance of departing from the common law jurisdiction and simply acknowledging customary adoption as an ancient Hawaiian tradition; however, the Supreme Court of Hawai‘i interpreted the natural progression of customary adoption as an inevitable blend into Western legal adoption,\textsuperscript{56} thereby construing the two distinct practices as one. To support this proposition that customary adoption would blend into Western legal adoption, the court noted:

In a case where the status of adoptions was fully developed by ancient customs and usage as the law of the land, a subsequent enactment by the legislature providing a procedure for adoptions would merely, in effect, be an Act to preserve the rights already accrued to adopted children and a subsequent enactment defining the status of adopted children for the purpose of intestacy which was substantially the same as it existed prior thereto by

\textsuperscript{53} Id.

\textsuperscript{54} O’Brien v. Walker, 35 Haw. 104, 104 (1939).

\textsuperscript{55} O’Brien, 35 Haw. at 104.

ancient customs, would in effect be the mere codification or crystallization of the rights already in existence.\textsuperscript{57}

The court, in its reasoning, hypothesized that because both John A. Cummins’s and his wife were of Hawaiian ancestry, that intended to convey their property to their adopted heirs.\textsuperscript{58} Additionally, the court makes an unheeded presumption that because of the decedent’s ages, they were aware of the literal definitions of hānai and that “adopted children were intended to be included within the term ‘lawful issue.’”\textsuperscript{59} Within the courts discussion of customary adoption, it recognizes every relevant decision applicable to customary adoption rights prior to O’Brien, beginning with Estate of Hakau.\textsuperscript{60}

The Estate of Hakau decision is noteworthy for several reasons. First, while the court accepted oral testimony that the claimant was living in the adoptive parent’s home for a lengthy period of time, it was not satisfactory enough to show a formal, legal adoption occurred.\textsuperscript{61} Second, the court expressly stated that “had Manoa [the claimant] been adopted by Hakau as her son, \textit{in due form of law}, he would have been her sole heir to her estate, upon her dying intestate.”\textsuperscript{62} The Supreme Court of Hawai‘i notes this decision as a “voluntary expression . . . to its composite recognition of the effect of adoptions made under ancient Hawaiian customs and usage.”\textsuperscript{63} However, the courts failure to contrast the important differences and subtle nuances of

\textsuperscript{57} O’Brien, 35 Haw. at 107.
\textsuperscript{58} Id. 104, 107.
\textsuperscript{59} Id., at 104, 107.
\textsuperscript{60} Id. at 104, 110.
\textsuperscript{61} Id., at 104, 110, (citing Estate of Hakau, 1 Haw. 47 (1856)).
\textsuperscript{62} Id., at 104, 110, (citing Estate of Hakau, 1 Haw. 471 (1856)) (emphasis added).
\textsuperscript{63} Id., at 110 (1939)
customary adoption versus Western legal adoption has lead to a devastating impact on the
promulgation of Hawaiian culture within Hawai‘i’s judiciary.\textsuperscript{64} This decision, cited by the court
in \textit{O’Brien} is exemplary of Hawai‘i’s judiciary imposing Western ideals that conflict with native
Hawaiian traditional practices.


The next case examined differs from the landmark \textit{O’Brien v. Walker} decision in several
ways. In \textit{Maui Land and Pineapple Co. v. Naiapaakai Heirs of John Keola Makeelani}, the
Supreme Court of Hawai‘i displayed an attitude of \textit{shocking dismay} that a well-grounded
principle such as customary adoption should come before the court again.\textsuperscript{65} In \textit{Maui Land and
Pineapple Co.} the Supreme Court of Hawai‘i held: “(1) a foster child of a decedent’s sibling was
not a heir where they were not legally adopted but were only ‘keiki hānai’ by Hawaiian custom,
and (2) the doctrine of equitable adoption is not recognized in the State of Hawai‘i.”\textsuperscript{66}

This case involved the hānai children of John Keola Makeelani claiming an interest to
13.81 located in \textit{Honokeana} and \textit{Ka’anapali}, Maui.\textsuperscript{67} The critical issue before the Court was
whether the deed, conveyed in the Hawaiian language, correctly translated into “or someone of

\textsuperscript{64} Id., at 104, 110; see \textsc{Native Hawaiian Rights Handbook}, \textit{supra} note 9, at 16-13.
(recognizing that “discussing adoption from this Western perspective, Hawai‘i courts have
continued to fail to mention, or have regarded as irrelevant, the important social and cultural
reasons that distinguish customary and legal adoption. Id.).

\textsuperscript{65} \textit{Maui Pineapple & Land Company v. Naiapaakai Heirs of John Keola Makeelani}, 69
Haw. 565, 751 P.2d 1020 (1988) (Justice Padgett asserted, “Indeed the law of Hawai‘i with
respect to the question of whether ‘keiki hanais’ are heirs is so well settled that it is somewhat
surprising to have the issue again brought before us.” \textit{Id.)} (emphasis added).

\textsuperscript{66} \textit{Id.} (emphasis added).

\textsuperscript{67} \textit{Id.}, 69 Haw. at 566, 751 P.2d at 1021 (emphasis added); see generally, \textsc{Native
their heirs – not someone else?” In response to this question, the Supreme Court, once again, confirmed that “keiki hānai” is not legally recognized under Hawai‘i law and the court refused to apply the doctrine of equitable adoption. In response to the equitable adoption claim, the court noted that, “the doctrine of equitable adoption does not comport with Hawai‘i’s long history of laws and decisions relating to adoption and is not part of the law of Hawai‘i.”

The appellant’s argued in this situation that as “keiki hānai” they are “ho‘oilina,” and thereby the intent of Mr. Makeelani was to convey them the 13.81 acres of property located in Maui. The appellants posited that under Hawaiian customary traditions, they were adopted children, thereby making them heirs. However, despite this longstanding customary tradition, the Court disregarded with the appellant’s arguments and abruptly stated:

An exhaustive review of the history of the law of adoption by custom was recognized in early times, beginning in 1841 and continuing until the present time, there were written statutes of adoption which had to be followed in order to constitute the adoptee’s legal heirs of the adopters . . . The mere fact that one was a “keiki hānai” did not, by Hawaiian custom, carry with it a right of inheritance . . . Indeed the law of Hawaii with respect to the question of whether keiki hānai(s) are heirs is so well settled that it is somewhat surprising to have the issue again brought before us.

68 Makeelani, 69 Haw. at 567-68, 751 P.2d at 1021-22 (The deed translated into Hawaiian was, “ike kekahi o lakou ka hooilina aole kekahi mea e ae.” Id. This translates into English as, “or someone of their heirs – not someone else.” Id.).

69 Id., 69 Haw. at 565, 751 P.2d at 1020.

70 Id.

71 HAWAIIAN DICTIONARY, supra note 4, at 99 (defining “ho‘oilina” as “heir, inheritance, legacy, estate, heritage, bequest; successor.”).

72 Makeelani, 69 Haw. at 567-568, 751 P.2d at 1021-22.

73 Makeelani, 69 Haw. at 568, 751 P.2d 1022.

74 Id.
As to the issue of equitable adoption, the court explicitly noted that because there was a body of “well developed law of adoption in this State and todepart form the statutes . . . would import mischief and uncertainty into the law.”

3. Nihipali v. Apuakehau

In 2006, the Intermediate Court of Appeals of Hawai‘i had the opportunity to examine the importance of familial values and traditional customs of the native Hawaiian community in Nihipali v. Apuakehau. The Intermediate Court of Appeals held in part that native Hawaiian grandparents are not constitutionally entitled to greater visitation rights than non-native Hawaiian grandparents. This case involved the maternal grandparents of a minor child (born out of wedlock) seeking to expand their visitation rights and have the court appoint a guardian ad litem (GAL) for the minor child. Chief Judge Burns, writing for the court, acknowledged the importance of ‘ohana within the Hawaiian community and recognized that this term has persisted despite the decomposition of the native Hawaiian culture:

> From time immemorial, the ‘ohana has been and still is our main social unit of organization. It continues to be practiced in the maintenance and operation of the subsistence lifestyle and essential to the maintenance of the family network. The values, traditions and customs that the [Maternal Grandparents] have exercised and practiced are being passed down from one generation to the next, including down to their mo‘opuna.

75 Id.


77 Id.

78 BLACK’S LAW DICTIONARY 725 (8th ed. 2004) (defining “guardian ad litem” as “a guardian, usually a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party”).

79 Nihipali, 112 Haw. at 113, 144 P.3d at 561.

80 Id.; HAWAIIAN DICTIONARY, supra note 4, at 254 (defining mo‘opuna as “Grandchild; great-niece or –nephew; relatives two generations later, whether blood or adopted; descendant; posterity”) (emphasis added).
These “customary and traditional” values and activities are part of their daily lives, not just practice for the sake of convenience. In addition to the subsistence activities, cultural activities, norms and values in order to maintain order, harmony, balance and respect. Sharing of resources within the ‘ohana and respecting others are important values needed to be taught.\textsuperscript{81}

The court continued to stress throughout its opinion that the concept of ‘ohana has a multi-generational dimension that is unique, self-regulating, and interdependent which “will ensure the continuity of our cultural values, beliefs and practices important in keeping our Hawaiian culture alive and, thus, are at the core of what is protected under the state constitution.”\textsuperscript{82} Chief Judge Burns ultimately posited that the best interests of the child would not be served to deprive them access to a caring and active ‘ohana that practice their culture in their everyday life.\textsuperscript{83} The Intermediate Court of Appeals for the State of Hawai‘i identified the importance of the Hawaiian family as a vehicle for passing down traditions and customs (such as hānai and ho‘oponopono) to younger generations.

The Intermediate Court of Appeals concluded, “tradition and customary practices of ‘ohana and specifically this kuleana\textsuperscript{84} warrant protection by the court and is in the best interests of [this child] and his ‘ohana.”\textsuperscript{85} Therefore, the native Hawaiian culture as well as the familial

\textsuperscript{81} Nihipali, 112 Haw. at 116, 144 P.3d at 564 (emphasis added).

\textsuperscript{82} Nihipali, 112 Haw. at 117, 144 P.3d at 565 (emphasis added).

\textsuperscript{83} Nihipali, 112 Haw. at 119, 144 P.3d at 567.

\textsuperscript{84} HAWAIIAN DICTIONARY, supra note 4, at 276 (defining “kuleana” as “right, privilege, concern, responsibility, title, business, property, estate, portion, jurisdiction, authority, liability, interest, claim, ownership, tenure, affair, province; reason, cause, function, justification”).

\textsuperscript{85} Nihipali, 112 Haw. at 113, 144 P.3d at 561.
values of native Hawaiians has formally been recognized by the Hawai‘i Intermediate Court of Appeals as an element of the culture that “warrants protection by the court.”

III. HAWAI‘I’S FAMILY COURTS AND ITS EXERCISE OVER CHILD CUSTODY DISPUTES

Family court is perhaps, the most important sector within the State of Hawai‘i’s larger judiciary system. Hawai‘i’s family court is given exclusive jurisdiction over all matters pertaining to child custodial proceedings. Hawai‘i’s Supreme Court Chief Justice Ronald Moon recently gave his State of the Judiciary speech acknowledging both the importance and presence of family court within Hawai‘i’s judiciary. Chief Justice Moon identified that family court judges are overworked and overloaded with as many as fifteen cases in one morning, requiring judges to make “gut-wrenching decisions.” In addition, Chief Justice Moon noted, “because too many cases are heard on the same date, waiting areas are increasingly packed, creating ‘heightened security concerns.’” Because of the increased concern of adequate facilities and challenges facing family court, Chief Justice Moon asked the Hawai‘i legislature for additionally funding to help alleviate the current worries of both the legislature and the community at large. This part discusses the State of Hawai‘i’s Family Court system, which is overburdened and

86 Id. (emphasis added).


88 Id.

89 Id. (articulating further, “you can definitely feel the emotions and hostility in the room, and the noise level might lead you to think you’re in a train station rather than a courthouse.” Id.)

90 Id.
thereby unable to give adequate attention to determining the best interests of the child when deciding child custody disputes.

A. Family Court

The State of Hawai‘i’s Family Court was established in 1965 to, “provide a fair, speedy, economical, and accessible forum for the resolution of matters involving families and children.”\(^91\) As discussed above, the current problem of judges being “overburdened and overworked”\(^92\) has a direct effect on the “fair”\(^93\) decisions they are supposedly making for the “best interests” of the child (or children) involved.

There are several differences between child custody disputes in Family Court and other types of litigation. First, the child is the subject of the litigation, not a party to the proceeding.\(^94\) The emotional intensity and hostility between the warring parties leaves a damaging effect on the children.\(^95\) Ironically, the nature of these proceedings is supposedly conducted in the “best interests” of the child.\(^96\) However, in recent years, there has been substantial development in areas to help reform the adversarial atmosphere within Family Court proceedings.\(^97\)

Recent developments to help ease the adversarial nature of child custody proceedings include, “the increased use of guardians ad litem (attorneys for the child), greater involvement of

\(^91\) http://www.courts.state.hi.us (follow “Family Court” hyperlink).

\(^92\) Da Silva, supra note 80.

\(^93\) http://www.courts.state.hi.us (follow “Family Court” hyperlink).


\(^95\) Id. at 27.

\(^96\) Id. at 27.

\(^97\) Id. at 31.
mental health consultants acting as ‘friends of the court’ to assists the judge in decision making, and growing emphasis on the child’s preference regarding his or her custodian as an important factor.”

B. The “Best Interests” Doctrine and Child Custody Laws

The “best interests” doctrine is unique to American jurisprudence in that it does not employ a mechanical formula, but proceeds through child custody proceedings with “an individualized application of generally stated social policies (standards).” Prior to the state mandated best interests doctrine, “the gender-biased presumptions, first in favor of the father, then of the mother, for a long time governed the way judges determined a child’s best interests.” However, with the burgeoning popularity of the “best interests” doctrine throughout American jurisprudence, gender-bias was supposedly eliminated as courts struggled to find exactly what defines the best interests of the child.

This section discusses the negative consequences of family courts utilizing the best interest of the child standard while weighing the positive attributes of this standard. While the benefits appear to outweigh the costs of utilizing this standard, this Article argues that Hawai’i’s “best interests” guidelines, HRS § 576-41 (2006), must be amended to consider the largest population affected by this statute, native Hawaiian children.

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98 Id.


101 Id. at 164.

102 See infra Part V.
The costs of utilizing the “best interest” standard have enormous negative consequences for the native Hawaiian community. “The resulting multi-factored best interests test [is] heavily criticized as too discretionary and unpredictable to provide guidance to courts and litigants and too vague to guard against the risk of arbitrary judicial decision making.” In addition, because child custody disputes often involve parents or parties who are in disagreement about the custody of the child, it promotes and indeed, encourages parents to argue and litigate their issues before the court. 103 “When parent’s separate, divorce, or annul their marriages, the children are the focus, albeit muted participants in what all too often are factious custody disputes that may involve, not only the biological parents but also stepparents, grandparents, non-related care givers, or state agencies.”104 However, most often the custody dispute involves two, warring adults thereby leaving the child (or children) voiceless in the proceeding. 105

Another costly implication from utilizing the “best interests” standard is the possible physical, emotional, social, and intellectual problems that will arise from the lack of establishing permanent custody. 106 Most often, child placement within a proceeding for divorce, separation, or any other proceeding where the issue of custody is involved is never final and is conditional. 107 All these negative attributes to a custody proceeding have an adverse impact on the child or children involved. There are serious costs involved for the native Hawaiian children

103 Schepard, supra note 96 at 164.


105 Id.


107 Id. at 37.
who often have no access to adequate resources to adjust to the impact of these egregious custody proceedings.

While the harmful effects of utilizing the best interest standard are apparent, there are positive features to this doctrine worth mentioning. “It is not completely accurate to say that “the best interests” test is standardless, courts and legislatures have articulated factors that judges should consider in making best interest determinations.”108 One major benefit of family court using the “best interest” standard is that “the test does have great moral virtue – it directs the child custody court to [supposedly] review each child’s particular circumstances without preconceptions or presumptions.”109 However, these positive attributes are difficult to consider when Hawai‘i’s Family Court judges are overworked and overburdened by the influx of cases.110

IV. THE CHALLENGE OF RECTIFYING THE NATIVE HAWAIIAN FAMILY

UA PUKA A MAKÅ

(Face is Seen in The World)
– Mary Kawena Pukui111

108 SCHEPARD, supra note 96 at 162.

109 SCHEPARD, supra note 96 at 164.

110 Da Silva, supra note 80.

111 ‘OLELO NO‘EAU, supra note 2 at 312, (explaining that “a child who by his birth cements the relationship of his father’s family with his mother’s. As long as the child lives, the families recognize their kinship with each other.” Id.).
There are major challenges facing native Hawaiians entering the twenty-first century. “Besides being poorer, native Hawaiians – whether self-identified as solely Hawaiian or as multiracial – [tend] to be younger and less educated,” according to the 2005 American Community Survey conducted by the U.S. Census Bureau. Additionally, Dr. Shawn Kana‘iaupuni, director of strategic planning and implementation for Kamehameha Schools acknowledged during an interview with the Honolulu Star-Bulletin, that “our population is very young, with a lot of young families, and what these data show is that you have people working very hard to make a living.” Consequently, “native Hawaiian children [are] placed in foster homes more than any other single ethnic group . . . and about half the children in foster care are of native Hawaiian ancestry,” said Lillian Koller, Director of the State Department of Human Services. In addition, “over forty percent of them are placed in homes that are safe but not of the same cultural and ethnic background,” Koller added. Some forty percent of native Hawaiian children in foster care will be culturally unfamiliar because of their unconventional upbringing. Consequently, the data confirming native Hawaiians are unable to adequately survive in Hawai‘i, is a direct correlation to the dwindling of the Hawaiian culture.

This part discusses the current challenges that native Hawaiians face and the resources (or lack thereof) that are available to struggling low and middle income families. In addition, this part also examines the systemic implications that current jurisprudence has on the Hawaiian


113 Id.

114 Vicki Viotti, Foster Care Seeking Hawaiian Families, Honolulu Advertiser, November 10, 2004, at 1B.

115 Id. (emphasis added).
community. “The vast majority of native Hawaiians still find challenges on a daily basis . . . [Ultimately], it is important to recognize that there is no Hawaiian culture without the Hawaiian people, and the most recent statistics underlie some of the major challenges that our people face.”

A. The Legal Context of Hānai

Despite the copious amounts of scholarly work confirming the ancient concept of hānai within the Hawaiian culture, the Supreme Court of Hawai‘i has continuously applied western ideologue and legal concepts to this sacred traditional custom. “The attempt by Hawai‘i courts to translate the traditional Hawaiian concept of customary adoption to the framework of Western common law resulted in a narrow legal definition quite different from its cultural meaning.” A closer examination of the actions taken by the Hawai‘i courts reveals their lack of understanding and unwillingness to learn about the ancient traditions that governed this land prior to their arrival.

Native Hawaiian legal scholar, Melody Kapialoha MacKenzie recognizes that in order to comprehend and understand a cultural practice such as hānai, “it is important to understand some

116 Donnelly, supra note 109, (“Native Hawaiians had lower incomes than Hawaii’s overall population, on a median and a per capital basis. Id. The unemployment rate for native Hawaiians was slightly higher than for the state overall. Id. Native Hawaiians were less likely to hold management, professional and related occupations. Id. Within the population, a larger percentage of native Hawaiian women than men held those higher-paying jobs. Nearly 15 percent of all native Hawaiian families lived in poverty, compared with the overall state rate of 7.7 percent. About 20.3 percent of native Hawaiian families with related children under age 18 were poor, compared with 10.5 percent for that category in the state overall.”).

117 See NĀNĀ I KE KUMU, supra note 5, at 49-51, 166-167.


119 NATIVE HAWAIIAN RIGHTS HANDBOOK, supra note 9, at 16-8.
of the fundamental tenets of the society in which it is practiced.” Moreover, Professor MacKenzie asserts, “[that] a comparison of adoption in traditional Hawaiian society to that of Western legal traditions helps to understand how Hawaiian and Western concepts are fundamentally different.”

Traditionally, when the process of customary adoption occurred, or hānai, “there was not a feeling of turning the child over to strangers as there is with present-day adoption.” What is important to remember is that “the baby remained within the all-important unit – in which his own parents held only junior rank – the family clan or ‘ohana,” thereby the hānai(ed) child retained his sense of cultural identity and knew who his family and ‘aumakua were.

Native Hawaiian traditional rights in the context of family are significant and vital to the cultural survival of this indigenous population. While the practice of hānai has endured centuries of turmoil, it is important to note that growing populations of native Hawaiians still participate in this ancient customary tradition.

The history of this ancient practice shows that hānai flourished prior to the arrival of the first haole. In fact, “the practice still persists, especially in informal declarations of familiarity


121 Id.; see also, Vicki Viotti, Hanai-an Style, Honolulu Advertiser, September 24, 2000, at 1D (acknowledging that, “Hānai, the Hawaiian practice generally translated as ‘adoption,’ differs from its Western counterpart in many ways.” Id.)

122 Nānā I Ke Kumu, supra note 5, at 49.

123 Id.

124 See infra, Part II.A.

125 Vicki Viotti, Hanai-an Style, Honolulu Advertiser, September 24, 2000, at 1D.

126 Id.
and affection ("I’d like you to meet my hānai mom," for example)." 127 Additionally, in many Hawaiian families, "children reared by grandparents are considered to be hānai by those elders, whether or not any legal adoption took place." 128 Interestingly, a child being reared by their grandparents is, perhaps, a direct vestige of this ancient tradition as Mary Kawena Pukui asserts:

As among the privileges of grandparents was that of taking as hānai the hiapo (first born child) of one’s children. The first-born girl was the hānai of the maternal grandparents. The child was given outright; the natural parents renounced all claims to the child . . . Co-author Pukui, who was herself the keiki hānai of her maternal grandmother . . . recalls: “I knew, loved and respected my real parents. My parents and my hānai grandmother always talked over decisions that might by important to me.” 129

Professor Davianna Pōmaika‘i McGregor explains that the ties between family members who hānai their relatives children are maintained.130 This is an encouraging fact and yet, another compelling reason why Hawai‘i’s judiciary and legislature should give credence to this traditional custom. By formally acknowledging the practice of hānai among native Hawaiian families, is essentially allowing parents who are deemed unfit 131 to maintain some familial relationship with their children. In addition, children who are hānai-ed by their family members maintain a connection to their Hawaiian cultural upbringing. As a child, it is important to understand your cultural heritage and background because it directly impacts your understanding of the world.

While the contemporary practicing of hānai among native Hawaiian families is encouraging, it is not the only avenue of change that needs to occur within the Hawaiian family

127 Id.
128 Id.
129 NĀNĀ I KE KUMU, supra note 5, at 49.
130 NĀ KUA‘ĀINA, LIVING HAWAIIAN CULTURE, supra note 7, at 15.
dynamic. In addition to practicing ancient traditions that perpetuate the Hawaiian culture, there needs to be more emphasis on problem solving within the family using a cultural approach that is indigenous to the culture.132

A University of Hawai‘i Professor in Social Work, Dr. Noreen Mokuau explains the importance of taking a family centered approach to solving family disputes as a viable way to helping different ethnic populations.133 Professor Mokuau states:

The majority of the intervention theories and models cited in the literature have focused on the white family and may not be appropriate for ethnic-minority families . . . One strategy to advance culturally sensitive practice is to identify those family-centered approaches that are endemic to different ethnic groups and are still evident as viable systems of helping today.

[Additionally] native Hawaiians are one ethnic minority group subsumed and inadvertently concealed in the label ‘Asian and Pacific islander.’ They represent a group of people indigenous to the Hawaiian Islands who have traditionally been neglected in human services literature because of their small population, isolated geographical location, and divergent worldviews and practices.134

Professor Mokuau further explains that native Hawaiian families that maintain a traditional way of living, “may appreciate the choice of an indigenous family practice,”135 in terms of identifying and resolving family disputes. “However, the development of family-centered approaches as frameworks for intervention is relatively recent,” and needs to gain a wider support in the Hawaiian community to make a larger impact. One type of family intervention that has gained momentum within the native Hawaiian community is ho‘oponopono.


133 Mokuau, supra note 132, at 607-13 (articulating that, a strategy for advancing culturally sensitive family practice is to identify family-centered approaches indigenous to the culture).

134 Id. 608.

135 Id. at 608, 610.
B. **Ho‘oponopono**

*Ho‘oponopono* has many different definitions and variations to its practice. The most common definition is derived from Mary Kawena Pukui, as “setting to right; to correct; to restore and maintain good relations among family, and family-and-supernatural powers.” The practice of *ho‘oponopono* is mostly a familial practice involving nuclear and immediate family. While the entire extended family could partake in this ancient ritual, it was highly unrealistic to include every member. Most often, it was a “person-to-person” ritual, which implicates that it wasn’t “community-wide therapy.” However, with the emerging tide of missionaries and influx of Christianity imposed on the native Hawaiian community, people stopped participating in this method of restoring family relationships. Ultimately, The practice of *ho‘oponopono* sharply declined when Christianity was imposed on the Hawaiian community.

Because *ho‘oponopono* prayers and rituals were addressed to pagan gods, the ‘*akua*’ and ‘*aumakua*’, the total *ho‘oponopono* was labeled pagan. Many Hawaiians came to

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136 HAWAIIAN DICTIONARY, supra note 3, at 341 (defining “*ho‘oponopono*” as “to put to rights; to put in order or shape, correct, revise…”).

137 NĀNĀ I KE KUMU, supra note 5, at 61.

138 Id.

139 Id.

140 Id. at 69.

141 Id. at 69.

142 HAWAIIAN DICTIONARY, supra note 3, at 15 (defining *akua* as “God, goddess, spirit, ghost, devil, image, idol, corpse; divine supernatural, godly”); but see, NĀ KUA ‘ĀINA, LIVING HAWAIIAN CULTURE, supra note 8, at 9 (articulating that, “when Christian influences entered these areas, they had to coexist with traditional beliefs.” Id.).
believe their time-honored method of family therapy was “a stupid healing thing.” Some practiced ho’oponopono secretly. As time went on, Hawaiians remember, not ho’oponopono but only bits and pieces of it. Or grafted on innovations. Or mutations. Or complete distortions of concept, procedure and vocabulary.  

Even with the diminishment of ho’oponopono, cultural values are still extremely important to the contemporary native Hawaiian culture. “Native Hawaiians, like other people of color, have experienced a cultural renaissance in the last two decades, and important cultural values and traditions have reemerged in the consciousness and life-style practices.” Native Hawaiians have always recognized the importance of major traditional and cultural practices, such as ho’oponopono and hānai.

Professor Melody Kapilialoha MacKenzie, acknowledges “members of the ‘ohana knew, and indeed still know today, that spiritual and social harmony” is extremely important to the vitality of the Hawaiian culture. In addition, “the specific family conference in which relationships were ‘set right’ through prayer, discussion, confession, repentance, and mutual

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143 HAWAIIAN DICTIONARY, supra note 3, at 276 (defining ‘aumakua as “family or personal gods, deified ancestors who might assume the shape of sharks, owls, hawks, mudhens, octopuses, eels, mice, rats, dogs, caterpillars, rocks, cowries, clouds, or plants”).

144 NĀNĀ I KE KUMU, supra note 5, at 69.; see also, Mokuau, supra note 126, at 608-609 (“Although this family-centered approach has undergone many changes and during some parts of history was almost lost, it has reemerged as a tradition of strength that may have helped many native Hawaiians to survive the chaos of historical transition” Id.).

145 Mokuau, supra note 132, at 608, 609.

146 Id.

147 Id.

148 NATIVE HAWAIIAN RIGHTS HANDBOOK, supra note 9, at 16-7.
restitution and forgiveness,” was often used when problems arose in the family unit. The
basic procedure for *ho'oponopono* reveals it to be a highly structured and ritualized practice.

Mary Kawena Pukui, emphasizes that *ho'oponopono* has specific requirements, or rituals, that need to be met in order for the process to be effective. Pukui describes the process as beginning with an opening *pule*, or prayer, is important and must be conducted alongside of a statement about the problem to be solved. “The ‘setting of rights’ of each successive problem that becomes apparent during the course of *ho'oponopono*, even though this might make a series of *ho'oponoponos* necessary.” In addition, to the possibility of several ceremonies, there must be a discussion of one’s individual conduct, attitude towards others, and emotions concerning the problem. The leader of the ceremony will control disruptive emotions and all discussion is to be channeled through the leader. In addition, this ceremony requires absolute truth, candor,

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149 NĀNĀ I KE KUMU, supra note 5, at 60-61.; see also, Noreen Mokuau, A Family-Centered Approach in Native Hawaiian Culture, 71 FAMILIES IN SOCIETY: THE JOURNAL OF CONTEMPORARY HUMAN SERVICES 608, 607-613 (1990) (acknowledging that “although the family-centered approach has undergone many changes and during some parts of history was almost lost, it has reemerged as a tradition of strength that may have helped many native Hawaiians to survive the chaos of historical transition.).

150 Mokuau, supra note 132, at 607, 610.

151 NĀNĀ I KE KUMU, supra note 5, at 62.

152 NĀNĀ I KE KUMU, supra note 5, at 60-61.

153 NĀNĀ I KE KUMU, supra note 5, at 62.

154 Id.

155 NĀNĀ I KE KUMU, supra note 5, at 61, (“Either a helping-healing *kahuna* or family senior could conduct *ho'oponopono*. In the closely-knit community life of early Hawaii, the *kahuna* usually had a kind of ‘family doctor’ knowledge of a family. This would allow him to lead *ho'oponopono* with real insight into the problems.”).

156 NĀNĀ I KE KUMU, supra note 5, at 62.
and sincerity. Subsequently, there is questioning on behalf of the leader to all of the participants followed by an “honest confession to the gods (or God) and to each other of wrongdoing, grievances, grudges, and resentments.” A mutual-forgiveness and releasing of guilty feelings and tensions is next and the process is then concluded with a closing prayer. “Nearly always, the leader called for the period of silence or ho‘omalu. Ho‘omalu was invoked to calm tempers, encourage self-inquiry into actions, motives and feelings, or simply for rest during an all-day ho‘oponopono.”

Even today, cultural values are still visible within the contemporary practice of ho‘oponopono. For example, both the State of Hawai‘i’s Child Protective Services Agency and Hawai‘i’s correctional system sponsor the use of ho‘oponopono as an alternative way to help families heal. It is imperative that there be culturally comfortable means by which Hawaiians can resolve their disputes. There must be treatment services for Hawaiians that are culturally

157 Id.
158 Id.
159 Id.
160 Id.
161 Mokuau, supra note 132, at 607, 609 (articulating that strategies for advancing culturally sensitive family practice is to identify family-centered approaches indigenous to the culture. Id.).
163 NATIVE HAWAIIAN RIGHTS HANDBOOK, supra note 9, at 16-1, (quoting Victoria Shoot & Leonard Ke‘ala Kwan, Ho‘oponopono: Straightening Family Relationships in Hawai‘i, in CONFLICT RESOLUTION; CROSS-CULTURAL PERSPECTIVES 213, 215 (Kevin Avruch, ed. 1991)).
164 Interview with Judge Michael F. Broderick, Family Court Judge, in Honolulu, HI. (Feb. 7, 2007).
based; thereby the people that are receiving these services begin to develop a sense of pride and appreciation for who they are.\textsuperscript{165}

V. \hspace{1em} CONCLUSION

Ultimately, Hawai‘i’s Family Court should develop culturally sensitive methods for addressing custody cases involving native Hawaiian children.\textsuperscript{166} Additionally, the current failure to modify HRS § 571-46 (2006) by the Hawai‘i legislature and recognize native Hawaiian traditions are a violation of the State’s legal duties under HRS § 1-1 (2006)\textsuperscript{167} and its duty to protect “all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes,” under Article XII, section VII of the state constitution.\textsuperscript{168}

To perform its legal duties, the State of Hawai‘i must inaugurate an approach that considers the Hawaiian culture while awarding child custody of a native Hawaiian child. Only then will the overrepresentation of native Hawaiian children decrease in the State of Hawai‘i’s Family Court system. The benefits that will arise from these changes will be innumerable for every community in the State of Hawai‘i.

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\textsuperscript{165} Id.

\textsuperscript{166} Id.; see Off the Record, Hawai‘i Bar Association, 6-MAR HAW. B.J. 46, 46 (2002) (stating, “The NHBA [Native Hawaiian Bar Association] is also in the process of developing a ho‘oponopono program to provide an alternative culturally sensitive means of resolving legal disputes.”).

\textsuperscript{167} HAW. REV. STAT. § 1-1 (2006).

\textsuperscript{168} HAW. CONST. ART. XII, § 7 (emphasis added).