

# LEGAL ALERT

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## Is Your Neighbor's Tree A Nuisance?

By Joanna C. Zeigler



**M**any homeowners would answer this question with a "YES!" The big tree next door that encroaches into your yard and drops leaves or fruit onto your property creating a mess is burdensome and annoying. But do you have any legal action against your neighbor because of that tree? A recent Intermediate Court of Appeals (ICA) opinion, *Spittler v. Charbonneau*, addresses the law in Hawaii regarding this topic.

Spittler was angry with his neighbors, the Charbonneaus, because the Charbanneaus' overhanging trees dropped leaves onto Spittler's property, and the roots from the trees grew onto Spittler's property. Spittler claimed those trees constituted a nuisance and the Charbanneaus were thereby trespassing onto his property. To address the nuisance claim, the court looked to *Whitesell v. Houlton*, which is the only other case in Hawaii that defines a person's liability to their neighbor for an encroaching tree on their neighbor's property. In that case, the ICA noted that "the owner of the tree's trunk is the owner of the tree" and thus "he bears some responsibility for the rest of the tree."



*A property owner may always, at her own expense, cut any part of a tree or other plant life up to the property line, whether above or below the surface...*



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In *Spittler*, the court slightly modified the rule established in *Whitesell*. It held that a tree is not a nuisance if its overhanging branches merely cast shade or drop leaves, flowers, or fruit on a neighboring property. Further, a tree is not a nuisance if its roots only interfere with other plant life. According to the court, there is only one instance in which your neighbor's tree's overhanging branches or protruding roots constitute a nuisance: when "they actually cause, or there is imminent danger of them causing, material harm to a person or to property other than plant life." Therefore, according to the ICA, a tree is only a nuisance if actual or imminent danger is involved. Only in that instance, can an endangered neighbor require the tree's owner to pay for damages and to cut back the endangering branches or roots, and if not done in a reasonable time, the neighbor can do it at the tree owner's expense.

Not surprisingly, the court concluded that the Charbanneaus' trees that merely dropped leaves and the roots that merely grew onto the Spittler's property were not a nuisance entitling Spittler to damages.

With regard to whether the Charbanneaus committed a trespass by way of owning encroaching trees, the court's decision is less clear. It merely concludes that when an owner's tree drops leaves, flowers, or fruit onto a neighboring property the owner is not liable for trespass to her neighbor. Similarly, the owner is not liable for trespass if the owner's tree roots only interfere with other plant life on a neighbor's property.

The court does not set a standard for when a trespass may occur due to an encroaching tree. Only in a footnote does the court indicate that if an owner's plant causes physical harm or damage to their neighbor's property would the owner be potentially liable in tort to their neighbor. Thus, the law of trespass in this area remains unclear.

What is the lesson from *Spittler*? During mango season when your neighbor's tree is dropping mangos and they are rotting in your yard, although those mangos are causing a mess, your neighbor is likely not legally obligated to pay you damages or to cut back her tree. However, the ICA does provide a saving grace to property owners who are dealing with encroaching trees. A property owner may always, at her own expense, cut any part of a tree or other plant life up to the property line, whether above or below the surface. So, even though it is at your own expense, you at least have the right cut back that mango tree to keep it from dropping fruit on your property or to remove its roots from growing on your property. One last thing to consider, however: The court says nothing about what happens if the tree dies as a result of cutting back its branches or roots. Thus, it does not say, for example, if the tree dies and falls on your property who would be responsible for those damages. In the end, perhaps the best thing to do is to talk to your neighbors about their encroaching trees and come up with a solution that suits everybody. (Also, gather the mangos before they rot and enjoy the delicious fruit.)



**For more information on this article, please call Joanna at 531-8031  
or email her at [jcz@hawaiiilawyer.com](mailto:jcz@hawaiiilawyer.com).**



## The Dedication of the Frank Damon Room at the William S. Richardson School of Law



**C. Frank Damon, Jr.**



**Pictured: Joanna C. Zeigler (2015); Brooke H. Hunter (2016); Travis T. Moon (2018); Laurel E. Pepe (2018); Veronica Nordyke (2016)**

Our law firm's founding partner, C. Francis (Frank) Damon (1926-2017), was one of those “old school” lawyers who believed that collegiality, dignity, and service to the Hawaii Bar were essential. And he never had a bad word about anyone.

But Frank was not hidebound to tradition: over 50 years ago, he boldly crossed the unwritten — but well-observed — lines in the Hawaii Bar, and formed what was Hawaii's first multi-ethnic law partnership. By doing that, he changed the way things were done. Today, that's the norm, not the exception.

On September 6, the University of Hawai'i at Manoa William S. Richardson School of Law — which he was also instrumental in founding — celebrated the opening of the new Clinical Building. Several of the firm's lawyers who earned their degrees at the Law School, and our firm, were glad to help with the creation of the “Frank Damon Room” to help future lawyers understand and appreciate Frank's legacy. Several of our firm's young lawyers, who are carrying on Frank's traditions, attended the opening celebration, too.

Thank you to all who attended, who donated, and especially thank you, Frank.

## Welcome to the Firm, Adam Miller!

**A**dam N. Miller joins the firm as the newest Associate in the firm's Business & Commercial, Estate Planning, Real Estate, and Immigration and Naturalization practice groups. Adam attended the University of Hawai'i at Manoa William S. Richardson School of Law, where he graduated *cum laude*.

Adam was born and raised in northern Idaho and attended the University of Idaho, where he double majored in Philosophy and Spanish. As an undergraduate, Adam studied abroad at universities in Costa Rica and Ecuador before moving to Maui in 2004.

Adam began his career in fine dining with Tri-Star Restaurant Group shortly after moving to Maui, and in 2010, transferred to Oahu to oversee operations as General Manager of one of the group's award-winning restaurants in Waikiki. Upon acceptance to law school in 2015, Adam moved into a consulting role with the restaurant group, a position he maintained throughout his studies.

While in law school, Adam was a staff writer and board member of the University of Hawaii Law Review, and served as a judicial extern for the Honorable Michael D. Wilson, Associate Justice of the Hawaii Supreme Court. Adam's Second Year Seminar Paper, "Up in the Air: The Status & Future of Drone Regulation in Hawaii" received several awards, including Best Overall Second Year Seminar Paper, and was published in the UH Law Review. Prior to joining Damon Key as an Associate, he was a Summer Associate at the firm in 2018.

Adam looks forward to putting his business skills to work for our clients. "As a student, I gravitated toward classes that leveraged my business experience. I found my calling after participating in the Entrepreneurship and Small Business Clinic, which gave me the opportunity to meet local business owners, and aspiring business owners, and to help them achieve their goals," said Adam. This remains his focus as an attorney with Damon Key.

Adam's interests outside of work include surfing, archery, and bantering with his book club. His enthusiasm for fine wine led him to receive a Certified Sommelier designation from the Court of Master Sommeliers in 2014. An avid traveler, Miller has surfed, backpacked, and sought out street food in more than 30 countries. In his travels and studies, he has become fluent in Spanish.

An active Rotarian and past board member of the Rotary of Ala Moana, he has served as its Literacy Chair and twice received the club's Quiet Rotarian Award. To learn more about Adam and all our dedicated attorneys, visit [hawaiiawyer.com/attorneys](http://hawaiiawyer.com/attorneys).





# Hawaii's New "Red Flag" Law: Gun Violence Protective Orders Can Save Lives

By Judith A. Schevtchuk



**W**ould you have expected that the same man who terrorized a Pacific Palisades neighborhood in Honolulu by shooting randomly at his neighbors in 1998 was allegedly doing it again on September 12, 2019? Do you know that in Hawaii our police are not authorized to seize a firearm which is lawfully owned by a person who may pose an extreme risk of harm to himself or other people UNTIL he threatens to shoot someone or commits a crime?

Have you ever worried about someone whom you know is angry or depressed or unstable and *also has access to a gun* in his/her house? Do you think maybe it would be a good idea if "somebody" got the gun out of the house to a safe location "at least for the time being?" Have you ever felt you didn't do enough to intervene before a friend or family member committed suicide with a gun? Effective January 1, 2020, you will have an option to prevent gun violence in Hawaii.

While the national debate about the Second Amendment to the US Constitution will continue, on January 1, 2020, Hawaii will join California (2014), Washington State (2016), Oregon (2017) and 14 other states and the District of Columbia in giving a remedy to ordinary people in their efforts to prevent gun violence. Popularly referred to as "red flag" or "extreme risk protection orders," these laws have decreased the rates of suicide by firearm. Ordinary people (and police officers), who personally see signs of reckless, negligent use, display, storage, possession or brandishing of a firearm, or planning to use a gun to commit a violent act against themselves or another person can now act to prevent another tragedy.

Beginning January 1, 2020, the Hawaii Family Court Judges are authorized to issue a "Gun Violence Protective Order" at the request of a "family or household member," "colleague" (defined as a person employed or working at the same place of business or employment), "educator" (defined as "a person employed at an institution of learning at which the respondent may have a connection"), or a medical professional or a law enforcement officer. The "petitioner" (applicant) files a written "ex parte" petition in Family Court with her/his personal observations of the troubled "respondent." Alcohol and substance abuse,

dementia, psychiatric conditions, domestic violence, TROs against family or neighbors and recent gun purchases are all relevant. "Ex parte" means that the Judge reviews the petition and makes a decision without talking to the petitioner/applicant or the person who will be restrained—and in this case, who will have her/his firearms temporarily confiscated until there is a hearing.

**Beginning January 1, 2020,  
the Hawaii Family Court Judges are  
authorized to issue a "Gun Violence  
Protective Order"...**

The Judge has to find "probable cause to believe that the respondent poses an imminent danger" to himself or others with a firearm. For the one-year gun violence protective order, the Court must find that the respondent poses "a significant danger of causing a self-inflicted bodily injury or an injury to another person by owning, purchasing, possessing, receiving, or having in the respondent's custody or control, any firearm or ammunition."

Confidential consultations and assistance in preparing applications for a Gun Violence Protective Order and other Family Court matters are available from Damon Key Family Law Practice Group attorneys Judith A. Schevtchuk and Kayla M. Fajota.

**For more information on this article, please call Judy or Kayla at 531-8031 or email Judy at [jas@hawaiilawyer.com](mailto:jas@hawaiilawyer.com) or Kayla at [kmf@hawaiilawyer.com](mailto:kmf@hawaiilawyer.com).**

# 2019 Hawaii Legislative Update

By Na Lan

If you own a condominium unit, business or electric vehicle in Hawaii, you may be interested in learning more about the following new laws passed in 2019:



**Act 282 (SB551)** clarifies that a condominium association in Hawaii may foreclose its lien against a unit by non-judicial foreclosure, regardless of whether the association's governing documents include a explicit power of sale language, provided that this shall not apply (1) when a unit owner is on active duty military status and the association's lien has been outstanding for a period less than one year; or (2) when a unit owner has been complying with an agreed-upon payment plan with the association. The new law requires the association to offer mediation with a notice of default and intent to foreclose, and reaffirms that non-judicial foreclosure is also prohibited for (1) any lien arising from fines, penalties, legal fees or late fees; and (2) the sixty-day stay period after a unit owner notifies the Association in writing of the intent to cure the default or timely submit a payment plan.

**Act 282** applies retroactively to pending matters that arose prior to its effective date, i.e., July 10, 2019, in an attempt to supersede the 2018 decision in *Sakal v. AOA Hawaiian Monarch* by the Intermediate Court of the Appeals. However, the dust has not settled yet, as the Hawaii Supreme Court heard this issue again on September 19, 2019 in the pending appellate case *Malabe v. AOA Executive Center* (SCWC-17-0000145) and may issue a decision reshaping the law on this matter soon.

**Effective July 1, 2019, Act 192 (HB61)** expressly authorizes a unit owner to designate how payments to a condominium association should be applied. Without such designation, the association shall first apply any payment from a unit to common expenses first, then to assessments like ground lease rent, utility sub-metering, storage lockers, parking stalls, boat slips, insurance deductibles and cables, and last to other charges like late fees, legal fees, fines and interest according to a Board adopted application of payment policy.

**Effective July 2, 2019, Act 178 (HB710)** adds reproductive health decisions to the list of categories that are protected against discriminatory employment practices. It defines "reproductive health decisions" as the use or attempted use of any legal drug, device, or medical service intended to prevent or terminate a pregnancy, or the use or attempted use of any assisted reproductive technology.

**Effective July 1, 2019, Act 67 (SB1173)** amends the income withholding requirements to impose a fine against any employer who (1) discharges from employment, refuses to employ, or takes disciplinary action against any noncustodial parent subject to income withholding, or (2) fails to withhold support from income or pay the amounts to Child Support Enforcement Agency.

**Act 142 (HB1585)** establishes a rebate program for installation of eligible new or upgraded multi-user electric vehicle charging systems. Starting on January 1, 2020, each eligible installation shall receive \$4,500 for an alternating current Level 2 station or \$35,000 for a direct current fast charging system; each eligible upgrade shall receive \$3,000 for an alternating current Level 2 station or \$28,000 for a direct current fast charging system. Applicants shall submit applications to the public utilities commission within 12 months of the date the newly installed or upgraded system is placed into service to claim for the rebate. There is a cap of \$500,000 in total rebates each fiscal year this program.



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# The SECURE Act May Leave Americans Feeling Insecure

By Brooke H. Hunter



In May 2019, the Setting Every Community Up for Retirement Enhancement (SECURE) Act passed with widely bipartisan support in the House, and is expected to be passed with equal ease in the Senate, where a nearly identical bill, the Retirement Enhancement Savings Act (RESA) is pending. In the first major retirement law in over a decade, the SECURE Act aims to make it easier for Americans to save — and save more — for retirement under tax-deferred qualified retirement plans.

If passed, the Act will address the savings access gap by giving small businesses the option to band together to offer 401(k) plans to employees and expand eligibility for retirement plans for long-term, part-time workers, and most notably, workers in the burgeoning gig economy. The Act would also enhance American's ability to contribute to their existing retirement plans. The Act would repeal the maximum age for contributions to traditional IRAs and increase the beginning date for required minimum distributions ("RMD") from 70.5 to 72 years of age.

Beyond expanding retirement savings opportunities, the Act is anticipated to have a major impact on Americans who have accrued significant retirement savings by eliminating a valuable wealth transfer tool: the "Stretch" Inherited IRA. Historically, IRAs have been a popular means of passing generational wealth outside of probate and without triggering substantial tax implications. By "stretching" an IRA, an account owner can pass on their IRA to non-spouse beneficiaries who can withdraw strategic amounts over their lifetime and continue to maintain tax-deferred growth for decades. If the Stretch feature is utilized properly, the balance of an IRA can be easily passed from generation to generation, retaining valuable tax protections.

In addition to serving as an estate planning tool for account holders, the Stretch IRA offers beneficiaries significant tax planning perks. Rather than being burdened with tax liability for distributions, beneficiaries may tailor distributions to manage taxes incurred on withdrawals and do not run the risk of moving into a higher tax bracket.

If the Act passes, non-spouse adult beneficiaries will be required to withdraw inherited account balances within 10 years of the initial account owner's death. The required withdrawal deadline will prevent multiple generations from benefitting from an IRA, and prevents beneficiaries from delaying tax liability.

In light of such changes and depending on life expectancy, account values, and planning goals, owners of 401(k) and IRA accounts may consider converting accounts to Roth IRAs. While account owners will have to pay taxes on the converted funds, they can spread the conversion out over years and enjoy tax free withdrawals later in life. While inherited Roth IRAs will be subject to the same ten-year distribution deadline, beneficiaries will also enjoy tax-free withdrawals.

If you have an estate plan based on current IRA laws, such as a trust named an beneficiary of your IRA, or if you have been contributing to your IRA with the intention of having those funds enjoy special tax treatment for your beneficiaries, you may want to revisit your plans pending passage of the Act.



**For more information on this article, call Brooke at 531-8031  
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### Attorneys in the News

Damon Key Leong Kupchak Hastert  
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Damon Key Associates (bottom right: Joanna Zeigler, Nica Nordyke, Kayla Fajota, top right: Laurel Pepe) and our Summer 2019 Associate (top middle: Nick Ernst and his wife Keri) attended the 2019 Hawaii State Bar Association Annual Dinner.

**Kenneth R. Kupchak** was elected President of the Cornell University Class of 1964, a five-year term.



**Na Lan** (second row, right) presented her 2019 legislative update for property and business owners in Hawaii at a workshop at the Chinese Chamber of Commerce of Hawaii, Chinatown Training & Visioning Center in September.

**Robert H. Thomas'** blog [inversecondemnation.com](http://inversecondemnation.com) is now in its fourteenth year of disseminating information about property law to the world and is one of the most widely read on the subject.

