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Gut and Replaced or Why Reading This Title is not Reading This Article.

By Toren K. Yamamoto



The first “desk job” that I ever had was as a committee clerk during the 2016 Hawaii legislative session. Fresh out of college, I barely had a grasp of how the Legislative body even functioned and honestly not much of the experience really sank into the core recesses of my psyche. However, one thing that wiggled its way deep down into the crevices of my brain was the “gut and replace” tactic yielded, seemingly without hesitation, on the floors of our State’s Legislature. Watching it live in action, I remember thinking, “how is this allowed?” Over five years later, I got my answer. According to the recent Supreme Court decision in *League of Women Voters of Honolulu & Common Cause v. State*, it is not.

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Simply put, “gut and replace” is the practice of “gutting” a bill through the removal of its initial language, then “replacing” its contents with the language of a completely different bill; leaving only the title of the original bill left unchanged. What made the practice dubious was that, for years, it allowed our State Legislators to side step a fundamental mandate of our Constitution. Specifically, Article III, Section 15, of Hawaii’s Constitution dictates, “[n]o bill shall become law unless it shall pass three readings in each house on separate days.”

The lawsuit filed in *League of Women Voters*, with the support of an amicus brief written by Damon Key alumni Robert H. Thomas, specifically challenged a 2018 bill pertaining to recidivism, which the Legislature “gut and replaced” with a bill regarding hurricane shelters. The hurricane shelter bill was only read once, while the recidivism bill had gone through five readings and multiple rounds of public testimony. Under the old regime, this was permissible because both bills technically could fit under the single (very broad) title of “Relating to Public Safety”. Because said title had been read five times, the replacement hurricane shelter bill had been “read” five times as well. After the sixth reading, it was passed into law.

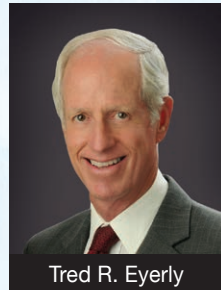
The Plaintiffs in the suit claimed that “gut and replace” was an unconstitutional bypass of the Constitution’s three readings requirement. This evasive tactic, they argued, allowed the hurricane shelter bill to be enacted without full public participation, and such a maneuver was an affront to government transparency and the general democratic process. In response, the State argued that the Constitution does not define “reading”, and that because the “gut and replace” did not change the title of the bill, the bill was technically “read” three times. A Majority of the Hawaii Supreme Court did not find the State’s argument persuasive, probably for the same reason my middle school English teacher did not give me credit for “reading” the books on my summer reading list. After all, just as reading the cover of a book is not “reading” said book, reading the title of a bill does not, and should not, constitute a “reading” capable of satisfying constitutional mandates. Thus, the Court held that future legislation could not be enacted through the “gut and replace” tactic unless the language of the replacement bill was “germane” to the purpose of the original, gutted bill. There is a noticeable issue with this standard.

In *League of Women Voters*, the difference between the purpose of the recidivism bill and the purpose of the hurricane shelter bill was stark. However, as posited by Chief Justice Recktenwald in his dissenting opinion, what happens when the “germaneness” of two bills fall into more murky waters? For example, if a bill pertaining to equal employment opportunities for recently released prisoners replaced the recidivism bill, would the bills be considered “germane” to a single purpose and replacement therefore permissible? I think it could be.

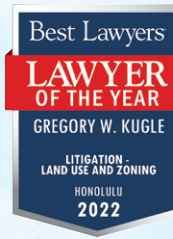
The “germaneness” standard created in this case does not abolish “gut and replace”. It simply relegates the practice to a gray area. Through that gray area, the Legislature can continue to “gut and replace”; it will simply require a bit more precision. It is therefore imperative that we, the citizens of this State, continue to hold our government accountable and make sure the bounds of the gray area remain reasonable. Ultimately, our Legislators work for us, but it our responsibility to make sure that it stays that way.

**For more information on this article, please call Toren at (808) 531-8031
or email him at tky@hawaiilawyer.com.**

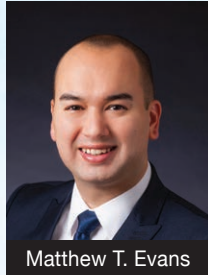
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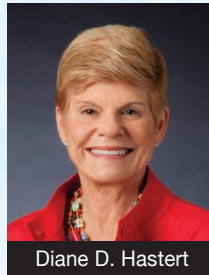


Gregory W. Kugle



Matthew T. Evans

Litigation-Real Estate



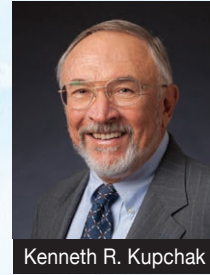
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Commercial Litigation



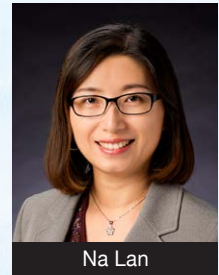
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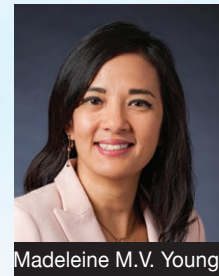
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Trusts & Estates



Michael A. Yoshida

Business Organizations
(including LLCs and
Partnerships)



Madeleine M.V. Young

Litigation-Trusts &
Estates



Megan L.M. Lim

Trusts & Estates



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Litigation-Construction



Megumi Soga

Immigration Law

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Congratulations to Tred R. Eyerly and Gregory W. Kugle on being awarded the "Lawyer of the Year" honor and our colleagues on being selected Best Lawyers® and Best Lawyers: Ones to Watch in the latest edition of *The Best Lawyers in America*®. Selections are based on the highly regarded Best Lawyers® peer reviews process. For over 50 years, our firm has provided superior service and innovative solutions while assisting individuals, families and businesses with their legal needs. Our clients are at the center of every decision we make. We pursue client issues with integrity and passion at the highest levels. Please scan the QR code or go to <https://hawaiilawyer.com/bestlawyers> to see the complete list of practice areas in which our colleagues have been recognized by Best Lawyers®.



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What are Reverse Mortgages?

By Amber M. Yonamine

A reverse mortgage is a type of loan that allows older homeowners to borrow against the equity in their house. A homeowner may qualify for a reverse mortgage if they are at least 62 years old, live in their house, and either own it outright or are close to paying it off. Eligible property types include single-family homes, 2 to 4 unit properties, and certain manufactured homes and condominiums that meet Federal Housing Administration (FHA) and Department of Housing and Urban Development (HUD) criteria.



In a reverse mortgage, the homeowner keeps the title of their house, and the house serves as the loan's collateral. Funds can be dispersed as a lump sum, fixed monthly payment, line of credit, or a combination of the options. Unlike a regular "forward" mortgage, traditional home equity loan, or home equity line of credit, no payment is due until the house is no longer the borrower's principal residence. Thus, payments are normally due when the borrower dies, sells the house, or moves out for at least 12 months. The borrower, their estate, or their heirs must then pay back the loan plus interest and fees.

Many factors affect the amount the borrower can borrow including age (the older the borrower, the more they can borrow), appraised value of the house, current interest rates, and assessment of the borrower's finances.



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Pros of Reverse Mortgages

Reverse mortgages are ideal for older homeowners whose wealth is mainly tied up in their house. Funds can be used for a variety of purposes such as healthcare costs, home renovations, or to supplement income. Reverse mortgages allow homeowners to convert the equity in their house into cash without selling their house or paying additional monthly bills. The funds are not taxable and generally do not affect Social Security or Medicare benefits, but funds may affect needs-based benefits, such as Medicaid and Supplemental Security Income (SSI).

Cons of Reverse Mortgages

Reverse mortgages are complicated and make it difficult to sell, rent, move, or add a name to the house's title. Reverse mortgages have high costs and fees including origination fees, closing costs, and servicing fees. These costs are added to the loan amount and accrue interest. Thus, the homeowner's debt increases over time while their house's equity decreases. However, the amount due cannot exceed the appraised value of the house at the time the loan is due. Homeowners must also continue to pay property tax, homeowner's insurance, and maintenance fees to avoid defaulting on the loan.

Reverse mortgages use up the equity in the house, so borrowers have less assets to leave to their heirs. Upon the borrower's death, heirs must decide how to pay the loan balance. Typically, heirs choose to sell the house or refinance the reverse mortgage into a traditional loan. This must be done within 30 days of the borrower's death. Heirs may keep proceeds from the sale of the house.

Home Equity Conversion Mortgage (HECM)

HECMs are the most common type of reverse mortgages. HECMs are federally insured loans that are through private companies, but backed by HUD. These loans cannot exceed the FHA loan limit, which is currently set at \$822,375.00. Borrowers must meet with a HUD certified counselor who will explain the loan's costs, financial implications, and alternatives.

Reverse mortgages can be a great financial decision for some, but a poor decision for others. Homeowners should compare lenders and understand how a reverse mortgage affects them and their family before deciding if a reverse mortgage is appropriate for their situation.

**For more information on this article, please call Amber at (808) 531-8031
or email her at amy@hawaiiilawyer.com.**

COVID-19, Act 57, and Mediation, Again

“Just when I thought I was out, they pull me back in!”

Michael Corleone in the film *The Godfather Part III*

By Max J. Kimura



There are a great multitude, out of every nation, who share Michael Corleone's frustration, anger, and utter exhaustion right now. The Godfather wailed over his inability to escape mob life, and we cry and agonize over our inability to pull away from COVID-2019, even as we step into 2022. It was just six months ago that we were dealing with the more transmissible, Delta variant of the corona virus, which prompted even the reluctant among us to get vaccinated. This gave us all hope that at last, a return to normalcy was near. Instead, the world is now facing the heavily mutated and even more transmissible, Omicron variant, causing a new round of border closings, social limitations, and doubts about our vaccines, our leaders, and our own security.

Over the past two years of Hawaii Emergency Proclamations and Executive Orders on sheltering in place, quarantining, and limiting in-bound travel, I have had a steady flow of clients on both sides of the issue of unpaid rent. Such as a residential landlord with tenants who stopped paying rent after they were laid off from their well-paid hotel or restaurant jobs. And a retail business owner, who was nearly 100% reliant upon Japanese tourists and, as a result, saw his sales go from gangbusters to zero, but was still locked into a commercial lease that charged high, Waikiki rent prices. The COVID pandemic has not discriminated between landlords and tenants, but has meted out its cruel and unusual, financial hardships equally, and both sides are desperately seeking ways out of their very dire situations.

In the Summer/Fall 2021 issue of the *Legal Alert* Casey T. Miyashiro, Esq., wrote an excellent article on Hawaii's eviction moratorium and the requirement that landlord's must offer mediation to their tenants to resolve their dispute. At the time of his article, Act 57 was just going into effect on August 7, 2021. Again, the corona virus, its many mutations and collateral consequences continue to be with us, and both landlords and tenants are still suffering under great financial strains. Writing to you in January 2022, I would like to continue where Mr. Miyashiro left off.

The
COVID-19

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As my good colleague mentioned, Act 57 created a tiered schedule for when a landlord may begin the formal process of evicting a tenant, called a “summary possession” action, and request a court judgment for the unpaid rent. Since January 5, 2022, we have been in the last of three tiers, where a landlord may send an eviction notice to a tenant who is just one month behind in rent. In all tier levels, the landlord must provide his/her eviction notice to the Mediation Center of the Pacific (MCP) via the MCP website (www.mediatehawaii.org) or may call MCP (808-807-0080) for assistance. From there, MCP will contact the tenant to schedule a mediation session within 15 days of the date of the eviction notice.

**“You’re unhappy. I’m unhappy too. . . .
A good compromise is when both parties are
dissatisfied, and I think that’s what we have here.”**

Larry David, from the HBO series *Curb Your Enthusiasm*.



Whether you are in formal mediation or informal negotiations, whether you are a landlord or tenant, and whether you have legal counsel or representing yourself, I advise all of us to keep in mind the words of Larry David, actor and co-creator of the hit TV show, *Seinfeld*, regarding reaching a compromise. I say this because in these COVID-related landlord-tenant disputes over unpaid rent, I have not met a single tenant who thought he or she had to pay any of the back rent to their landlord. They invariably have this notion in their heads that if they went to court and explained how they lost their job or how their business came crashing down that the judge will waive a magic wand and say, “You are absolved of your back rent.” My response is, “No. That is not how it works.” The judge will follow the law, not some storybook ending.

Likewise, some landlords believe they can collect 100% of the back rent owed. I remind these individuals that you may get a judgment for the full amount, but collecting that amount is a completely different matter. Sadly, there are times when a judgment is only worth the paper it is written on. Accordingly, somewhere above 0% and below 100% is where a negotiated or mediated settlement can be reached, and that is the problem for the parties involved. (Let me also mention that the striking point is not likely to be at or near 50%. It will be at a point where a reasonable person would believe to be fair and reasonable, under the totality of the circumstances.) Whatever that point is, both landlord and tenant will walk away unhappy and dissatisfied. Fortunately, they can at least walk away, put their dispute behind them, and go on living their lives.

If you have any landlord-tenant disputes and believe you are in need of professional, legal assistance, please contact us at Damon Key. We will aggressively work to bring your dispute to a fair and reasonable resolution, and do our best to make you feel comfortable with an otherwise unhappy and dissatisfying situation.

**For more information on this article, please call Max at (808) 531-8031
or email him at mjk@hawaiilawyer.com.**

New Attorney Amber Yonamine Puts Analytical Thinking and Compassion into Practice

In 2017, newly graduated Amber Yonamine looked forward to a career in Environmental Engineering, a field that initially appeared to be a good fit for her analytical side. However, Amber soon came to realize that engineering, while interesting and exciting, did not give her opportunity to interact with people to the degree that she desired. She spoke with an advisor who suggested environmental law as a natural transition from environmental engineering.



After further research, she realized that being an attorney required many of the same skills as being an engineer, such as thinking logically and analytically. Plus, the added bonus was that attorneys interact with people more than engineers. Amber made the bold move to pursue a law degree and later settled in on trust and estate law, as she realized that her analytical engineering skills translated perfectly to estate planning. Today, Amber adds her skill, knowledge and experience to the firm as an Associate in our Business & Commercial Law, Real Estate and Wills, Trusts & Estates practice groups.

“Trust and estate work offers the perfect balance of logical thinking and interacting with clients,” said Amber. “I have a great appreciation for the important work that is done for clients in this area of the law. I enjoy helping people plan for their future and understand the estate planning and administration processes. Death is an inevitable part of life, and having an estate plan is one of the greatest gifts you can leave your loved ones,” she added.

Amber earned her law degree from Willamette University College of Law, where she graduated *cum laude* and served as Vice President of the Asian Pacific American Law Student Association. While in law school, she was a Moot Court board member, taking runner-up in the First Year Appellate Competition. Amber was also a member of the Business Law Society, Women’s Law Caucus, and the Multicultural Law Student Association.

She was also a Zoom Assistant and Teaching Assistant for Civil Procedure, Torts, and Trusts and Estates. Amber received recognition for earning the highest grade in the following classes: Beginner Trusts and Estates Clinic; Advanced Trusts and Estates Clinic; Federal Income Tax; Secured Transactions; and Land Use Planning.

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Amber was a Summer Associate with Damon Key in 2020. She was also a Legal Intern with the Willamette University's Clinical Law Program, where she drafted wills, trusts, power of attorneys, and advance-healthcare directives. With the Oregon Department of Justice, Amber served as a Law Clerk in the Civil Litigation Section, preparing legal research memoranda and pleadings for inmate litigation cases, as well as assisting with mediations, depositions, and trial preparations. As a Student Representative with LexisNexis, Amber presented legal researching tips to law students weekly.

"During Amber's time with the firm last summer, we were able to see firsthand her strengths and abilities," said Damon Key Vice President Michael Yoshida. "Her strong work ethic, diligence and thoughtful demeanor are well suited for the trusts and estates practice group, which can often require conversations of a sensitive nature."

Amber's Environmental Engineering degree was earned *cum laude* from Oregon State University. While there, she was a College of Engineering Dean's Scholarship recipient, served as Officer and Captain of the Women's Ultimate Disc Club, and was a High School Engineering Outreach Volunteer. She was a Process Engineering Intern with Clean Water Services, an Environmental Engineering Intern with Carestream Health Inc., a Sports Club Committee member with Oregon State University Recreational Sports, and an Ambassador with Women and Minorities in Engineering.

"My greatest strengths are my work ethic, my ability to think creatively and analytically, and my capacity for compassion, as I am able to make people feel secure and heard regarding difficult subjects," said Amber. "I enjoy helping people navigate the legal issues associated with the death of a loved one, so they can primarily focus on grieving."

Amber recalls an especially impactful experience while in law school when she participated in a trusts and estates clinic where law students created estate plans for real clients. "I had to go to my client's home and was able to get her to sign important estate planning documents the day before her life-threatening surgery. It was rewarding to know that the work I do can drastically impact the client and their loved one's lives," remarked Amber.

Born and raised in Mililani, Hawaii, Amber attended Mililani High School and was *valedictorian* of the class of 2012. Her interests include ultimate frisbee, vinyasa flow yoga, and indoor rock climbing. She is a member of the Hawaii Ultimate League Association, the premier organization promoting and playing ultimate (frisbee) in the state.

Amber looks forward to learning from all the attorneys here at Damon Key and being part of a firm with a collaborative and supportive culture.

Litigation Attorney Max J. Kimura Joins the Firm

Max J. Kimura, a civil litigation attorney with more than 10 years of legal experience, has joined the firm's Litigation & Dispute Resolution practice group, emphasizing construction litigation. He holds a law degree from the University of California, Hastings College of the Law.



"We are pleased to welcome Max to the firm," said Damon Key Vice President Michael Yoshida. "His previous experience as a litigation associate with an insurance defense firm will add further depth to Damon Key's already robust litigation practice group."

Prior to joining Damon Key, Max was an associate attorney at a Honolulu law firm for nine years, where his primary practice was insurance defense for lawsuits arising from personal injuries, construction defects, products liability, and breach of contract. Other practice areas included plaintiff litigation, real property, estate planning, and foreclosure.

Earlier in his legal career, Max was an associate at a large law firm in San Francisco, specializing in asbestos and tobacco litigation. There, he gained experience in working a heavy load of multi-million dollar cases, all while maintaining a cordial and professional relationship with clients, opposing counsel, and judges.

Max was also a Judicial Extern for Superior Court Judge Donald S. Mitchell in San Francisco, where he performed legal research and drafted court orders and decisions. "Judge Mitchell was a wonderful mentor and set me on a good, solid path towards becoming a lawyer," said Max. "To me he was an example of a well-tempered man, with fair and reasonable judgment. We both came from modest backgrounds, and he was instrumental in my being able to truly envision myself as a lawyer."

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"His previous experience as a litigation associate with an insurance defense firm will add further depth to Damon Key's already robust litigation practice group."

Michael Yoshida, Damon Key Vice President



A local boy, Max graduated from Saint Louis High School and went on to attend the University of Hawaii. In his first year of college, while sitting in an auditorium with hundreds of other students for a History 151 class, listening to fascinating stories from the past, Max decided to become a history professor.

The next year he moved to California, with the goal of eventually earning a graduate history degree from Berkeley, which had a very good reputation in the field. Max moved first to Irvine and attended junior college there for two years before transferring to the undergraduate history program at the University of California, Irvine. Throughout his years in Southern California, he worked as a waiter to pay for his education and life. Accordingly, Max's focus was on work, school, and traveling. During summers, he worked two jobs to save enough money to travel to places he had only read about or seen in movies, such as New York, London and Paris. When Max was staying in Paris, for a study abroad program at the Sorbonne University, splashed across the news headlines was the announcement that the Berlin Wall has fallen. Immediately, Max traveled by train for 16 hours to witness the historic event and even get his piece of history – an actual piece of the wall.

In the months prior to his graduation from undergraduate school, Max decided to apply to law school as a backup, just in case his application to Berkeley was denied. Berkeley did accept Max into its graduate history program and so did law school. He decided to pursue both. Max holds an M.A. degree in History from the University of California, Berkeley and a Juris Doctor degree from Hastings. In the end, Max chose to be a lawyer.

"I enjoy meeting, talking, and connecting with people. Every client has a very interesting theme, story, and life, and I love to communicate that whether it be in court or mediation," said Max. In the end, Max is not just practicing law, but practicing history.

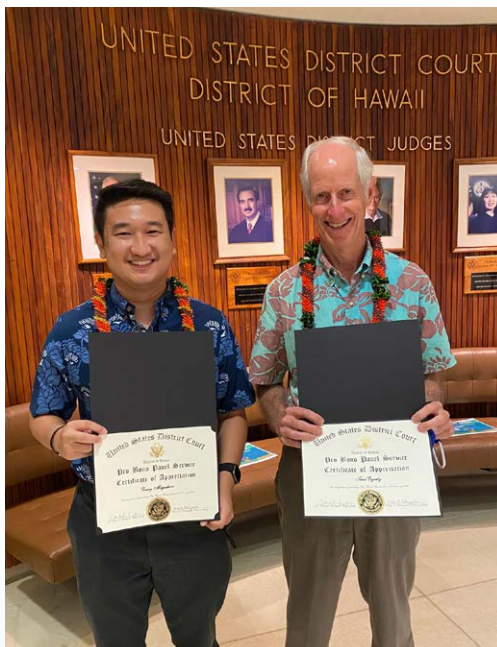
Today, Max lives in Honolulu with his family. He and his wife have five children, three chickens, and one dog.



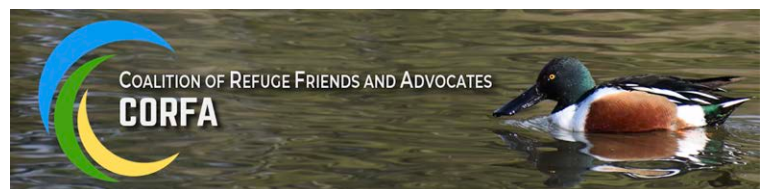


Amber M. Yonamine, Toren K. Yamamoto, and Clint K. Hamada sworn in as Damon Key's newest attorneys.

Damon Key attorneys **Megumi Soga, Ross Uehara-Tilton** and **Casey T. Miyashiro** had lunch with their Japan Meritas contact, Darcy Kishida (standing) from the Kojima Law firm in Tokyo.



Tred R. Eyerly and Casey T. Miyashiro were recognized by The United States District Court, District of Hawaii in recognition of their service on the Pro Bono Panel.



Kenneth R. Kupchak has been asked to join the Board of the Coalition of Refuge Friends and Advocates (CORFA). Two years ago, the CORFA and the National Wildlife Refuge Association (NWRA) formally agreed to begin working together to advocate on behalf of Friends groups around the country. With missions focused on national wildlife refuges and hatcheries.



Mark M. Murakami and Gregory W. Kugle spoke, for the eighth year in a row, at the Hawaii State Bar Association's Real Property and Financial Services Section Real Estate Litigation Update.