

SB2716

SD1



The Judiciary, State of Hawaii

Testimony to the Senate Committee on Judiciary and Government Operations

The Honorable Brian T. Taniguchi, Chair
The Honorable Dwight Y. Takamine, Vice Chair

Tuesday, February 23, 2010, 10:00 a.m.
State Capitol, Conference Room 016

by
Thomas R. Keller
Administrative Director of the Courts

WRITTEN TESTIMONY ONLY

Bill No. and Title: Senate Bill No. 2716, S.D. 1, Relating to Child Protective Act

Purpose: Establishes child protective provisions in the Hawaii Revised Statutes that are consistent with federal Title IV-E provisions.

Judiciary's Position:

This bill is the product of a Task Force led by the Judiciary, after last year's Senate Bill No. 912 was vetoed by the Governor because it did not ensure compliance with certain federal requirements. The State was given an extension of time to draft new legislation. In our testimony below, we will explain the collaboration that went into producing this bill. However, we wish to raise an issue which was an oversight on the part of the Judiciary in our work as members of the Task Force that drafted this bill.

In the current law, the court appointment of attorneys for indigent parties is within the court's discretion. In actual practice, all family courts in the state appoint attorneys for all legal parents in foster custody cases (these are cases where the child has been placed out of the family home). On Oahu (1st Circuit), attorneys are also appointed for all legal parents in family supervision cases (where the child remains in the family home). The 2nd, 3rd, and 5th circuits (Maui/Molokai/Lanai, Big Island, Kauai) do not appoint attorneys in family supervision cases. Also, from time to time, the courts will appoint counsel to other parties in rare cases where it has been deemed in the child's best interest. Obviously, our current budget request is based on these



current practices and we will be unable to accommodate a greater number of cases than what is based on our current practices.

This bill creates a right to counsel (similar to the right of defendants in criminal cases) in these civil cases for a broad range of parties as defined in the bill's definition of "parent" (page 14, lines 9-14), which, in addition to legal mothers and fathers, includes "presumed, or concerned natural" fathers, "legal guardians", and "other legal custodians". The Judiciary takes no position on the creation of this new right.

Without commenting on the substance of creating a new right, we believe that our current system maximizes the use of severely limited dollars. Accordingly, we respectfully submit a proposed amendment to section - 17 of this bill (page 45, lines 3-16), as follows:

Section -17: Court-appointed attorneys. (a) The court [shall] may appoint an attorney to represent a legal parent who is indigent, based on court- established guidelines [, unless the parent retains, or waives the right to, an attorney]. The court may also appoint an attorney to represent another party who is indigent, based on court-established guidelines, if it is deemed in the child's best interest.

(b) Unless otherwise ordered by the court, the attorney for a child or for an incapacitated adult shall take instructions from the child's or incapacitated adult's guardian ad litem.

(c) Attorneys who are appointed by the court to represent indigent legal parents and parties may be paid by the court, unless the legal parent or party for whom counsel is appointed has an independent estate sufficient to pay such fees and costs. The court may order the appropriate legal parents or parties to pay or reimburse the fees and costs of an attorney appointed for the child

Although we are proud to be in the Task Force that assisted in drafting this bill, the Judiciary takes no position on the other provisions of this bill because this is a policy decision within the authority of the Legislature. If this bill is passed, the Judiciary will have the responsibility of applying the law. As with all new laws, a party may decide to challenge the legality of all or a portion of the statute, either as written or as applied to a specific fact pattern. Although this bill results from very close collaboration of all Task Force members, any future rulings by the court must be specific to the case and the issues raised and the court cannot be bound by any appearance of predisposition.

Just prior to the 2009 Legislature, the Department of Human Services (DHS), at the insistence of the federal representatives who assist in oversight of Title IV-E funding, proffered a bill seeking limited amendments to HRS Chapter 587. Although the Family Court and the parents' counsel and guardians ad litem were concerned about the language of the bill, there was,



nevertheless, a concerted effort to draft a coherent bill. That effort simply ran out of time. However, the Family Court pledged to provide the leadership to continue work on HRS Chapter 587 so that a bill could be presented to the 2010 Legislature. This leadership began immediately after the 2009 Legislature adjourned. We sought, through the use of federal Court Improvement Funds, technical assistance through the American Bar Association, Center on Children and the Law. We were able to secure the expert help of Joanne Brown (a retired judge who is now a consultant in the area of state child welfare legislation and compliance with federal laws). Our goal was to avoid a piecemeal band aid approach. In fact, the "charge" to this Task Force was to review the entire HRS Chapter 587 and to revamp it according to what we have learned from our work through the years, what we know to be the current best practices, and what the current federal law and rules require. Our overarching job was to craft a bill that would protect abused and neglected children and to foster both family healing as well as timely permanency for these children.

Under the Family Court's leadership, a Task Force was formed comprised of DHS, parents' counsel, guardians ad litem, representatives from the Department of the Attorney General, and Family Court Judges and staff. Besides the extraordinary assistance of Joanne Brown, we also received critical assistance from various Fellows of the William S. Richardson School of Law and Faye Kimura, our Court Improvement Liaison. All of these people have worked tirelessly since the late Spring of 2009.

This bill is the product of hard work and close collaboration. This bill fulfills the charge to the Task Force to bring HRS Chapter 587 to the threshold of the 21st Century and to do so in compliance with federal requirements while always focusing on the needs of the children.

The Family Court is grateful for the work of the Task Force members, our consultant, Joanne Brown, the UH Law School Fellows, and Faye Kimura. As noted above, because of the role that we play in applying the law and our responsibility in determining issues of legality and constitutionality, we are unable to take a categorical position of favoring this bill and all of its components. For example, the Family Court has been very concerned about the types of information that the DHS has chosen to disclose pursuant to its rules. We have been concerned that their public disclosures appear inconsistent with the current statute's strict confidentiality requirements and, even more importantly, that the public disclosures have not been in the children's best interests. The section of this bill that addresses this issue is neutrally worded. However, a party could still challenge this section's legality and/or a specific public disclosure by DHS under both the language of this bill and the DHS' rules. The court would then apply an independent review of the law.

This bill is a fine example of the good faith efforts and hard work of DHS, the Attorney General's office, the private bar, UH Law School Fellows, our federal and CIP consultants, and



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the court. We are grateful to the Legislature for their interest in all of these issues, its forbearance as we tried to do this in time for the 2010 Legislative Session, and its trust in all of us by giving us the additional year to present a good work product.

Thank you for the opportunity to submit testimony on this matter.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010**

ON THE FOLLOWING MEASURE:

S.B. NO. 2716, S.D. 1, RELATING TO CHILD PROTECTIVE ACT.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

DATE: Tuesday, February 23, 2010 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): WRITTEN TESTIMONY ONLY. For more information, call Jay K. Goss, Deputy Attorney General, at 587-2969.

Chair Taniguchi and Members of the Committee:

The Department of the Attorney General supports this bill.

This bill brings our child abuse statute into compliance with the federal Adoptions and Safe Families Act ("ASFA") and the Child Abuse Prevention and Treatment Act ("CAPTA"). This legislation was drafted by a committee convened by the Family Court that included representatives of the Family Court, the Department of Human Services, the Legal Aid Society of Hawaii, and the Department of the Attorney General, as well as members who have practiced as attorneys representing parents and guardians ad litem for children. The committee also worked closely with Joanne Brown, from the National Resource Committee on Legal and Judicial Issues, to ensure compliance with ASFA and CAPTA.

The Department of the Attorney General supports this bill for two reasons. First, it is extremely important that our child abuse statute complies with the federal provisions of ASFA and CAPTA because compliance with those laws enables the state to receive federal funding for cases involving child abuse and neglect. Second, the committee convened by the Family Court spent considerable time rewriting the statute in an attempt to make it more understandable to both people who practice in this

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area of law on a regular basis and those who may be new to this area of law or those who may not have legal representation.

The amendments in S.D. 1 were suggested by the Department of Human Services to incorporate some last minute changes required by the federal agency overseeing compliance with ASFA and CAPTA.

We respectfully ask this Committee to pass this bill with the amendments contained in S.D. 1.

LINDA LINGLE
GOVERNOR



LILLIAN B. KOLLER, ESQ.
DIRECTOR

HENRY OLIVA
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES
P. O. Box 339
Honolulu, Hawaii 96809

February 23, 2010

MEMORANDUM

TO: Honorable Brian T. Taniguchi, Chair
Senate Committee on Judiciary and Government Operations

FROM: Lillian B. Koller, Director

SUBJECT: S. B. 2716, S.D. 1, RELATING TO CHILD PROTECTIVE ACT

Hearing: February 23, 2009, Tuesday, 10:00 a.m.
Conference Room 016, State Capitol

PURPOSE: The purpose of S.B. 2716, S.D. 1 is to establish child protective provisions in the Hawaii Revised Statutes that are consistent with federal Title IV-E provisions.

DEPARTMENT'S POSITION: The Department of Human Services (DHS) strongly supports this bill **which is necessary to ensure the receipt of approximately \$50,000,000 in federal Title IV-E funds annually** which is used to support everything we do - from staffing to services - to protect abused and neglected children. We also appreciate and support the amendments made to the bill by the Senate Committee on Human Services.

Based on the information and instructions given to the Department, the U.S. Administration for Children and Families has

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indicated that the State does not have any other viable option besides this legislation to ensure compliance with the requirements of Title IV-E.

The rewritten Child Protective Act has been updated, simplified, and incorporates all necessary federal Title IV-E requirements. The bill was drafted by a committee convened by the Judiciary composed of Judiciary, DHS and AG staff, together with representation from Legal Aide, Guardians Ad Litem and Parent's attorneys. Technical assistance was provided through the Administration for Children and Families by the National Center for Legal and Judicial Issues by former Judge Joanne Brown.

The committee was tasked with ensuring that the Child Protective Act complies with all necessary Federal Title IV-E requirements and revising Chapter 587 to reorganize and clarify the statute to make it easier to understand and implement.

This legislation is necessary to ensure that Hawaii's law is consistent with federal Title IV-E provisions. If the legislation is not passed the State will not be able to finalize a federally approved State Plan for Title IV-E to continue receiving Title IV-E funds.

Legislation was submitted in the 2009 Legislature which passed, but did not meet, the Federal Title IV-E requirements. The bill was vetoed, but the State still has to pass the necessary legislation.

This legislation is necessary to ensure that chapter 587, Hawaii Revised Statutes, is compliant with federal Title IV-E provisions related to periodic and permanency hearings and required timelines for hearings and Court findings.

For example, Chapter 587 does not specifically address the Federal requirement for periodic review hearings at six-month intervals to determine the safety of the child and case progress and permanency hearings at twelve-month intervals to determine the permanency plan for a child in accordance with Section 475(5) (C) (1) of the Social Security Act and 45 CFR 1356.21(h). Instead, chapter 587 continues to require eighteen-month dispositional hearings along with requirements that were made obsolete by the amendments in the Adoption and Safe Families Act of 1997 (P.L. 105-89).

DHS cannot over-emphasize the importance of the passage of this bill, especially during the fiscal crisis facing the State at this time. If the proposed statute change is not adopted with the specific language proposed by the Department to ensure compliance with Federal Title IV-E requirements, **approximately \$50,000,000 in Federal Title IV-E funds annually will be lost.**

The proposed Child Protective Act will ensure compliance with federal Title IV-E requirements, while providing our community with improvements to the current Child Protective Act that will promote child safety, permanency and well-being.

Thank you for the opportunity to testify.

COMMENTS IN SUPPORT, REQUESTING AMENDMENTS
SB2716 - RELATING TO CHILD PROTECTIVE ACT

February 23, 2010 at 10:00 a.m.

The Legal Aid Society of Hawaii hereby provides comments to the Senate Committee on Judiciary and Government Operations in support of SB2716– Relating to Child Protective Act and requesting an amendment.

The Legal Aid Society of Hawaii is the largest non-profit provider for direct civil legal services in the State. Further, since the start of our guardian ad litem work in 1996, we have assisted over 2,700 children as guardian ad litem and have represented over 600 parents in child welfare cases. We are currently the only statewide provider of child welfare legal services and through this experience have a unique perspective on the impact legislation can have on those who are part of the system.

We were asked along with the Department of Human Services, Department of the Attorney General, parent counsel and guardian ad litem to work with the Judiciary to review and relook at the Child Protective Act for compliance with federal Title IVE provisions and to improve the act.

While we are in strong support this bill, we are asking for a few amendments (two substantive and two housekeeping) to this bill.

SUBSTANTIVE AMENDMENTS

Duties of an Guardian ad Litem for an Incapacitated Person

We believe that requiring a guardian ad litem for an incapacitated person to file a report with the court intrudes into the attorney-client relationship and could force inappropriate disclosures. Specifically, we recommend the following change:

Page 43, Lines 17-18: replace “the child or incapacitated adult’s best interest” with “the child’s best interest”
Page 43, Lines 19-20: delete “or incapacitated adult”

Child’s Attorney Taking Direction from Child’s Guardian ad Litem

In a child welfare case, a child is only appointed an attorney when that child’s “opinions and requests differ from those being advocated by the guardian ad litem” and is only appointed if the court determines “it is in the child’s best interest to appoint an attorney for the child concerning such issue.” To then require the attorney to take direction from the child’s guardian ad litem seems to directly interfere with the purpose for appointing an attorney for the child in the first place. We are therefore recommending the following amendments:

Page 44, Line 15: delete “for a child or”
Page 44, Line 16: delete “child’s or”
Page 45, Line 8: delete “for a child or”
Page 45, Line 9: delete “child’s or”

HOUSEKEEPING

Resource Family Definition

We believe that it was not intended in the definition of a resource family that they only provide “temporary” foster care services for children. In that respect, we recommend that:

Page 16, Line 13: “temporary” be deleted

Reference to Foster Parents

With respect to the disclosure of records, foster parents and not resource family is listed. As this bill does aim to change the term foster parent to resource family, reference to foster parents should be adjusted. As such we recommend that:

Page 89, Line 16: replace “foster parents” with “the resource family”

Page 90, Line 5: replace “foster parents” with “resource family”

Thank you for this opportunity to provide comments.

Sincerely,



M. Nalani Fujimori Kaina
Executive Director
527-8014