



The Judiciary, State of Hawaii

Testimony to the House Committee on Human Services

Representative Dee Morikawa, Chair

Representative Bertrand Kobayashi, Vice Chair

Tuesday, February 2, 2016, 9:00 a.m.

State Capitol, Conference Room 329

by

R. Mark Browning

Senior Judge, Deputy Chief Judge

Family Court of the First Circuit

Bill No. and Title: House Bill No. 1701, Relating to Family Courts

Judiciary's Position:

The Judiciary strongly opposes House Bill No. 1701, Relating to Family Courts.

At page 5, from line 15, this bill purports to set forth a mandatory evidentiary hearing as follows:

(9) In every proceeding where there is at issue a dispute as to the custody of a child[;] or visitation by a parent, if the case involves allegations or a history of family violence, the court shall first hold an evidentiary hearing that shall be limited to evidence related to the issue of family violence.

This provision of a mandatory evidentiary hearing will act as a costly and potentially dangerous straightjacket for the parties (especially the victims) as well as the judicial and social systems involved with the parties. This provision, in the context of the other changes proposed by this bill, will produce untenable results, additional costs to parties, and increased burdens on the victims and children of the violence. Requiring an evidentiary hearing in every target proceeding will also cause delays in the judicial process; thereby, delaying appropriate relief to the parties and their families. Additional judicial resources will be required and such resources will have to be funded.



Here are our specific concerns:

1. This requirement will apply to divorces, paternities, protective orders, and other types of cases and will affect a large number of cases. Unfortunately, the problem of domestic violence is widespread. Rather than representing a small percentage of cases, the court is confronted with domestic violence allegations on a daily basis.
2. The requirement that the “court shall *first* hold an evidentiary hearing . . .” is problematic. This implies that the court will be setting cases on its own volition. It is a long established policy of this country’s judicial system that the court generally does not respond absent case or controversy. This allows the parties to decide what needs to be brought to court. This discretion is taken away by this requirement.
3. The requirement that the “court shall first hold an *evidentiary* hearing that shall be limited to evidence related to the issue of family violence” is problematic. First of all, the timing of the hearing, i.e., “first,” implies “early in the case” or “soon after filing.” These means that the parties have yet to conduct discovery or to get their own evidence in order before they must participate in such a hearing. Requiring a hearing before the parties are ready generally leads to incomplete decision making and/or errors.
4. The requirement that the “court shall first hold an evidentiary hearing that shall be *limited* to evidence related to the issue of family violence” is problematic. This is possible if the issues of the case are very limited. However, in custody/visitation cases, the facts and issues are often not limited. Certainly, the effect of family violence when children are involved is complex. This provision appears to envision a simple hearing that might be limited to “she said/he said.” However, in the context of custody/visitation issues, the burden and the need to go beyond “she said/he said” are greater, as are the consequences of hasty decision making.
5. The application of the policies of issue and fact preclusion may have to be suspended. These policies basically apply to allow just “one bite at the apple.” In other words, if a fact or an issue is established/ruled upon after a full litigated hearing, the parties cannot come back to the trial court and try to re-do the hearing. If the parties are not satisfied, their recourse is to file an appeal. However, it would be fundamentally unfair to first require a hearing early in the proceedings limited to one issue and then to apply issue and fact



preclusion to the outcome of that hearing. In the end, all contested issues and facts will have to be re-litigated, including the ones covered at that “first” hearing.

6. A fundamental problem, in addition to the practical problems of cost, delay, and procedural unfairness, is this bill’s nullification of the rebuttable presumption that the Legislature enacted to aid victims of family violence in recognition of the imbalance of power and resources between aggressors and victims. The mandatory evidentiary hearing requirement thwarts the impact of the presumption.
7. The new provision at page 7, beginning at line 8 states: “(iv) A parent’s allegation of family violence, if made in good faith, shall not be a factor that weighs against the parent in determining custody or visitation;”. This provision automatically creates a new area of litigation, *i.e.*, the intent of the party alleging family violence. This will be a trap and a cost for victims. For example, even if the court finds that the allegations are true, there can still be litigation about whether or not said allegations were made in good faith. Truth and good faith may not be congruent.

Page 1 of the bill requires mandatory training of judges and “relevant professional personnel” in “domestic violence advocacy” at least every three years. This provision is not appropriate and it is not necessary. The Judiciary must operate with strict neutrality and fairness. We must also avoid even the *appearance* of impropriety. It would be inappropriate to require the Judiciary to conduct training about advocacy of *any* subject. In contrast, for the past several years, family court judges have participated in annual training regarding best practices in the area of domestic violence, intimate partner violence, and the effect of such violence on children. The training topics were not designed to instill any sense of “advocacy” on behalf of the judges or court staff.

In our testimony for SCR 51 last year, we noted the extensive training that the Family Court judges have had and gave examples of the trainings held in the past 5 years. Here is the relevant excerpt from that testimony with an accompanying table submitted to the 2015 Legislature.

“Furthermore, the Family Court is committed to judicial training. Nationally, Family Courts and Juvenile Courts have long been viewed as courts with specially trained judges. Such special training promotes better understanding of certain areas such as child abuse, divorce, and family/domestic violence. In addition to training provided to all judges by the Judiciary, the Family Court judges of all the circuits also attend an annual Family Court Symposium.



Family/domestic violence is a major topic that is regularly presented in addition to other matters and topics. For example, in the last five years, the judges have received training on the following family/domestic violence subjects:”

Year	Topic	Speaker(s)
2010	Accounting for Domestic Violence in Child Custody Cases: <ul style="list-style-type: none">• Victim & Perpetrator Behavior• Implications for Parenting• Custody & Visitation: Getting the Right Information Crafting Plans: Best Interests of the Child	National Council of Juvenile and Family Court Judges (NCJFCJ)
2011	Domestic Violence and Child Welfare	National Council of Juvenile and Family Court Judges
2012	Child Witness in Domestic Violence, CPS, & Divorce Cases	National Council of Juvenile and Family Court Judges
2013	Context for Understanding Trauma in Victims of Domestic Violence & Sexual Assault Responding to Trauma in Victims of Domestic Violence & Sexual Assault	Olga Trujillo, J.D. Danielle Pugh-Markie Honorable Tamona Gonzalez Olga Trujillo, J.D. Danielle Pugh-Markie Honorable Tamona Gonzalez
2014	Intimate Partner Violence & Trauma <ul style="list-style-type: none">• Examining the Impact from the Inside Out• Connecting the Neurobiology of Trauma• Victim Behavior & Assessing Credibility• What You Can Do to Help	Olga Trujillo, J.D.

The court takes no position and have no comments on the provisions of the bill concerning child custody evaluators beginning at page 12, from line 10.

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