The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Ways and Means
Senator David Y. Ige, Chair
Senator Michelle Kidani, Vice Chair

Monday, March 25, 2013, 9:10 a.m.
State Capitol, Conference Room 211

WRITTEN COMMENTS FOR DECISION MAKING

by
Judge R. Mark Browning
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Family Court of the First Circuit

Bill No. and Title: House Bill No. 395, H.D. 2, S.D. 1, Relating to Youth.

Purpose: Requires the Office of Youth Services to coordinate a Safe Places for Youth Pilot Program to coordinate a network that youth may access for safety and where they may obtain advice, guidance, programs, and services. Appropriates funds. Provides that in awarding custody and visitation of a minor child, the court shall consider the preference that custody be awarded to both parents to ensure maximum continuing physical, emotional, and meaningful contact with both parents. Effective July 1, 2030. (SD1)

Judiciary's Position:

The Judiciary has not submitted testimony regarding the original House Bill 395. While we strongly support increasing available services to youth, the bill is a policy issue that is particularly dependent on funding from the State budget—these are generally reasons for the Judiciary to remain silent in order to avoid overstepping the separation of powers boundaries. We continue to view the original H.B. 395 favorably and continue to take no position on its passage with funding.

However, the Judiciary respectfully ***opposes*** the recent Senate Draft 1 of this bill, which grafted the following language as a "Part II" into the original bill (see page 6, lines 13 to 20, of House Bill 395 H.D. 2, S.D. 1):

> (1) Custody should be awarded to [~~either parent or to~~] ensure the inclusion of both parents [~~according to the best interests~~] in the raising of the child, [~~and the court also may consider frequent, continuing,~~] to ensure maximum continuing, physical, emotional, and meaningful contact [~~of each parent with the child~~] with both parents unless the court finds that a parent is unable to act in the best interest of the child;

This language comes from H.B. 477, which passed first reading in January but was never set for hearing. We respectfully suggests the elimination of the language from page 5, line 19, to page 14, line 15, of House Bill 395, H.D. 2, S.D. 1.

The Judiciary opposes S.D. 1 for the following reasons.

1. It is likely that passage of this bill in the current form may violate the Hawaii Constitution, which prohibits passage of a bill with two subjects. Furthermore, the grafted language is not encompassed by the title of the original H.B. 395, *i.e.*, "Relating to Youth."

> No law shall be passed except by bill. Each law shall embrace but one subject, which shall be expressed in its title. The enacting clause of each law shall be, "Be it enacted by the legislature of the State of Hawaii." Haw. Const. Art. III, § 14.

2. The wisdom behind this constitutional prohibition is illustrated by the insertion of S.D. 1. Since there was no hearing for the HB477 language, there would be effectively ***no*** public input regarding S.D. 1. This is particularly important since the newly inserted language appears to attempt to institute a "sea change" in child custody determinations, turning the focus away from the child to focus on the two adult parents.

3. Focusing on competent adults (parents) may effectively undermine the court's authority since the court's authority in child custody matters depends in large part on the *parens patriae* principle that allows state involvement in matters that are otherwise constitutionally protected, such as family privacy. Changing the focus solely on the child to a focus on maximizing contact with parents is a sea change. It is important for us to be clear here. The Legislature has the authority to change public policy away from focusing on children. It has the authority to abolish the "best interest" standard and replace it with another standard that may in

fact be an improvement over the current system of determining contested child custody cases. Within parameters established by the law and the Constitutions of the United States and Hawaii, the court is required to and will apply the new law. We are in no way questioning the Legislature's authority to deal with the issue at hand through an appropriate, fair, and legal process.

4. The "best interest of the child" standard, which S.D. 1 appears to delete, has long been recognized by the Hawaii Supreme Court.

> In sum, Hawaii courts have consistently adhered to the best interests of the child standard as paramount when considering the issue of custody. In so doing, the family court is granted broad discretion to weigh the various factors involved, with no single factor being given presumptive paramount weight, in determining whether the standard has been met. *Fisher v. Fisher*, 111 Haw. 41, 50; 137 P.3d 355, 364 (2006).

5. If passed, children will be harmed as the language of S.D. 1 is challenged in the appellate court system. Children need certainty in their lives. Children remain highly anxious as their parents' battle wends its way through litigation and then appeals. *No* child who is subject to a contested child custody "battle" after the passage of S.D. 1 will have certainty until the appeals are finally resolved. This is true whether or not the child's particular case is appealed or not since the appellate decision may apply to all cases decided based on the same language.

6. The vast majority of child custody court orders result from agreements/stipulations made by the parents. It is a relatively small handful of cases that need contested trials. Of that group, there is a smaller number of cases involving highly litigious parents who are apparently unable to resolve "differences" without court "battles" and who return to court year after year. Enacting fundamental changes in an apparent response to a small and minor group of litigious parents may cause disruption to the much larger group of normal parents who are able to move on after divorce and effectively parent their children with two households without litigation.

7. Inclusion of the new child custody provisions in S.D. 1 may jeopardize passage of the entire bill, including what has now turned into "Part I"—the original bill.

8. If enacted, S.D. 1 may also jeopardize the goals of the original bill if the constitutionality of the entire act is contested.

For these reasons, the Judiciary respectfully opposes just Part II of House Bill 395, H.D. 2, S.D. 1 and respectfully suggests the elimination of the language from page 5, line 19 of S.D. 1 that is before the Committee today.

Thank you for the opportunity to comment on this measure.