The Judiciary, State of Hawai'i

Testimony to the House Committee on Judiciary
Representative Karl Rhoads, Chair
Representative Sharon E. Har, Vice Chair

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State Capitol, Conference Room 325

WRITTEN TESTIMONY ONLY

by

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Bill No. and Title: House Bill No. 951, Relating to the Service of Process

Purpose: The stated purpose is to "update statutes to authorize persons authorized by the courts to serve legal process."

Judiciary's Position:

The Judiciary opposes this bill because of the significant operational problems it would create for the judicial system which would, in turn, create logistical and financial problems for litigants. The responsibility it imposes upon the courts is not viable given the limited information presently available to the court. Judges are not trained in matters of public safety and their expanded role in determining what credentials and/or training are needed for particular law enforcement actions involved when serving and enforcing writs, is simply not an appropriate or prudent use of their time.

The issue involves which individuals are authorized to serve garnishment orders, serve and enforce writs of execution, attachment, possession and replevin and serve and enforce orders to show cause under HRS Section 603-29 (collectively referred to as "writs.") Because writs are related to post-judgment activity, they are complicated, involved and potentially difficult processes. They involve physically taking possession of one's personal property, or forcing removal of persons from property and other types of potentially time-consuming, drawn out and adversarial process.

This bill creates a potential for a perceived conflict of interest situation given that judges are often called upon to rule as to whether service was legally effected. It may be perceived as a conflict if a judge makes that determination having already authorized the process server to so serve. Moreover, judges cannot realistically determine whether a particular process server is "authorized" without requisite criteria and/or a regulatory process to determine who is appropriate to serve in terms of both satisfying the criteria and also receiving the necessary training. Without a full understanding of the criteria, training and other issues, judges run the risk of either spending inordinate amounts of time ascertaining whether a particular person should be "authorized" to serve and enforce a writ; or, alternately, authorizing persons who may be ill-prepared or ill-suited for executing writs, thus resulting in potential safety and liability risks.

Historical Context: Act 142, SLH 2012

Legislation enacted last year allowed persons "authorized by rules of court" to serve and enforce writs. At that time, the Department of Public Safety (PSD) held a list of authorized civil process servers for five types of service: orders to show cause, writs of attachment and execution; garnishment documents; writs of replevin; and writs of possession. The authorization process required application to the Department. (Notes from Public Safety Department Director, page 6, State Survey of Process Server Requirements by Feerick Center for Social Justice at Fordham Law School, 2009).

At the time Act 142 was passed, PSD authorized individuals on a PSD-generated list to serve certain types of civil process. PSD provided the list with a letter explaining that PSD has "authorized the individuals on the attached list . . . . [but] that PSD is not responsible for the conduct of the authorized process servers and . . . [a]n authorized process server is NOT a law enforcement officer, civil deputy sheriff, or an employee of the State of Hawaii." (Letter from Deputy Director for Law Enforcement, September 1, 2011) Shortly after Act 142 was enacted, the PSD Sheriff's Division stopped using their lists of process servers. There was an apparent assumption that the court rules would take over where the list ended. The only applicable court rules, however, are Rules 4 of the Hawaii District Court Rules of Civil Procedure, the Hawaii Rules of Civil Procedure and the Family Court Rules. Those rules apply only to service of a complaint and summons and do not apply to persons who would serve and enforce writs.

Because the rules of court do not apply, the present bill would drop the clause of "authorized by rules of court" and replace it with the clause "authorized by the court" so that it would fall to the judge to determine the individual authorized to serve a writ in each case for which service and enforcement is needed.

Impact of Bill

In addition to the potential of a conflict of interest situation, addressed above, this bill may create gridlock in our courts. In district courts, a large number of writs, including writs of possession in landlord tenant cases (where district court has exclusive jurisdiction regardless of the amount involved) as well as writs of execution for judgments in district court cases and writs of replevin for goods valued at $25,000 or less, are handled.

Having courts authorize persons who may execute or serve writs is simply not a judicial function. District court judges do not have the resources available to evaluate credentials of civil process servers. Moreover, this process would significantly increase the number of documents filed in district court, as there are presently 25 to 50 writs of possession issued each week in the district court of the First Circuit alone. Most of these writs are not served by sheriff's deputies but instead by someone on the current Department of Public Safety list. The added paperwork needed to review and approve a particular process server would place an inordinate burden on an already overworked and understaffed court civil division.

Moreover, and of primary importance to civil litigants, is that requiring court pre-approval of servers would delay the execution of writs – such as writs of possession in summary possession cases, which are handled on an expedited basis. Time is of the essence when landlords seek to regain possession of their rental property, particularly in the vast majority of cases where the tenant has failed to pay rent owed.

Suggested Alternative

While we strongly oppose this bill, we agree with the approach taken in House Bill 1280 and Senate Bill 311 that propose establishing a working group to review the matter and report its findings to the legislature as to (1) the duties and responsibilities of process servers under the department's jurisdiction and (2) a proposed process of registration and certification of process servers, and other relevant issues.

A 2009 state survey of process server requirements by Feerick Center for Social Justice at Fordham Law School, showed that while the regulation of process servers varies greatly throughout the country, many states require licensure, registration and/or appointment. Additional provisions mandate education (training and/or testing), bond and/or insurance requirements, and fee guidelines. It would be helpful for the working group to determine which state requirements are most appropriate.

Our only suggested change to the creation of the working group is that it include representative(s) from the department of commerce and consumer affairs (DCCA), given that the registration and certification of process servers (like that of bondsmen, detectives and investigators regulated by statute) may best be accomplished through DCCA.

Finally, we point out that the working group does not provide guidance for the immediate issue at hand and that is the impasse that has arisen from the Department of Public Safety's discontinuation of its list of authorized civil process servers. That is the immediate issue that must be addressed.

Thank you for the opportunity to provide comments on this measure