



The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Judiciary

Senator Karl Rhoads, Chair
Senator Glenn Wakai, Vice Chair

Friday, February 1, 2019, 9:00 a.m.
State Capitol, Conference Room 016

WRITTEN TESTIMONY ONLY

by
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Bill No. and Title: Senate Bill No. 3, Relating to Guardianship.

Purpose: Requires the court to appoint an attorney to represent the respondent in a guardianship petition. Requires the court appointed attorney to meet with the respondent at least once prior to the guardianship petition hearing.

Judiciary's Position:

The Judiciary respectfully **opposes** this bill, which would mandate the appointment of a lawyer for the respondent with every petition filed for the establishment of a guardianship of an incapacitated person. This one-size-fits-all approach would not account for each respondent’s unique circumstances. Existing law and court rules provide for a more nuanced, individualized determination of whether a given respondent may need legal representation.

For example, the court may currently appoint a kokua kanawai pursuant to Hawai‘i Revised Statutes (“HRS”) § 560:5-305(a). Generally, among other duties as the court may direct, the kokua kanawai serves as an extension of the court to conduct an independent review of the situation; interview the respondent and the person seeking to be appointed guardian; explain to them the nature and purpose of the proceeding; determine the respondent’s views; and report findings and recommendations to the court. Although the appointment of a kokua kanawai is discretionary, traditionally the court will appoint one as a matter of course and common practice. Moreover, all kokua kanawai must be individuals “having the training or experience that the court deems appropriate,” and in practice are almost invariably attorneys themselves.



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Among the kokua kanawai's existing duties are to inform the respondent of the right to request a court-appointed attorney, and, further, to include in his or her report a recommendation as to whether an attorney **should** be appointed to represent the respondent, given the respondent's particular needs, wishes, and circumstances. (See HRS § 560:5-305(e).)

Additionally, when necessary, and completely independent of the kokua kanawai's recommendations, the court has the authority to appoint a guardian ad litem for the respondent under Rule 28(b) of the Hawai'i Probate Rules. Said rule in relevant part provides that "[t]he guardian ad litem shall represent the interests of the person . . . for whom the guardian ad litem is appointed."

Given the effectiveness and flexibility of existing safeguards, the Judiciary is concerned that this bill's one-size-fits-all approach would generate unnecessary costs—for example, in situations where a kokua kanawai recommends that the respondent does not require legal representation, or where the respondent him or herself does not desire legal representation—while current law already provides for an expedient, personalized, and just process.

With respect to potential costs, the Judiciary also notes that this bill deletes the existing provision that all costs and expenses related to the proceeding are to be paid by the respondent, without specifying an alternative funding source for court-appointed legal representation in guardianship proceedings. That this lack of direction may compel the Judiciary's circuits to bear the costs of court-appointed counsel individually, especially without the allocation of additional monies sufficient to fund that representation, is of concern. The Judiciary also understands that the available pool of attorneys who would be willing to accept the role of court-appointed representation would be very limited in some circuits.

In conclusion, the Judiciary is confident that existing law, which gives due consideration to each respondent's unique circumstances and allows for the appointment of a kokua kanawai and/or a guardian ad litem whenever necessary, sufficiently safeguards the rights and needs of a respondent in a proceeding to establish guardianship of an incapacitated person.

Thank you for the opportunity to testify on this measure.