The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Human Service
Senator Russell Ruderman, Chair
Senator Karl Rhoads, Vice Chair

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State Capitol, Conference Room 016

WRITTEN TESTIMONY ONLY
by
Judge Glenn J. Kim, Chair
Hawai‘i Supreme Court Standing Committee
on the Hawai‘i Rules of Evidence

Bill No. and Title: Senate Bill No. 449, Relating to Children.

Purpose: Establishes in the department of the attorney general a child abuse investigation unit. Allows the department of the attorney general to intervene in adjudications in family court. Enacts the Uniform Child Witness Testimony by Alternative Methods Act, which authorizes courts to allow for children to testify in a place other than an open forum or away from the finder of fact, court, or parties. Requires the court and the prosecution to take appropriate action to ensure a prompt trial in order to minimize the length of time a child abuse victim or minor witness must endure the stress of the child's involvement in the proceedings.

Judiciary's Position:

The Hawai‘i Supreme Court’s Standing Committee on Rules of Evidence respectfully opposes Senate Bill 449, Section 3, pages 4 to 15, which would adopt the “Uniform child witness testimony by alternative method act” in Hawai‘i. This measure should not be adopted as it is unnecessary and probably offensive to the constitutional right of confrontation in at least some of its predictable applications.

Hawaii Rule of Evidence 616, entitled “Televised testimony of child,” and adopted in 1993 in response to Maryland v. Craig, 497 U.S. 836 (1990)(approving a Maryland statute allowing televised broadcast into a courtroom of testimony of a child crime victim taken at a remote location under carefully specified conditions), adequately protects a child victim-witness who would suffer “serious emotional distress” if required to give testimony in an accused’s presence. And HRE 611, enabling trial courts to “exercise reasonable control over the mode and order of

interrogating witnesses and presenting evidence" so as to ascertain the truth and protect witnesses "from harassment or undue embarrassment," vests in the trial judge the power to adopt any procedure that the HB 129 measure would countenance in a civil case. This committee is an arm of the Judiciary, and we are aware of no instance in which HRE 611 and 616 were inadequate to protect a child witness from the stresses of the courtroom. Had there been such a development, it would certainly have been brought to our attention. To the contrary, judges report that their courtrooms, equipped as they are to implement the remote TV procedure of HRE 616, are more than adequate to protect child witnesses in criminal cases, and that their inherent power, restated in HRE 611, to adapt courtroom procedures to comport with the needs of litigants and witnesses, includes the necessary leeway to fashion appropriate modes of eliciting child testimony in civil and family court cases.

The vice of this measure lies in its utterly permissive approach to methodology. Rather than carefully specify the conditions and procedures for taking testimony from children, this bill defines an alternative method as follows:

> " 'Alternative method' means a method by which a child witness testifies that does not include all of the following:
> (1) Having the child witness present in person in an open forum;
> (2) Having the child witness testify in the presence and full view of the finder of fact and presiding officer; and
> (3) Allowing all of the parties to be present, to participate, and to view and be viewed by the child."

To begin with, it seems clear that a "method" that does not include any of the specified criteria will nonetheless qualify as a method that does not include all of them. The bill as drafted may reflect an expectation that the language *implies* that at least two of the criteria should be present, but relying on implication on a matter that directly challenges the "facing" prerequisite of the Sixth Amendment right to confrontation reveals a dangerous vagueness and overbreadth that countenances procedures that will violate the Constitution. See Maryland v. Craig, supra, and Coy v. Iowa, 487 U.S. 1012 (1988)(striking down a procedure allowing placement of a screen between an accused and two complaining witnesses in such a way that it blocked him from their view as they gave their testimony). Would the Coy procedure be a permitted "alternative method" in the Senate Bill 449 scheme of things? Of course the trial judge would know about Coy and would presumably follow the U.S. Supreme Court law and disallow the screen. But the vice of overbreadth is that it will permit an entire range of process that will also offend the law, and statutes implementing criminal procedures should not be written in this way. Compare the Hawai'i scheme, which employs a tightly circumscribed criminal rule -- HRE 616 -- and a broadly fashioned HRE 611 to allow maximum discretion in civil and family cases.

Section -3 of this measure makes it applicable "in a criminal or noncriminal proceeding," and the commentary makes clear that maximum discretionary leeway in interpreting the open ended term, "alternative method," is intended.

Finally, as to the taking of the testimony of a child by an alternative method, the term is defined broadly in Section 2(1) to mean not only alternative methods currently recognized among the several states for taking the testimony of a child, such as audio visual recordings to be later presented in the courtroom, closed-circuit television which is transmitted directly to the courtroom, and room arrangements that avoid direct confrontation between a witness and a particular party or the finder of fact, but also other similar methods either currently employed or through technology yet to be developed or recognized in the future.

Such breadth is desirable in family court, where the best interests of children are the governing criterion. But HRE 611 is equally flexible, and family court judges can be counted on, with or without this "uniform" measure that its proponents boast has been adopted in four states, to continue to administer justice with ample regard to the psychological well-being of the child witnesses who appear before them.

Thank you for the opportunity to comment on this measure.