



The Judiciary, State of Hawai‘i

Testimony to the House Committee on Human Services

Representative Dee Morikawa, Chair
Representative Bertrand Kobayashi, Vice Chair

Tuesday, March 17, 2015 11:00 AM
State Capitol, Conference Room 329

WRITTEN TESTIMONY ONLY

By

Judge R. Mark Browning
Deputy Chief Judge and Senior Judge, Family Court

Bill No. and Title: House Concurrent Resolution No. 37 and House Resolution No. 14, Requesting an Audit of Child Custody Proceedings Involving the Commission of Family Violence of a Parent, to Assess the Use and Application of Section 571-46, HRS.

Judiciary's Position:

The Judiciary has grave concerns about House Concurrent Resolution (HCR) No. 37 and House Resolution (HR) No. 14 and respectfully offers the following reasons for our position:

1. While we are certainly well aware of the consequences of family violence, the lethality surrounding the victim's attempts to leave the perpetrator, and the courage it takes for victims to take those steps to leave, HCR No. 37 and HR No. 14 require the Auditor to go far beyond her authority and her mission and seriously abridge the fundamental democratic policy of separation of powers. HCR No. 37 and HR No. 14 should not be passed out of committee for these reasons alone. We address these issues and include other reasons for our grave concerns.

2. Separation of powers is a critical concept underpinning of our democracy. Basically, it recognizes that our country's strength is in part based on three co-equal branches of government, with all three being able to work robustly and vigorously within its own kuleana. The Legislature makes the laws; the Executive carries out the laws; and the Judiciary enforces and interprets the laws.



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3. In researching whether the Auditor can conduct such an “assessment” of specific judicial cases, we made a cursory review of reports by the U.S. General Accounting Office (GAO) (similar to our Legislative Auditor’s Office). We first noted its scope of operations:

Congress created GAO in the Budget and Accounting Act of 1921 in order assist in the discharge of its [Congress’] core constitutional powers-- the power to investigate and oversee the activities of the executive branch, the power to control the use of federal funds, and the power to make laws. All of GAO's efforts on behalf of Congress are guided by three core values: (1) Accountability-- GAO helps Congress oversee federal programs and operations to ensure accountability to the American people; (2) Integrity-- GAO sets high standards in the conduct of its work. GAO takes a professional, objective, fact-based, non-partisan, nonideological, fair, and balanced approach on all activities; and (3) Reliability-- GAO produces high quality reports, testimonies, briefings, legal opinions, and other products and services that are timely, accurate, useful, clear and candid.

<http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-02-816T/html/GAOREPORTS-GAO-02-816T.htm> (accessed March 5, 2015).

Based on this cursory review, we found three reports concerning the judiciary. One report was made in order for the Congressional Judicial Resources Committee to determine when additional courts of appeals judgeships needed to be created. Here is a sample of their sources of data:

The design for the new case weights relied on three sources of data for specific types of cases: (1) data from automated databases identifying the docketed events associated with the cases; (2) data from automated sources on the time associated with courtroom events for cases, such as trials or hearings; and (3) consensus of estimated time data from structured, guided discussion among experienced judges on the time associated with noncourtroom events for cases, such as reading briefs or writing opinions.

<http://www.gao.gov/products/GAO-13-862T> (accessed March 5, 2015).



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Here are the purpose and methodology for another report concerning judicial data:

Laws, such as the Clean Air Act, require EPA to issue rules by specific deadlines. Citizens can sue EPA for not issuing rules on time. These lawsuits are sometimes known as deadline suits. EPA sometimes negotiates a settlement to issue a rule by an agreed upon deadline. Some have expressed concern that the public is not involved in the negotiations and that settlements affect EPA rulemaking priorities. GAO was asked to review EPA settlements in deadline suits. This report examines (1) key environmental laws that allow deadline suits and the factors EPA and DOJ consider in determining whether to settle these suits, (2) the terms of settlements that led EPA to issue major rules in the last 5 years and the extent to which the public commented on the settlements, and (3) the extent to which settlements in deadline suits have affected EPA's rulemaking priorities.

<http://www.gao.gov/assets/670/667532.pdf> (accessed March 5, 2015).

We found one 1985 report regarding special education that looked a little deeper into specific cases:

In response to a request from your office [Senator Lowell Weicker, Jr., Chairman, Subcommittee on the Handicapped, Committee on Labor and Human Resources], we have reviewed several lawsuits filed under The Education of All Handicapped Children Act (EAHCA) (Public Law 94-142). The act provides for "a free appropriate public education which emphasizes special education and related services designed to meet . . . [the] unique needs . . . of handicapped children." As agreed with your office, our review was limited to obtaining information on only the successfully litigated cases under EAHCA from those court cases identified for your Subcommittee by the Congressional Research Service. We determined (1) whether each successfully litigated case was brought by an individual or a class; (2) the attorney's fees awarded, if any, and who paid; (3) the amount of the damage award, if any, and who paid; and (4) the nature of each case and the reasons litigation was brought.



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<http://www.gao.gov/assets/210/207656.pdf> (accessed March 5, 2015).

As illustrated by these reports, there are legitimate reasons for a legislature to obtain information from the judiciary and even information regarding specific cases. However, the scope, intent, and methodology of HCR No. 37 and HR No. 14 go way beyond anything found in these three examples.

4. Similarly, HCR No. 37 and HR No. 14 would require the Auditor to go beyond what our own state would allow. It is clear that, similar to the GAO, the Auditor's primary mission is to be an independent watchdog over spending of public funds.

In 1950, the delegates to Hawaii's first Constitutional Convention considered the position of the Auditor sufficiently important to be established in the State Constitution. The delegates envisioned an Auditor who would help eliminate waste and inefficiency in government, provide the Legislature with a check against the powers of the executive branch, and ensure that public funds are expended according to legislative intent.

The State Constitution in Article VII, Section 10, establishes the position of Auditor. To ensure independence from undue pressure from individual legislators, the executive branch, and forces outside government, the Constitution specifies that the Auditor be appointed for an eight-year term by a majority vote of each house in joint session. The Auditor may be removed only for cause by a two-thirds vote of the members in joint session.

It is the constitutional duty of the Auditor to conduct post-audits of the transactions, accounts, programs and performance of all departments, offices, and agencies of the State and its political subdivisions. The 1978 Constitutional Convention clarified these duties, making clear that the office's post-auditing functions are not limited to financial audits, but also include program and performance audits of government agencies. . . .

The Auditor also undertakes other studies and investigations as may be directed by the Legislature. In addition, Hawai'i Revised



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Statutes, Chapter 23, gives the Auditor broad powers to examine all books, records, files, papers, and documents, to summon persons to produce records and answer questions under oath, to hold working papers confidential, and to conduct post-audits as the Auditor deems necessary. These powers in their totality support the principles of objectivity and independence that the *1950 constitutional drafters envisioned for a fearless watchdog of public spending*.

<http://auditor.hawaii.gov/about-us/> (accessed March 14, 2015, emphases added).

5. The common law upon which our nation's judiciaries are designed provides for orderly and predictable court processes. Persons dissatisfied with the decision at the trial level in our state have two levels of appellate courts to turn to. The appellate courts defer to the trial court on credibility matters but not on matters of law. This makes common besides legal sense. At a contested trial, the trial judge sees and hears the litigants. The trial judge observes body language, interactions, facial expressions, and myriad other human cues. The trial judge makes findings of fact based on all the pleadings, testimony at trial, and the arguments made by the litigant or the litigant's attorney.

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:

(table on next page)



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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.

6. The common law also recognizes that the public good requires certainty in judicial decisions. Even in a court such as Family Court that deals with ever changing human beings and their family systems, certainty must be available absent material changes in circumstances. A lack of certainty harms the community, the litigants, and their children.



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7. The Auditor's assessing "the use and application of section 571-46(a) (9) to (14), Hawaii Revised Statutes" in the manner suggested in HCR No. 37 and HR No. 14 will cause upheaval in the lives of families and serious breaches of privacy. And, in the end, the Legislature will not be able to affect any of the final decisions and orders. The Legislature has other avenues and resources that can inform its work and does not have to rely on the kind of "audit" found in HCR No. 37 and HR No. 14. The Legislature can make different, new, and better laws based on input appropriate to legislative bodies such as by working with advocacy professionals, surveying national best practices, networking with other state legislatures, and other legislative resources.

8. The Auditor's work as envisioned by HCR No. 37 and HR No. 14 may be a Sisyphean task of rolling a large boulder up a steep hill only to have it roll back down near the top. The initial petitions in divorce and paternity cases do not usually include allegations of family violence. The family court becomes aware of such allegations through subsequent pleadings or by reviewing related cases or when the allegations are orally made during a pretrial proceeding. Transcripts will need to be ordered and examined. In the end, the Auditor will find herself taking on the role of a finder of fact and making determinations of credibility. This is clearly an undesirable outcome for all parties to the investigation.

9. The preamble at page 2, from line 1, recognizes a dynamic that the Family Court is already aware of, i.e., perpetrators extend their coercive controls even outside the home—with family members, neighbors, circles of friends, the workplace, church, and courtrooms. Please do not add the Auditor to this list. Although we know it is not the Legislature's intent, perpetrators will find an "audit" to be a new fertile ground upon which to further torment the victims and their children.

10. The intrusions into personal and family privacy cannot be underscored enough; neither can the harsh consequences for all litigants and their children. This is especially true since the Auditor will have powerful authority under §23-5:

(b) The auditor may cause search to be made and extracts to be taken from any account, book, file, paper, record, or document in the custody of any public officer without paying any fee for the same; and every officer having the custody of the accounts, books, records, files, papers, and documents shall make such search and furnish such extracts as thereto requested.

(c) The auditor may issue:



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(1) Subpoenas compelling at a specified time and place the appearance and sworn testimony of any person whom the auditor reasonably believes may be able to provide information relating to any audit or other investigation undertaken pursuant to this chapter; and

(2) Subpoenas *duces tecum* compelling the production of accounts, books, records, files, papers, documents, or other evidence, which the auditor reasonably believes may relate to an audit or other investigation being conducted under this chapter.

Upon application by the auditor, obedience to the subpoena may be enforced by the circuit court in the county in which the person subpoenaed resides or is found in the same manner as a subpoena issued by the clerk of the circuit court.

11. HRS §23-5 mandates certain duties required of the “officer having the custody of the accounts, books, records, files, papers, and documents.” Although we normally do everything we can to respond to legislative and Auditor’s requests, we will not be able to offer the same level of assistance pursuant to HCR No. 37 and HR No. 14. For example, we would not be able to duplicate the volumes and volumes of files that may be requested without an appropriation to cover temporary clerical assistance and related costs. We cannot provide the transcripts; those will have to be purchased through the court reporters. We certainly cannot make any comment on any of the cases.

12. We reiterate that, in the end, neither the Auditor nor the Legislature can change the outcome of a particular case. The Legislature has other avenues to determine whether new laws are needed or whether current laws should be amended. As noted above, local and national advocacy groups and professionals can advise the Legislature. The Legislative Reference Bureau can report on national best practices and the work of other states’ legislatures.

13. As a final note, the Judiciary, including Family Court, is deeply concerned about access to justice issues. We respectfully suggest that what is truly needed is more significant funding of Legal Aid and other providers of legal services such as the Domestic Violence Action Center. The control wielded by perpetrators includes control over finances and family resources. They, therefore, are more likely to have legal representation. The Family Court is not a social services provider, neither is it a legal services provider. The judges are not and should not be advocates. It is our job to be objective, fair, and neutral. Our democracy demands this and our community rightfully expects this. The Judiciary does what we can to promote access to the



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court through steps such as working hard on *pro se* packets of forms and directions, working with the bar to provide opportunities to consult with attorneys at self-help centers, and by adopting procedures that are appropriately accommodating without running the risk of perceptions of impropriety or bias. Victims desperately need legal representation and support for legal services funding will help ensure that they can get such representation.

Thank you for the opportunity to testify on these measures.

kobayashi2-Lynda

From: mailinglist@capitol.hawaii.gov
Sent: Friday, March 13, 2015 1:29 PM
To: HUS testimony
Cc: jusbecuz@hotmail.com
Subject: Submitted testimony for HR14 on Mar 17, 2015 11:00AM

Categories: Blue Category

HR14

Submitted on: 3/13/2015

Testimony for HUS on Mar 17, 2015 11:00AM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Marilyn Yamamoto	Individual	Support	No

Comments: All government entities should be subject to oversight. I strongly support an audit to assess the family court performance on custody issues where family violence is alleged.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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TO: Representative Dee Morikawa, Chair
Representative Bertrand Kobayashi, Vice Chair
House Human Services Committee Members

FROM: Dara Carlin, M.A.
Domestic Violence Survivor Advocate
881 Akiu Place
Kailua, HI 96734

DATE: March 17, 2015

RE: STRONG SUPPORT for HCR 37 / HR 14

Good Morning Chair Morikawa, Vice Chair Kobayashi & House Human Services Committee Members and my apologies for this Late Testimony.

I am an independent Domestic Violence Survivor Advocate who works exclusively with those who have “successfully escaped” domestic violence meaning those who were not killed in the process of leaving. What many people fail to understand is that **domestic violence doesn't end just because the primary victim leaves/ends the relationship**; for those survivors who have children in-common with their abusers, their journey through hell is far from over. Our state boasts some of the best anti-abuse legislation and laws in the nation, however, these laws and legislation mean nothing when they are not appropriately applied and enforced.

Back in 2010, Senator Mike Gabbard and Representative John Mizuno presented **SCR 91** that sought an audit of contested child custody cases to see if **HRS 571-46(9)** was accurately being applied in all domestic abuse/family violence-related cases. Thanks to the effort of a group of DV survivors, Representative Karl Rhoads and Senator Suzanne Chun-Oakland, SCR 91 gathered every legislator's signature on both the House and Senate side in support, except for two – unfortunately, one of the two absent signatures was a crucial one as Hawaii News Now reporter, Mari-Ela David, detailed in a news story here:

DOWNTOWN HONOLULU (HawaiiNewsNow) - A domestic violence resolution designed to make sure judges stick to the law and not grant batterers child custody, is just one final house vote away from passing.

But on Wednesday, SCR91 got stuck on House Speaker Calvin Say's desk.

He wasn't available for comment, but his staff says it's all because of one letter.

The holdup is the letter 'C'. The resolution is an 'SCR' but Speaker Say's office says it should be labeled 'SR'. There are questions though on whether that really makes a difference.

"The survivors are hurt, they're really hurt. If you look at some of the testimony they really put

themselves on the line coming forward, going public with some of their stories. So it's disappointing," said Dara Carlin, a domestic violence advocate.

'SCR' stands for Senate Concurrent Resolution which means the House and Senate are involved.

'SR' stands for Senate Resolution, which means only the Senate is involved.

SCR91 calls for an investigative child custody task force made up of Senate members, no House members.

That's why Speaker Say's office says he refuses to pull it out onto the House floor for a full vote. A staff member says the House has nothing to do with the resolution.

"Initially we wanted the House and the Senate to both be involved. We were not too sure if the House wanted to do that. And so the proposal that went over to the House was basically a Senate investigative committee," said Sen. Suzanne Chun Oakland.

The hope was that the House would support it.

And some lawmakers who wish to remain anonymous tell Hawaii News Now that technically, Speaker Say could've still pushed the resolution through, regardless of its label.

But with Thursday being the last day of the legislative session, time has run out.

Sen. Chun Oakland says interested lawmakers will still form the task force, just without the formal legislative stamp of approval.

The informal child custody task force is set to have its first meeting at the end of May.

Sen. Chun Oakland says they'll try to push for SCR91 again at next year's legislative session.

<http://www.hawaiinewsnow.com/story/12395042/domestic-violence-resolution-gets-stuck-in-house-because-of-the-letter-c>

Five years later, HCR 37 / HR 14 re-introduces what SCR 91 attempted to accomplish.

Last May (2014) I traveled to Washington, DC to participate in the *Mothers of Lost Children's* Mothers Day event outside of the White House and visited with our congressional leaders to explain the reason for the annual gathering of DV survivor moms who've lost custody of their children to their abusers after successfully escaping the violence and abuse in their homes despite laws to protect them from such outcomes. Senator Maize Hirono was particularly upset by what I had to say and asked for "numbers and statistics" to validate what I had told her. I explained that DV survivors in Hawaii had indeed tried to obtain those numbers and statistics back in 2010 through SCR 91 but we failed; she suggested it be re-introduced in the 2015 legislative session so the next time I come to visit her, she'd have the numbers and statistics available to her.

The problem I brought before Senator Hirono – DV survivors losing custody of their children to their abusers despite laws against it – has been called “the family court crisis” which is a *national* problem as well as a “local” one:

According to a conservative estimate by experts at the Leadership Council on Child Abuse and Interpersonal Violence (LC), more than 58,000 children a year are ordered into unsupervised contact with physically or sexually abusive parents following divorce in the United States.

<http://www.leadershipcouncil.org/1/med/PR3.html>

HCR 37 isn't going to solve the problem BUT it *is* a first step towards it so I humbly ask for your support towards this end.

Please understand that HCR 37 isn't about laying blame, pointing fingers or assigning fault for what's already happened; it's about getting it right, doing what's right and seeing the wisdom of the law and best practices being applied to protect those most at-risk of harm by abusers known to them.

Thank you most sincerely for your time, consideration and for this opportunity to provide testimony in STRONG SUPPORT of HCR 37 / HR 14.

Respectfully,

Dara Carlin, M.A.
Domestic Violence Survivor Advocate