The Judiciary, State of Hawai'i

Testimony to the Thirty-First State Legislature, 2021 Regular Session

Senate Committee on Human Services
Senator Joy A San Buenaventura, Chair
Senator Les Ihara, Jr., Vice Chair

Thursday, February 11, 2021, 3:00 P.M.
VIA VIDEOCONFERENCE
State Capitol, Conference Room 225

by
Judge Christine E. Kuriyama
Deputy Chief Judge, Senior Judge
Family Court of the First Circuit

Bill No. and Title: Senate Bill No. 822, Relating to Child Welfare.

Purpose: Defines and recognizes rights in trust for children within the Child Protective Act. Requires family court to appoint guardian ad litem in custody cases. Provides that when a child is subject to harm or imminent harm, has been harmed, or may suffer probable harm is sufficient for police officer to take child into protective custody without court order, for department of human services to assume temporary foster custody of child, and for the department of human services to conduct an investigation.

Judiciary's Position:

The Judiciary offers the following comments and observations:

1. Section 2 appears to be an attempt to codify a child's constitutional rights, which already exist under the State and Federal constitutions. Consequently, including this provision in the bill may lead to confusion and additional and unnecessary litigation.

2. Section 3 appears to create a mandatory appointment of a Guardian Ad Litem ("GAL") in all cases involving child custody. The Judiciary opposes this amendment based on the following considerations:

a. A GAL is expensive. They bill by the hour and their hourly rates start at $150.00 and up. The parties in the majority of cases involving custody issues do not have the financial means to be able to afford such additional expenses and there is no appropriation to pay for such expenses when the parties are unable to bear the expense;

b. The majority of cases involving child custody are uncontested, i.e., the parties agree to the custody arrangements and the court adopts the same. It would not make sense to be required to appoint a GAL and require the parties to pay for a GAL if the case is uncontested;

c. If custody is disputed, the child/children have a voice through the use of a Custody Evaluator, Best Interest Factfinder, and/or the appointment of a GAL. Thus, it makes more sense economically, and from a litigation standpoint, to "right size" a case and appoint third-party investigators only when necessary and on a case-by-case basis.

3. The Judiciary takes no position with regard to Sections 4 through 7 of the bill, but does note that such amendments will likely cause an increase of cases filed under the Child Protective Act, which, in turn, will cause an increase in funding requirements.

4. Overall, it must be emphasized that this bill appears to conflate or inappropriately fuse Child Protective Act cases under HRS Chapter 578A ("Child Welfare Services or CWS") with custody cases, i.e., divorce and paternity cases, which are governed by HRS Section 571-46 ("custody cases"). CWS cases and custody cases are completely different and, as stated above, are governed by different statutory sections and separate case law.

As an example and simply put, in CWS cases, the issue is whether the parent(s) is/are able to provide a safe family home for the child/children. As a result, the interests/positions of parent(s) and the child/children often conflict with each other. As a result, in all CWS cases, a GAL is appointed on behalf of the child/children to ensure that the child's/children's interests are voiced and, in turn, supported.

In comparison, in custody cases, the issue is not necessarily whether a parent is able to provide a safe family home, rather, the issue is to ensure that custody, both legal and physical, as well as visitation, are ordered in accordance with the best interest of the child standard as set forth in HRS Section 571-46. It should be noted, however, that in contested custody cases, a third party may be appointed as stated in paragraph 2.c. above, which allows for the child's/children's position to be known.

Again, it is critical to recognize that CWS cases and custody cases are completely distinct and unconnected, and proposed amendments to the same should not be identified or analyzed under the same lens.

Thank you for the opportunity to testify on this measure.

WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021

ON THE FOLLOWING MEASURE:
S.B. NO. 822, RELATING TO CHILD WELFARE.

BEFORE THE:

SENATE COMMITTEE ON HUMAN SERVICES

DATE: Thursday, February 11, 2021 **TIME:** 3:00 p.m.

LOCATION: State Capitol, Room 225, Via Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Erin K.S. Torres,
Deputy Attorney General, at 693-7081)

Chair San Buenaventura and Members of the Committee:

The Department of the Attorney General (Department) offers the following comments on this bill.

The purposes of the bill are to (1) define and recognize “rights in trust” for children under the Child Protective Act (CPA); (2) require the appointment of a guardian ad litem in family court custody proceedings; and (3) lower the threshold determination of level of harm needed for a police officer to take a child into protective custody, for the Department of Human Services (DHS) to assume temporary foster custody, and for the DHS to conduct an investigation under the CPA.

Section 2 of this measure may inadvertently restrict children's constitutional rights. Section 2, on page 2, lines 16-18, includes a proviso that appears to infringe upon a child’s constitutional rights, by allowing those rights to be "postponed if there is evidence that exercise of the right will damage the child’s future autonomy.”

The Supreme Court of the United States has held that “although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability”. *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S. Ct. 3035, 3044 (1979). However, it has also concluded that many of children’s claims to constitutional protection are “virtually coextensive with that of an adult.” *Id.* at 634, 99 S. Ct. at 3043.

Section 2 of the bill provides no guidance on what standards a court would use to determine whether a child's rights ought to be postponed. Without such guidance the bill could be subject to a constitutional challenge.

The amendments to sections 587A-8 and 587A-9, Hawaii Revised Statutes (HRS), at sections 5 and 6 of this bill (page 13, lines 13-14, and page 14, lines 10-12) would allow the State to remove children from their parents' custody if the child is subject to harm, or imminent harm, has been harmed, or may suffer probable harm while in the custody of the child's family. The United States Court of Appeals for the Ninth Circuit has held that absent prior court authorization, *imminent* harm is required before the government can remove children from their parents' custody.

> [T]he rights of parents and children to familial association under the Fourteenth, First, and Fourth Amendments are violated if a state official removes children from their parents without their consent, and without a court order, unless information at the time of the seizure, after reasonable investigation, establishes reasonable cause to believe that the child is in *imminent* danger of serious bodily injury, and the scope, degree, and duration of the intrusion are reasonably necessary to avert the specific injury at issue.

Keates v. Koile, 883 F.3d 1228, 1237–38 (9th Cir. 2018) (emphasis added).

Under the current CPA, a police officer assumes protective custody without a court order, and the DHS assumes temporary foster custody from the police, when a child is subject to *imminent harm* while in the custody of the child's family. *See* sections 587A-8(a)(1) and (9)(a)(1), HRS. Sections 5 and 6 of the bill allow a police officer to assume protective custody and the DHS to assume temporary foster custody of a child without a prior court order if there is "harm" or "probable harm", effectively eliminating the requirement for "imminent harm." Therefore, sections 5 and 6 of the bill should be deleted.

Section 7 of this bill, which adds reports of "harm" and "probable harm" as bases for DHS investigations in CPA cases, creates redundancy and may have the effect of creating unnecessary confusion. Section 587A-11, HRS, allows for DHS investigations

when the child "is subject to imminent harm, has been harmed, or is subject to threatened harm," which already encompasses 'harm" and "probable harm". Under section 587A-4, HRS, ""[t]hreatened harm" means any reasonably foreseeable substantial risk of harm to a child". Thus, "threatened harm" is more expansive than, and is inclusive of, "probable harm" as defined in section 4 of this bill. Therefore, the Department recommends deleting sections 4 and 7 from this measure.

If the Committee chooses to pass this measure, we respectfully ask that it make the amendments suggested by the Department.

LATE

DAVID Y. IGE
GOVERNOR

CATHY BETTS
DIRECTOR

JOSEPH CAMPOS II
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES
P. O. Box 339
Honolulu, Hawaii 96809-0339

February 10, 2021

TO: The Honorable Senator Joy A. San Buenaventura, Chair
Senate Committee on Human Services

FROM: Cathy Betts, Director

SUBJECT: **SB 822 – RELATING TO CHILD WELFARE.**

Hearing: Thursday, February 11, 2021, 3:00 p.m.
Via Videoconference, State Capitol

DEPARTMENT'S POSITION: The Department of Human Services (DHS) provides comments on this bill and defers to the Department of the Attorney General.

PURPOSE: The purpose of the bill defines and recognizes rights in trust for children within the Child Protective Act. Requires family court to appoint guardian ad litem in custody cases. Provides that when a child is subject to harm or imminent harm, has been harmed, or may suffer probable harm is sufficient for police officer to take child into protective custody without court order, for department of human services to assume temporary foster custody of child, and for the department of human services to conduct an investigation.

In SECTION 2, which roughly defines the constitutional rights of children, DHS is concerned that the proposed language limits the constitutional rights of children versus protecting their rights. While on one hand this section appears to give unabated "rights in trust" to children, it also enforces limitations where the exercise of a right "will damage the child's future autonomy." It is questionable what would constitute evidence of potential damage to future autonomy. Additionally, this proposed language would give custodians the

authority to hold the rights in trust, which seems to contradict the notion that all children have inherent constitutional rights.

A high threshold is required for the removal of custody of a child from a parent without consent or court order. "Probable harm" in this context provides a different standard for the police or DHS to assume custody without consent or a court order. The current statute includes the threshold of "imminent harm," a threshold that has been upheld by the United States Supreme Court and should remain unamended. DHS defers to the Department of the Attorney General for its testimony on the legal analysis of this bill in relation to the addition of "probable harm" to both sections 587A-8 and 587A-9, HRS.

It should be noted that removal of a child from a family home is a traumatic and disruptive experience for all parties involved. Once CWS receives an intake indicating child abuse and/or neglect, a thorough risk analysis is undertaken as well as an assessment of a family's protective factors to keep a child or children safe. If the underlying causes of harm do not rise to the level of removal pursuant to provisions of Chapter 587A, HRS, other services are offered to a family, such as family strengthening services and other diversionary measures to help support a family in addressing safety concerns, without having to remove a child from a home.

It should also be noted that Hawaii's diversion response is aligned with the Family First Prevention Services Act, a federal law which endeavors to prevent removal and instead, provide prevention services and measures to a family in order for children to stay safely in their home.

This bill also proposes the addition of "probable harm" as part of section 587A-11, HRS, for the DHS to investigate. The term and definition "threatened harm" is already included in section 587A-4, HRS, and "means any reasonably foreseeable substantial risk of harm to a child." Threatened harm is already included in section 587A-11, HRS. In this context, "probable harm" falls under the umbrella of "threatened harm." The addition of "probable harm" does not add further clarity and may cause confusion in its application and should not be added.

This bill also proposes adding "harm" to section 587A-11, HRS. This section already includes a reference that the child has been harmed or is subject to threatened harm and

currently reads: "Upon receiving a report that a child is subject to imminent harm, has been harmed, or is subject to threatened harm, and when an assessment is required by this chapter, the department shall cause such investigation to be made as it deems to be appropriate." The addition of "harm" is not necessary and is duplicative.

Thank you for the opportunity to testify on this measure.

SB-822
Submitted on: 2/8/2021 10:27:10 AM
Testimony for HMS on 2/11/2021 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Marilyn Ruth Yamamoto	Testifying for Hawaii Family Advocacy Team	Oppose	No

Comments:

Senator Sanbuenaventura and HMS committee,

Thank you for the opportunity to testify on behalf of our KEIKI.

I strongly oppose that portion of the SB822 that amends HRS587A-8.

All citizens, including minor children, are protected by the Constitution Bill of Rights 4th amendment to be free from search or seizure unless there is a warrant. The Federal Courts of Appeal in all states have caselaw that allows a narrow exception for "exigency". The language in the context of child welfare is: "Present danger (PD) is an immediate, significant, and clearly observable family condition or situation that is actively occurring or "in-process" of occurring at the point of contact with a family and will likely result in serious harm to a child." The addition of the phrase "may suffer probable harm" is predictive, subject to opinion or bias and inappropriate when an investigation has not occurred by either the police or CWS. If an investigation determines that there is high risk for a child, there is time to submit substantiated facts to obtain a court order for removal.

When emergency circumstances exist … constitutional requirements, such as the need for a warrant …may be excused because of overriding necessity." In the report of the incident, the officers would need to clearly describe what circumstances existed that prompted them to enter the home without being invited, and without a warrant.

Absent exigency defined as observed harm and/or clear immediate danger of injury or death to a child, both the police and CWS need a warrant/court order. If the bar is lowered on exigent circumstances, that is a violation of the rights of children to the 4th and 14th amendment due process clause.

February 8, 2021

COMMITTEE ON HUMAN SERVICES
Senator Joy A. San Buenaventura, Chair
Senator Les Ihara, Jr., Vice Chair
Senator Laura Acasio
Senator Bennette Misalucha
Senator Kurt Fevella

NOTICE OF HEARING

DATE: February 11, 2021
TIME: 3:00pm
PLACE: Conference Room 225/Via Video
State Capitol
415 South Beretania Street

RE: TESTIMONY IN STRONG SUPPORT OF **SB822**
Relating to Child Welfare

Dear Committee on Human Services:

Though I write this testimony in a professional capacity as a human-rights advocate, this issue holds significant personal importance for my ohana and me. My step-children have fallen victim to a broken system that was created to protect them. Instead, the Child Welfare System has betrayed, silenced, discriminated against, and harmed them.

While fighting for their custody, my wife and I have ascertained by several records that their due process rights and right to freedom of speech, afforded them by the U.S. Constitution, have been denied in an intentional attempt to coerce them back to their father upon whom *all* of our children have repeatedly reported physical abuse, extreme psychological abuse, sexual abuse, and the witnessing of family violence by him, as minors.

We have been silenced by the inherent biases of a few bigoted social workers afforded too much systemic power by Family Court to investigate reports of child sexual abuse with the little experience they have. As in my ohana's case, when the reporting party is LGBTQ and the accused is a heterosexual white male, we have experienced firsthand that bias in favor of the latter is blatantly practiced by Child Welfare Services.

Our children have no recourse and even today as our eldest hanai daughter, Sydney, who we will be formally adopting this year, has filed her police report within her statute of limitations. However, she has yet to receive the justice she deserves. She was also sexually and physically abused by her then-foster father, the same father of my step-children, and though she reported the

Kathryn 'Alamea-Xian – 1215 S. Kihei Road, Ste. O #924 – Kihei, HI 96753 – kxian@hawaii.edu

offenses twice to two different social workers assigned to help her when she was a minor, they did nothing.

Passing SB822 is an integral step toward ensuring justice in our clearly broken Child Welfare System. SB822 passed into law will ensure that our state abides by the U.S. Constitution and the U.S. Supreme Court as Supreme Court Justice Harry Blackmun stated, in Planned Parenthood of Central Missouri v. Danforth, that "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."

Furthermore, expanding the overly narrow parameters wherein which authorities may keep a child safe in protective custody when abuse has been reported (under Section 587) by adding the definition of "probable harm," is long overdue and will prevent such authorities from consistently returning children back to their abusers to suffer retaliatory abuse and preventable deaths for which the State has been sued several times in recent years.

Before entering the William S. Richardson School of Law last fall, Chief Justice Mark E. Recktenwald of the Hawaii Supreme Court told our entering class that he had hopes that we would become lawyers who seek to end systemic bias in our court system and create true access to justice. I do not take his words lightly. I hope you do not either.

On behalf of my ohana still suffering from our broken and biased system, I kindly urge you to pass SB822.

Sincerely,

Kathryn ʻAlamea-Xian
Expert Consultant and Trainer on Anti Human Trafficking Issues, U.S. Federal Government
Juris Doctor Candidate, EPT Program Class of 2024
University of Hawaiʻi at Manoa | William S. Richardson School of Law

SB-822
Submitted on: 2/8/2021 3:24:41 PM
Testimony for HMS on 2/11/2021 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Barbara Shimei	Individual	Support	No

Comments:

IN SUPPORT

Divorce cases where the parents do not agree on custody are supposedly governed by the best interests of the child. Judges do not have the time for independent assessment and rely on state child custody evaluators who have overwhelming caseloads. The result is that the child is at the mercy of the system.

It is imperative that the child has a guardian ad litem, an autonomous representative who focuses on the child and who can independently speak for the child wherever necessary. Children are the innocent bystanders and must be protected from being the collateral damage of an overwhelmed and understaffed process.

With regard to changing the standards for intervention, childhood damage, once done, is difficult or impossible to undo. Those charged with protecting children should not have to wait until the damage is done before intervening, especially where the damage was reasonably foreseeable and preventable.

Custody decisions have life-long impacts. We cannot allow these futures to continue to be compromised.

SB-822
Submitted on: 2/8/2021 5:40:58 PM
Testimony for HMS on 2/11/2021 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Tadia Rice	Individual	Support	No

Comments:

Please PASS SB822 because Hawaii's child welfare laws need to be updated to ensure that children in custody have their due process and free speech, especially when prejudice is demonstrated or reflected by biased or prejudiced investigators.

Please PASS SB822 to prevent Hawaii's Child Welfare System from returning children to their abusers only to be abused even more.

SB-822
Submitted on: 2/8/2021 5:42:21 PM
Testimony for HMS on 2/11/2021 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Eileen M Gawrys	Individual	Support	No

Comments:

yes.

I am writing to request caution regarding two aspects of SB 822 relating to child welfare. The first is regarding the rights of children, and the second is regarding adding "probable harm" to the child welfare statute.

I am writing as a private citizen who is currently President & CEO of EPIC `Ohana, a non-profit organization that works to strengthen families and young people by ensuring that their voices and needs are heard in the child welfare system. HI HOPES Initiative is an important part of our work, where young leaders, former foster youth, advocate, educate and collaborate on behalf of children who experience foster care. HI HOPES worked hard with many partners, including DHS, in 2018, to support a Bill of Rights for Foster Youth that became H.R.S. 587A – 3.1, and is currently establishing a Pono Process to assure that the rights of children in care are upheld. I also practiced as a parents attorney and as a guardian ad litem many years ago, and taught Children and the Law and Family Law at the Richardson School of Law. I am also one of the co-founders of Kids First, a divorce education program that helps parents and children in divorce and paternity actions.

I grieve for the pain expressed by the writers of this bill, and in the testimony of parents who feel they have not been heard. Indeed, there are imbedded and systemic issues of discrimination that are extremely complex and difficult. I do not want to dismiss that pain, and also the horrible conflict that comes when parents engage in custody disputes. It is even more challenging when those custody disputes are underneath the child welfare cases. Truly the children stuck in the middle of toxic custody battles suffer a great deal. I support the goals of the bill, but the provisions in SB 822 do not address these underlying systemic problems and I am concerned may have consequences that contradict the goals of the authors.

In addition, as Hawai`i emerges from the pandemic and the economic recovery, it is an imperative time for us to concentrate our resources to help the families and children that are the most vulnerable. Prevention services and family strengthening services are needed now more than ever.

Regarding Constitutional Rights of Children in Foster Care.

On July 5, 2018, Governor Ige signed SB 2790 (Act 105) which established the Rights for Children in Foster Care. The intent of the Bill of Rights was to lift the rights of children in care. Those rights come from many sources, including the constitution, federal and state law and regulation. Because of Act 105, and because of federal law, every social worker must have a conversation with older children about their rights, and a document signed by the child and the social worker is placed in the judicial record. A collaborative public and private effort with strong youth voice through the HI HOPES initiative has been educating young people about their rights, and has developed a Pono Process by which a young person who feels that their rights are infringed upon can seek help to resolve the problem.

Central to the rights of young people in the statute is a right to speak to the judge, to attend court hearings and the right to have an attorney appointed to advocate for them, in addition to a Guardian ad Litem. There are enumerated rights against harm and discrimination and more. A curriculum has been created to teach young people about their rights and to teach self advocacy and problem solving. Hawai`i is a leader in establishing this curriculum and the problem solving process. I agree that there is still more work to be done, but the proposed language of "rights in trust" does might not further the effort. They are not harmful either, but because the concept of holding a "trust" is a concept that implies that the rights are kept by another, there is a likelihood of some confusion, especially with the very clear and specific delineation of rights that follow in the statute. There is a tangle of case law about

the rights of children, and a tension between the rights of children and the rights of their parents. We do not want the rights of foster youth to linger in that tangle of case law unnecessarily. The rights of the children in the Bill of Rights do not diminish constitutional rights held by the children. It is possible that the individuals who have experienced issues of voice and advocacy who are most concerned about this bill, experienced the system before Act 105 was implemented.

Regarding Probable Harm and 587A

SB 822 suggests inserting “probable harm” at several points in the child welfare statute: first it adds a definition of ""Probable harm"; then it adds probable harm to the criteria for police removal of a child, temporary custody and investigation.

The words “reasonable” and “probable” are words that try to describe the critical thinking of individuals in a time of urgency to determine whether a state action should be taken or not. It is difficult to quantify what reasonable and probable mean, or even to place them against one another. That will become the fodder for litigation and interpretation. Actually, “reasonable” is imbedded in “probable” and in ‘imminent.” But the primary difference between the current:

> "Imminent harm" means that without intervention within the next ninety days, there is reasonable cause to believe that harm to the child will occur or reoccur.”

And the addition of the proposed:

> "Probable harm" means that without intervention there is reasonable cause to believe that harm to the child is more likely than not to occur."

is that there is no time period to “Probable harm.” It is true that this provides a lower threshold for intervention by the police and the department, but it also means that the state can take a traumatic and drastic action when less restrictive alternatives may be available. The proposal does not address the concerns in the preamble of the bill that the state demonstrates bias against single mothers of color, and the lack of meaningful recourse. It seems likely, I think, that this broader discretion provides less recourse in the face of bias or prejudice.

Removing a child from their parents is a traumatic event for the children, and therefore strong critical thinking must take place with the least restrictive alternatives used whenever possible. When I was a guardian ad litem I had the experience of assisting the police and participating in the removal of children on two separate occasions. I can still hear the unrelenting sobs of the two toddlers I sat with in the back of a police car on the way to Kapiolani Hospital for a placement physical exam. I can still hear the homeless parents screaming at us as the police car pulled away from the car they were living in outside a grocery store. Our HI HOPES young leaders speak about the trauma that they experienced when they were removed and how they believed they were somehow at fault. Those memories haunt them.

We have a responsibility to remove children who are harmed, neglected or threatened with harm. But if that harm is not “imminent” meaning there is “reasonable cause to believe that harm to the child will occur or reoccur” within the next 90 days, we have a responsibility to provide less restrictive, less traumatic, more peaceful action. Otherwise, as stated in the preamble of the bill, it is the children who suffer the most.

Thank you for your consideration.

SB-822
Submitted on: 2/10/2021 10:42:40 AM
Testimony for HMS on 2/11/2021 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Sherry Alu Campagna	Individual	Support	No

Comments:

Please help CWS workers who are required to return children to their abusers if their abuser simply suspends the abuse for the moment. Even our police departments believes that the "most important thing" is that the abuse stops and will not intervene, assuming instead that the abusers will stop abusing children after a visit or two from the police. Statistics show that this is not true. My daughter, Sydney, recently testified before the Hawaii State Legislature about the repeated abuse she suffered even after multiple reports and cases were made on her behalf.

1) Our child welfare laws need to be updated. Hawaii has seen too many child deaths due to the narrow definition of law allowing children to be taken into protective custody or to remain there. In order for children to remain in protection, there needs to be evidence of "imminent harm" to the child. All the abuser(s) need to do to escape detection is to stop any abuse for the moment and then the child MUST be returned. In order to fix this, we propose to add to existing language that of "probable harm" which would allow the child to remain in protective custody if the child is at risk of probable harm.

The U.S. Supreme Court ruled that children are born with all the Constitutional Rights afforded to adults...

2) but in practice, states do not protect their due process rights nor their right to free speech. All too often children in custody investigations have their due process and free speech suspended leading to their "life imprisonment" with their abuser or, conversely, leading to children being taken away from good families due to prejudice on the part of the investigator. SB822 seeks to end that.

Thank you for reading my testimony and thank you for helping me continue to advocate for the children of Hawaii.

With respect,

Sherry Alu Campagna