



The Judiciary, State of Hawai‘i

**Testimony to the Thirty-First Legislature
2022 Regular Session**

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair

Thursday, February 17, 2022 at 9:30 a.m.
Via Videoconference

by
Matthew J. Viola
Senior Judge, Deputy Chief Judge
Family Court of the First Circuit

Bill No. and Title: Senate Bill No. 2642, Relating to Family.

Purpose: Establishes an exemption from mediation in paternity proceedings where there are allegations of domestic abuse. Amends the exemption from mediation in divorce proceedings by disallowing mediation when there are allegations of domestic violence.

Judiciary's Position:

Based on the family court’s experiences where parties, including victims of domestic abuse, have reported or reached positive results through mediation, the Judiciary strongly opposes this bill.

Senate Bill No. 2642’s blanket prohibition on mediation in all paternity and divorce cases forces a Hobson’s choice on victims of domestic abuse: reach an agreement directly with the abuser without the assistance of a neutral third party mediator or litigate the case in court, with all of its attendant costs, both financial and emotional. It also takes away their agency, presuming that no victims of domestic abuse can make voluntary and competent choices about how to resolve their cases. We recognize that the court cannot guarantee positive outcomes for all parties and we do not take a position that all coercive behaviors can be completely



Senate Bill No.2642, Relating to Family
Senate Committee on Judiciary
Thursday, February 17, 2022 at 9:30 a.m.
Page 2

neutralized. Despite that, our experience is that many victims on both calendars can mediate safely and reach voluntary, fair, and equitable agreements.

Besides forcing victims to confront the stark reality of having to agree with the abuser or litigate in court, this bill strips all protections which have been beneficial in many cases for many years after a party agrees to mediation.

First and foremost, the *existing* Hawai'i Revised Statutes (HRS) §580-41.5 is based on the agreement of the victim. Under HRS §580-41.5, in contested divorce cases involving allegations of spousal abuse and in cases involving the custody or visitation of a child with allegations of family violence where a protective order is in place, the court cannot require participation in any component of a mediation program against the wishes of the party; that is, unless the party voluntarily agrees to mediation. The court has the discretion and the responsibility to determine whether such an agreement is voluntary or coerced. All trial judges, including family court judges, make determinations about the voluntariness of agreements in a myriad of cases and proceedings every day, including agreements to mediate. If the court determines an agreement to mediate a case involving allegations of domestic abuse was made voluntarily, the court can explore and impose requirements to ensure that the process is safe and fair. If, however, the court determines that the agreement was not voluntary, *i.e.*, that it was coerced, then mediation is not ordered and the case is placed on the trial track.

If the court accepts the victim's agreement to participate in mediation, the statute then provides a panoply of appropriate protections that the mediation must follow. HRS §580-41.5 contains several clauses that give victims of domestic abuse meaningful choices and protections. This process has worked well and has been beneficial to many parties who have been victims of domestic abuse since the 1996 enactment of HRS §580-41.5 in its current form.

It is counterproductive to promote the position that domestic abuse renders *all* victims incapable of making good choices about how to resolve disputes. In the family court's experience, even under the tremendous challenge of their circumstances, most victims are more than capable of making good choices. There are imperfect and tough choices made by victims who determine that the choice is best for them and their children. The lives of victims and perpetrators are complex and, whether in this or other cases brought to court, requiring a simple binary one-size-must-fit-all prohibition does not serve the victims or the community well.

We therefore respectfully recommend changes to this bill, which preserve the option of voluntary participation in mediation in divorce and child custody/visitation proceedings currently reflected in HRS §580-41.5 and which incorporate essentially a mirror version of these provisions into the paternity statutes.



Section 1 at page 1, line 4 to page 2, line 2. The family court respectfully suggests deleting all portions of Section 1 of this bill and inserting the following:

§584- Domestic abuse; exemption from mediation in paternity proceedings.

(a) In contested paternity proceedings where there are allegations of domestic abuse, the court shall not require a party alleging the domestic abuse to participate in any component of any mediation program against the wishes of that party.

(b) A mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of domestic abuse between the parties. A mediator shall not engage in mediation when it appears to the mediator or when either party asserts that domestic abuse has occurred unless:

(1) Mediation is authorized by the victim of the alleged domestic abuse;

(2) Mediation is provided in a specialized manner that protects the safety of the victim by a mediator who is trained in the field of domestic abuse;
and

(3) The victim is permitted to have in attendance at mediation, a supporting person of the victim's choice including but not limited to an attorney or advocate. If the victim chooses to exercise such option, any other party to the mediation will be permitted to have in attendance at mediation, a supporting person of the party's choice including but not limited to an attorney or advocate.

(c) If a temporary restraining order or a protective order is in effect, the court shall not require a party alleging domestic abuse to participate in any component of any mediation program against the wishes of that party.

(d) If there is an allegation of domestic abuse and a temporary restraining order or a protective order is not in effect, the court may order mediation or refer either party to mediation only if:

(1) Mediation is authorized by the victim of the alleged domestic abuse;

(2) Mediation is provided in a specialized manner that protects the safety of the victim by a mediator who is trained in the field of domestic abuse;
and



(3) The victim is permitted to have in attendance at mediation, a supporting person of the victim's choice including but not limited to an attorney or advocate. If the victim chooses to exercise such option, any other party to the mediation will be permitted to have in attendance at mediation, a supporting person of the party's choice including but not limited to an attorney or advocate.

(e) As used in this section, "domestic abuse" shall have the same meaning as in section 586-1."

Section 2 at page 2, line 5 to page 4, line 11. The family court respectfully suggests deleting all portions of Section 2 of the bill and replacing it with the following that slightly amends the existing §580-41.5:

§580-41.5 [~~Battered spouses~~] Domestic abuse; exemption from mediation in divorce proceedings.

(a) In contested divorce proceedings where there are allegations of [~~spousal~~] domestic abuse, the court shall not require a party alleging the [~~spousal~~] domestic abuse to participate in any component of any mediation program against the wishes of that party.

(b) A mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of [~~family violence~~] domestic abuse between the parties. A mediator shall not engage in mediation when it appears to the mediator or when either party asserts that [~~family violence~~] domestic abuse has occurred unless:

(1) Mediation is authorized by the victim of the alleged [~~family violence~~] domestic abuse;

(2) Mediation is provided in a specialized manner that protects the safety of the victim by a mediator who is trained in [~~family violence~~] the field of domestic abuse; and

(3) The victim is permitted to have in attendance at mediation, a supporting person of the victim's choice including but not limited to an attorney or advocate. If the victim chooses to exercise such option, any other party to the mediation will be permitted to have in attendance at



Senate Bill No.2642, Relating to Family
Senate Committee on Judiciary
Thursday, February 17, 2022 at 9:30 a.m.
Page 5

mediation, a supporting person of the party's choice including but not limited to an attorney or advocate.

(c) In a proceeding concerning the custody or visitation of a child, if a temporary restraining order or a protective order is in effect, the court shall not require a party alleging [~~family violence~~] domestic abuse to participate in any component of any mediation program against the wishes of that party.

(d) In a proceeding concerning the custody or visitation of a child, if there is an allegation of [~~family violence~~] domestic abuse and a temporary restraining order or a protective order is not in effect, the court may order mediation or refer either party to mediation only if:

(1) Mediation is authorized by the victim of the alleged [~~family violence~~] domestic abuse;

(2) Mediation is provided in a specialized manner that protects the safety of the victim by a mediator who is trained in the field of domestic abuse [~~family violence~~]; and

(3) The victim is permitted to have in attendance at mediation, a supporting person of the victim's choice including but not limited to an attorney or advocate. If the victim chooses to exercise such option, any other party to the mediation will be permitted to have in attendance at mediation, a supporting person of the party's choice including but not limited to an attorney or advocate.

(e) As used in this section, "domestic abuse" shall have the same meaning as in section 586-1.

The family court respectfully asks this committee to favorably view the recommendations in this testimony so that victims of domestic abuse retain the choice to voluntarily participate in mediations with appropriate protections in place when they so choose.

Thank you for the opportunity to testify on this important bill.



TO: Chair Karl Rhoads
Vice Chair Jarrett Keohokalole
FR: Nanci Kreidman, M.A.
Chief Executive Officer
RE: S.B. 2642

Thank you for hearing this important Bill. It has long been our experience and our concern that survivors of abuse are forced to mediate issues needing resolution in a partnership that is ending. The imbalance of power, intimidation and threat of retaliation is real and terrifying. No one speaks up in those circumstances.

Many people do not enter into an official marriage but have children together. At the end of that partnership, issues needing resolution pertaining to that relationship would be on the paternity calendar in Family Court. We would suggest that mediation is not a good approach for resolution of disagreements when the matter before Family Court judges is a paternity case, involving a couple where there has been domestic violence.

This Bill is really kind of a housekeeping measure, aligning the two pathways out of an abusive partnership, and not facing mediation if it poses risks, panic or a loss of rights that are surrendered in the presence of a partner who has tormented them.

Thank you for your consideration of this Bill and we shall look forward to favorable action.



COMMITTEE: Senate Committee on Judiciary
DATE: Thursday, February 17, 2022
TIME: 9:30 a.m.
PLACE: Via Videoconference

TO: Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair
And members of the Senate Committee on Judiciary

RE: SB 2642 Relating to Family

The Hawaii State Democratic Women's Caucus is a catalyst for progressive, social, economic, and political change through action on critical issues facing Hawaii's women and girls. The Women's Caucus SUPPORTS SB 2642 Relating to Family.

The purpose of this bill is to establish an exemption from mediation in paternity proceedings when there are allegations of domestic abuse. It also amends the exemption from mediation in divorce proceedings by disallowing mediation when there are allegations of domestic abuse.

The waiver of the requirement to participate in mediation was included in the divorce statute many years ago, however today, many partners do not marry but rather cohabitate and have children in common. If abuse occurs in the household, the issue of custody must be resolved when the relationship ends and arrangements are made for visitation or custody. The paternity statute should have the same provision to exclude the requirement to participate in mediation when there has been domestic violence as the divorce statute has. Mediation is not the right intervention for resolving the dispute when there has been domestic violence.

We urge your favorable consideration of this measure.
Thank you for the opportunity to testify.

Members of Hawaii State Democratic Women's Caucus

SB-2642

Submitted on: 2/14/2022 11:41:04 AM

Testimony for JDC on 2/17/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Dara Carlin, M.A.	Individual	Support	No

Comments:

Stand in STRONG Support!

LATE

SB-2642

Submitted on: 2/16/2022 4:16:40 PM

Testimony for JDC on 2/17/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
aimee chung	Individual	Support	No

Comments:

TO: Chair Karl Rhoads

Vice Chair Jarrett Keohokalole

FR: Aimee Chung, MSW, LSW

RE: S.B. 2642, in support

Thank you for hearing this important Bill. It is of great concern that survivors of abuse are required to participate in mediation when a partnership ends. This requirement reinforces the imbalance of power, emphasizes the intimidation, and heightens the threat of retaliation. Survivors do not feel safe enough to speak up under these circumstances.

Many people do not enter into an official marriage, but have children together. At the end of that partnership, issues needing resolution pertaining to that relationship would be on the paternity calendar in Family Court. We suggest that mediation is not an appropriate approach for resolution of disagreements.

This Bill would align the two pathways out of an abusive partnership, and would ensure survivors are not required to face mediation.

We appreciate your consideration of this Bill and we look forward to favorable Action. Thank you for supporting survivors of domestic violence.

Mahalo,

Aimee Chung, MSW, LSW

Licensed Social Worker

University of Hawai'i at Mānoa, Faculty

Domestic Violence Action Center, Executive Board Member