The Judiciary, State of Hawai'i

Testimony to the House Committee on Human Services
Representative Dee Morikawa, Chair
Representative Bertrand Kobayashi, Vice Chair

Tuesday, February 3, 2015, 8:30 AM
State Capitol, Conference Room 329

by
Judge R. Mark Browning
Deputy Chief Judge, Senior Judge
Family Court of the First Circuit

Bill No. and Title: House Bill 624, Relating to the Family Courts

Description: "Clarifies the factors under which the family court awards custody and visitation of a minor child to ensure parental parity."

Judiciary's Position:

The Family Court has grave concerns about the consequences of the wording of House Bill No. 624.

Although "the best interest of the child" remains the overarching standard applied to child custody determinations by the court, the new proposed language inadvertently objectifies the child by mistakenly skewing the focus of the court and the litigants. The proposed section (1) appears to make fairness to the parents and physical geography the primary considerations of custody determinations. In fact and in practice, the physical proximity of the parents is an important factor of the court's decisions about custody and visitation but it is neither the first nor the most controlling factor.

Proposed section (1) may be impractical by apparently assuming that families generally have easy access to private transportation or easy access to mass transit. This is not universally true on Oahu and most certainly not true in parts of Oahu and on the neighbor islands with extremely limited mass transit and/or a higher percentage of families who cannot afford private

transportation and/or large counties (for example, the Big Island, the three islands of Maui County, or even from Keʻe to Kekaha on Kauai).

The clause in proposed section (1), "unless the court finds that a parent is unable to provide for the best interests of the child," illustrates the point made in the second paragraph of this testimony. This clause encompasses the whole intent of this statute. The court's job, when parents cannot agree, is to determine what is stated in this clause—that is, what constitutes the "best interests" of this particular child and are both parents able "to provide" for these "best interests." In other words, what the court now does under the existing statute is required to be proven in the limited context of proposed section (1). It cannot be assumed that this proof can then be simply applied to the entire case. If it cannot be so applied, then the litigants face the real possibility of proving the issue once in the context of the proposed section and then once more in the context of the entire case.

Unfortunately, the last clause in proposed section (1) has the inadvertent effect of decreasing the impact of evidence/findings of domestic violence in the family, an interest that the Legislature has rightfully stressed in this and other statutes. This proposed section makes domestic violence appear as an afterthought. This proposed section may also inadvertently heighten the danger to the victim parent by allowing the aggressor parent an opportunity to continue to exert control over the victim parent and the children. As advocates assisting victims of domestic violence attempt to educate the court and the public, the dynamics in such families are very complex (and unique in each family), that is, the various methods that the aggressor parent uses to control the victim parent are myriad and imaginative. Pinning a custody/visitation order on the continued presence of both parents in the "same county or school district" could be an easy device for an aggressor parent to maintain control over the victim parent and the children. It is a discouraging reality (and a predictable reality in domestic violence dynamics) that many aggressor parents have more power, money, and assets than victim parents. This proposed section may offer ripe opportunities for unnecessary and harmful litigious behaviors.

The proposed sections (2) and (3) do not appear to add substantive considerations for the court's determination of "frequent, continuing, and meaningful contact" between the child and the parents; a determination which the statute already includes. Moreover, just adding new language can be confusing for parties who are attempting to reach an agreement about their children.

Under the current law and in practice among the judges, joint legal and/or joint physical custody is preferred so that "frequent, continuing, and meaningful contact" between the child and both parents can be more easily facilitated both in the court order and by the parents. We find that parents who can agree to joint physical custody can construct many different successful solutions. Even when the court has to decide after a trial, there are no "cookie cutter" orders

because of the unique qualities of the children and the circumstances of the parents require "custom" orders. Even though the words in this bill do not purport to make an even firmer presumption for joint physical custody, the proposed language has that effect, which in turn may lead to increased opportunities for litigation. Parties who cannot agree and therefore must fight in court (fortunately, this is a small fraction of divorce cases) will have another level of "fight." Rather than first focusing on the child and the child's interests and then looking at the parents' abilities according to the child, any litigation over custody may first have to center on the conditions in the proposed bill. This could result in even more expense for the parents, more protracted cases, and consequently more harm to the children.

The existing factors in this statute are extensive and adequate guides to the court's decision making in custody and visitation cases. In litigious cases, the court often observes the harmful debilitating effects to children over the course of the case. Frequent amendments to statutory language can lead to increased litigation. When it comes to custody and visitation determinations, increased litigation is not in the children's best interests.

Thank you for the opportunity to submit testimony on this bill.

FAMILY LAW SECTION
OF THE
HAWAII STATE BAR ASSOCIATION

2250 Kalakaua Avenue, Suite 313
Honolulu, Hawaii 96815
www.hawaiifamilylawsection.org

February 2, 2015

TO: Representative Dee Morikawa, Chair
Representative Bertrand Kobayashi, Vice-Chair
Committee on Human Services

FROM: Elizabeth Paek-Harris, Legislative Committee of the HSBA Family Law Section
E-Mail: elizabeth@epaeklaw.com
Phone: 522-7171

HEARING DATE AND TIME: February 3, 2015 at 8:30 a.m.

RE: Testimony in Support of HB 624

Good Morning Chair and Vice-Chair, and members of the Committee.

My name is Elizabeth Paek-Harris, a licensed attorney here in the State of Hawaii. I have practiced here in Hawaii for about 10 years now mostly concentrating in Family Law matters. Today I not only speak for myself, but for the Family Law Section (FLS) of the Hawaii State Bar Association, which is comprised of approximately 136 licensed attorneys statewide all practicing or expressing an interest in practicing family law. I serve as a member of the current Legislative Committee as well as Chair of FLS.

The Family Law Section strenuously opposes HB 624.

The presumption of joint custody seems appealing in theory, but it does not achieve the best interests of a child in practice.

While it's true that joint custody can benefit both the children and parents by increasing contact with both parents equally, it only works when both parents voluntarily and wholeheartedly commit to a joint custody arrangement. It fails to recognize those large population of parents going through the Hawaii Family Court system whose relationship is characterized by acrimony and/or minimal communication.

Joint custody requires significant effort from each parent so that children who shift back and forth between two parents' homes on an equal time-sharing basis are not unduly stressed by the arrangement. This is not easy for parents who are not living together and especially for parents who have never lived and parented together (i.e. paternity cases). Cooperation and

communication are essential to the success of a joint custody arrangement and such an arrangement is incompatible with parents in conflict.

Hawaii's best interests of the child factors set forth in the current statute requires Family Court judges to determine custody on a case-by-case basis and weigh each of the factors. Every family is unique and as a result, every custody case is unique. Presumptions pressure judges to order joint custody without carefully and thoroughly examining and considering the best interests of the child factors. A presumption of "parental parity" assumes a "one size fits all" or "cookie cutter" approach to developing post-divorce parenting arrangements which are inappropriate and may be harmful to some families.

A presumption of joint custody is particularly troubling in the context of domestic violence. Presumptive joint custody compromises the safety of battered women by providing a batterer with continuing opportunities for destructive and potentially lethal contact. A presumption of joint custody also inappropriately gives the batterer an advantage in the custody dispute and unfairly burdens the victim of domestic violence with rebutting the presumption.

HB 624 will also encourage parents to litigate for purposes other than what's in the best interests of a child. For example, Hawaii's Child Support Guidelines provide a formula to calculate child support. The amount of child support is significantly reduced if the parents share a joint physical equal time-sharing arrangement. If custody is presumed joint, parents will not hesitate to litigate custody to minimize their child support obligation, and the number of contested hearings and trials in Family Court will increase multifold.

The concept of presuming joint custody based on geographical area will also wreak havoc with school districts and cause disruption in children's lives by encouraging parents to unnecessarily move. If Hawaii's statute presumes that custody is joint by living in the same school district, children will be negatively impacted as parents attempt to move residences to gain a legal advantage. Moving residences would likely affect the child schooling as well. A Family Court judge would then need to determine which home the child should live in, and also which school the child should attend, and the child may not be able to attend either school until there is a court order.

Presuming joint custody based on geographical area also seems discriminatory on a socio-economic basis. It could afford the higher-income parent a legal advantage over a lower-income parent. If the lower-income parent cannot afford to continue living in the same geographical location as the higher-income parent post-separation, then the higher-income parent will have an advantage of seeking sole custody.

Our current best interests of the child statute has been working well and has allowed for fair, well reasoned decisions concerning the custody, care, education and upbringing of children involved in custody disputes. Since the current statute has been working well, we see no basis for amendment and ask that the Committee take no further action on HB 624.

NOTE: The comments and recommendations submitted reflect the position/ viewpoint of the Family Law Section of the HSBA. The position/viewpoint has not been reviewed or approved by the HSBA Board of Directors, and is not being endorsed by the Hawaii State Bar Association.

TO: Chair Dee Morikawa
Vice Chair Bertrand Kobayashi
Members of the Committee

FR: Nanci Kreidman, M.A

RE: HB 624 Oppose

Aloha. And thank you for scheduling this Bill for hearing early in the Session. This is an issue of great importance, and deserves the legislature's attention.

The best interests of a child or children is quite a nuanced assessment. This discussion has been underway for many years, with spirited efforts, disagreements and compromises made by community members. This Bill was introduced without any discussion among the interested parties. This raises a red flag for us.

It would have been very important to listen to and understand the need for this change to the law. We shall be attentive to the assertions and rationale for HB 624. Our agency has a complex and robust Family Court practice where custody is at the heart of many of the cases. It has been an unfortunate outcome more than a few times that abusers have successfully silenced his victim partner, influenced the children or used the court system to continue the harassment and manipulation characteristic of the abusive relationship. It is not infrequent, also, that abusers have resources beyond what victims can access, which results in surrender of children, property, safety or other personal rights.
avoid working with available resources, like Family Court restraining orders for fear that they would be investigated for potential child abuse. It is not uncommon or unfamiliar that child welfare services is over-extended and cannot conduct an investigation in a timely fashion, requiring multiple appearances by survivors. This burdens the Court and the community's families.

Thank you for your careful, discriminating attention to HRS 624.

P.O. BOX 3198 • HONOLULU, HI 96801-3198
'Oahu Helpline: 808 531-3771 • Toll-free: 800 690-6200 • Administration 808 534-0040 • Fax 808 531-7228

kobayashi2-Lynda

From: mailinglist@capitol.hawaii.gov
Sent: Friday, January 30, 2015 5:58 PM
To: HUStestimony
Cc: kalawaiag@hotmail.com
Subject: *Submitted testimony for HB624 on Feb 3, 2015 08:30AM*

HB624
Submitted on: 1/30/2015
Testimony for HUS on Feb 3, 2015 08:30AM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Kalawai'a Goo	Individual	Support	No

Comments:

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 Committee on Human Services

FROM: Jessi L.K. Hall
E-Mail: jhall@coatesandfrey.com
Phone: 524-4854

HEARING DATE: February 3, 2015 at 8:30 p.m.

RE: Testimony in Opposition to HB624

Good day Representative Morikawa, Representative Kobayashi, and members of the Committee. My name is Jessi Hall. I am an attorney who practices Family Law. I am also a past Chair of the Family Law Section of the Hawaii State Bar Association. I am here today to testify against HB624.

There are many factors in which the Family Court needs to consider in making a custody order. A cookie cutter approach should never be taken when determining what is in the best interest of each individual child. The only reason to support a provision for automatic joint physical custody is if you are worried about paying child support, and that should not even be a consideration in determining custody.

Why should the residential location of the parents be the primary factor in determining custody? What about the parents' work schedules or the needs of the child? It makes no sense to determine custody based on whether or not the parents live in the same county or school district. Consider how inappropriate joint physical custody could be for a child in Hawaii County or Maui County where parents could be in the same county but, yet live hundreds of miles away or separate islands.

If the desire is for the Family Court to consider the appropriateness of a child having frequent, continuing and meaningful contact with both parents, that can be done with a simple modification to the current statute. Currently Hawaii Revised Statutes § 571-46(a)(1) as written encourages the Court to include in their consideration that there should be frequent and consistent contact between the child and both parents. This provision could be strengthened by just modifying some of the current language.

It is for the above reasons that I must write in opposition of HB624 as it is currently written. Thank you for this opportunity to testify.

KLEINTOP, LURIA & MEDEIROS

A LIMITED LIABILITY LAW PARTNERSHIP

CHARLES T. KLEINTOP
TIMOTHY LURIA
DYAN M. MEDEIROS

NAOKO C. MIYAMOTO
CATHY Y. MIZUMOTO

DAVIES PACIFIC CENTER, SUITE 480
841 BISHOP STREET
HONOLULU, HAWAIʻI 96813

TELEPHONE:
(808) 524-5183

FAX:
(808) 528-0261

EMAIL:
D.Medeiros@hifamlaw.com

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

FROM: Dyan M. Medeiros
E-Mail: d.medeiros@hifamlaw.com
Phone: 524-5183

HEARING DATE: February 3, 2015 at 8:30 a.m.

RE: Testimony in Opposition to HB 624 Relating to the Family Courts

Good morning Representative Morikawa, Representative Kobayashi, and members of the Committee. My name is Dyan Medeiros. I am a partner at Kleintop, Luria & Medeiros, LLP and have concentrated my practice solely in the area of Family Law for more than sixteen (16) years. I am also a past Chair of the Family Law Section of the Hawaii State Bar Association. I submit this testimony to strongly oppose HB624.

My sister and I were raised by a single father after our mother passed away. We remain close to my father to this day. As a result, I understand the value that comes from having a strong relationship with your father and I truly believe that custody and visitation awards should be based on what is in a child's best interest, not on a parent's gender.

That being said, I simply cannot support HB624 because it prioritizes parents' interests over the interests of their children. HRS 571-46(a)(1) currently reads,

> Custody should be awarded to either parent or to both parents according to the best interests of the child, and the court may also consider frequent, continuing, and meaningful contact of each parent with the child unless the court finds that a parent is unable to act in the best interest of the child.

This language properly prioritizes the best interests of the child not the interests or a desires of a parent.

A close examination of HB624 shows that it is attempting to rewrite HRS 571-46(a) to establish that equal custody is by definition in the best interest of a child if parents live in the same county or school district. It would require "equal custody" unless the Court finds that a parent is "unable to provide for the best interests of a child" or there is evidence of domestic violence. Although HB624 refers to the "best interests of a child", it in fact eliminates the best interests of a child from the Court's consideration for those parents who live in the same county or school district.

HB624 would establish geography as the determinative factor when deciding whether to award "equal custody". While geography should perhaps be a factor that is considered in certain cases, it should not be the determinative factor. If passed, HB624 will set up a system that encourages parents to move and possibly move their child for the sole purpose of either obtaining equal custody or fighting against equal custody. Such actions simply aren't in a child's best interest.

Further, the changes proposed by HB624 are completely unnecessary. In my experience, in most cases, children usually spend significant time with both parents. Although the timesharing may or may not be exactly equal, it doesn't have to be equal in order for parents to maintain a strong, meaningful relationship with their children.

HB624 is also completely unnecessary since HRS 571-46(a)(1) does not contain a preference of any kind. If the legislature believes that HRS 571-46(a)(1) should be modified to require the Court to consider maintaining contact between both parents and children (something the Court already does), I would support the following modification of HRS 571-46(a)(1)

> Custody should be awarded to either parent or to both parents according to the best interests of the child, and the court ~~may~~ shall consider maintaining frequent, continuing and meaningful contact between the child and both parents ~~of each parent with the child~~ unless the court finds that a parent is unable to act in the best interest of the child.

Otherwise, I strongly oppose HB624.

Thank you.

LATE

COMMITTEE ON HUMAN SERVICES

February 3rd, 2015 in House conference room 329

Testimony of Chris Lethem in Strong Support of HB624

RELATING TO FAMILY COURT

Dear Committee Chair Representative Morikawa;

I am testifying in strong support of the original language found in HB624.

It is time that we move the family court away from the adversarial model and finally start respecting the unique and mutually important roles that both parents have in their children's lives.

Parenting has been and will always be a time intensive activity.

More parenting is better than less parenting. (2 > 1)

2 parents parenting is consistently better than either 1 parent parenting. (2 > 1)

Once our court system adopts a paradigm that respects the unique and invaluable role that both parents play in their child's development allows families to heal, we will all be the beneficiaries. This is a healthy and respectful approach to developing an optimal environment for our children and their well-being post-divorce.

When there is respect (`Ihi) for the important yet unique roles that both parents and also the grandparents have in their children's lives we soon realize that having a legal dispute isn't just destructive it is serves no purpose other than to create more conflict, ill will and drains families of much needed assets that could otherwise be put use for the benefit of our children. (2 > 1)

When the focus is about having a successful post marriage (successful divorce) relationship that gives both parents adequate time to parent their children, there is much less post decree litigation and children do better in all risk areas along with substantial reductions in family violence. (2 > 1)

Children who have lived in shared residential parenting families say the inconvenience of living in two homes was worth it – primarily because they were able to maintain strong relationships with both parents. (2 > 1)

Parenting time is how we pass on our traditions, values and beliefs. It is how parents teach nurturing, pass on standards of excellence, the principle of self-reliance, the importance of

respect and reconciliation. For parents to parent effectively they need adequate time to parent. (2 > 1)

When both parents have adequate time with their children, they are able to engage them in day to day activities, where effective parenting occurs. Thus, avoiding the "Disneyland dad" scenarios that often leave both parent and child frustrated. Equal time also gives both parents adequate time to pursue other beneficial endeavors and interests. (2 > 1)

Too often custody litigation is ego driven or is about getting retribution, getting free money or having the power and control. Parents are easily enflamed by attorneys seeking to play on their hostility or fears. When parents engage in litigation they will often invent ways to gain an advantage through allegations or taking statements or behaviors out of context in a battle of he said, she said scenarios. These behaviors and motivations are self-serving for attorneys and parents while doing nothing to serve the goals of having healthy outcomes for our children. (2 > 1)

It should be a time of healing (Ho'oponopono). When there is ongoing conflict over custody, it sets the tone of the relationship in a very negative atmosphere where there no longer exists any goodwill between the parents for the remaining years of the child's minority. The loss of trust and goodwill makes working together for the common good of the children much more difficult or impossible. (2 > 1)

Consistency is an imperative related to emotion not to location. Children function best when there is emotional consistency and regularity in their schedules. Spending adequate time with both parents gives children that level of emotional balance and certainty. (2 > 1)

Why did we think that effectively removing a parent from a child's life would give them an advantage? We know today that it doesn't. In fact, we know that 38 percent of children raised in a single parent household will grow up to live in poverty. Much more likely to drop out of school, get involved in drugs, be a victim of a violent act or engage in violent behavior. Teenage girls are far more likely to become pregnant - only to create an even a greater reliance on social welfare and perpetuating poverty. (2 > 1)

In summary, it is time to put an end to the adversarial model of litigating over time allocation or child custody. We know that shared parenting is good for children and families . It is time that we have statutes that reflect our unique Hawaiian values and also better serves our children and families. Let's have a legal structure that engenders mutual respect for both parents and assures our children they will be the beneficiaries of the love, respect and protection of both parents. Thank you for taking the time to read my testimony. (2 >1)

Sincerely

Chris Lethem

“Our Liberty is not dependent on the good intentions of people in power, liberty is secured by our laws.” OBAMA

kobayashi2-Lynda

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 02, 2015 8:32 PM
To: HUStestimony
Cc: miyu87sumi@hotmail.com
Subject: Submitted testimony for HB624 on Feb 3, 2015 08:30AM

Categories: Red Category

LATE

HB624
Submitted on: 2/2/2015
Testimony for HUS on Feb 3, 2015 08:30AM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
miyuki sumida	Individual	Support	No

Comments: I agree this bill I have daughter she spend equal time with me and her dad. And she likes having time with both of us Sometimes we don't agree on everything. we both agree our daughter needs both of us

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HAWAII STATE LEGISLATURE

HOUSE OF REPRESENTATIVES

COMMITTEE ON HUMAN SERVICES

February 3rd, 2015 in House conference room 329

Testimony in Support of HB624

RELATING TO FAMILY COURT

Chair Morikawa and members of the Committee:

This testimony is in support of the original language found in HB624.

It is also in support of the testimony submitted by Chris Lethem endorsing this legislation. Mr. Lethem presents a convincing, principled argument that Hawaii's legislation should reflect the known fact that shared parenting is good for both children and families. Insofar as Hawaii's present legislative framework is not based on this principle but rather on an adversarial model, the proposed language is far preferable.

I believe that Mr. Lethem's argument is right on point and that the Committee should adopt this approach in its deliberations on this bill.

Sincerely,

Richard W. Baker

206 Lumahai Place, Honolulu, HI 96825; Tel 396-6021

kobayashi2-Lynda

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 03, 2015 2:54 AM
To: HUStestimony
Cc: adamtm@lava.net
Subject: Submitted testimony for HB624 on Feb 3, 2015 08:30AM

Categories: Red Category

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HB624
Submitted on: 2/3/2015
Testimony for HUS on Feb 3, 2015 08:30AM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Tom Marzec	Individual	Support	No

Comments: When both parents are fit parents it is not in the best interests of the child for there to be a custody fight over parenting time; yet, this happens way too often! Remove the needless adversarial fight over custody with this bill.

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