



SB 494

Measure Title:	RELATING TO CHILD VISITATION.
Report Title:	Child Visitation; Primary Caregiver Visitation
Description:	Permits family courts to award reasonable visitation to primary caregivers under certain circumstances, regardless of whether the child has been formally adopted by the caregiver under Hawaii law. Establishes presumption that a parent's decision regarding visitation is in the best interests of the child, which may be rebutted by evidence that denial would cause harm to the child. Identifies factors a court may consider in awarding visitation. Grants the court discretion to place reasonable restrictions, including time limitations, on visitation.
Companion:	
Package:	None
Current Referral:	HSH, JDL
Introducer(s):	L. THIELEN, CHUN OAKLAND, GALUTERIA, GREEN, RUDERMAN, SHIMABUKURO, Baker, Espero, Keith-Agaran, Kouchi, Riviere



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015**

ON THE FOLLOWING MEASURE:

S.B. NO. 494, RELATING TO CHILD VISITATION.

BEFORE THE:

SENATE COMMITTEE ON HUMAN SERVICES AND HOUSING

DATE: Tuesday, February 17, 2015 **TIME:** 1:20 p.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
Jay K. Goss, Deputy Attorney General

Chair Chun-Oakland and Members of the Committee:

The Department of the Attorney General (the "Department") provides the following comments.

The purpose of this bill is to allow the family court to award reasonable visitation to a primary caregiver if the denial of visitation would cause actual or potential harm to the child. The bill establishes a rebuttable presumption that visitation decisions made by a parent are in the best interest of the child.

The current version of section 571-46.3, Hawaii Revised Statutes ("HRS"), was held unconstitutional by the Supreme Court of the State of Hawaii in Doe v. Doe, 116 Haw. 323, 172 P.3d 1067 (2007). The Supreme Court in Doe ruled that section 571-46.3, HRS, was unconstitutional because it did not require the person who was petitioning for visitation, to show that the denial of visitation would cause significant harm to the child.

This bill attempts to address the concerns raised by the Hawaii Supreme Court by (1) making clear that parents have a fundamental privacy right in making child rearing decisions, and that there is a presumption that their decisions regarding visitation are in their child's best interests, and (2) requiring that if a primary caregiver challenges the visitation decisions made by a parent, he or she must show that the denial of visitation would cause harm to the child. However, the Supreme Court ruled that the standard is not a showing of mere harm to the child, but rather that the denial of the visitation would cause "significant" harm to the child.

To ensure that this bill will pass challenges based on the holding Doe, the Department recommends that any changes track the language used by the Supreme Court. The Department

suggests that page 2, lines 12-13, be amended to read “Denial of reasonable visitation rights would cause significant harm to the child.”

In addition, we suggest that the language on page 3, lines 3-8, be amended to read “In any proceeding on a petition filed under this section, there shall be a rebuttable presumption that a parent's decision regarding visitation is in the best interest of the child. The presumption may be rebutted by evidence that denial of reasonable visitation rights would cause significant harm to the child.”



The Judiciary, State of Hawaii

Testimony to the Senate Committee on Human Services and Housing

Senator Suzanne Chun Oakland, Chair

Senator Josh Green, Vice Chair

Tuesday, February 17, 2015,
1:20 p.m.

State Capitol, Conference Room 016

By

R. Mark Browning

Deputy Chief Judge, Senior Family Judge

Family Court of the First Circuit

Bill No. and Title: Senate Bill No 494, Relating to Child Visitation.

Judiciary's Position:

The Family Court respectfully offers the following concerns regarding Senate Bill No. 494.

The primary concern is a possible question about the bill's constitutionality (United States' and/or Hawaii's). As the Legislature is well aware, a statute had to be carefully crafted to ensure the constitutionality of awarding visitation to grandparents over the objections of the child's parents. We offer no opinion or suggestions in this regard because we may be asked to decide this issue.

As accurately noted in Section 1 of this bill, there are many diverse and rich cultural practices in our state that are not prevalent on the Mainland. In our experience, it has been difficult melding our jurisprudence based on English common law with the Hawaiian, Pacific Islanders, and Asian ways of resolving disputes and rifts among family members. Indeed, as noted by Section 1 of this bill, the concept of "family" in these cultures is more expansive than the notion of "family" as merely a biological nuclear family. It may be more appropriate to encourage and defer to the use of a cultural remedy such as ho'opono'ono that would allow an extended hanai family to seek the healing that is needed, to work toward a "pono" solution



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within the extended hanai family that will be appropriate for the child and allows the child to feel loved by many rather than something fought over as children can feel with the court process that sometimes may result in “winners” and “losers.”

This bill establishes a presumption in favor of parents but does not state the standard of proof required. We respectfully request that the bill expressly states whether the court applies “preponderance of the evidence” or proof “by clear and convincing evidence.” We note that the latter standard is the more usual standard in such cases so that Page 3, lines 6-8 could read: “The presumption may be rebutted by clear and convincing evidence that denial of reasonable visitation rights would cause harm to the child.”

Thank you for the opportunity to provide testimony on this matter.

TESTIMONY OF THOMAS D. FARRELL
Regarding Senate Bill 494, Relating to the Child Visitation

Committee on Human Services and Housing
Senator Suzanne Chun Oakland, Chair

Tuesday, February 17, 2015 1:20 p.m.
Conference Room 016, State Capitol

Dear Senator Chun Oakland and Members of the Committee:

I oppose SB 494.

This bill purports to authorize the family court to award visitation to “primary caregivers” other than parents. This bill is unnecessary because the family court already has authority to do so. Section 571-46(a)(7), Hawaii Revised Statutes explicitly permits the court to award reasonable visitation rights to “any person interested in the welfare of the child in the discretion of the court, unless it is shown what rights of visitation are detrimental to the best interests of the child.”

Although SB 494 incorporates some of the language of the US Supreme Court’s decision in *Troxell v. Granville* as a guide to the court in making determinations of visitation by non-parents, it is not necessary for the legislature to engraft by statutory amendment what is already the law of the land.

I respectfully submit that the legislature should refrain from enacting a statute that is unnecessary, except for the purpose of making a statement. Perhaps a resolution expressing the sense of the legislature would be more appropriate.

Thank you for the opportunity to testify this afternoon.

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February 16, 2015

TO: Senator Suzanne Chun Oakland, Chair
Senator Josh Green, Vice-Chair
Committee on Human Services and Housing

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 17, 2015 at 1:20 p.m.

RE: Testimony in Opposition to SB494 Relating to Child Visitation

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 in Hawaii for about ten (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 am the current Chair of FLS and also serve as co-chair of the Legislative Committee.

The Family Law Section opposes SB 494. Last legislative session, there was a similar bill of which we testified in opposition to as well, with all due respect this bill is no better.

First, the bill is still vague as to the definition of "primary caregiver". As it reads now a primary caregiver means "a relationship between a caregiver and a nonbiological child where the caregiver cares for the child, regardless of whether the child has been formally adopted by the caregiver under Hawaii law". This is problematic because most parents work and leave their children with sitters; day care providers; pre-school teachers; and/or nannies. This will allow every child care provider to file a motion in Family

Court requiring them to have visitation with the children they take care of while the parents are at work.

Second, more importantly, the bill may be unconstitutional in light of *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000). The Fourteenth Amendment provides that no State shall deprive any personal of life, liberty, or property, without due process of law. A parent's right to the care, custody and control of a child is a fundamental right.

A parent also has a duty of support to his/her child, regardless if it is monetary or in-kind services. This bill does not create a duty of support, but just a "right" to visitation even if it is contrary to a parent's desire/wishes.

Here, this bill appears to suggest that parents' rights are protected by including a rebuttable presumption that the parents' decision regarding visitation is in the best interest of the child. However, the bill makes no mention of what standard of proof the presumption can be rebutted. Nor does the bill indicate what is "harm to the child".

Essentially this bill attempts to create a different legal standard than what is currently in place for parents. In determining visitation for parents, the court relies on the *best interest of the child* standard. There is no mention of that here and as such it appears primary caregivers have a different standard.

So with the passage of this measure, a "primary caregiver" would be able to visit; not required to support a child; and, would be subject to a lesser standard than a biological or legal parent.

Lastly, most importantly, this bill is **unnecessary** as the Court is already afforded the opportunity to allow third parties to visit with children in Hawaii Revised Statutes Section 571-46(7):

"Reasonable visitation rights shall be awarded to parents, grandparents, siblings, and any person interested in the welfare of the child in the discretion of the court, unless it is shown that rights of visitation are detrimental **to the best interests of the child**"

Thank you for your time.

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.

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TO: Senator Suzanne Chun Oakland, Chair
Senator Josh Green, Vice-Chair
Senate Committee on Human Services and Housing

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

HEARING DATE: February 17, 2015 at 1:20 p.m.

RE: Testimony in Opposition to SB494 Relating to Children

Good morning Senator Shimabukuro, Senator Galuteria, Senator Chun Oakland, Senator Green, and members of the Committees. 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 in opposition to SB494.

SB494 seeks to allow "primary caregivers" the right to petition the Court for visitation with a child. "Primary caregiver" is vaguely defined as "a relationship between a caregiver and a nonbiological child where the caregiver cares for the child". Under this definition, anyone who cares for a child could be considered a "primary caregiver". I believe this would violate parents' constitutional rights to make decisions for their children. Further, this bill appears to give paid babysitters or child care providers more rights to visitation than grandparents and other family members. Finally, although Section 1 of this bill refers to hanai relationships, this bill does not only apply to hanai relationships. It applies to any caregiving relationship, including paid caregivers. As currently written, this bill is so vague and overbroad that it poses a danger to Hawaii's families by increasing the opportunities for fighting and litigation. For all of these reasons, I oppose SB494.

Thank you.

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S.B. 494
Relating to Child Visitation

Committee on Human Services & Housing

Senator Suzanne Chun Oakland, Chair

Senator Joshua Green, Vice-Chair

Hearing on Tuesday, February 17, 2015, at 1:20 p.m.

Mahalo for this opportunity to submit testimony in **support** of **S.B. 494** relating to Child Visitation. I am a professor at the William S. Richardson School of Law and director of Ka Huli Ao Center for Excellent in Native Hawaiian Law but submit this testimony in my personal capacity and as one who has had friends, family, and former clients who would have benefitted from a law such as this one.

As you know, S.B. 494 allows the family courts, in limited cases, to award reasonable visitation to primary caregivers, regardless of whether the child has been formally adopted by the caregiver under Hawaii law. While recognizing the importance of parental rights and a parent's decision in relation to visitation, this bill allows a nonparent caregiver to present evidence that denying visitation would harm the child. The bill carefully lists those factors that the family courts may consider in making the decision and also gives the court the discretion to place reasonable restrictions on visitation. This bill thus gives strong consideration to parental rights while appropriately allowing a court to weigh possible harm to the child who may be deprived of visitation with a loving and familiar caregiver.

Although I do not practice in the family courts, as noted above, I certainly know of several instances in which individual children and their non-parental caregivers could have directly benefitted from a law that allows the family courts the kind of balanced and limited discretion given in this bill. For this reason, I **support** S.B. 494 and urge its passage.

TO: Senator Suzanne Chun Oakland, Chair
Senator Josh Green, Vice-Chair
Senate Committee on Human Services and Housing

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

HEARING DATE: February 17, 2015 at 1:20 p.m.

RE: Testimony in Opposition to SB494

Good day Senator Chun Oakland, Senator Green, and members of the Committee. My name is Jessi Hall. I am an attorney whose practice concentrates in Family Law. I am also a past Chair of the Family Law Section of the Hawaii State Bar Association. I am writing in opposition to SB494.

My biggest issue with the language of this Bill is the use of the term “primary caregiver”. Due to the expense to live in Hawaii, many parents rely heavily on paid caregivers and often times these people end up spending the majority of the waking day with the child. There is no clear definition as to what constitutes a “primary caregiver” for the purpose of this Bill.

The language of this Bill would allow any caregiver to seek visitation with the child. Not only is that inappropriate, it specifically goes against a parents’ Constitutional right to parent. It further takes away crucial time that the child should be permitted to spend with their biological parents.

Finally, current law allows the Court to consider visitation for other third parties. This Bill is not necessary for interested parties to obtain the result that they desire.

Thank you for the opportunity to testify in opposition to SB494.