CHAPTER 709
OFFENSES AGAINST THE FAMILY AND AGAINST INCOMPETENTS

Section

Note

L 2001, c 91, §4 purports to amend this chapter.

" **§709-900 Illegally marrying.** (1) A person commits the offense of illegally marrying if the person intentionally marries or purports to marry, knowing that the person is legally ineligible to do so.

(2) Illegally marrying is a petty misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §709-900

This section is intended to serve two purposes: (1) to protect a party to a purported marriage from imposition and deception, and (2) to reinforce the statute setting forth the minimal requirements for valid marriage. The Code imposes its lowest form of criminal liability for intentionally marrying or purporting to marry when the actor knows the actor is ineligible to do so. Except to the extent that the previous offense relating to incest[1] covered some aspects of this conduct, this offense represents an addition to Hawaii law.

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§709-900 Commentary:

1. See H.R.S. §768-41 which makes it an offense to "marry" or engage in sexual intercourse with any person with whom marriage is prohibited by consanguinity or affinity. See also H.R.S. §572-1.

" **§709-901 Concealing the corpse of an infant.** (1) A person commits the offense of concealing the corpse of an infant if the person conceals the corpse of a new-born child with intent to conceal the fact of its birth or to prevent a determination of whether it was born dead or alive.

(2) Concealing the corpse of an infant is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §709-901

Concealing an infant corpse makes impossible the determination of whether or not criminal conduct was involved in the failure of the fetus to be born alive or in the failure of the infant to continue to live. When an infant corpse is found after it has been hidden, the decomposition of the corpse makes it impossible to determine beyond a reasonable doubt: (1) whether the fetus

had been born alive before it met its death (in which case the fetus would be a "person" as that term is defined in chapter 707, which covers in part, crimes involving homicide); (2) whether, if born alive, the death resulted from murder, manslaughter, negligent homicide, or other causes; and (3) whether, if not born alive, the pregnancy was terminated by an illegal abortion. Therefore it is advisable to have a residual section making it an offense to conceal the corpse of a new-born child.

Previous Hawaii law on this subject was too restricted.[1] It seems unwise to limit the offense to cases in which the actor was the mother of the fetus or infant and in which, if born alive, the infant would be illegitimate. Although most cases of concealment might present these circumstances, it seems entirely possible that some cases might not. An infant or fetus conceived in wedlock may be concealed by its mother or some other individual. Moreover, the Code rejects limiting the offense to conduct of the mother only.

> [A] limitation of coverage to the mother is unwise, since someone else may conceal the birth. Of course, if the mother and a relative or friend conspire to conceal the birth, accomplice responsibility brings the latter within the ambit of criminal law. But cases are on record in other states in which[,] without the knowledge of the mother and while she was still disoriented because of the childbirth process, relatives have taken the fetus away and concealed it. Accomplice responsibility does not arise in this case, but the need for inclusion is obvious.[2]

The Code enlarges the offense and eliminates restrictions in its coverage which seem clearly inconsistent with its purpose.

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§709-901 Commentary:

1. H.R.S. §768-8, which provided: "If any woman conceals the death of any issue of her body, whether born alive or not, which, if born alive, would have been illegitimate, so that it may not be known whether the issue was born alive or not, or whether it was murdered, she shall be fined not more than $100 and imprisoned at hard labor not more than two years."

2. Prop. Mich. Rev. Cr. Code, comments at 500.

" **§709-902 Abandonment of a child.** (1) A person commits the offense of abandonment of a child if, being a parent, guardian, or other person legally charged with the care or

custody of a child less than fourteen years old, the person deserts the child in any place with intent to abandon it.

(2) Leaving a newborn child at a hospital, fire station, or police station or with emergency services personnel pursuant to section 587D-2 shall not constitute a violation of this section.

(3) Abandonment of a child is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993; am L Sp 2007, c 7, §3]

COMMENTARY ON §709-902

Abandonment of a child is essentially a residual offense hence the relatively low grade of its penalty. If an abandoned child dies, suffers bodily injury, or is exposed to a substantial risk of bodily injury, the parent, guardian, or person charged with care or custody of the child would, depending on the culpability of the actor and circumstances of the case, be subject to a charge of murder, manslaughter, negligent homicide, assault in some degree, or reckless endangering in the second degree. Section 709-902 should be invoked primarily in those cases of abandonment where the abandoned child is discovered and taken into protective custody before the child suffers bodily injury.

Previous Hawaii law lumped abandonment together with a host of other, assorted evils.

> Any person who wilfully abandons or injures in health or limb any child under his legal control or neglects to provide the child with suitable or necessary food or clothing or cruelly or unreasonably strikes, beats, flogs, or chastises the child shall be fined not more than $200 or imprisoned not more than six months.[1]

Abandonment is a residual offense which is defined to cover cases where a harm which is the subject of a more serious offense does not result. The offense is particularly concerned with those persons having a special legal duty to care for the child. Moreover, the age limitation separates abandonment of those children who are able to call attention to the abandonment from younger children who may not be able to seek necessary help. Nonsupport presents a distinct problem. The definition of an offense based on nonsupport should take into consideration the ability of the defendant to provide the support. It ought to encompass more than the parent-child relationship and support ought to include more than food and clothing.[2] Finally, an offense involving physical maltreatment of children is, to some extent, unnecessary in view of the assault offenses of chapter 707. To the extent that maltreatment constitutes the violation of a legal duty owed the child by a parent, guardian, or other person, the definition of the offense should take into

consideration not merely the ability of the child to call attention to the child's plight, but the age range which makes the minor especially susceptible to the adverse effects of maltreatment.[3]

The Code deals individually, in §§709-902, 903, and 904, with the problems which previous law lumped together. In dealing with abandonment, the Code lists those factors which ought properly to be considered: the relationship of the actor and the child, the intent of the actor, and the ability of the child to call attention to the child's plight. The sentence which the Code provides is more severe than that provided by prior law.

SUPPLEMENTAL COMMENTARY ON §709-902

Act 7, Special Session Laws 2007, provided a safe haven for newborns, by amending this section to provide immunity from prosecution for persons leaving an unharmed newborn at a hospital, fire station, or police station, or with emergency services personnel, within seventy-two hours of the child's birth. The legislature found that the intent of a "safe-surrender" law is to focus on the health and safety of a child rather than a parent's liability for abandonment. The goal is to encourage a person who may be at risk of abandoning a child to do so at a suitable location, such as a hospital, fire station, or police station, or with the appropriate personnel at these facilities. Conference Committee Report No. 66, Senate Standing Committee Report No. 1283.

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§709-902 Commentary:

1. H.R.S. §577-12. See also H.R.S. §575-1 [Uniform Desertion and Nonsupport Act (Modified)] which provides in part: "...any parent who deserts or wilfully neglects his or her child or children under the age of sixteen years...shall be guilty of a misdemeanor...." Although the Uniform Act includes desertion or nonsupport, no case has been found of a prosecution under this provision which did not include nonsupport. M.P.C., Tentative Draft No. 9, comments at 190 (1959).

2. Cf. §709-903.

3. Cf. §709-904.

" **§709-903 Persistent nonsupport.** (1) A person commits the offense of persistent nonsupport if the person knowingly and persistently fails to provide support which the person can

provide and which the person knows the person is legally obliged to provide to a spouse, child, or other dependent.

(2) "Support" includes but is not limited to food, shelter, clothing, education, and other necessary care as determined by law.

(3) Persistent nonsupport is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §709-903

The purpose of laws dealing with nonsupport by a person who owes a duty of support to another is to enforce compliance with the legislative directive setting forth a community standard; yet a policy of strict criminal punishment of offenders would frustrate the purpose of the law by incapacitating (by incarceration or fine) the defendant from providing the support.

> Exemplary punishment is of doubtful efficacy in complex family situations, where many forces, psychic, social, and economic, may combine to excuse, if not justify, the behavior. Moreover, imprisonment should be a last resort here, since it incapacitates the defendant from providing the very support which the community seeks to require and frustrates any broader effort to rehabilitate the family situation. Recent thought has favored the development of "family courts" staffed to handle non-support and other intra-family problems primarily through social work, with less concentration on purely fiscal aspects.[1]

The Code adopts the position that intervention of the criminal process ought to take place only as a last resort. The primary resort ought to be to the social and counseling processes of the Family Court. It is only when a record has been established of repeated, persistent failure to provide the support which the defendant can provide and which the defendant knows the defendant is obliged by law to provide that the criminal process ought to be employed.

> By focussing on "persistent" defaulters, we express a legislative policy in favor of resort, in the first instance, to non-penal measures....
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> The concept of "persistent" violation is not unprecedented in penal law.... The term connotes repetition, obstinacy, wilfulness; and it is difficult to formulate a more precise standard to differentiate the aggravated case of continued defiance of the support law, which we wish to penalize, from the simple case of default which may be solved by an official notice or judicial order to pay, or some intelligent social work.[2]

There were a number of provisions in previous law which dealt with the problem of nonsupport, and they were not totally consistent with one another. None of them focused on the concept of persistent default as a condition precedent for a criminal sanction; however, in actual practice, the prosecutor probably required some degree of persistency.

Under Hawaii's adoption, in modified form of the Uniform Desertion and Nonsupport Act:

> Any husband who deserts or wilfully neglects his wife, or wilfully fails, neglects, or refuses to provide for her support or maintenance, thereby reducing her to destitute or necessitous circumstances, or any parent who deserts or wilfully neglects his or her child or children under the age of sixteen years, or wilfully fails, neglects or refuses to provide for the support or maintenance of the child or children or wilfully fails, neglects, or refuses to pay amounts awarded for the support and maintenance of such child or children under a decree of divorce, thereby reducing the child or children to destitute or necessitous circumstances, shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding $500 or imprisonment not exceeding one year, or both; provided, that instead of imposing the sentence provided in this section the court may release the defendant under suspended sentence for such period as shall be fixed by the court and under such terms as shall be fixed by the court as to the payment weekly or otherwise of money for the support of the wife or child and as to giving security for such payments and for the appearance of the defendant at such time or times as the court shall direct. The terms so fixed by the court shall be subject to change or additional security at any time.[3]

Under the chapter dealing with protection of children, substantially similar conduct, as it related to children, subjected the offender to a sentence with approximately half the severity of that provided under the Uniform Act.

> Any person who wilfully abandons ... any child under his legal control or neglects to provide the child with suitable or necessary food or clothing ... shall be fined not more than $200 or imprisoned not more than six months.[4]

The statutes imposing a duty of support are not exactly consistent in defining the extent of the duty. Although an illegitimate child does not have a right to be supported by its father,[5] if an action to establish paternity is brought and paternity is established, the child becomes entitled, with certain exceptions, to "support, maintenance and education"

until the child reaches eighteen years of age.[6] Under certain specific circumstances, a step-parent is required to support his or her step-child.[7] The age to which the duty to support one's children continues is not specified, except in the case of illegitimates, although by inference it continues until the child has achieved majority.[8]

The Code attempts to reconcile some of the latent ambiguities which exist in comparing the various sections of prior law. A single section covering penal default of support provides a uniform authorized sentence for similar conduct. By covering "spouse, child or other dependent," the Code provides that the penal sanction may be employed in all cases where the support law establishes a duty of support. The use of the word "child" in this section is intended to cover all persons who have not reached the age of majority. The definition of support ensures that all forms of care which are required by the support law are covered. However, unlike the previous law, which, on its face, would allow resort to prosecution in the first instance of default, the Code requires that the default be persistent before a prosecution can be successfully maintained.

SUPPLEMENTAL COMMENTARY ON §709-903

The Proposed Draft had included "medical attention" as one of the items of "support." However, that was deleted by the legislature in 1972. As stated in Conference Committee Report No. 2 (1972):

> Your Committee has agreed to the deletion of the words "medical attention" as a requisite of the term "support" in order to avoid penalizing the free exercise of certain religions.

Case Notes

Reasonable to conclude that term "support" includes medical attention and medical assistance, except where the exercise of religion is involved. 8 H. App. 506, 810 P.2d 672 (1991).

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§709-903 Commentary:

1. M.P.C., Tentative Draft No. 9, comments at 188 (1959).

2. Id. at 188-189.

3. H.R.S. §575-1.

4. Id. §577-12.

5. See id. §577-14 (semble).

6. Id. §579-4.

7. Id. §577-4.

8. But see id. §571-2, which defines, for purposes of chapter 571, "child" to mean "a person less than eighteen years of age."

" **§709-903.5 Endangering the welfare of a minor in the first degree.** (1) Except as provided in subsection (2), a person commits the offense of endangering the welfare of a minor in the first degree if, having care or custody of a minor, the person:

(a) Intentionally or knowingly allows another person to inflict serious or substantial bodily injury on the minor; or

(b) Intentionally or knowingly causes or permits the minor to inject, ingest, inhale, or otherwise introduce into the minor's body any controlled substance listed in sections 329-14, 329-16, 329-18, and 329-20 that has not been prescribed by a physician for the minor, except as permitted under section 329-122.

(2) It shall be a defense to prosecution under sections 709-903.5(1) and 709-904(1) if, at the time the person allowed another to inflict serious or substantial bodily injury on a minor, the person reasonably believed the person would incur serious or substantial bodily injury in acting to prevent the infliction of serious or substantial bodily injury on the minor.

(3) Endangering the welfare of a minor in the first degree is a class C felony. [L 1986, c 314, §70; am L 2006, c 249, §1; am L 2008, c 81, §1]

Revision Note

In subsection (2), "709-904(1)" substituted for "709-704(1)".

COMMENTARY ON §709-903.5

Act 314, Session Laws 1986, provided that a person is criminally liable for intentionally or knowingly allowing another person to inflict serious or substantial bodily harm on a minor. Persons charged with this offense may defend on the ground that they reasonably believed they would incur serious or substantial bodily injury by acting to prevent the harm to the minor. Conference Committee Report No. 51-86.

Act 249, Session Laws 2006, expanded the crime of endangering the welfare of a minor in the first degree to include causing or permitting a minor to ingest methamphetamine. Conference Committee Report No. 84-06.

Act 81, Session Laws 2008, amended subsection (1) to include in the offense causing or permitting a minor to inject, ingest, inhale, or otherwise introduce into the minor's body, any controlled substance listed in schedules I through IV not prescribed by a physician, excluding the medical use of marijuana. The legislature found that the Act would provide greater protection for the health and safety of the children of Hawaii, and was necessary because of the high risk of injury caused by the ingestion of schedule I, II, III, and IV controlled substances. Conference Committee Report No. 55-08, Senate Standing Committee Report No. 3415.

" **§709-904 Endangering the welfare of a minor in the second degree.** (1) Except as provided in section 709-903.5(2), a person commits the offense of endangering the welfare of a minor in the second degree if, having care or custody of a minor, the person:

(a) Recklessly allows another person to inflict serious or substantial bodily injury on the minor; or

(b) Recklessly causes or permits the minor to inject, ingest, inhale, or otherwise introduce into the minor's body any controlled substance listed in sections 329-14, 329-16, 329-18, and 329-20 that has not been prescribed by a physician for the minor, except as permitted under section 329-122. This subsection shall not apply to nursing mothers who may cause the ingestion or introduction of detectable amounts of any controlled substance listed in sections 329-14, 329-16, 329-18, and 329-20 to their minor children through breastfeeding.

(2) A person commits the offense of endangering the welfare of a minor in the second degree if, being a parent, guardian, or other person whether or not charged with the care or custody of a minor, the person knowingly endangers the minor's physical or mental welfare by violating or interfering with any legal duty of care or protection owed such minor.

(3) Endangering the welfare of a minor in the second degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1974, c 198, §1; am L 1986, c 314, §71; am L 2006, c 230, §45 and c 249, §2; am L 2008, c 81, §2]

COMMENTARY ON §709-904

[The Proposed Draft as well as the Code as adopted had limited this offense to a parent, guardian, or other person charged with the care or custody of the minor. In 1974, this was broadened to include persons who were not charged with the care or custody of the minor. (See Supplemental Commentary on §709-904.) This Commentary is based on the original wording prior to the 1974 amendment.]

This section provides a penal sanction for the violation of a duty of care and protection which the civil law relating to minors places upon parents, guardians, and other persons charged with the care or custody of a minor. In a sense this offense is residual. Specific types of conduct which may endanger the welfare of minors are treated separately in §709-902 (abandonment) and §709-903 (persistent nonsupport). However, prosecutions for abandonment and persistent nonsupport do not depend upon a showing that the abandonment or nonsupport actually endangered the welfare of the child. For example, abandonment of a child in a police station or an orphanage may, if the parent is not suitable and beyond rehabilitation, be in the interest of the child. Yet, under such circumstances, a prosecution for abandonment could be maintained. Similarly, an exceedingly poor parent may refuse to support his child and thereby cause a more wealthy relative to furnish support beyond the means of the parent; even so, the persistent refusal would constitute an offense. Section 709-904 involves violations of legal duties which do in fact endanger the welfare of the child. If a person knowingly endangers the welfare of a minor by violating a legal duty of support or non-desertion, it matters not that the nonsupport was sporadic or that the desertion was not with intent to abandon.

The Model Penal Code commentary, in discussing the section of that Code from which this section is derived, observed that

> its significance lies as much in what it does not make criminal as in what it does penalize. Notably, it will not be an offense under this or any other Section of the Code to "contribute to the delinquency" or "corrupt the morals" of a child, although nearly all American jurisdictions now have laws couched in these terms, often incorporated in the juvenile court acts.
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> Authorities concerned with the welfare of children have disavowed the loosely drawn statutes against contributing to delinquency. Experience has shown that such statutes are almost always invoked in situations specifically dealt with by other Sections of the Code, especially those concerned with sexual offenses. To the extent of the overlap, there is no need for the contributing statute. More important, the existence of this overlapping catch-all

> has been, and would under this Code continue to be, a means of avoiding legislative judgments, made in other sections dealing with specific offenses on such matters as mens rea, punishability of consensual intercourse, proper grading of offenses, corroboration of complaining witnesses, and adequacy of proof generally. Finally, the contributing legislation embraces such a vast range of behavior as to make it completely meaningless as a criminologic category, treating as one class, for example, a rapist, a dealer who buys stolen junk from a fifteen-year-old boy, a narcotics peddler who lures high school children into drug addiction, and a parent who keeps his child out of schools where flag saluting is required.
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> The basic error that appears to account for the prevalence of the legislation here disapproved is the assumption that the comprehensive terms in which jurisdiction is commonly conferred upon juvenile courts over "delinquent, dependent or neglected" children are also appropriate to define a criminal offense. It is one thing to give broad scope to an authority to promote the welfare of children, but quite another thing to give a criminal court equivalent latitude in defining crimes for which adults shall be punished. The vagueness of current statutes in this field presents serious constitutional problems in the light of the decision in Musser v. Utah.[1]

The definition of this offense limits its application to cases where the victim is under 18 years of age. This limit is set on the theory that in modern society persons 18 and 19 years of age are not, by virtue of their minority status, especially susceptible to the adverse effects which result from breaches of civil duties relating to the welfare of minors. If the behavior of the parent or guardian presents a serious danger to the minor, another offense, addressed specifically to the danger, can be employed, e.g., assault, reckless endangering, etc.

Previous Hawaii law reflected the standard failure to distinguish the broad jurisdiction of the Family Court[2] from that conduct of adults toward children which ought properly to be regarded as criminal. The governing section provided:

> Any parent, or legal guardian, or person having the custody of any minor within the purview of chapter 571 establishing the Family Court, or any other person who knowingly or wilfully encourages, aids, causes, abets, or connives at the acts or does anything that directly produces, promotes, or contributes to the conditions which bring the minor within the purview of chapter 571, or who wilfully neglects to do that which will directly tend to prevent the acts or conditions that bring the minor within

the purview of chapter 571, shall be fined not more than $200 or imprisoned not more than one year, or both.[3]

The vagueness and lack of specificity was aggravated by a provision that the above section be construed liberally, i.e., to extend liability.[4]

The Code provides a degree of specificity by requiring that, for liability to attach, the actor must violate a legal duty of care or protection. The scope of the section is limited, necessarily, to those persons (parents, guardian, or others) charged with the care and custody of the minor.

SUPPLEMENTAL COMMENTARY ON §709-904

Act 198, Session Laws 1974, amended this section so as to apply to a parent, guardian, or other person whether or not charged with the custody of a minor and so as to include the interference with, as well as the violation of, any legal duty of care or protection owed to the minor.

In Standing Committee Report No. 130-74 the Senate Judiciary Committee stated:

> It will be possible to prosecute persons who harbor runaway juveniles and who assist them in any illegal activities under the rewording of §709-904.
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> Your Committee on Judiciary would also like to emphasize that in the approval of this bill, there is no intent on their part to interfere with the practices and beliefs of the Christian Scientist population of the State of Hawaii.

Act 314, Session Laws 1986, provided that a person is criminally liable for recklessly allowing another person to inflict serious or substantial bodily injury on a minor. Persons charged with this offense may defend on the ground that they reasonably believed they would incur serious or substantial bodily injury by acting to prevent the harm to the minor. Conference Committee Report No. 51-86.

Act 230, Session Laws 2006, amended subsection (3) to clarify that endangering the welfare of a minor in the second degree is a misdemeanor.

Act 249, Session Laws 2006, expanded the crime of endangering the welfare of a minor in the second degree to include causing or permitting a minor to ingest methamphetamine. Conference Committee Report No. 84-06.

Act 81, Session Laws 2008, amended subsection (1) to include in the offense causing or permitting a minor to inject, ingest, inhale, or otherwise introduce into the minor's body, any controlled substance listed in schedules I through IV not prescribed by a physician, excluding the medical use of marijuana. Act 81 exempted nursing mothers who may cause the

ingestion or introduction of detectable amounts of any controlled substance listed in schedules I through IV to their minor children by breastfeeding. The legislature found that the Act would provide greater protection for the health and safety of the children of Hawaii, and was necessary because of the high risk of injury caused by the ingestion of schedule I, II, III, and IV controlled substances. Conference Committee Report No. 55-08, Senate Standing Committee Report No. 3415.

§709-904 Commentary:

1. M.P.C., Tentative Draft No. 9, comments at 183-184 (1959). Cf. Musser v. Utah, 333 U.S. 95 (1948). Among the questionable convictions which have resulted from the vagueness of current statutes, the M.P.C. commentary cites: State v. Davis, 58 Ariz. 444, 120 P.2d 808 (1942) (parent contributed to delinquency of a minor by encouraging, on religious grounds, refusal to salute the flag, which led to child's expulsion from school [but cf. Partain v. State, 77 Okla. Crim. 270, 141 P.2d 124 (1943), holding compulsory flag saluting statutes unconstitutional]); State v. Scallon, 201 La. 1026, 10 So.2d 885 (1942) ("accused permitted daughter under 17 to go to a nightclub"); State v. Sobelman, 119 Minn. 232, 271 N.W. 484 (1937) (tavern owner convicted for contributing to the delinquency of 16 year old girl who had been drinking in tavern without owner's knowledge); In re Lewis, 193 Misc. 676, 84 N.Y. Supp. 2d 790 (Children's Ct. 1948) (offense consisted of employing a 15 year old boy "to work in a bowling alley where the boy was able to see money placed in a desk and succumbed to the temptation to steal" it); People v. Lew, 78 Cal. App. 2d 178, 177 P.2d 60 (1947) ("acquittal of statutory rape despite indubitable proof of intercourse; conviction of contributing to delinquency despite clear proof that the girl 'victim' was a prostitute"); and State v. Harris, 105 W. Va. 165, 141 S.E. 637 (1928) (defendant convicted of contributing to delinquency "for taking a fifteen-year-old girl out riding against her father's orders and remaining out until eleven o'clock, although the girl asked for the ride").

2. See H.R.S. §§571-11 through 571-14.

3. H.R.S. §577-8. In an attempt to eliminate outmoded phrases, the Revisor of Statutes changed the language of R.L.H. §330-6 (1955) considerably when the Revised Laws were recodified as the Hawaii Revised Statutes [1968].

4. Id. §577-11 which provides: "Sections 577-8 to 577-11 shall be liberally construed in favor of the State for the purpose of the protection of the child from neglect, or omission of parental duty toward the child by its parents, and further to protect the child from the effects of the improper conduct or acts of any person which may cause, encourage, or contribute to the dependency or delinquency of the child, although the person is in no way related to the child."

" **[§709-904.5] Compensation by an adult of juveniles for crimes; grade or class of offense increased.** (1) A person other than a juvenile commits the offense of compensation of a juvenile for a crime if the person intentionally or knowingly compensates, offers to compensate, or agrees to compensate any juvenile for the commission of any criminal offense.

(2) Any person convicted of compensating, offering to compensate, or agreeing to compensate a juvenile for the commission of a:

(a) Petty misdemeanor shall be deemed guilty of a misdemeanor;

(b) Misdemeanor shall be deemed guilty of a class C felony;

(c) Class C felony shall be deemed guilty of a class B felony;

(d) Class B or class A felony shall be deemed guilty of a class A felony.

(3) It is not a defense to a prosecution under subsection (1) that the accused had no knowledge of the juvenile's age. The intent is to impose absolute liability with respect to the element of the other person's being less than eighteen years old.

(4) For the purposes of this section, the following terms have the following meanings:

"Compensate" means to confer any benefit or pecuniary benefit.

"Juvenile" means any person under eighteen years of age. [L 1986, c 314, §72]

Revision Note

Section was enacted as an addition to chapter 710 but was renumbered to this chapter pursuant to §23G-15.

COMMENTARY ON §709-904.5

Act 314, Session Laws 1986, provided for enhanced sentences for an adult offering to pay a juvenile to commit a crime. This

offense is aimed at deterring adults from inducing juveniles to engage in criminal activity, a practice frequently used because juveniles are generally given lesser sentences than those for adults for the same crime. Conference Committee Report No. 51-86.

Case Notes

Defendant could not be convicted for compensating juvenile for defendant's commission of sexual assault against juvenile. 85 H. 92 (App.), 937 P.2d 933 (1997).

" **§709-905 Endangering the welfare of an incompetent person.** (1) A person commits the offense of endangering the welfare of an incompetent person if he knowingly acts in a manner likely to be injurious to the physical or mental welfare of a person who is unable to care for himself because of physical or mental disease, disorder, or defect.

(2) Endangering the welfare of an incompetent person is a misdemeanor. [L 1972, c 9, pt of §1]

COMMENTARY ON §709-905

This section seeks to expand the protection which the law affords to incompetents by making it roughly equivalent to that afforded to minors. A child who suffers from a mental or physical disease, disorder, or defect is protected as a child from certain dangers by §§709-902 through 904 which make abandonment, persistent nonsupport, and endangering the welfare of a minor penal offenses. A person who is physically incapacitated or mentally incompetent is afforded protection against sexual assault and abuse by chapter 707, which makes such conduct, as it relates to such persons, an offense. However, in cases not involving sexual activity or not specifically involving minors under §§709-902 through 904, there is, without §709-905, a gap in the coverage of the Code. This gap also existed in prior law.

Case Notes

Family court did not abuse its discretion by requiring defendant to attend domestic violence counseling as a condition of defendant's probation; where defendant was charged with endangering the welfare of an incompetent person under this section based on substantial evidence that defendant assaulted complainant, under §706-624(2), the court was free to impose discretionary conditions of probation that are reasonably

related to the factors set forth in §706-606 and to the extent that the conditions involve only deprivations of liberty as is reasonably necessary for the purposes indicated in §706-606(2). 121 H. 228 (App.), 216 P.3d 1251 (2009).

Section is not unconstitutionally vague or overbroad; under a plain reading of this section, the phrase "likely to be injurious" is reasonably clear and provides sufficient notice to a person of ordinary intelligence that knowingly engaging in conduct that would probably cause harm to an incompetent person's welfare is prohibited; section is also clear that the accused must wilfully engage in conduct that would likely harm the incompetent person's welfare, "which is the antithesis of an intentional act that may injure but is performed in the incompetent person's best interest". 121 H. 228 (App.), 216 P.3d 1251 (2009).

Where witness testimonies, particularly when viewed in the light strongest for the State, substantially supported the findings that complainant was unable to care for complainant's self because of a mental disability and defendant knew defendant's actions were likely to injure complainant's physical or mental welfare, there was sufficient evidence to convict defendant under this section. 121 H. 228 (App.), 216 P.3d 1251 (2009).

" **§709-906 Abuse of family or household members; penalty.** (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member, upon request, may transport the abused person to a hospital or safe shelter.

For the purposes of this section:

"Business day" means any calendar day, except Saturday, Sunday, or any state holiday.

"Family or household member":

(a) Means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons in a dating relationship as defined under section 586-1, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit; and

(b) Does not include those who are, or were, adult roommates or cohabitants only by virtue of an economic or contractual affiliation.

(2) Any police officer, with or without a warrant, may arrest a person if the officer has reasonable grounds to believe

that the person is physically abusing, or has physically abused, a family or household member and that the person arrested is guilty thereof.

(3) A police officer who has reasonable grounds to believe that the person is physically abusing, or has physically abused, a family or household member shall prepare a written report.

(4) Any police officer, with or without a warrant, shall take the following course of action, regardless of whether the physical abuse or harm occurred in the officer's presence:

(a) The police officer shall make reasonable inquiry of the family or household member upon whom the officer believes physical abuse or harm has been inflicted and other witnesses as there may be;

(b) If the person who the police officer reasonably believes to have inflicted the abuse is eighteen years of age or older, the police officer lawfully shall order the person to leave the premises for a period of separation, during which time the person shall not initiate any contact, either by telephone or in person, with the family or household member; provided that the person is allowed to enter the premises with police escort to collect any necessary personal effects. The period of separation shall commence when the order is issued and shall expire at 6:00 p.m. on the second business day following the day the order was issued; provided that the day the order is issued shall not be included in the computation of the two business days;

(c) If the person who the police officer reasonably believes to have inflicted the abuse is under the age of eighteen, the police officer may order the person to leave the premises for a period of separation, during which time the person shall not initiate any contact with the family or household member by telephone or in person; provided that the person is allowed to enter the premises with police escort to collect any necessary personal effects. The period of separation shall commence when the order is issued and shall expire at 6:00 p.m. on the second business day following the day the order was issued; provided that the day the order is issued shall not be included in the computation of the two business days. The order of separation may be amended at any time by a judge of the family court. In determining whether to order a person under the age of eighteen to leave the premises, the police officer may consider the following factors:

(i) Age of the person;

(ii) Relationship between the person and the family or household member upon whom the police officer reasonably believes the abuse has been inflicted; and

(iii) Ability and willingness of the parent, guardian, or other authorized adult to maintain custody and control over the person;

(d) All persons who are ordered to leave as stated above shall be given a written warning citation stating the date, time, and location of the warning and stating the penalties for violating the warning. A copy of the warning citation shall be retained by the police officer and attached to a written report which shall be submitted in all cases. A third copy of the warning citation shall be given to the abused person;

(e) If the person so ordered refuses to comply with the order to leave the premises or returns to the premises before the expiration of the period of separation, or if the person so ordered initiates any contact with the abused person, the person shall be placed under arrest for the purpose of preventing further physical abuse or harm to the family or household member; and

(f) The police officer shall seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of an offense under this section.

(5) Abuse of a family or household member and refusal to comply with the lawful order of a police officer under subsection (4) are misdemeanors and the person shall be sentenced as follows:

(a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and

(b) For a second offense that occurs within one year of the first conviction, the person shall be termed a "repeat offender" and serve a minimum jail sentence of thirty days.

Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.

(6) Whenever a court sentences a person pursuant to subsection (5), it also shall require that the offender undergo any available domestic violence intervention programs ordered by the court. However, the court may suspend any portion of a jail

sentence, except for the mandatory sentences under subsection (5)(a) and (b), upon the condition that the defendant remain arrest-free and conviction-free or complete court-ordered intervention.

(7) For a third or any subsequent offense that occurs within two years of a second or subsequent conviction, the offense shall be a class C felony.

(8) Where the physical abuse consists of intentionally or knowingly impeding the normal breathing or circulation of the blood of the family or household member by applying pressure on the throat or the neck, abuse of a family or household member is a class C felony.

(9) Where physical abuse occurs in the presence of a minor, as defined in section 706-606.4, and the minor is a family or household member less than fourteen years of age, abuse of a family or household member is a class C felony.

(10) Any police officer who arrests a person pursuant to this section shall not be subject to any civil or criminal liability; provided that the police officer acts in good faith, upon reasonable belief, and does not exercise unreasonable force in effecting the arrest.

(11) The family or household member who has been physically abused or harmed by another person may petition the family court, with the assistance of the prosecuting attorney of the applicable county, for a penal summons or arrest warrant to issue forthwith or may file a criminal complaint through the prosecuting attorney of the applicable county.

(12) The respondent shall be taken into custody and brought before the family court at the first possible opportunity. The court may dismiss the petition or hold the respondent in custody, subject to bail. Where the petition is not dismissed, a hearing shall be set.

(13) This section shall not operate as a bar against prosecution under any other section of this Code in lieu of prosecution for abuse of a family or household member.

(14) It shall be the duty of the prosecuting attorney of the applicable county to assist any victim under this section in the preparation of the penal summons or arrest warrant.

(15) This section shall not preclude the physically abused or harmed family or household member from pursuing any other remedy under law or in equity.

(16) When a person is ordered by the court to undergo any domestic violence intervention, that person shall provide adequate proof of compliance with the court's order. The court shall order a subsequent hearing at which the person is required to make an appearance, on a date certain, to determine whether the person has completed the ordered domestic violence

intervention. The court may waive the subsequent hearing and appearance where a court officer has established that the person has completed the intervention ordered by the court. [L 1973, c 189, §1; am L 1980, c 106, §1 and c 266, §2; am L 1981, c 82, §37; am L 1983, c 248, §1; am L 1985, c 143, §1; am L 1986, c 244, §1; am L 1987, c 360, §1; am L 1991, c 215, §§2, 4 and c 257, §§1, 2; am L 1992, c 290, §7; am L 1994, c 182, §§1, 3; am L 1995, c 116, §1; am L 1996, c 201, §2; am L 1997, c 321, §1, c 323, §1, and c 383, §70; am L 1998, c 172, §8; am L 1999, c 18, §18; am L 2002, c 5, §1; am L 2006, c 230, §46; am L 2012, c 205, §1; am L 2013, c 251, §1; am L 2014, c 117, §1; am L 2015, c 221, §1; am L 2016, c 231, §44]

Cross References

Shelters, unlawful entry, see §708-816.5.

COMMENTARY ON §709-906

This section was added by Act 189, Session Laws 1973, to provide protection to a spouse from being physically abused by the other spouse. Standing Committee Report No. 828 (1973) states:

> It is apparent today that there is little, if any, protection for a spouse beaten by the other spouse....
>
> This bill is intended to alleviate this problem to a certain extent. A police officer, upon arrival at the scene, is given the power to arrest if the offense is committed in his presence. Section 571-14(2)(B) gives the family court exclusive jurisdiction over any adult charged with an offense, other than a felony, against the person of the defendant's husband or wife. Section 571-42 establishes the procedure to be followed in such cases. It is intended by your Committee that these laws be enforced to the extent that they will afford the abused spouse the necessary protection needed. Further, unless it appears adverse to the best interests of all concerned, the family unity should be retained without the necessity of the abusing spouse being branded a "criminal." Toward this end, the courts are asked to aid these persons needing its assistance in order that they may be rehabilitated.

SUPPLEMENTAL COMMENTARY ON §709-906

Act 106, Session Laws 1980, amended subsection (1) to authorize the police to transport the victim of spouse abuse to a safe place when in the investigating officer's judgment it is

reasonably necessary to do so and there is no effective alternative transportation. Senate Standing Committee Report No. 667-80, House Standing Committee Report No. 875-80.

Act 266, Session Laws 1980, amended subsections (2) and (3) to authorize a police officer to make an arrest or take the actions specified in subsection (3) regardless of whether the physical abuse occurred in the officer's presence or not. The changes to this section and the enactment of §709-907 were intended to expand the protection and remedies available to a spouse who is the victim of non-felonious offense against the person committed by the other spouse. While recognizing the expertise of the family court, the conference committee stated that "your Committee is concerned that family court administrative policies may be diverting an inordinate number of petitions for summonses to counseling, and respectfully recommends that the court review its policy to ensure that the remedy the law creates not be vitiated by undue reluctance to employ it." Conference Committee Report No. 29-80 (33-80).

Act 82, Session Laws 1981, substituted "the abused person" for "such person" in the last sentence of subsection (1) for purposes of clarity.

Act 248, Session Laws 1983, amended this section and repealed §709-907. Two of the changes made in this section were intended to encourage more immediate police action in spouse abuse cases: the removal of the requirement that "substantial" physical harm to a spouse occur before police can act and the granting of civil immunity to police who act in good faith when arresting persons for spouse abuse. Along with other changes, these changes were felt to "greatly assist in dealing with spouse abuse." The section was also amended to substitute sex-neutral terms for gender-based language. Senate Standing Committee Report No. 793.

Act 143, Session Laws 1985, amended the spouse abuse law to: (1) require police to prepare a written report if there are reasonable grounds to believe that abuse exists; (2) increase the "cooling off" period to twelve hours; (3) require the arrest of the abuser who refuses to leave the premises when ordered by police or who returns before the "cooling off" period expires; (4) mandate a minimum 48-hour jail term and counseling and treatment of a convicted abuser; and (5) extend coverage of the law to protect family or household members from abuse. These changes are intended to effectively address and combat family violence and its effect on the community. Senate Conference Committee Report No. 6, House Conference Committee Report No. 15.

Act 244, Session Laws 1986, required police to issue written citations to abusive persons ordered to leave the premises of a

family or household for a cooling off period. The written citation would accomplish a number of purposes. First, it informs the abusive person of the conditions of the cooling off period. Second, the citation helps insure that the cooling off period is observed. Third, responding police may use the citation as an efficient means of transmitting information to police on subsequent shifts who are resummoned to the same household where the abuse occurred. Finally, the citation eases prosecution of the abusive person since it records the exact facts of the alleged abuse and provides proof that the defendant was notified of the conditions of the cooling off period. House Standing Committee Report No. 518-86, Senate Standing Committee Report No. 940-86.

Act 360, Session Laws 1987, changed the time period before which a person convicted under this section may apply for an order to expunge their records, from one year to five years. The legislature found that the five year period would cover a crucial period in which reabuse is frequent. The legislature stated a five year period would provide a more realistic time period in which a person may demonstrate that expungement is warranted. Senate Standing Committee Report Nos. 879 and 1126.

Act 290, Session Laws 1992, amended this section by providing that for the first offense of the abuse of a household member the person shall serve a minimum jail sentence of forty-eight hours, and, for subsequent offenses occurring within one year of the previous offense, the person shall be termed a "repeat offender" and serve a minimum jail sentence of thirty days. Conference Committee Report No. 122.

Act 182, Session Laws 1994, amended this section to provide for a twenty-four hour cooling off period and to extend the cooling off period until the first day following a weekend or legal holiday. Conference Committee Report No. 50.

Act 116, Session Laws 1995, deleted the repeal date of the amendment to this section made by Act 182, Session Laws 1994, which provided for a twenty-four hour cooling off period. The legislature found that the cooling off period imposed by the police in certain circumstances was very successful in preventing further domestic violence; the cooling off period created a "safe" period during which abuse victims might seek refuge in a shelter or use other safety options. Making the twenty-four hour cooling off period a permanent requirement would allow the police to continue to use the cooling off period to prevent domestic abuse. House Standing Committee Report No. 1566.

Act 321, Session Laws 1997, amended this section by deleting subsection (13) to eliminate the possibility of expungement of records relating to a person's arrest, trial, conviction,

dismissal, or discharge involving abuse of a family or household member. The legislature found that domestic violence was a serious crime affecting many families in the community, and for which perpetrators must be held accountable. Further, the repetitive and retaliatory nature of domestic violence required accurate and complete documentation of a perpetrator's history for the future safety of the victim and the victim's family. Senate Standing Committee Report No. 1553.

Act 323, Session Laws 1997, amended subsection (4) by prohibiting contact with a victim of domestic violence, regardless of location, during the "cooling off" period. The Act prohibited the perpetrator of domestic violence from "initiating" contact with the victim so that a violation of subsection (4) was avoided in the event that the victim had reason to contact the perpetrator. The legislature found that the provisions regarding the "cooling off" orders issued by police have had a significant impact in denying domestic violence perpetrators access to their victims. However, its success has been limited in part by the fact that the protection extends only to the premises and not to the victims themselves or to other locations that might be important to the victims, such as their place of employment. The legislature believed that extending the temporary protective legal shield to victims, regardless of their location, would remedy the problem. House Standing Committee Report No. 1481.

Act 383, Session Laws 1997, amended this section by amending the definition of "family or household member" to include reciprocal beneficiaries and former reciprocal beneficiaries. The amendment establishes the status of reciprocal beneficiaries and provides rights and benefits to those with that status. Among the benefits extended to reciprocal beneficiaries which are substantially equivalent to those extended to spouses is legal standing relating to domestic violence family status. Conference Committee Report No. 2.

Act 172, Session Laws 1998, amended this section by, among other things, adding persons who have a child in common to the definition of "family or household member," changing the term "cooling off period" to "period of separation," and making the third offense of abuse of family or household member within two years of the second conviction a felony. Act 172 also amended the section to require that defendants convicted of abuse of family or household member be immediately incarcerated, clarifying that the amendment did not affect the defendant's right to bail pending appeal pursuant to chapter 804, and that the court, upon a finding of special circumstances, may stay the imposition of the jail term.

Additionally, Act 172 deleted "recent" with respect to police issuance of twenty-four hour warnings. Under current law, if a police officer had reasonable grounds to believe that there was recent physical abuse or harm, the officer may order the abuser to leave the premises for a cooling off period of twenty-four hours. The legislature found that police officers responding to a domestic violence complaint had to make quick decisions on whether or not to remove an abuser from a home. The decision was often delayed because an officer had to interpret how "recently" the physical abuse occurred. Deleting the ambiguous term would result in more twenty-four hour warnings, thereby protecting more victims of domestic abuse.

Act 172 also substituted the phrase "domestic violence intervention" for "domestic violence treatment or counseling"; the change reflected the current language in the domestic violence community. Conference Committee Report No. 80, House Standing Committee Report No. 578-98.

Act 5, Session Laws 2002, amended this section to clarify the sentencing provisions in domestic abuse cases to delete overlapping references to first, second, third, and subsequent convictions. The Hawaii supreme court in State v. Modica, 58 H. 249 (1977), held that a defendant's due process and equal protection rights are violated if the defendant is convicted of a felony, when the same act committed under the same circumstances could also have been punished as a misdemeanor under another statute, and the elements of proof essential to either conviction are exactly the same. Subsection (5)(b) made it a misdemeanor for second and subsequent offenses of abuse of a family member that occur within one year of the previous offense. Subsection (7) made it a class C felony for any subsequent offense occurring within two years after a second misdemeanor conviction. Under those provisions, subsequent offenses after a second offense could be charged either as a felony or misdemeanor. A potential constitutional problem existed under State v. Modica. Act 5 remedied the potential defect by limiting misdemeanors to the first and second offense, while making it a class C felony for any third and subsequent offense. Senate Standing Committee Report No. 2949, House Standing Committee Report No. 540-02.

Act 230, Session Laws 2006, amended this section by adding strangulation as abuse of a family or household member and making it a class C felony. House Standing Committee Report No. 665-06.

Act 205, Session Laws 2012, amended §709-906(4) by: (1) requiring a police officer to order a person whom the officer has reasonable grounds to believe has physically abused or harmed a family or household member to have no contact with the

family or household member for a 24-hour period, or longer if the incident occurs on the weekend, when the police officer has reasonable grounds to believe that there is probable danger of further physical abuse or harm to the family or household member; and (2) requiring, rather than allowing, a police officer to seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in cases where the officer reasonably believes that physical abuse or harm was inflicted by a person upon a family or household member. The legislature found that domestic violence was a public health epidemic and Act 205 would assist in addressing this epidemic. Senate Standing Committee Report No. 2539, House Standing Committee Report No. 1503-12.

Act 251, Session Laws 2013, amended subsections (1) and (4) to strengthen Hawaii's law protecting family or household members from physical abuse. Specifically, Act 251 amended: (1) subsection (1) to include persons in a dating relationship as family or household members when considering the offense of abuse of family or household members; and (2) subsection (4) by (A) increasing from twenty-four to forty-eight hours the period of separation that a police officer is required to order a person to stay away from a family or household member if the police officer has reasonable grounds to believe that a family or household member is in probable danger of further physical abuse or harm being inflicted by the person; and (B) specifying that the forty-eight hour period of separation shall be enlarged and extended to 4:30 p.m. on the first day following a weekend or legal holiday if the incident occurs on such a day. The legislature found that domestic violence was a public health epidemic and Act 251 would assist in addressing the epidemic by expanding the definition of "family or household member" to include persons in a dating relationship. Existing law required a police officer to order a person to leave the premises for a period of separation of twenty-four hours if the police officer had reasonable grounds to believe that there was probable danger of further physical abuse or harm being inflicted by the person upon a family or household member. The twenty-four hour no contact period was beneficial to domestic violence victims because it created a safe period in which the victim may seek refuge in a shelter or use other safety options. A no contact order has the same effect as a temporary restraining order, but victims may use a no contact order when the courts are closed and then follow up their request for a temporary restraining order using a no contact order issued by the police as justification. Accordingly, the legislature believed that increasing the no contact period from twenty-four to forty-eight hours would provide victims a longer safe period to seek refuge

or assistance. Senate Standing Committee Report No. 1330, Conference Committee Report No. 27.

Act 117, Session Laws 2014, amended this section by: (1) establishing that the offense of abuse of a family or household member is a class C felony when the physical abuse occurs in the presence of any family or household member who is less than fourteen years of age; (2) requiring police officers to make a reasonable inquiry of the family or household member upon whom the officer believes that physical abuse or harm has been inflicted, and inquire the same of any available witnesses; and (3) requiring a police officer to order a person whom the police officer reasonably believes has inflicted the abuse to leave the premises for a period of separation for forty-eight hours, regardless of whether the officer has reasonable grounds to believe that there is probable danger of further physical abuse or harm being inflicted by one person upon a family or household member. The legislature found that research had shown that children who witness domestic violence can suffer severe emotional and developmental difficulties that are similar to those of children who are victims of direct physical and mental abuse. The legislature also found that existing law allowed the sentencing judge to consider as an aggravating factor that the offense of abuse of a family or household member was committed in the presence of a child, but this factor does not impact the penalty imposed for the commission of the offense. Act 117 established that the offense of abuse of a family or household member is a class C felony when the physical abuse occurs in the presence of a child under fourteen years of age to deter these types of domestic abuse cases. Senate Standing Committee Report Nos. 3071 and 3294, Conference Committee Report No. 113-14.

Act 221, Session Laws 2015, amended this section by: (1) defining the term "business day" for purposes of calculating the period of separation imposed in conjunction with the offense of abuse of family or household members; and (2) repealing the forty-eight hour no contact provision and instead specifying that the period of separation that a police officer shall order for the person whom the police officer reasonably believes to have inflicted the abuse of a family or household member commences when the order is issued and expires at 6:00 p.m. on the second business day following the day the order was issued. The legislature found that the intent of the forty-eight hour period of separation in cases of actual or probable family or household abuse was to keep the abuser or potential abuser away from the victim and to give the victim time to get a restraining order and find a safe shelter. However, under existing law, when the abuse occurs at certain times or on certain days, the victim does not receive the benefit of the forty-eight hour

separation period or does not have sufficient time to obtain a restraining order or shelter because government agencies and many private organizations are closed on weekends and holidays. Act 221 gave abuse victims additional time to get help and legal protection by extending the period of separation that a police officer shall order under specified circumstances. Senate Standing Committee Report No. 587, House Standing Committee Report No. 1490.

Act 231, Session Laws 2016, amended subsections (1), (4), and (9) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Law Journals and Reviews

Essay: When Less Is More--Can Reducing Penalties Reduce Household Violence? 19 UH L. Rev. 37 (1997).

Hamilton v. Lethem: The Parental Right to Discipline One's Child Trumps a Child's Right to Grow Up Free from Harm. 36 UH L. Rev. 347 (2014).

Case Notes

Term "physical abuse" is not vague or overbroad. 69 H. 620, 753 P.2d 1250 (1988).

Refusal to sign the twelve hour warning was not a crime. 71 H. 53, 781 P.2d 1041 (1989).

Mutual affray is not a defense. 71 H. 165, 785 P.2d 1320 (1990).

Statute is not unconstitutionally vague or overbroad; victim residing in the same dwelling with defendant for fourteen weeks in another person's house was considered a "family or household member". 71 H. 479, 795 P.2d 280 (1990).

Not violated by parent who hit child with belt. 72 H. 241, 813 P.2d 1382 (1991).

Constitutional right to confrontation violated. 72 H. 469, 822 P.2d 519 (1991).

Trial court's imposition of sentence based solely on unsupported finding that "victim lied for the defendant" unconstitutionally punished defendant for an uncharged crime. 72 H. 521, 824 P.2d 837 (1992).

Because a person convicted of offense may be imprisoned for up to one year, the court had a duty to inform defendant of defendant's right to trial by jury in order to ensure a knowing and voluntary waiver of that right. 75 H. 118, 857 P.2d 576 (1993).

Prosecution not precluded by principles of double jeopardy from re-trying defendant, where testimony constituted substantial evidence supporting trial court's conviction. 75 H. 118, 857 P.2d 576 (1993).

Double jeopardy clause of Hawaii constitution barred unlawful imprisonment but not terroristic threatening prosecution of defendant who had been found guilty of abuse under this section. 75 H. 446, 865 P.2d 150 (1994).

Absence of any evidence in the record that defendant and complaining witness were family or household members recognized as plain error necessitating reversal of defendant's conviction. 78 H. 185, 891 P.2d 272 (1995).

Requisite state of mind for violation of subsection (1) is intentionally, knowingly, or recklessly; prosecution need only prove recklessness. 81 H. 131, 913 P.2d 57 (1996).

Substantial evidence proved defendant consciously disregarded substantial and unjustifiable risk of physically abusing wife by slapping her on side of head. 81 H. 131, 913 P.2d 57 (1996).

As §§701-101, 701-102, 701-107, and 701-108, construed together, establish that the term "offense", as employed by the Hawaii Penal Code, refers to the commission of the crime or violation and not to the procedural events that transpire as a result of that commission, the plain meaning of "offense", as employed in subsection (5), precludes an interpretation equating it with the term "conviction". 90 H. 262, 978 P.2d 700 (1999).

Defendant's second offense was "subsequent" to the first offense within plain meaning of subsection (5)(b) where brief interval separated both offenses. 90 H. 262, 978 P.2d 700 (1999).

In order to prove a prior offense in order to justify an enhanced sentence for a "second" or "subsequent" offense pursuant to subsection (5), the prosecution must adduce evidence of a conviction of the prior offense. 90 H. 262, 978 P.2d 700 (1999).

Subsection (5) does not require that a "second" or "subsequent" offense occur on a separate day. 90 H. 262, 978 P.2d 700 (1999).

Section not unconstitutional as State has a legitimate interest in protecting the health, safety and welfare of its citizens, enactment of this section to address family violence within the community is "legitimate" in protecting Hawaii's citizens, and as including family and household members within scope of this section may reduce or deter family violence by imposing upon violators greater criminal punishment than criminal assault, it is rationally related to the State's interest in preventing incidents of family violence. 93 H. 63, 996 P.2d 268 (2000).

Under either §701-109(4)(a) or (4)(c), a petty misdemeanor assault under §707-712(2) is not a lesser included offense of family abuse under this section. 93 H. 63, 996 P.2d 268 (2000).

Evidence was of sufficient quality and probative value to support the conclusion that defendant intentionally, knowingly or recklessly maltreated girlfriend where witness heard slapping noises and a "hard thug" and later found girlfriend "shook up, kind of scared and half beaten", and responding officers observed that girlfriend had sustained injuries to her face and right shoulder, and had reported to officer that defendant held her neck against the couch and punched her in the face. 115 H. 503, 168 P.3d 955 (2007).

Defendant's right to have all elements of an offense proven beyond a reasonable doubt was statutorily protected under §701-114 and constitutionally protected under the Hawaii and federal constitutions; as only defendant personally could have waived such fundamental right and such right could not have been waived or stipulated to by defendant's counsel, stipulation by defendant's counsel of the fact that defendant committed defendant's crime within two years of a second or prior conviction of abuse for purposes of the subsection (7) charge violated defendant's due process rights. 116 H. 3, 169 P.3d 955 (2007).

Pursuant to the definition of "element" set forth in §702-205, the prior conviction reference in subsection (7) constitutes an element of the offense of the felony abuse charge. 116 H. 3, 169 P.3d 955 (2007).

Where a defendant has stipulated to the prior conviction element of an offense under subsection (7), the trial court must instruct the jury, inter alia, that the stipulation is evidence only of the prior conviction element, the prior conviction element of the charged offense must be taken as conclusively proven, the jury is not to speculate as to the nature of the prior convictions, and the jury must not consider defendant's stipulation for any other purpose. 116 H. 3, 169 P.3d 955 (2007).

The charge fully defined the offense in unmistakable terms readily comprehensible to persons of common understanding and was legally sufficient: (1) where the actual name of defendant's wife was part of the charge, defining the term "family household member" as "wife" was not required to apprise defendant of the charges defendant needed to be prepared to meet; and (2) the term "physical abuse" need not be defined in the written charge; the term provided sufficient notice to defendant as part of the charge. 131 H. 286, 318 P.3d 126 (2013).

Police not authorized to order domestic disputants to separate except as specified in this section. 7 H. App. 28, 742 P.2d 388 (1987).

Where extended family lives together as a common household, defendant and daughter-in-law were "residing in the same dwelling unit". 9 H. App. 325, 839 P.2d 530 (1992).

When family court implicitly entered a deferred acceptance of guilty plea pursuant to §853-1 and conditioned deferral upon defendant's submitting to counseling according to schedule and not committing any subsequent offenses, family court violated §853-4(2), where defendant was charged with abuse of family and household members. 10 H. App. 148, 861 P.2d 759 (1993).

The fact that defendant was a "family or household member" for purposes of this section did not satisfy §571-14(1)'s subject matter jurisdiction factual criteria because a "family or household member" is not by that fact "the child's parent or guardian or ... any other person having the child's legal or physical custody". 77 H. 260 (App.), 883 P.2d 682 (1994).

In subsection (1), to "physically abuse" someone means to maltreat in such a manner as to cause injury, hurt, or damage to that person's body. 79 H. 413 (App.), 903 P.2d 718 (1995).

As defendant's striking of husband did actually cause harm sought to be prevented by this section, no abuse of discretion where trial court holds that infraction not too trivial to warrant the condemnation of conviction under §702-236. 79 H. 419 (App.), 903 P.2d 723 (1995).

Insufficient evidence to convict under this section where evidence only showed that victim was injured and defendant's statement of wanting to apologize was not necessarily for the violative conduct. 80 H. 469 (App.), 911 P.2d 104 (1996).

Alleged abuse or harm inflicted less than one day earlier was "recent" under this section (1992). 82 H. 381 (App.), 922 P.2d 994 (1996).

Complainant's out-of-court statements not hearsay under HRE rule 801 where offered by State not for their truth, but to show that police had reasonable grounds under this section to issue warning citation which defendant subsequently violated. 82 H. 381 (App.), 922 P.2d 994 (1996).

"Reasonable grounds" standard in subsection (4) not unconstitutionally vague where standard is an objective standard requiring a trial court to independently assess facts and circumstances which responding officers had before them in determining to issue warning citations. 82 H. 381 (App.), 922 P.2d 994 (1996).

Subsection (4) not unconstitutionally overbroad as issuance of warning citation must be based on objective facts and circumstances, other than merely a complainant's claim, which

would lead a reasonable police officer to believe recent physical abuse was inflicted on family or household member. 82 H. 381 (App.), 922 P.2d 994 (1996).

An uncorroborated prior inconsistent statement of a family or household member offered under HRE rule 613 and HRE rule 802.1 as substantive evidence of the facts stated therein may be sufficient, if believed, to establish physical abuse and the manner in which such abuse was inflicted in a prosecution for physical abuse of a family or household member under this section. 84 H. 253 (App.), 933 P.2d 90 (1997).

Where defendant lived with victim at victim's residence "probably three to four nights a week", defendant and victim were "persons jointly residing or formerly residing in the same dwelling unit". 85 H. 512 (App.), 946 P.2d 620 (1997).

Legislature intended that a written warning citation be given to a person prior to person being charged with violating this section; trial court's failure to instruct the jury that the State was required to prove beyond a reasonable doubt that the officer issued a written warning citation to defendant prior to defendant's arrest was therefore prejudicially erroneous. 96 H. 42 (App.), 25 P.3d 817 (2001).

Where there was no substantial evidence that defendant received the written warning citation as required by subsection (4) prior to defendant's arrest for violation of the warning citation, conviction reversed. 96 H. 42 (App.), 25 P.3d 817 (2001).

There was insufficient evidence to show that the police had reasonable grounds to believe that there was physical abuse or harm inflicted by defendant on complainant where complainant testified that there was "pushing and shoving between her and the defendant". 106 H. 381 (App.), 105 P.3d 258 (2004).

Discussed: 474 F.3d 561 (2006).

Family court failed to ensure that defendant's waiver of defendant's right to a jury trial was voluntary, where defendant failed to sign defendant's initials next to the paragraph addressing voluntariness on the written waiver form and none of the family court's questions were directed towards determining the voluntariness of defendant's waiver. 132 H. 1, 319 P.3d 1009 (2014).

An alleged two-year period of domestic abuse can never be charged as a continuous conduct offense. 132 H. 436, 323 P.3d 80 (2014).

" **§709-907 REPEALED.** L 1983, c 248, §2.

" **§709-908 REPEALED.** L 2016, c 231, §45.

Cross References

For present provision, see §712-1258.