

JAN 18 2019

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# A BILL FOR AN ACT

RELATING TO FAMILIES.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The legislature finds that individuals with  
2 disabilities face certain preconceived biases and attitudes in  
3 family and dependency law proceedings where custody and  
4 visitation are at stake. As reported by the National Council on  
5 Disability in its 2012 report "Rocking the Cradle: Ensuring the  
6 Rights of Parents with Disabilities and Their Children", parents  
7 with disabilities are more likely to be referred to child  
8 welfare services and then have their children removed and  
9 parental rights severed than parents without disabilities.

10           The legislature further finds that a number of states have  
11 amended their child custody laws to address some of the barriers  
12 experienced by parents with disabilities. Additionally, in 2015  
13 the United States Department of Justice and the United States  
14 Department of Health and Human Services issued technical  
15 assistance guidance clarifying that children should not be  
16 removed from their parents simply because a parent has a  
17 disability.



1           The purpose of this Act is to protect the best interests of  
2 children parented by individuals who have a disability by  
3 establishing procedural safeguards.

4           SECTION 2. Section 571-46, Hawaii Revised Statutes, is  
5 amended by amending subsection (a) to read as follows:

6           "(a) In actions for divorce, separation, annulment,  
7 separate maintenance, or any other proceeding where there is at  
8 issue a dispute as to the custody of a minor child, the court,  
9 during the pendency of the action, at the final hearing, or any  
10 time during the minority of the child, may make an order for the  
11 custody of the minor child as may seem necessary or proper. In  
12 awarding the custody, the court shall be guided by the following  
13 standards, considerations, and procedures:

14           (1) Custody should be awarded to either parent or to both  
15 parents according to the best interests of the child,  
16 and the court also may consider frequent, continuing,  
17 and meaningful contact of each parent with the child  
18 unless the court finds that a parent is unable to act  
19 in the best interest of the child;

20           (2) Custody may be awarded to persons other than the  
21 father or mother whenever the award serves the best



1 interest of the child. Any person who has had de  
2 facto custody of the child in a stable and wholesome  
3 home and is a fit and proper person shall be entitled  
4 prima facie to an award of custody;

5 (3) If a child is of sufficient age and capacity to  
6 reason, so as to form an intelligent preference, the  
7 child's wishes as to custody shall be considered and  
8 be given due weight by the court;

9 (4) Whenever good cause appears therefor, the court may  
10 require an investigation and report concerning the  
11 care, welfare, and custody of any minor child of the  
12 parties. When so directed by the court, investigators  
13 or professional personnel attached to or assisting the  
14 court, hereinafter referred to as child custody  
15 evaluators, shall make investigations and reports that  
16 shall be made available to all interested parties and  
17 counsel before hearing, and the reports may be  
18 received in evidence if no objection is made and, if  
19 objection is made, may be received in evidence;  
20 provided the person or persons responsible for the  
21 report are available for cross-examination as to any



1 matter that has been investigated; and provided  
2 further that the court shall define, in accordance  
3 with section 571-46.4, the requirements to be a court-  
4 appointed child custody evaluator, the standards of  
5 practice, ethics, policies, and procedures required of  
6 court-appointed child custody evaluators in the  
7 performance of their duties for all courts, and the  
8 powers of the courts over child custody evaluators to  
9 effectuate the best interests of a child in a  
10 contested custody dispute pursuant to this section.  
11 Where there is no child custody evaluator available  
12 that meets the requirements and standards, or any  
13 child custody evaluator to serve indigent parties, the  
14 court may appoint a person otherwise willing and  
15 available in accordance with section 571-46.4;

16 (5) The court may hear the testimony of any person or  
17 expert, produced by any party or upon the court's own  
18 motion, whose skill, insight, knowledge, or experience  
19 is such that the person's or expert's testimony is  
20 relevant to a just and reasonable determination of  
21 what is for the best physical, mental, moral, and



1 spiritual well-being of the child whose custody is at  
2 issue;

3 (6) Any custody award shall be subject to modification or  
4 change whenever the best interests of the child  
5 require or justify the modification or change and,  
6 wherever practicable, the same person who made the  
7 original order shall hear the motion or petition for  
8 modification of the prior award;

9 (7) Reasonable visitation rights shall be awarded to  
10 parents, grandparents, siblings, and any person  
11 interested in the welfare of the child in the  
12 discretion of the court, unless it is shown that  
13 rights of visitation are detrimental to the best  
14 interests of the child;

15 (8) The court may appoint a guardian ad litem to represent  
16 the interests of the child and may assess the  
17 reasonable fees and expenses of the guardian ad litem  
18 as costs of the action, payable in whole or in part by  
19 either or both parties as the circumstances may  
20 justify;



1           (9) In every proceeding where there is at issue a dispute  
2           as to the custody of a child, a determination by the  
3           court that family violence has been committed by a  
4           parent raises a rebuttable presumption that it is  
5           detrimental to the child and not in the best interest  
6           of the child to be placed in sole custody, joint legal  
7           custody, or joint physical custody with the  
8           perpetrator of family violence. In addition to other  
9           factors that a court shall consider in a proceeding in  
10          which the custody of a child or visitation by a parent  
11          is at issue, and in which the court has made a finding  
12          of family violence by a parent:

13           (A) The court shall consider as the primary factor  
14           the safety and well-being of the child and of the  
15           parent who is the victim of family violence;

16           (B) The court shall consider the perpetrator's  
17           history of causing physical harm, bodily injury,  
18           or assault or causing reasonable fear of physical  
19           harm, bodily injury, or assault to another  
20           person; and



- 1           (C) If a parent is absent or relocates because of an
- 2           act of family violence by the other parent, the
- 3           absence or relocation shall not be a factor that
- 4           weighs against the parent in determining custody
- 5           or visitation;
  
- 6       (10) A court may award visitation to a parent who has
- 7           committed family violence only if the court finds that
- 8           adequate provision can be made for the physical safety
- 9           and psychological well-being of the child and for the
- 10          safety of the parent who is a victim of family
- 11          violence;
  
- 12       (11) In a visitation order, a court may:
  
- 13           (A) Order an exchange of a child to occur in a
- 14           protected setting;
  
- 15           (B) Order visitation supervised by another person or
- 16           agency;
  
- 17           (C) Order the perpetrator of family violence to
- 18           attend and complete, to the satisfaction of the
- 19           court, a program of intervention for perpetrators
- 20           or other designated counseling as a condition of
- 21           the visitation;



- 1 (D) Order the perpetrator of family violence to
- 2 abstain from possession or consumption of alcohol
- 3 or controlled substances during the visitation
- 4 and for twenty-four hours preceding the
- 5 visitation;
- 6 (E) Order the perpetrator of family violence to pay a
- 7 fee to defray the costs of supervised visitation;
- 8 (F) Prohibit overnight visitation;
- 9 (G) Require a bond from the perpetrator of family
- 10 violence for the return and safety of the child.
- 11 In determining the amount of the bond, the court
- 12 shall consider the financial circumstances of the
- 13 perpetrator of family violence;
- 14 (H) Impose any other condition that is deemed
- 15 necessary to provide for the safety of the child,
- 16 the victim of family violence, or other family or
- 17 household member; and
- 18 (I) Order the address of the child and the victim to
- 19 be kept confidential;
- 20 (12) The court may refer but shall not order an adult who
- 21 is a victim of family violence to attend, either





1 individually or with the perpetrator of the family  
2 violence, counseling relating to the victim's status  
3 or behavior as a victim as a condition of receiving  
4 custody of a child or as a condition of visitation;

5 (13) If a court allows a family or household member to  
6 supervise visitation, the court shall establish  
7 conditions to be followed during visitation;

8 (14) A supervised visitation center shall provide a secure  
9 setting and specialized procedures for supervised  
10 visitation and the transfer of children for visitation  
11 and supervision by a person trained in security and  
12 the avoidance of family violence;

13 (15) The court may include in visitation awarded pursuant  
14 to this section visitation by electronic communication  
15 provided that the court shall additionally consider  
16 the potential for abuse or misuse of the electronic  
17 communication, including the equipment used for the  
18 communication, by the person seeking visitation or by  
19 persons who may be present during the visitation or  
20 have access to the communication or equipment; whether  
21 the person seeking visitation has previously violated



1 a temporary restraining order or protective order; and  
2 whether adequate provision can be made for the  
3 physical safety and psychological well-being of the  
4 child and for the safety of the custodial parent;

5 (16) The court may set conditions for visitation by  
6 electronic communication under paragraph (15),  
7 including visitation supervised by another person or  
8 occurring in a protected setting. Visitation by  
9 electronic communication shall not be used to:

10 (A) Replace or substitute an award of custody or  
11 physical visitation except where:

12 (i) Circumstances exist that make a parent  
13 seeking visitation unable to participate in  
14 physical visitation, including military  
15 deployment; or

16 (ii) Physical visitation may subject the child to  
17 physical or extreme psychological harm; or

18 (B) Justify or support the relocation of a custodial  
19 parent; [and]

20 (17) Notwithstanding any provision to the contrary, no  
21 natural parent shall be granted custody of or



1           visitation with a child if the natural parent has been  
2           convicted in a court of competent jurisdiction in any  
3           state of rape or sexual assault and the child was  
4           conceived as a result of that offense; provided that:

5           (A) A denial of custody or visitation under this  
6           paragraph shall not affect the obligation of the  
7           convicted natural parent to support the child;

8           (B) The court may order the convicted natural parent  
9           to pay child support;

10          (C) This paragraph shall not apply if subsequent to  
11          the date of conviction, the convicted natural  
12          parent and custodial natural parent cohabituate  
13          and establish a mutual custodial environment for  
14          the child; and

15          (D) A custodial natural parent may petition the court  
16          to grant the convicted natural parent custody and  
17          visitation denied pursuant to this paragraph, and  
18          upon such petition the court may grant custody  
19          and visitation to the convicted natural parent  
20          where it is in the best interest of the child[-];

21          and



1        (18) Custody shall not be determined, in and of itself, by  
2        a disability of a parent unless the proposed custodial  
3        arrangement is not in the best interest of the child."

4        SECTION 3. Section 587A-7, Hawaii Revised Statutes, is  
5 amended to read as follows:

6        "[+]§587A-7[+] **Safe family home factors.** (a) The  
7 following factors shall be fully considered when determining  
8 whether a child's family is willing and able to provide the  
9 child with a safe family home:

10        (1) Facts relating to the child's current situation, which  
11 shall include:

12        (A) The child's age, vulnerability, and special needs  
13        that affect the child's attachment, growth, and  
14        development;

15        (B) The child's developmental, psychological,  
16        medical, and dental health status and needs,  
17        including the names of assessment and treatment  
18        providers;

19        (C) The child's peer and family relationships and  
20        bonding abilities;



- 1 (D) The child's educational status and setting, and
- 2 the department's efforts to maintain educational
- 3 stability for the child in out-of-home placement;
- 4 (E) The child's living situation;
- 5 (F) The child's fear of being in the family home;
- 6 (G) The impact of out-of-home placement on the child;
- 7 (H) Services provided to the child and family; and
- 8 (I) The department's efforts to maintain connections
- 9 between the child and the child's siblings, if
- 10 they are living in different homes;
- 11 (2) The initial and any subsequent reports of harm and
- 12 threatened harm to the child;
- 13 (3) Dates and reasons for the child's out-of-home
- 14 placement; description, appropriateness, and location
- 15 of the placement; and who has placement
- 16 responsibility;
- 17 (4) Facts regarding the alleged perpetrators of harm to
- 18 the child, the child's parents, and other family
- 19 members who are parties to the court proceedings,
- 20 which facts shall include:
- 21 (A) Birthplace and family of origin;



- 1 (B) Manner in which the alleged perpetrator of harm
- 2 was parented;
- 3 (C) Marital and relationship history; and
- 4 (D) Prior involvement in services;
- 5 (5) Results of psychiatric, psychological, or
- 6 developmental evaluations of the child, the alleged
- 7 perpetrators, and other family members who are
- 8 parties;
- 9 (6) Whether there is a history of abusive or assaultive
- 10 conduct by the child's family members and others who
- 11 have access to the family home;
- 12 (7) Whether there is a history of substance abuse by the
- 13 child's family or others who have access to the family
- 14 home;
- 15 (8) Whether any alleged perpetrator has completed services
- 16 in relation to any history identified in paragraphs
- 17 (6) and (7), and acknowledged and accepted
- 18 responsibility for the harm to the child;
- 19 (9) Whether any non-perpetrator who resides in the family
- 20 home has demonstrated an ability to protect the child



- 1 from further harm and to ensure that any current  
2 protective orders are enforced;
- 3 (10) Whether there is a support system available to the  
4 child's family, including adoptive and hanai  
5 relatives, friends, and faith-based or other community  
6 networks;
- 7 (11) Attempts to locate and involve extended family,  
8 friends, and faith-based or other community networks;
- 9 (12) Whether the child's family has demonstrated an  
10 understanding of and involvement in services that have  
11 been recommended by the department or court-ordered as  
12 necessary to provide a safe family home for the child;
- 13 (13) Whether the child's family has resolved identified  
14 safety issues in the family home within a reasonable  
15 period of time; and
- 16 (14) The department's assessment, which shall include the  
17 demonstrated ability of the child's family to provide  
18 a safe family home for the child, and recommendations.
- 19 (b) The court shall consider the likelihood that the  
20 current situation presented in the safe family home factors set



1 forth in subsection (a) will continue in the reasonably  
2 foreseeable future.

3 (c) Custody shall not be determined, in and of itself, by  
4 a disability of a parent unless the proposed custodial  
5 arrangement is not in the best interest of the child."

6 SECTION 4. This Act does not affect rights and duties that  
7 matured, penalties that were incurred, and proceedings that were  
8 begun before its effective date.

9 SECTION 5. Statutory material to be repealed is bracketed  
10 and stricken. New statutory material is underscored.

11 SECTION 6. This Act shall take effect upon its approval.

12

INTRODUCED BY:

Karl Rhoads  
Paul E. Pfeiffer  
Breene Hunt





# S.B. NO. 333

**Report Title:**

Parental Disability; Child Custody Determination; Deaf and Blind Task Force

**Description:**

Prohibits child custody determinations from being based solely on a disability of a parent.

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