



The Judiciary, State of Hawai‘i

Testimony to the Thirty-Second Legislature, 2023 Regular Session

House Committee on Judiciary and Hawaiian Affairs
Senator David A. Tarnas, Chair
Senator Gregg Takayama, Vice Chair

Tuesday, February 7, 2023 at 2:00 p.m.
State Capitol, Conference Room 325 & Videoconference

by
Jessi L.K. Hall
Judge, Family Court of the First Circuit

Bill No. and Title: House Bill 829, Relating to Court-Appointed Attorneys

Purpose: Requires the court to appoint counsel to indigent parents upon the filing of a petition for custody or family supervision and make every effort to do so at the first hearing attended by the parents.

Judiciary's Position:

The Judiciary takes no position on House Bill No. 829, but respectfully offers the following comments:

- 1. The bill requires that the court appoint counsel for indigent parents “[u]pon filing a petition for custody or family supervision[,]” except if “the legal parent knowingly and voluntarily waives the right to appointed counsel on the record.”**

The Judiciary fully recognizes that parents in child abuse and neglect cases are entitled to legal counsel and that parents who cannot afford to hire their own attorneys are entitled to court-appointed counsel. The Judiciary’s main concern with these provisions is primarily one of timing.

It is not possible for the court to apply the proposed exception to the requirement that counsel be appointed upon the filing of a petition -- *i.e.*, when “the legal parent knowingly and



voluntarily waives the right to appointed counsel on the record[.]” -- because the initial hearing takes place two days after the petition is filed. HRS §587A-26 (“When the department...files a [temporary foster custody petition], the court shall conduct a temporary foster custody hearing within two days after the petition is filed, excluding Saturdays, Sundays, and holidays”). Thus, there is no hearing for the waiver to be placed on record until at a minimum of two days after the petition is filed.

2. The bill requires a continuance “if counsel is not appointed at least three days prior to the date of the hearing[.]”

As noted above, the first hearing is held within two days after a petition is filed. The family court would be unable to appoint counsel to a parent three days before the hearing because a case will not yet exist. As such, any continuance request made by counsel will be granted, which would delay these cases, perhaps to the detriment of children and families. This would be in contravention of the purpose of Hawai‘i’s Child Protective Act, set forth in HRS §571-2, which emphasizes prompt and ample protection for children, timely reconciliation with their families where possible, and the provision of timely and appropriate services.

Finally, we note that there have been other iterations of this bill since 2017. The family courts’ greatest concern has been and continues to be protecting the child from further harm caused by delays in the system attributable to ensuring counsel for their parents. So long as the following sentence remains in this or any other iteration, we will be able to accommodate the requirements of the appellate courts and the Legislature. That sentence is found at page 3, lines 13 to 15:

Nothing in this section shall preclude the issuance of court orders required for the immediate safety of the subject child or children.

Thank you for the opportunity to testify in this matter.



February 3, 2023

Re: Testimony in Support of HB 829, Relating to Court-Appointed Attorneys

To Chair Tarnas, Vice Chair Takayama, and members of the Committee on Judiciary & Hawaiian Affairs:

On behalf of the National Coalition for a Civil Right to Counsel (NCCRC), I am pleased to submit this testimony in support of HB 829. This bill is necessary to ensure that the constitutional rights of parents are fully protected. The NCCRC is an association of over 600 individuals in 45 states, including a number in Hawaii, who work to advance the right to counsel in civil cases involving basic human needs. The rights of parents have been recognized as constitutionally fundamental, and the right to counsel is essential to protect these rights.

The statute governing appointment of counsel for parents in child welfare proceedings, Haw. Rev. Stat. § 587A-17(a), currently states, “The court may appoint an attorney to represent a legal parent who is indigent based on court-established guidelines.” However, in *In re T.M.*, 319 P.3d 338 (Haw. 2014), the Supreme Court of Hawai’i held that the Hawaii Constitution’s due process clause requires the appointment of counsel for all parents in abuse/neglect and termination of parental rights proceedings. The *T.M.* decision put Hawai’i in line with the vast majority of other states as to the right to counsel, and ensures that the fundamental, constitutional rights of parents receive the due process protection that they deserve.

Then, in *In re L.I.*, 149 Haw. 118, 482 P.3d 1079 (2021), the Court clarified an unanswered question from *T.M.* by holding that counsel must be appointed for the parents upon filing of a petition and not later, and that petitions for both custody and family supervision trigger the right to appointed counsel.

The statute now needs to be amended for a number of reasons:

First, § 587A-17(a) has not been rewritten since *T.M.*, so it still states a court has discretion as to whether or not to appoint counsel for an indigent parent, rather than it being mandatory. This could lead trial judges unaware of *T.M.* to mistakenly believe they have the discretion to deny the appointment of counsel, or that appointment of counsel does not apply to cases involving family supervision.

Second, § 587A-17(a) says nothing about the timing of appointment. It is therefore necessary to clarify exactly that counsel must be appointed upon filing of a petition, as outlined by *L.I.*

Third, trial courts may not be asking whether parents want counsel or may be improperly

including that parents have waived such their right to counsel. In *In re T.S.*, 353 P.3d 409 (Haw. App. 2015), after a father's retained counsel withdrew, the trial court "questioned whether Father wanted to proceed without an attorney" and said to him, "[I]f you're not comfortable and would like to have an attorney present, then you can let me know." The father then said that he would proceed. From this, the Court of Appeals concluded that "Father was aware of his right to counsel but chose to proceed without counsel." Thus, the Court of Appeals either required the father to request appointed counsel or determined he had waived his right to appointed counsel. Yet *T.M.* does not require a parent to affirmatively request counsel in order for the right to counsel to attach; rather, it states that trial courts "must appoint counsel." And in order to fully protect the vital parental rights at stake, any waiver of appointed counsel must be knowing, voluntary, and on the record. The current version of § 587A-17(a) does not address these things.

HB 829 eliminates the discretionary language in § 587A-17(a), requires the court to inquire whether the parent desires counsel, specifies that counsel must be appointed quickly absent certain extenuating circumstances, and requires a waiver of appointed counsel to be knowing, voluntary, and on the record. Moreover, it addresses the situation where a parent no longer has retained counsel but may qualify for appointed counsel (a fairly common occurrence where a low-income parent is able to secure counsel for a short period but then runs out of resources). These statutory changes are necessary to ensure that the constitutional requirements laid out in *T.M.* and *L.I.* are met and that parents are not deprived of their children without due process.

We thank you for your consideration and hope the bill gains your support.

Sincerely,



John Pollock
Coordinator, NCCRC

HB-829

Submitted on: 2/4/2023 11:51:35 AM

Testimony for JHA on 2/7/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Marilyn Yamamoto	Hawaii Coalition for Child Protective Reform	Support	Written Testimony Only

Comments:

Committee members,

All citizens, including those who qualify for a court-appointed counsel, brought to court by an accusation should be allowed ample consultation prior to an initial hearing.

I strongly **SUPPORT** this bill that not only makes appointed attorneys mandatory but provides adequate time to consult.

Opportunity Youth Action Hawai'i

Committee: House Judiciary & Hawaiian Affairs
Hearing Time: 2:00 p.m., February 7, 2023
Location: State Capitol
Re: HB 829, Relating to Court-Appointed Attorneys

Aloha e Chair Tarnas, Vice Chair Takayama and members of the Committee:

We are writing in **support** of HB 829, Relating to Court-Appointed Attorneys.

This bill requires the court to appoint counsel to indigent parents upon the filing of a petition for custody or family supervision and make every effort to do so at the first hearing attended by the parents.

Our collective, the Opportunity Youth Action Hawai'i (OYAH), works to support young people under age 25 who are disconnected from school and work, referred to as "opportunity youth." This developmental time period is extremely consequential to the individual growth and overall life chances of our children. We believe that this measure is important to ensuring that legal counsel is provided to indigent parents in a timely manner and under appropriate circumstances.

The Opportunity Youth Action Hawai'i hui is a collaboration of organizations and individuals committed to reducing the harmful effects of a punitive incarceration system for youth; promoting equity in the justice system; and improving and increasing resources to address adolescent and young adult mental health needs. We seek to improve the continuity of programs and services for youth and young adults transitioning from minor to adult status; eliminate youth homelessness and housing market discrimination against young adults; and promote and fund more holistic and culturally-informed approaches among public/private agencies serving youth.

Please support HB 829.

HB-829

Submitted on: 2/6/2023 10:27:23 AM

Testimony for JHA on 2/7/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Nonohe Botelho	Hawaii Coalition for Child Protective Reform	Support	Written Testimony Only

Comments:

SUPPORT HB829 regarding Court-appointed attorneys. To include the following.

Upon filing a petition for custody or family supervision, the court [may] shall appoint an attorney to represent a legal parent who is indigent, or was represented by private counsel but is presently indigent and no longer represented by counsel, based on court-established guidelines unless the legal parent knowingly and voluntarily waives the right to appointed counsel on the record. If a legal parent appears without counsel, the court or its designee shall utilize court-established guidelines to inquire as to whether the legal parent is indigent. The court shall provide counsel by the first hearing attended by the legal parent; provided that if counsel does not appear at the hearing, the court shall not enter a ruling or order that would prejudice the legal parent's rights until counsel appears or the legal parent knowingly and voluntarily waives the right to appointed counsel on the record; provided further that if counsel is not appointed at least three days prior to the date of the hearing, the court shall grant a continuance if requested. Nothing in this section shall preclude the issuance of court orders required for the immediate safety of a child or children.

HB-829

Submitted on: 2/5/2023 1:53:20 PM

Testimony for JHA on 2/7/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Will Caron	Individual	Support	Written Testimony Only

Comments:

The Hawai'i Supreme Court held in *In re T.M.*, 131 Hawai'i 419 (2014), that indigent parents are guaranteed the right to court-appointed counsel under the due process clause of the Hawai'i State Constitution in termination of parental rights proceedings. The court also held that the appointment of an attorney is crucial to ensure that parents are provided a fair process in a termination of parental rights proceeding under the Child Protective Act, chapter 587A, Hawai'i Revised Statutes. The failure to timely appoint counsel in these cases is a systemic problem that should be addressed. Please pass HB829.