TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA ʻOIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2023

ON THE FOLLOWING MEASURE:
S.B. NO. 472, RELATING TO FAMILY COURT.

BEFORE THE:
SENATE COMMITTEE ON JUDICIARY

DATE: Friday, February 10, 2023 **TIME:** 9:35 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Ian T. Tsuda, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General provides the following comments.

The purpose of this bill is to require the Family Court to amend the Hawaiʻi Family Court Rules to permit service on a party, who is not a resident of or found within the island or circuit with jurisdiction over the proceeding, to be effectuated by a declaration of the petitioner stating that the petitioner will abide by the Hague Service Convention (Convention) with respect to foreign service of process.

It is not clear from the wording of the bill whether a petitioner's declaration would bind another party, a party who may not have had notice. The Department is concerned that the wording of this bill, which permits service to be "effectuated by a declaration of the petitioner," could be interpreted in a manner that violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and article I, section 5, of the Constitution of the State of Hawaiʻi. The Due Process Clause requires service of process to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Eto v. Muranaka*, 99 Haw. 488, 498, 57 P.3d 413, 423 (2002). Without more, this bill could be interpreted to allow a petitioner's declaration to satisfy the notice requirement of the Due Process Clause as to parties who do not reside or are not found in the island or circuit with jurisdiction, without requiring the petitioner to actually provide notice to the other party. The only requirement for service of process under this bill is a

declaration stating that foreign service of process will be governed by the Convention, which preempts Hawaii's service provisions. *Eto*, 99 Haw. at 494-95, 57 P.3d at 419-20.

To ensure this bill does not run afoul of the Due Process Clause, the Department recommends that section 1 on page 1, lines 1-7, of the bill be revised to read as follows:

> "SECTION 1. The family court shall amend its family court rules to require petitioners to provide a declaration that includes a statement that the petitioner will abide by the terms of the Hague Service Convention, if and when the Convention applies."

The Department respectfully requests that the Committee consider this recommendation.

Thank you for the opportunity to testify.

The Judiciary, State of Hawai'i

Testimony to the Thirty-Second Legislature
2023 Regular Session

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair

Friday, February 10, 2023 at 9:35 a.m.
State Capitol, Conference Room 016 & Videoconference

WRITTEN TESTIMONY ONLY

by
Matthew J. Viola
Senior Judge, Deputy Chief Judge
Family Court of the First Circuit

Bill No. and Title: Senate Bill No. 472, Relating to Family Court.

Purpose: Requires the family court to amend its rules to require that service upon a party who is not a resident of or found within the island or circuit with jurisdiction over the proceeding may be effectuated by a declaration of the petitioner that states that the petitioner shall abide by the terms of the Hague Service Convention with respect to foreign service of process.

Judiciary's Position:

The Judiciary respectfully opposes Senate Bill No. 472 because it is in contravention of Article 6, § 7 of the Hawaii Constitution which provides,

> The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law.[1]

Senate Bill No. 472 is also in contravention of Hawai'i Revised Statutes § 602-11:

[1] *See* Haw. Const. art. VI, § 7

> §602-11 Rules. The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of law. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations.

As described above, the power to promulgate "rules" is held only by the Supreme Court.[2] This bill mandates that Family Court amend rules of court, but the Family Court does not have that authority. In sum, because the legislature does not promulgate court rules, the Judiciary respectfully request the measure be held.

In addition, the judiciary has additional concerns with the measure:

1. It is unclear whether this bill applies to an initial complaint, petition, registration, post-decree motion or other pleading as there are specific and separate rules that govern service of these documents in the Hawai'i Family Court Rules ("HFCR").

2. The language of the bill is overly broad. The Legislature must be concerned about the possible constitutional implications of a person or a party's procedural due process rights to service of notice.

3. If the intent of this bill is to allow petitioners in annulment, divorce and separation proceedings to serve by mail respondents who reside outside of the judicial circuit without requiring Family Court approval, then Hawai'i Revised Statutes §580-3(c) must first be amended. A proposal to amend the HFCR alone will not be sufficient.

4. The requirement of a petitioner to "abide by the terms of the Hague Service Convention with respect to foreign service of process" is vague. Because of the complicated nature of any multi-nation "convention" or "agreement", an individual country or subdivision of the country (such as a state) must approach with great care any treatment of the Convention's terms. Even something that may sound simple may be complicated.

Specifically, the Hague Service Convention (formally known as *The Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*) deals primarily with the expedient transmission of documents in general, and technically does not address or comprise substantive rules relating to the actual service of process.

Of the 195 countries in the world, only 79 countries are "Contracting Parties" to this Convention. Of those 79 countries, 68 have expressed reservations about the Convention. This

[2] *See* Haw. Const. art. VI, § 7.

has resulted in many countries who have varied the Convention's application and many countries who have declared their opposition of specific terms. For example, Japan has filed a declaration of opposition to certain methods of service.

Therefore, the bill's vagueness and ambiguity may cause difficulties for petitioners.

Thank you for the opportunity to testify in this matter.

THOMAS D. FARRELL

Attorney at Law, LLLC. Certified Family Specialist*

Testimony Regarding Senate Bill 472
Relating to Family Court
Committee on Judiciary
Sen. Karl Rhoads, Chair/Sen. Mike Gabbard, Vice Chair
Friday, February 10, 2023 9:35 a.m.

Good morning Chair Rhodes, Vice Chair Gabbard, and members of the committee.

I'm Tom Farrell and I have practiced law in Hawaii for forty-two years, the last twenty-eight of them almost exclusively in Family Court. I am (or at least was the last time I checked) a member of the Permanent Committee on Family Court Rules.

As I submit this, I regret that I may not be able to join you, even by Zoom, due to a pre-existing Family Court hearing. I will try, however.

While I support the original intent of SB 472, I cannot support the bill as presently drafted. The bill states:

> The family court shall amend its family court rules to require that service upon a party who is not a resident of or found within the island or circuit with jurisdiction over the proceeding may be effectuated by a declaration of the petitioner. The declaration shall state that the petitioner shall abide by the terms of the Hague Service Convention with respect to foreign service of process.

There are several problems here.

First, I believe it is a violation of the separation of powers doctrine to tell the Family Court to adopt a specific rule. It is one thing to grant the court the authority to develop rules to implement a particular process or procedure. You could repeal all the statutes governing service of process, if you wished, and delegate rulemaking on that subject to the courts. However, if the legislature wants to prescribe a specific legal procedure or entitlement, it must amend or enact a statute. Then, if there are any Family Court Rules to the contrary, the court must amend its rules to conform.

The relevant statutes here are §§634-23, 24 and 25, HAW. REV. STAT. Section 634-23(2), provides that "[I]f a defendant is unknown or does not reside within the State, and the facts shall appear by affidavit to the satisfaction of the court, it may order that service be made as provided by section 634-24 [service by registered mail] or by publication, as may be appropriate… provided that service by publication shall not be valid unless it is shown to the satisfaction of the court that service cannot be made as provided by section 634-24." Section 634-24, provides that "[P]ersonal service shall be made upon the defendant wherever found…A certified copy of the

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order, the summons and complaint shall be served…" This language about an "order" has led the Family Court to develop a one-page *Ex Parte Motion and Order for Personal Service Without the State* form, which is usually filed with the *Complaint* and is virtually always granted. It is unnecessary paperwork. If the legislature deleted the reference to an "order" in §634-14, then we would no longer have to obtain prior permission from the court to personally serve an out-of-state defendant. We would just do it, and file a *Proof of Service*.

These sections also refer to *affidavits* which are sworn statements made before a Notary Public. However, Rule 10(b), HAW. FAM. CT. RULES, says that "an unsworn declaration made under penalty of law" may be accepted wherever an affidavit would otherwise be required. As an aside, I'm not sure that the Family Court has the authority to change a legislative requirement for an affidavit, but requiring an affidavit seems to add little. And for what it's worth, I always write declarations so that the declarant is swearing under penalty of perjury.

So, if you want to get rid of the requirement for affidavits and replace it with declarations, that's fine, and if you want to drop any requirement for getting an order before serving out of state, that's fine too. I think that's what the drafters intended.

Finally, there should be no reference to the Hague Convention on International Service of Process, because that is a multi-party treaty to which the United States has acceded and a declaration by a litigant that he will comply with the Hague Convention means nothing. A declaration that one will serve is not proof of service. This is unnecessary language. Where the defendant is in a foreign country, it is already a requirement that the plaintiff prove service in compliance with the Hague Convention (or by the issuance of Letters Rogatory if the target nation is has not acceded to the Hague Convention). Moreover, as written, the bill does not discriminate between out of state defendants who are elsewhere in the US as opposed to foreign countries, and on its face would appear to require a declaration of intent to comply with the Hague Convention just to serve someone in California, or even on Maui. I don't think that's what the drafters intended.

Here is a proposed SD1:

> (1) Section Section 634-23(2) is amended to read as follows:
> "[I]f a defendant is unknown or does not reside within the State, ~~and the facts shall appear by affidavit to the satisfaction of the court, it may order that~~ service <u>may</u> be made as provided by section 634-24 [service by registered mail] or by publication, as may be appropriate…"
>
> (2) Section 634-24, is amended to read as follows
> "[P]ersonal service shall be made upon the defendant wherever found…A certified copy of the <u>order,</u> the summons and complaint shall be served…"
>
> (3) Substitute all references to "affidavits" with "declarations."