THE JUDICIARY, STATE OF HAWAII

Testimony to the Twenty-Fifth Legislature, Regular Session of 2009
House Committee on Human Services
The Honorable John M. Mizuno, Chair
The Honorable Tom Brower, Vice Chair

Thursday, February 5, 2009, 8:15 a.m.
State Capitol, Conference Room 329

by
Karen M. Radius
District Family Judge
Family Court, First Circuit

Bill No. and Title: House Bill No. 1094, Relating to Permanency Hearings

Purpose: To amend HRS Chapter 587 to ensure compliance with federal Title IV-E hearing requirements.

Judiciary's Position:

The Judiciary opposes the passage of House Bill No. 1094.

This bill adds yet another hearing to the child protective judicial process set for in H.R.S. Chapter 587. We were informed that the federal representative to the CFSR (Child and Family Services Review) process believes that there is a problem which may lead to the potential loss of federal Title IV-E monies.

We had previously requested written documentation of this perceived problem and the specific concerns and suggestions of the federal representatives. We received some of this information last Friday. Further, although we were advised, verbally, that legislation may be introduced regarding unspecified federal concerns; we were not given the opportunity to provide input until very late in the drafting process, and did not see the final language of this bill until it was introduced.

We are deeply concerned about taking such a major step as amending a statute without a clearer definition of the perceived problem and without true collaboration on a proposed solution

We have not been able to find any Federal legislative changes or any changes in Federal rules and regulations in this area since the last CFSR. In fact, there have not been any significant changes in the Federal statutes regarding permanency hearings since 1997. Therefore, because the perceived problem appears to be long standing, there does not appear to be an urgent reason to force through an amendment right now and bypass collaboration if we are to amend such an important statute.

The current Federal statute is a modified version of a provision of the 1980 P. L. 96-272. Originally, what is now called a "permanency hearing" was called a "Disposition Hearing." The 1997 Adoption and Safe Families Act revisions to that statute changed the name to "Permanency Hearing" and changed the time requirement for the hearing from 18 months to 12 months. A minor change was made in 2006 (see the underlined text in the attachment). There may be new regulations that amplify the provisions of the statute but we are not aware of them and have not been advised otherwise by the Department of Human Services (DHS).

The essential requirements of the Federal statute include:

1. Within 12 months of entry into foster care, a hearing must be held to determine if the plan is to return the child home and if so when.

2. If, at this hearing, it is determined that the plan is not to return the child home, then it must be determined whether the plan will be to have the child adopted, placed in guardianship, or placed in an alternative permanent living arrangement.

There is nothing in the current Hawaii statute that precludes such a process. In fact, the current Hawaii statute can facilitate this process, particularly if all the stakeholders are given a chance to get together to (a) be informed of the perceived problem and, if we agree that there is indeed a problem, we *first* (b) determine whether we can "fix" that problem short of amending the statute and, if we are unable to, (c) take the necessary time to work *together* to determine how to amend the statute. This bill describes a Federal "permanency hearing" requirement that does not require a decision on whether parental rights will be terminated. Instead the case simply has to be given direction, that is, set the direction toward a permanent plan hearing or return the child within 60 days or another selected direction. The current HRS Chapter 587 already gives the court that authority at the review hearing. Even though it does not align perfectly with the Federal statute, most, if not all, Federal requirements are met in the statute or in practice.

The proposed revision to the statute addresses the issue by adding a new hearing – Permanency Hearing – to our existing H.R.S. Chapter 587. There are other possible approaches. Many states have made complete revisions to their statutes by adopting all the terminology of the federal statutes. If the goal is to avoid issues like the one presented, then our state should consider this route. But, this important step must be taken collaboratively.

Ours is not *"the"* perfect statute. We do not take the position that nothing should ever be changed in it. Our position is that, if changes are made, we have to do it collaboratively and only after reviewing how a particular change "fits" within the rest of the entire statute. Prior attempts to make our statute align with the Federal requirements, particularly the revisions of 1998, have unfortunately exacerbated the discrepancies between the Federal and State statute.

The newly proposed "permanency hearing" will cause confusion if it is (as set forth in this bill) merely inserted into the existing statute. By requiring a separate hearing called a "permanency hearing," we would then have the following sequence of court events: →review hearing →permanency hearing →OSC hearing →permanent plan hearing. Each hearing step is likely to produce further delays and having such a sequence would very probably not promote prompt and permanent placement for the child. Furthermore, the proposed bill appears to require specific court findings. Unless there is agreement among the parties, any requirement of findings of fact by a judge will require an evidentiary hearing, that is, a trial. If this were the case, it is unclear which party would have the burden of proof (although, in all likelihood, it would be the DHS). Regardless of who bears the burden of proving the elements required in this bill, the resulting delay would only result in *a direction* being given to the case. It will not truly result in any concrete advances for the child. As a separate matter to consider, any additional trials will, of course, result in delays, not just for the specific case, but also for other cases and other issues.

Another example of the need to take time to consider changes to our state's statute is the bill's language in section b(2) which uses the phrase "determine the safety of the child." Is the intent that this phrase mean the same thing as "a safe family home with the assistance of a service plan," a phrase used throughout the existing statute? A comprehensive review of the statute would answer this specific question but it may also require the working collaborative to answer more global questions such as the basic use of is the Safe Family Home Guidelines (HRS 587-25), a core component of Hawaii's statute, and how it relates (or should relate) to the unrelated risk assessment currently being used by the DHS.

This important work takes time and effort. There is not enough time during this Legislature to perform the needed dispassionate review of the statute in light of whatever the federal concerns are believed to be. The Judiciary and the DHS share a history of close collaboration on policy issues. We propose to continue this tradition by working closely together with the DHS and with other stakeholders to return to the 2010 Legislature either with a

proposed bill or with a report outlining new practices that will work for our state short of amending Chapter 587.

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

42 USCA Section 675

(5)...

(C) with respect to each such child, (i) procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a permanency hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than 12 months after the date the child is considered to have entered foster care (as determined under subparagraph (F)) (and not less frequently than every 12 months thereafter during the continuation of foster care), which hearing shall determine the permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent, placed for adoption and the State will file a petition for termination of parental rights, or referred for legal guardianship, or (in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian) placed in another planned permanent living arrangement, in the case of a child who will not be returned to the parent, the hearing shall consider in-State and out-of-State placement options, and, in the case of a child described in subparagraph (A)(ii), the hearing shall determine whether the out-of-State placement continues to be appropriate and in the best interests of the child, and, in the case of a child who has attained age 16, the services needed to assist the child to make the transition from foster care to independent living; (ii) procedural safeguards shall be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents; and (iii) procedural safeguards shall be applied to assure that in any permanency hearing held with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child; [FN1]

(Aug. 14, 1935, c. 531, Title IV, s 475, as added and amended June 17, 1980, Pub.L. 96-272, Title I, ss 101(a)(1), 102(a)(4), 94 Stat. 510, 514; Apr. 7, 1986, Pub.L. 99-272, Title XII, ss 12305(b)(2), 12307(b), 100 Stat. 293, 296; Oct. 22, 1986, Pub.L. 99-514, Title XVII, s 1711(c)(6), 100 Stat. 2784; Dec. 22, 1987, Pub. L. 100-203, Title IX, s 9133(a), 101 Stat. 1330-314; Nov. 10, 1988, Pub.L. 100-647, Title VIII, s 8104(e), 102 Stat. 3797; Dec. 19, 1989, Pub.L. 101-239, Title VIII, s 8007(a), (b), 103 Stat. 2462; Oct. 31, 1994, Pub.L. 103-432, Title II, ss 206(a), (b), 209(a), (b), 265(c), 108 Stat. 4457, 4459, 4469; Nov. 19, 1997, Pub.L. 105-89, Title I, ss 101(b), 102(2), 103(a), (b), 104, 107, Title III, s 302, 111 Stat. 2117, 2118, 2120, 2121, 2128; July 3, 2006, Pub.L. 109-239, ss 6, 7, 8(a), 11, 12, 120 Stat. 512 to 514; Sept. 28, 2006, Pub.L. 109-288, s 10, 120 Stat. 1255; Oct. 7, 2008, Pub.L. 110-351, Title I, s 101(c)(4), Title II, ss 202, 204(a), 122 Stat. 3952, 3959, 3960.)

[FN1] So in original. The semicolon probably should be a comma.