

January 27, 2010

To: Senator Suzanne Chun Oakland, Chair  
Senator Les Ihara, Jr., Vice Chair  
Committee on Human Services

**LATE**

From: Tom Marzec

Subj: Testimony in **STRONG SUPPORT** of **SB2028** Custody Evaluator Registry

Hearing: Thursday, January 27, 2010; 1:50 p.m.; Room 016, State Capitol

My testimony includes comments based on Judiciary testimony provided for the hearing on the House version of this same bill.

This bill was developed by a working group focused on improvements in family court. As a member of that working group, I urge you to pass this bill in order to create a registry of child custody evaluators and to begin a process for developing standards of practice and certification for child custody evaluators.

Family Court previously kept a list of child custody evaluators and the registry created in this bill would benefit the public and the courts. A previous senior family court judge issued a memo (no longer in effect for other reasons) which required an annual declaration by child custody evaluators not unlike the registry requirements in this bill.

The Board of Family Court Judges is the best suited entity to decide how to handle the requirements of this bill and a subsequent concurrent resolution is intended to create the necessary task force to develop an education/training curriculum for child custody evaluators -- which is the first step towards eventual certification.

The performance of effective custody evaluations is critical to the courts determination of what is in the best interests of the child. This bill does not establish those standards, but does start laying the groundwork to ensure our child custody evaluators meet the requirements to perform effective evaluations.

### **Judiciary testimony re concerns and amendments**

#### **1. Custody Evaluator defn: "excluding social workers employed by the Judiciary"**

Comment: There are no license standards or certification requirements in this bill -- only a requirement to submit an annual form with certain information, for those who perform child custody evaluations. The people who get custody reports from Judiciary social workers should understand the relevant background on those social workers. There is no reason to exclude Judiciary social workers from submitting this form. This is an ongoing issue where the Judiciary desires to exclude its own employees from procedures that apply to others. This is inappropriate, particularly for this bill.

In fact, the Judiciary is tasked to develop standards and certification, and if they desire to exclude Judiciary social workers from those standards and certification -- they can do so. The Judiciary should not require the Legislature to exempt Judiciary social workers when the bill allows the Judiciary to make those decisions themselves.

The definition of child custody evaluators should not change because the bill allows the Judiciary to develop its own standards -- which may include their desired amendment.

## **2. No resources to establish, maintain and monitor this registry**

Comment: Judge Wong's June 2007 memo regarding custody evaluations required an annual declaration to be filed by custody evaluators and the family court kept a list of custody evaluators and their submitted information. This bill simply continues a program initiated and maintained for some time by the family court. Other than certain required information for the registry, the courts have broad discretion in implementing and maintaining this registry -- which is NOT resource intensive.

The Judiciary was given an opportunity to report resource requirement issues in their Child Custody Task Force report to the Legislature for the 2009 session. They did not address these resource issues, despite being specifically asked to do so.

The value of the registry and this bill to parents far outweighs the minor resource requirements. If necessary, amend the bill to add a section that the Judiciary report the resource requirements necessary to implement and maintain this registry -- AFTER the registry is established per this bill. In essence, rather than kill the registry, go forward and establish the registry and allow the Judiciary to more specifically report its resource requirements, to allow for proper evaluation by the Legislature. Killing bills with the generic, undefined "resource" requirements prevents the Legislature from evaluating those resources and establishing budget priorities. Such a generic, undefined "resource" requirements argument usurps the Legislature's ability and discretion to set budget priorities and programs.

## **3. No resources to certify these custody evaluators**

Comment: The bill uses "shall" for:

"The board shall establish child custody evaluation standards" and  
"The board shall recommend, for adoption by the supreme court, rules of court governing procedure and practices in such courts[-], including but not limited to the appointment and certification of child custody evaluators under part ."

The first "shall" is necessary for the court to set custody evaluation standards with respect to process and practice within the courts and is NOT certification. Note, there is no deadline for this, and the courts have broad discretion on how to do this.

The second "shall" is general, i.e. the board has these duties. Also, there is no time frame associated with "appointment and certification" of child custody evaluators, just as there is no deadline for rules of court.

If necessary, amend the bill to add a section that the Judiciary report the resource requirements necessary to meet the requirements of this bill -- AFTER the bill is passed, the registry is established, the associated task force is formed, and the Judiciary can more accurately provide specific information to the Legislature.

#### **4. Registry provisions re experts are inconsistent with HRS Chapter 626**

Comment: Curiously, the specific inconsistency is not described. Actually, there is no inconsistency with statutes, only a required step prior to the trial court using its discretion to qualify a witness as an expert. In other words, a Custody Evaluator or person desiring to be an expert must first file the annual declaration and become part of the registry, prior to being considered by the trial court for qualification as a witness. Past practice for expert qualification is based on case law and does not include such a prerequisite for HRS 571-46 child custody evaluators or experts. The Legislature is not bound to only pass laws that conform to previous case law decisions. This bill requires: "A current child custody evaluator annual declaration on file with the board shall be a prerequisite for a child custody evaluator or expert to be qualified to testify in family court on the issue of custody pursuant to section 571-46."

This prerequisite to the trial court determining if an expert is qualified is sound public policy and the information in the registry will actually allow the court to better determine if such a person should be an expert and allows both parties to have that information.

HRE states:

**Rule 702 Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

Also, the Commentary in this Rule, relating to case law, states:

Noting that the "allowance or disallowance of the testimony of an expert witness is addressed to the sound discretion of the trial court," the court in Smith established two preconditions for the receipt for expert testimony: "first, the subject matter of the inquiry must be of such a character that only persons of skill, education or experience in it are capable for forming a correct judgment as to any facts connected therewith and second, the testimony must be of a nature to aid the jury."

and

Committing the determination of expert qualifications to the discretion of the court is consistent with State v. Torres, 60 H. 271, 277, 589 P.2d 83, 87 (1978), where the court said: [T]he determination of whether or not a witness is qualified as an expert in a particular field is largely within the discretion of the trial judge and, as such, will not be upset absent a clear abuse of discretion.

Therefore, without the Judiciary specifying the actual claimed "inconsistency" in statute, the issue appears to be one of a prerequisite regarding witness qualification as an expert in this one narrow area. Having complete information on a person who wishes to testify as an expert in a child custody case is sound public policy and justifies having that person in the registry prior to the trial court exercising normal discretion to then determine if that person is indeed an expert. Witnesses are required to be disclosed prior to trial and accommodations can be made for filing the annual declaration and being included in the registry if one wishes to attempt qualifications as an expert.

More information from the Judiciary is required to explain their comment and describe the claimed inconsistencies.

Lastly, because this bill does not establish any CE standards, amendments intended to establish any standards are counter to the intent of the bill and were not addressed by the working group that collaborated on this measure.

Your consideration of these issues is appreciated.



*THE JUDICIARY, STATE OF HAWAII*

**Testimony to the Senate Committee on Human Services**

The Honorable Suzanne Chun Oakland, Chair

The Honorable Les Ihara, Jr., Vice Chair

Thursday, January 28, 2010, 1:50 p.m.

State Capitol, Conference Room 325

by

Thomas R. Keller

Administrative Director of the Courts

**WRITTEN TESTIMONY ONLY**

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**Bill No. and Title:** Senate Bill No. 2028, Relating to Family Court

**Purpose:** Establishes a program in the family court for the registration of child custody evaluators. Allows board of family court judges to adopt certification of child custody evaluators.

**Judiciary's Position:**

The Judiciary respectfully submits the following comments on this bill.

First, the Family Courts employ social workers who are trained to provide custody evaluator services to indigent parties. The Family Court of the First Circuit has a specialized unit. HRS Section 467E-6(2) exempts social workers employed by a federal, state or county government agency in a social work position from the licensing requirements. The Judiciary wishes to clarify that these Judiciary employees would be exempt from the policies in this bill and that such a provision would be included in the definition of "child custody evaluator."

Accordingly, we respectfully suggest the amendments noted below:



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Senate Committee on Human Services  
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(p.2, Section 2, lines 14-17)

“Child custody evaluator” means an investigator or professional, appointed by the court, to investigate and report concerning the care, welfare, and custody of any minor child of the parties under section 571-46(a)(4), excluding social workers employed by the Judiciary.

Second, given the current budget situation, the Judiciary has no resources to establish, maintain and monitor this registry, and to certify these custody evaluators. Those jurisdictions which are known to us to provide oversight of private custody evaluators have staff and resources to provide this service. The Judiciary does not have these resources.

Third, pursuant to Act 149 of 2008, the Judiciary convened and obtained the assistance of a child custody advisory task force to review and make findings and recommendations relating to court-appointed child custody evaluators. The task force concluded that there was not enough of a “demand” for this particular sub-specialty curriculum or course of study leading to certification or degree, except as was discussed by the Association of Marriage and Family Therapists. Also, the Task Force determined that there were not enough practitioners performing these services to warrant findings and recommendations (including resource needs) regarding the minimal requirements for custody evaluators.

Last, the provisions of this bill, which prohibit expert testimony unless the “expert” is included in this registry, are inconsistent with the Hawai`i Rules of Evidence (HRS Chapter 626).

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

## **chunOakland5 - Michael**

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**From:** Tom Marzec [adamtm@lava.net]  
**Sent:** Thursday, January 28, 2010 8:17 AM  
**To:** HMS Testimony  
**Subject:** Testimony in STRONG SUPPORT of SB2028 Custody Evaluator Registry, 27Jan10

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