

SB2028



The Judiciary, State of Hawaii

Testimony to the Senate Committee on Judiciary and Government Operations

The Honorable Brian T. Taniguchi, Chair
The Honorable Dwight Y. Takamine, Vice Chair

Tuesday, February 23, 2010, 10:00 a.m.
State Capitol, Conference Room 016

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

WRITTEN TESTIMONY

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 Senate Bill No. 2028.

First, the Judiciary is in strong support of the amendment in H.D.1 of House Bill No. 1936, in its exemption of social workers employed by the Judiciary from the requirements of this bill, as requested by our original written testimony, presented to both the Senate and the House. 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. In addition to the licensing consideration, our social workers have been carefully trained in the areas of custody evaluation, domestic violence, child development, and related areas. Our social workers are highly specialized in this area. They are unlike the various private professionals for whom custody



Senate Bill No.2028, Relating to Family Court
Senate Committee on Judiciary and Government Operations
Tuesday, February 23, 2010
Page 2

evaluations are just part of their general practice. Therefore, the Judiciary proposes a similar amendment to this bill, as follows (p.4, line 2):

(d) No person shall be appointed by the court as a child custody evaluator or shall otherwise testify as an expert on behalf of a party to the proceedings to render an opinion on awarding custody pursuant to section 571-46, unless the child custody evaluator or expert is included in the child custody evaluator registry [.] or is a social worker employed by the judiciary.

Second, given the current budget situation, the Judiciary has no resources to establish, maintain and monitor this registry.

Third, the Judiciary has no resources to certify these custody evaluators. 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



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February 23, 2010

Re: SB 2028, Relating to Family Court

Aloha Chair Taniguchi, Vice Chair Takamine and members of the Senate Committee on Judiciary and Government Operations.

On behalf of the Hawaii Psychological Association, thank you for the opportunity to testify in support of SB 2028, relating to family court.

SB 2028 establishes a program in the family court for the registration of child custody evaluators. This measure would allow board of family court judges to adopt a certification program for child custody evaluators. We respectfully ask that you pass SB 2028.

The Hawaii Psychological Association is a non-profit organization representing more than 400 Hawaii psychologists and psychology students in Hawaii. The mission of the Hawaii Psychological Association is to enhance the quality of life for the people of Hawaii by encouraging, integrating, applying, and communicating the contributions of Psychology in all its branches.

The Hawaii Psychological Association seeks to strengthen public relations, advocate for a psychologically healthy community, develop solutions for mental health care, be responsive to the multiple cultures in Hawaii, promote the highest standards of professional ethics, and to diffuse psychological knowledge through meetings, conventions and publications.



Ann S. Yabusaki, Ph.D., MFT
Psychologist, California PSY14443
Marriage and Family Therapist, Hawaii MFT-87

Testimony by:
Ann S. Yabusaki, Ph.D., MFT
SB2028 Custody Evaluator Register
Tuesday, February 23, 2010
Room 016 – 10 a.m.
Position: Support

Chair Taniguchi and Senate Committee on Judiciary and Government Operations:

I am a family therapist who has served clients involved with child custody battles. It is heartbreaking to see children and families suffer when custody appears to be inappropriately awarded or repeatedly contested at the sacrifice of the children. I strongly support the creation of a program in the family court for the registration of child custody evaluators in which family court judges would adopt certification standards for child custody evaluators.

The value to children and families of a registry with standards for custody evaluators far outweighs the cost of creating and overseeing it.

Sincerely,

Ann S. Yabusaki, Ph.D., MFT

Hawaii Association for Marriage and Family Therapy



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HAMFT networks, educates, and advocates for the enrichment of our members, the advancement of our profession, and the health of our community.

Testimony by:

Paul D. Kai Swigart, Ph.D., M.F.T
SB2028, Relating to Family Court

Senate Committee on Judiciary and Government Operations Hearing

Tues. Feb. 23, 2010

Conference Room 016– 10:00 am

Position: Support

Honorable Chair Taniguchi, and Members of the Committee:

My name is Paul D. Kai Swigart, Ph.D., M.F.T., and I am President of the Hawaii Association for Marriage and Family Therapy (HAMFT), a division of the American Association for Marriage and Family Therapy (AAMFT). HAMFT represents 208 licensed Marriage and Family Therapists (MFTs); and a total of 315 members in the State of Hawaii. MFTs work in a variety of agencies and settings within our state including, but not limited to: the Department of Education in the Individuals with Disabilities Education Act; the Department of Health; active duty military and their families; U.S. Department of Transportation; rural areas; families and communities; hospital and clinic systems; substance abuse treatment centers; and mental health practices.

Marriage and Family Therapy is a science driven, research based profession comprised of mental health practitioners trained and licensed to independently diagnose and treat mental health and substance abuse problems. MFTs specialize in treating mental disorders within the context of relationships. MFTs work with the individual, couple, or family to change behavioral patterns so that problems can be resolved. MFTs are the most qualified, and ideally suited professionals for providing clinical, mediation, and educational services pursuant to child custody evaluation.

The Federal government has designated marriage and family therapy as a “core mental health profession” along with psychiatry, psychology, social work, and psychiatric

nursing. MFTs provide the full range of mental health and substance abuse services including, but not limited to: 1. individual psychotherapy; 2. relationship counseling; 3. family therapy; 4. work-related consultation; 5. substance abuse professional evaluations; 6. child custody evaluation; 7. school counseling; and more. MFTs are the only professionals required to be trained in family therapy.

We strongly support this bill that will establish standards of practice pertinent to custody awards and criteria regarding those appointed to evaluate child custody. Importantly, it mandates professional licensure for Custody Evaluators (CE's). To protect the public, it is important to establish criteria for custody determinations as well as professional qualifications for those who perform these evaluations.

Custody determinations have been recently commented upon by the Hawaii Intermediate Court of Appeals (ICA). The ICA's *Memorandum Opinion* discusses custody determinations by the family court: "As evidenced by this case, custody disputes are particularly susceptible to dueling allegations of misconduct and abuse. Absent a true emergency, ex- parte custody proceedings can provide fertile ground for a misuse of the judicial process."

Thank you for the opportunity to submit testimony.

Respectfully submitted,



Paul D. Kai Swigart, Ph.D., M.F.T., C.E.A.P., S.A.P., C.A.I.,
HAMFT President

Testimony via email to: JGOTestimony@Capitol.hawaii.gov

THE SENATE
THE TWENTY-FIFTH LEGISLATURE
REGULAR SESSION OF 2010
COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

Senator Brian T. Taniguchi, Chair / Senator Dwight Y. Takamine, Vice Chair

AMENDED NOTICE OF DECISION MAKING

DATE: 02/23/10 / TIME: 10:00am / PLACE: Conference Room 016, State Capitol

SB 2028 RELATING TO FAMILY COURT: 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.

TESTIMONY FROM: Melinda (Chee) Franklin / Affiliation: Angel Group, Hawaii Children's Rights Council / email: cheem@umich.edu



I write in STRONG SUPPORT OF SB 2028 and hereto address the "Concerns" expressed by the Judiciary

SB 2028 establishes standards of practice pertinent to custody awards and criteria regarding those appointed to evaluate child custody. Importantly, it mandates professional licensure for Custody Evaluators (CE's). To protect the public, it is important to establish criteria for custody determinations as well as professional qualifications for those who perform these evaluations.

Custody determinations have been recently commented upon by the Hawaii Intermediate Court of Appeals (ICA). On June 19, 2009, as a Pro Se party, I won my Appeal # 28843 in the ICA. The ICA's *Memorandum Opinion* discusses custody

determinations by the family court: **“As evidenced by this case, custody disputes are particularly susceptible to dueling allegations of misconduct and abuse. Absent a true emergency, ex- parte custody proceedings can provide fertile ground for a misuse of the judicial process.”**

Background Information: I am a mother who has been involved in protracted custody litigation. By profession, I am a licensed nurse practitioner. I care for patients with cancer. I have been recognized by my alma mater, the University of Michigan, for humanitarianism and scholarly excellence. Following my divorce from my ex-husband, Kevin Chee (a Honolulu attorney with Chee and Markham), our custody arrangement was Joint physical and legal. After our divorce our 4 children resided primarily with me on the mainland. Their father had liberal visitation. After 4 years, on the final day of his summer visitation, Kevin Chee did not send our children back to their primary residence with me on the mainland. He then maneuvered an Ex-Parte change of custody to Sole for himself, and attached a Temporary Restraining Order (TRO) blocking me from all contact with our 4 children. The TRO persisted for 7 years! Ongoing custody litigation left me with insurmountable debt. In 2009, as a Pro-Se litigant, I finally won my Appeal # 28843 in the Hawai'i ICA. In their *Memorandum Opinion* pertinent to my Appeal, the ICA states: ***“Before the children’s relocation to Hawai’i pursuant to the 1999 stipulated custody order, Mother had been the primary caretaker for the children. Even after the children’s relocation, Mother enjoyed liberal time-sharing rights. By prohibiting all contact between Mother and her children, the November 2000 Ex Parte Orders effected a draconian change in the custodial arrangements. Yet, the family court permitted the November 2000 Ex Parte Orders to stand without ruling on the validity of the allegations on which the orders were based or the continued necessity for the orders. We further hold that, if a family court determines that an***

emergency situation requires an immediate change of custody, then the ex parte order changing custody must include notice of: (1) a post-deprivation hearing, promptly set; and (2) the grounds for this extraordinary measure. A parent deprived of custody in this manner must be given a prompt and meaningful opportunity to address the allegations supporting the immediate change of custody.

Here, with respect to the November, 2000 Ex-parte Orders, the family court did not comply with requirements set forth in Doe. The family court did not hold a prompt post-deprivation hearing to address the allegations supporting the change in custody over the children from joint to father's sole custody or the restraining orders prohibiting mother from any contact with the children. Indeed, despite Father's only seeking *temporary* sole custody of the children, and (presumably) *temporary* restraining orders prohibiting contact by Mother, the November 2000 Ex Parte Orders remained in effect for years without any substantive review by the family court. Thus the November 2000 Ex Parte Orders cannot stand."

I strongly support SB 2028 because it establishes standards of practice for CE's. In Chee v Chee, a change of custody occurred without a Custody Evaluation – or hearing!

I address **Judiciary testimony Concerns** as follows:

1. Judiciary testimony concern: adding "*excluding social workers employed by the Judiciary*" to the definition of child custody evaluator

Comment: There are no license standards or certification requirements -- 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 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 be given a pass, by requiring the Legislature to exempt Judiciary social workers when the bill allows the Judiciary to make those decisions themselves.

Recommendation: Do not change the definition of child custody evaluators. Allow the Judiciary to develop its own standards, which may include their desired amendment.

2. Judiciary testimony concern: *Registry Resources*

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 resources, despite being specifically asked to do so.**

Recommendation: 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.

3. Judiciary testimony concern: *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 .

Recommendation: 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.

4. **Judiciary testimony concern:** *Registry, expert testimony and HRS Chapter 626 inconsistency*

Comment: Curiously, the specific inconsistency is not described. **Actually, there is no inconsistency,** only a limiting of discretion for a trial court to qualify a witness as an expert. The 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 is sound public policy and the information in the registry will allow the court to better determine if such a person should be an expert and allows both parties to have that information. **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 as a prerequisite to a judge then determining if that person is indeed an expert.**

Recommendation: Leave the bill as is and ask the Judiciary to explain their comment and describe the claimed inconsistencies. Unless there are standards of practice pertinent to custody awards and criteria regarding those appointed to evaluate child custody, the injustice my children and I have suffered will continue.

Respectfully submitted,

Melinda (Chee) Franklin, Member, Angel Group, and Hawai'i Childrens Rights Council

"Injustice anywhere is a threat to justice everywhere"
Dr. Martin Luther King Jr.

From: Tom Marzec [adamtm@lava.net]
Sent: Monday, February 22, 2010 12:15 PM
To: JGO Testimony
Subject: Testimony in STRONG SUPPORT of SB2028 Custody Evaluator Registry, 23Feb10 10:00 am, Room 016

February 23, 2010

To: Senator Brian T. Taniguchi, Chair
Senator Dwight Y. Takamine, Vice Chair
Committee on Judiciary and Government Operations
Via email to: JGOTestimony@Capitol.hawaii.gov

From: Tom Marzec

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

Hearing: Tuesday, February 23, 2010; 10:00 a.m.; Room 016, State Capitol

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 as is, 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. My testimony includes comments in response to Judiciary testimony provided for the hearing on the House version of this same bill. First though, thank you for scheduling this hearing!

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. This bill complements SCR7/SR1 which creates a Family Court Custody Evaluator Working Group, tasked to "develop and recommend child custody evaluation standards and procedures and a training curriculum and course work". The Custody Evaluator registry created in this bill provides the baseline data for the SCR7/SR1 working group to develop a training curriculum and course work.

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 to ensure consistent standards apply to all circuits.

Response to Judiciary testimony concerns and proposed amendment

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 parties 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 as they are not restricted in any way from performing their duties. In fact, their training and education background is an important component to be considered when the working group develops a training curriculum and course work for custody evaluators, which would benefit Judiciary social workers. Excluding Judiciary social workers performing custody evaluations from a registry is particularly inappropriate 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, via the definition, when the bill allows the Judiciary to make the applicability of standards decisions themselves. Therefore, the definition of child custody evaluators should not change.

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 (i.e. keeping paper or electronic copies of the forms).

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. 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.

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.

Therefore, no resources are immediately implicated and progress can be accomplished based on available discretionary Judiciary resources.

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 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.

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. 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.

From: Dara Carlin, M.A. [breaking-the-silence@hotmail.com]
Sent: Monday, February 22, 2010 1:21 PM
To: JGO Testimony
Subject: SB2028 to be heard Tuesday, February 23rd at 10:00am in Room 016

TO: Senator Brian Taniguchi, Chair
Senator Dwight takamine, Vice Chair
Judiciary & Government Operations Committee Members

FROM: Dara Carlin, M.A.
Domestic Violence Survivro Advocate
881 Akiu Place
Kailua, HI 96734

DATE: February 23, 2010

RE: Support for SB2028

I stand in support for this measure that seeks to create a Custody Evaluator registry and that would authorize the appropriate training of those who are appointed to such a role.

Respectfully submitted,

Dara Carlin, M.A.
Domestic Violence Survivor Advocate

Hotmail: Trusted email with Microsoft's powerful SPAM protection. [Sign up now.](#)