The Judiciary, State of Hawaii

Testimony to the House Committee on Judiciary
The Honorable Jon Riki Karamatsu, Chair
The Honorable Ken Ito, Vice Chair

Tuesday, March 16, 2010, 2:15 p.m.
State Capitol, Conference Room 325

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

Bill No. and Title: Senate Bill No. 2716, S.D. 2, H.D. 1, Relating to Child Protective Act

Purpose: Establishes child protective provisions in the Hawaii Revised Statutes that are consistent with federal Title IV-E provisions

Judiciary's Position:

This bill is the product of a Task Force (described below) lead by the Judiciary. The Legislature should be aware that certain provisions of this bill are critical to ensure continuing compliance with federal requirements attached to this state's receipt of federal funds. The Task Force, which began work in mid-2009, has continued to work diligently during this current Legislature and has proffered amendments to the original bill during previous committee hearings. The Judiciary took part in these ongoing discussions and drafting amendments, which are best reflected in House Draft 1 of this bill.

While we are proud to be in the Task Force that assisted in drafting this bill, the Judiciary must take no position on this bill because this is a policy decision within the authority of the Legislature. If this bill is passed, the Judiciary will have the responsibility of applying the law. As with all new laws, a party may decide to challenge the legality of all or a portion of the statute, either as written or as applied to a specific fact pattern. Although this bill results from very close collaboration of all Task Force members, any future rulings by the court must be specific to the case and the issues raised and the court cannot be bound by any appearance of predisposition.

Just prior to the 2009 Legislature, the Department of Human Services (DHS), at the insistence of the federal representatives who assist in oversight of Title IV-E funding, proffered a bill seeking limited amendments to HRS Chapter 587. Although the Family Court and the parents' counsel and guardians ad litem were concerned about the language of the bill, there was, nevertheless, a concerted effort to draft a coherent bill. That effort simply ran out of time. However, the Family Court pledged to provide the leadership to continue work on HRS Chapter 587 so that a bill could be presented to the 2010 Legislature. Our leadership began immediately after the 2009 Legislature adjourned. We sought, through the use of federal Court Improvement Funds, technical assistance through the American Bar Association, Center on Children and the Law. We were able to secure the expert help of Joanne Brown (a retired judge who is now a consultant in the area of state child welfare legislation and compliance with federal laws). Our goal was to avoid a piecemeal band-aid approach. In fact, the "charge" to this Task Force was to review the entire HRS Chapter 587 and to revamp it according to what we have learned from our work through the years, what we know to be the current best practices, and what the current federal law and rules require. Our overarching job was to craft a bill that would protect abused and neglected children and to foster both family healing as well as timely permanency for these children.

Under the Family Court's leadership, a Task Force was formed comprised of DHS, parents' counsel, guardians ad litem, representatives from the Department of the Attorney General, and Family Court Judges and staff. Besides the extraordinary assistance of Joanne Brown, we also received critical assistance from various Fellows of the William S. Richardson School of Law and Faye Kimura, our Court Improvement Liaison. All of these people have worked tirelessly since the late Spring of 2009.

This bill is the product of hard work and close collaboration. This bill fulfills the charge to the Task Force to bring HRS Chapter 587 to the threshold of the 21st Century and to do so in compliance with federal requirements while always focusing on the needs of the children.

The Family Court is grateful for the work of the Task Force members, our consultant, Joanne Brown, the UH Law School Fellows, and Faye Kimura. As noted above, because of the role that we play in applying the law and our responsibility in determining issues of legality and constitutionality, we are unable to take a categorical position of favoring this bill and all of its components. For example, the Family Court has been very concerned about the types of information that the DHS has chosen to disclose pursuant to its rules. We have been concerned that their public disclosures appear inconsistent with the current statute's strict confidentiality requirements and, even more importantly, that the public disclosures have not been in the children's best interests. The section of this bill that addresses this issue is neutrally worded. However, a party could still challenge this section's legality and/or a specific public disclosure

by DHS under both the language of this bill and the DHS' rules. The court would then apply an independent review of the law.

This bill is a fine example of the good faith efforts and hard work of DHS, the Attorney General's office, the private bar, UH Law School Fellows, our federal and CIP consultants, and the court. We are grateful to the Legislature for their interest in all of these issues, its forbearance as we tried to do this in time for the 2010 Legislative Session, and its trust in all of us by giving us the additional year to present a good work product.

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

LINDA LINGLE
GOVERNOR

LILLIAN B. KOLLER, ESQ.
DIRECTOR

HENRY OLIVA
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES
P. O. Box 339
Honolulu, Hawaii 96809

March 16, 2010

MEMORANDUM

TO: Honorable Jon Riki Karamatsu, Chair
House Committee on Judiciary

FROM: Lillian B. Koller, Director

SUBJECT: S. B. 2716, S.D. 2, H.D. 1, RELATING TO CHILD PROTECTIVE ACT

Hearing: March 16, 2009, Tuesday, 2:15 p.m.
Conference Room 325, State Capitol

PURPOSE: The purpose of S.B. 2716, S.D. 2, H.D. 1, is to establish child protective provisions in the Hawaii Revised Statutes that are consistent with federal Title IV-E provisions.

DEPARTMENT'S POSITION: The Department of Human Services (DHS) strongly supports this bill **which is necessary to ensure the receipt of approximately $50,000,000 in federal Title IV-E funds annually** which is used to support everything we do - from staffing to services - to protect abused and neglected children. We also appreciate and support the amendments made to the bill by the House Committee on Human Services.

Based on the information and instructions given to the Department, the U.S. Administration for Children and Families has

indicated that the State does not have any other viable option besides this legislation to ensure compliance with the requirements of Title IV-E.

The rewritten Child Protective Act has been updated, simplified, and incorporates all necessary federal Title IV-E requirements. The bill was drafted by a committee convened by the Judiciary composed of Judiciary, DHS and Attorney General staff, together with representation from the Legal Aid Society of Hawaii, Guardians Ad Litem and Parents' attorneys. Technical assistance was provided through the Administration for Children and Families by the National Center for Legal and Judicial Issues by former Judge Joanne Brown.

The committee was tasked with ensuring that the Child Protective Act complies with all necessary Federal Title IV-E requirements and revising Chapter 587 to reorganize and clarify the statute to make it easier to understand and implement.

This legislation is necessary to ensure that Hawaii's law is consistent with federal Title IV-E provisions. If the legislation is not passed the State will not be able to finalize a federally approved State Plan for Title IV-E to continue receiving Title IV-E funds.

Legislation was submitted in the 2009 Legislature which passed, but did not meet, the Federal Title IV-E requirements. The bill was vetoed, but the State still has to pass the necessary legislation.

This legislation is necessary to ensure that chapter 587, Hawaii Revised Statutes, is compliant with federal Title IV-E provisions related to periodic and permanency hearings and required timelines for hearings and Court findings.

For example, Chapter 587 does not specifically address the Federal requirement for periodic review hearings at six-month intervals to determine the safety of the child and case progress and permanency hearings at twelve-month intervals to determine the permanency plan for a child in accordance with Section 475(5) (C) (1) of the Social Security Act and 45 CFR 1356.21(h). Instead, chapter 587 continues to require eighteen-month dispositional hearings along with requirements that were made obsolete by the amendments in the Adoption and Safe Families Act of 1997 (P.L. 105-89).

DHS cannot over-emphasize the importance of the passage of this bill, especially during the fiscal crisis facing the State at this time. If the proposed statute change is not adopted with the specific language proposed by the Department to ensure compliance with Federal Title IV-E requirements, **approximately $50,000,000 in Federal Title IV-E funds annually will be lost.**

The proposed Child Protective Act will ensure compliance with federal Title IV-E requirements, while providing our community with improvements to the current Child Protective Act that will promote child safety, permanency and well-being.

Thank you for the opportunity to testify.

House JUD committee
Tues, Mar 16, 2010
2:15 pm
Room 325

NASW

National Association of Social Workers — Hawaii Chapter

March 15, 2010

TO: Rep. Jon Riki Karamatsu, Chair
And members of the House Judiciary Committee

FROM: Debbie Shimizu, LSW
National Association of Social Workers, Hawaii Chapter

RE: SB 2716 SD2, HD1 Relating to Child Protective Act

Chair Mizuno and members of the House Human Services Committee, I am Debbie Shimizu, Executive Director of the National Association of Social Workers, Hawaii Chapter (NASW). I am testifying in **SUPPORT of the intent of SB 2716 SD2, HD1 Relating to Child Protective Act but would like to offer amendments.**

The intent of SB 2716 SD2, HD1 is to establish child protective provisions in HRS that are consistent with federal Title IV-E provisions. While we agree with the intent, we are concerned that there is no definition of "social worker" in the bill. We respectfully request inserting the following language to the definitions section of the bill:

Page 17 after line 3 add:
"Social worker" means a person as defined in HRS 467E.

HRS 467E defines a social worker as a person who holds a bachelors, masters or doctoral degree in social work, has passed a national exam and is licensed as a LBSW, LSW or LCSW. A license is not required for "any person employed by a federal, state, or county government agency in a social worker position, but only at those times when that person is carrying out the duties and responsibilities as a social worker in governmental employment". As of July 1, 2010, state social workers must hold a social work degree. HRS 467E also defines the scope of practice for social workers and makes it clear that government social workers must abide by the professions Code of Ethics.

Historically, social workers have been an integral part of the child welfare system. According to the Child Welfare League of America (2003) recent studies indicate that social work degrees are the most appropriate degree for child welfare. A social work-educated workforce has been directly linked to better outcomes for children and families and to lower staff turnover in child welfare settings.

NASW believes it would be appropriate to add this definition into the proposed legislation. Thank you for the opportunity to testify.

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George J. Zweibel, Esq.
President, Board of Directors

M. Nalani Fujimori Kaina, Esq.
Executive Director

TESTIMONY IN SUPPORT, REQUESTING AMENDMENTS
SB2716 HD1 - RELATING TO CHILD PROTECTIVE ACT
March 16, 2010 at 2:15 p.m.

The Legal Aid Society of Hawaii hereby provides comments to the House Committee on Judiciary in support of SB2716– Relating to Child Protective Act and requesting an amendment.

The Legal Aid Society of Hawaii is the largest non-profit provider for direct civil legal services in the State. Further, since the start of our guardian ad litem work in 1996, we have assisted over 2,700 children as guardian ad litem and have represented over 600 parents in child welfare cases. We are currently the only statewide provider of child welfare legal services and through this experience have a unique perspective on the impact legislation can have on those who are part of the system.

We were asked along with the Department of Human Services, Department of the Attorney General, parent counsel and guardian ad litems to work with the Judiciary to review and relook at the Child Protective Act for compliance with federal Title IVE provisions and to improve the act.

At the last hearing on this measure, a request was made by the National Association of Social Workers Hawaii ("NASWHI") to include a definition of social workers and to add social workers in child welfare as qualifying as expert witnesses. We support adding to definition of social worker as drafted by the NASWHI, however disagree with automatically qualifying any social worker in child welfare as an expert witness.

Thank you for this opportunity to provide testimony.

Sincerely,

M. Nalani Fujimori Kaina
Executive Director
527-8014

TESTIMONY
ON
SB 2716 SD 2, HD 1 RELATING TO CHILD PROTECTIVE ACT
HOUSE COMMITTEE ON JUDICIARY

March 16, 2010 **2:15 PM** **Room 325**

Aloha Chair Karamatsu and members of the House Committee on Judiciary. Blueprint for Change (BFC), a non-profit organization whose mission is to improve Hawai`i's Child Welfare System, **strongly supports SB 2716 SD 2, HD 1**. BFC is interested in this bill because it relates to efforts to improve the State's Child Welfare System.

BFC supports SB 2716 SD 2, HD 1 because by bringing Hawaii's Child Protective Act into alignment with the Federal Title IV-E statute, it will ensure that $50 million in federal funding through Title IV continues to flow to the State of Hawaii for child welfare services funded through the Department of Human Services. If this bill is not passed, there is the danger that the federal government could terminate this funding to the State.

However, besides ensuring the flowing of federal money into DHS, BFC supports this bill because it amends the Hawaii statute in several ways that will benefit the health and welfare of children in Hawaii's foster care system who have been abused and/or neglected and prevent further abuse and neglect from taking place.

We strongly urge passage of SB 2716 SD 2, HD 1. Thank you for this opportunity to provide testimony.

karamatsu1-Kenji

From: Chiyomi Chow [chiyomi.chow@gmail.com]
Sent: Saturday, March 13, 2010 2:52 AM
To: JUDtestimony
Subject: S.B. No 2716, SD2, HD1 - Related to Child Protective Act

Representative Jon Riki Karamatsu, Chair
Representative Ken Ito, Vice Chair
House Committee on Judiciary

March 13, 2010

Support for S.B. No. 2716, SD2, HD1, Relating to Child Protective Act
Hearing: Tuesday, March 16, 2010, 2:15pm, State Capitol, Room 325

As a student at Hawaii Pacific University in the Master's in Social Work Program and a community member, I strongly support S.B. No. 2716, SD2, HD1, Relating to Child Protective Act, which establishes child protective provisions in the Hawaii Revised Statutes that are consistent with federal Title IV-E provisions. Passing of this bill is necessary to ensure that our state receives the federal Title IV-E funds needed and to better protect abused and neglected children in Hawaii.

I appreciate all the work that the Task Force members and others have put into this bill and fully support the intent of this bill. However, I would like to suggest the following minor changes for clarification purposes.

- On page 16, for the definition of "resource family," I would suggest that line 19 be changed from "...services for children" to "...services for a child or children." I think this would be a more accurate definition, since a child-specific resource family may be licensed for one particular child.
- Also, in amending Chapter 350 of the Hawaii Revised Statutes on page 90, in line 10 and 18, the term "resource parents" is used. I would suggest using the term "resource family" to reflect consistency with the new chapter being established and with current language used in the foster care community.
- In addition, a definition of "resource family" should be added to Chapter 350 for clarification, and I would suggest using the same definition as the new chapter with the above suggested change.

I urge the committee to pass S.B. No. 2716, SD2, HD1, with amendments. Thank you for this opportunity to testify.

Sincerely,
Mary Chiyomi Chow

Testimony by Francis T. O'Brien

S.B. NO. 2716

My own initial observation is that this is supposed to be a child protective act. The primary goal and purpose of the act should be to protect children from harm. This means that anything that detracts from the protections provided to a child or dilutes the "best interest" standard is contrary to the stated purpose of the act. Anything that makes a child less safe should not be permitted.

COMMENTS

§ -2 Purpose/Construction: There have been substantial changes to this section, which would significantly change the focus of the Child Protective Act. The old act says that the purpose of the act is "to make paramount the safety and health of children who have been harmed..." The new act eliminates that language. Much of the change is directed at supporting the DHS policy on relative placement. It should be noted that the DHS conducted its own study regarding relative foster placements and found that the only measurable differences is that relative placements tend to be somewhat more stable and relative placements are more willing to allow contact with the parents. There are no definitive studies here or elsewhere that show that relative placements are better for children. One thing to consider is that people who are already foster parents have made the choice to accept foster children into their home. When you are dealing with relatives you most often get people who had not made that decision and are agreeing to take the children out of a sense of obligation.

Query: Why are we changing the purpose and focus of the statute?

§ -4 Definitions:

"Adjudication" This is new. The proposed law defines adjudication as a finding by a preponderance of the evidence that a child has been harmed or threatened with harm. The section regarding jurisdiction requires that the harm must be a result of the "acts or omissions of the child's family." It appears that the definition may write out the requirement that the harm must be caused by the child's family. It at least creates confusion. Note that the section on adjudication says that the findings must be that the harm was caused by the child's parents.

"Aggravated Circumstances" The proposed law has deleted language that included voluntary manslaughter in addition to murder as a basis for a finding of aggravated circumstances. They have also deleted the language that would cover a situation where the court made the required findings but then placed the child under guardianship instead of terminating parental rights.

"Court-appointed special advocate" This is something new. It says that when appointed by the court the person serves "in the capacity of a guardian ad litem." This phrase appears only in the definitions section and there is nothing else in the statute to explain when, under what circumstances and subject to what elements of proof the court would appoint someone to serve in this capacity.

Query: If you have a GAL, why do you need someone to serve "in the capacity of" a GAL, and what does that mean? Does that mean in place of or does it mean that you have two GALs in a case?

"Date of entry into foster care" This is new. The DHS has programs for handling the case informally, and they do not want the time that a child is in foster care during such a period to count as the date of entry into care. (See below)

Query: Since the child is out of the home and since it is all the same to the child whether the proceeding is formal or informal, and since the goal is to keep the child out of the home for as short a period as possible, why would you not count that time?

"Family" They have deleted language that refers to "each person residing in the dwelling unit" as a member of the family. This means that boyfriends and girlfriends, even those who had lived with the child for years, would not be considered as family to that child.

"Foster care" This now refers to a "resource family." The current law says that the foster home is a residence designated as suitable by an authorized agency "or the court" to provide care for a child. The DHS routinely takes the position that only the agency gets to make the decision and not the court. This looks like an effort to codify the DHS position and diminish the authority of the court.

"Guardian Ad Litem" They have eliminated the obligation to "protect" the needs and interests of a child or adult. The old language was "protect and promote." If something is going to be eliminated as being redundant it would be more appropriate to eliminate "promote."

"Harm" A number of harm categories have been eliminated: malnutrition; failure to thrive; burns to the extent that they are not "serious"; soft tissue swelling; extreme pain; extreme mental distress; and gross degradation.

Query: Why? The section on harm should be as inclusive as possible. To the extent that you eliminate categories of harm children are less safe.

They have deleted the category for inadequate shelter as a form of harm.

Query: Why? There is an instance when the DHS tried to reunify a child with a parent who was living in a car. Apparently, the fact that you are living in the open under a bridge with a child would not be sufficient reason for the DHS to become involved.

"Imminent harm" In the old definition the requirement was that there be "reasonable cause to believe" that harm would occur within the next 90 days. Here there is no time limit and it says that the harm exists only if there is "a substantial present danger" that a child will be harmed or will not be safe without invervention. This is dangerous because if you say that "with intervention" the danger does not exist, then it eliminates the duty on the part of the DHS to act to protect the child as long as they think somebody is going to "intervene". It does not define the

intervention or say when it has to occur. Reasonable cause to believe is something that is readily defined in the law. Substantial present danger is undefined.

Query: Why make the change?

"Ohana conference" The proposed statute has eliminated the requirement that the conference should include "other important people in the child's life" and the requirement that the conference is to provide for the safety and permanency needs of the child. It appears that the omission of "other people" is designed to exclude foster parents from the conferences.

"Party" The proposed statute has eliminated the language that gives the court the authority to limit the participation of a party if the court determines that the participation is not in the best interests of the child. It should be noted that this version of the act eliminates the section (§587-51.1) that now makes foster parents parties or quasi-parties depending upon how you choose to interpret it. Instead of writing foster parents out of the statute as parties, it would be in the interest of the child to say that foster parents (resource families) are parties along with everyone else. I will have a fuller discussion of foster parents as parties below.

"Permanent Custody" The proposed statute has eliminated the statutory description of the effects of termination of parental rights. It also eliminates the language that gives a family member visitation rights with the child after termination. (Elimination of another "best interests" requirement). It also eliminates the requirement that if a child is harmed after permanent custody (as by the foster parent) the DHS shall take a child under family supervision or foster custody and immediately notify the court.

"Permanent plan" The proposed statute says this is prepared in consultation with the child (how old?) and "other appropriate parties" (whomever that may be) that "establishes the placement intended to serve as the child's permanent home." In the first instance, this should be subject to court review and approval. One of the DHS' continuing positions is that they get to make this decision. This is just designed to further that position. Intended by whom, and why is it not subject to a best interest test? If you establish the permanent placement before you terminate parental rights then you make it essentially impossible for someone who is not the child's foster parent to intervene with regard to the issue of placement. If someone who wants to adopt the child wants to intervene before termination of parental rights, the court, parents and others will say that the intervention is "premature" because the court has not terminated parental rights. Also, you are giving the DHS the right to decide the issue of permanent placement before the court has decided that it is going to terminate parental rights. If the DHS wants to move the child from a stable foster placement to an untried relative placement before termination of parental rights (and this happens all the time) and if the foster parents are not parties then they will have to try to intervene in order to protect the child's interests and that will be subject to the whim of the court. The DHS routinely takes the position that it gets to make all decisions regarding placement and that best interests of the child do not come into play if they have not abused their discretion.

"Resource Family" This is new. Resource family is the DHS' new term to dehumanize foster parents and convince them that their homes are just holding pens. This is a bad thing for children in care.

"Service plan" The statute always says that the goal is reunification with the child's parents. Remember that we have defined parents to include "legal guardians or other legal custodians" so it is difficult to understand what they mean. It also does not deal with the question of whether you can reunify with only one parent and under what circumstances.

"Temporary foster custody" Since this says that foster custody commences when the department with or without court order assumes the duties and rights of a foster custodian, why should they get an extra 60 days before a child is deemed to have entered into foster care (see above). You cannot have it both ways.

"Threatened harm" They have eliminated the requirement of a "reasonably foreseeable substantial risk of harm to a child with due consideration being given to the age of the child and the safe family home guidelines" and replaced that with "an impending substantial risk of harm to a child" without "intervention."

Query: Why? This standard does not provide the same clear definition. What does "impending" mean? How is that different from "reasonably foreseeable"?

§ -7 Safe Family Home Factors. They have eliminated the requirement to consider the child's age and "vulnerability." Now we consider special needs that affect the child's attachment, growth and development. While it is probably a good thing to consider special needs I do not believe that it is good that we eliminate vulnerability as a factor. While some might say that it is included in age, it is my experience that whatever is not there disappears from consideration. Also, age is not the only measure of vulnerability.

We have changed consideration of the child's developmental, psychological, medical "needs" to a consideration of their "status." Those are not the same things.

We have eliminated consideration of bonding abilities. Often there is a real issue over whether removal of a child from a foster home at a critical time will interfere with that child's ability to bond with people. There can be serious and very unfavorable consequences to the child if this is not considered. DHS does not like it because it gets in their way when they want to reunify. The new section contains a factor relating to the "impact of out of home placement" on the child. That is undefined and can be used to cut both ways.

We include as a factor whether the "alleged" perpetrator has acknowledged and accepted responsibility for the harm.

Query: Why must an alleged perpetrator do anything? Once the court has made a determination of harm it also presumably has converted an alleged perpetrator into a proven perpetrator. If it cannot determine who caused the harm then what do you do—make everyone an alleged perpetrator and have each one apologize for the harm? You run into this problem all the time

when there is no determination of who actually caused the harm, but people who deny that they were the perpetrator are graded down because they have not admitted and apologized for harm that they say was not their fault. This defaults to the DHS and their determination of whether a person is a perpetrator even when the court makes no finding as to the identity of the perpetrator. If the court cannot make a finding as to which person is the perpetrator, then this requirement should be eliminated from the guidelines.

We include a factor dealing with whether the parents have "demonstrated" an "understanding of and involvement in" services. Demonstrated to whom and how? What sort of opportunity are parents to have to make this demonstration?

There is a section dealing with the "reasonable period" of time to resolve identified safety issues. Since the section on termination of parental rights (current §587-73(a)) says that the outside limit is two years from the date when the child was first placed in foster care shouldn't this section parallel that wording?

§ -11 Investigation; department powers. Under Kahoohanohano the DHS has a duty to a child from the moment that the child is identified to the DHS as being a child at risk. The current statute says that when the DHS receives a report that a child is in imminent harm, has been harmed or is threatened harm it shall cause such investigation to be made as it deems appropriate. This section is an attempt to water down that duty by saying that "in its discretion" and "in accordance with its procedures and duly adopted departmental rules" it shall conduct an investigation. This is an attempt to water down protections for children.

Query: Why?

The section saying that it can close the matter if the child is residing with a caregiver who is willing and able to meet the child's needs and provide a safe and appropriate placement for the child is new. It is difficult to see what that means or how it helps or protects a child. Apparently this means that if the child is living with an auntie that the DHS likes they can close the case without doing anything. Understand that such a relative would have no rights vs. the parents. Also, there would be nothing to prevent that caregiver from giving the child right back to the parents as soon as the DHS social worker drives away from the home. It happens all the time. So why should the DHS be the sole decision-maker in situations such as this and how are they going to protect the children? Also note that once DHS walks away on this basis, there is no follow-up to protect the child.

The section also says that the DHS is not required to file a petition if the parents agree to adoption or legal guardianship so long as the proceeding is "conducted" within 6 months of the date on which the DHS assumed physical custody of the child. Does conducted mean "completed" or something else? Is the date when DHS assumed physical custody different from the "date of entry into foster care" defined above?

§ -14 Notice of hearings; participation of resource family. The current statute (HRS 587-51.1) provides that notice of all hearings subsequent to the disposition hearing shall be given to foster parents who shall be "entitled to participate in the hearings as a party." The new section writes

that out and says that the foster parents (resource family) are entitled to participate to provide information to the court regarding the status of the child in their care. A social worker is supposed to see the child once a month, and a GAL gets to see the child once every three months. The foster parents see the child every day. Who has a better read on what is good for the child and what should be done for the child? Why is it a good idea to take away party status from foster parents?

Example: Child is seeing parents in supervised visits. Parents live in a homeless shelter, are druggies and come to every visit with ukus. Consequence is that child comes back to the foster home after every visit with ukus. Further consequence is that foster parents have to disinfect child and home after every visit. Further consequence is that child misses school because school will not let child come to school with ukus. Foster parent raises this to social worker and GAL who show no interest in doing anything. Under present statute, foster parent who is represented threatens to file her own motion. Result. Social worker and GAL suddenly show interest. Visits with parents are halted until they can show that they have cleaned themselves up. Under proposed legislation, foster parents can do nothing except write a letter, children continue to get ukus and miss school. Foster parent probably also gets ukus.

Foster parents need to be able to sit at the table as parties and provide information to the court about the children. The foster parents also need to be able to advocate for the child and file motions and take other actions to protect the best interests of the children. There is nothing about the participation of foster parents that is bad for a child. If foster parents are interfering with the reunification process under the present law the judge can limit their participation so the court has the ability to protect itself and the child from foster parents who come into court with other agendas than the best interests of the child. The DHS does not like the participation of foster parents because active foster parents tend to insist that the DHS do its job and that it provide appropriate services for children.

§ -17 Court appointed attorneys. The earlier section of the proposed law says that the court will appoint an attorney for a child if the child's opinions and requests are different from those being advocated by the GAL. However this section says that the court appointed attorney shall take instruction from the GAL unless otherwise ordered by the court. If the reason for appointment is different opinions and requests between child and GAL there should be no circumstance under which it would be appropriate for the court appointed attorney would take instruction from the GAL.

§ -18 Reports to be submitted by the department and authorized agencies. The current statute requires that all reports submitted be served upon the parties or their counsel and the GAL. This is removed in the new statute. One of the problems that exists even under the current law is that the DHS does not get the reports to the various parties until the date of the hearing so that you get blindsided at the hearing. The new language that says that "additional information may be submitted to the court up to the date of the hearing" means that they can submit their report on the day of the hearing and/or hold evidence back and then blindside you with it on the date of the hearing. That is not good for anyone involved and means that the hearings will be a waste of time.

§ -19 Expert testimony by department social worker. The current statute says that a social worker is qualified to testify as an expert in the area of social work, child protective services and child welfare services. The proposed statute says that the social worker is "presumed" to be qualified as an expert in those areas. To the extent that this is a step back from the statute that said that social workers were qualified without question, that is a good thing. But the question remains, what sort of presumption is it? Is it a Rule 303 presumption or a Rule 304 presumption?

§ -21 Admissibility of evidence; testimony by a child. The proposed statute says that "in deciding whether there is reasonable cause to believe that a child is subject to imminent harm, the court may consider relevant hearsay evidence when direct testimony is unavailable or when it is impractical to subpoena witnesses who will be able to testify to facts based upon personal knowledge." It does not say what hearing this provision applies to. Under the existing law, this standard applies only to temporary foster custody hearings. Under the new law this provision could apply to adjudication hearings, in which case the evidence to support jurisdiction could all be hearsay. It is submitted that this would be a violation of due process and a violation of the constitutional rights of the parents.

The section also gives the court the ability to have the child testify in chambers with only those parties present during the interview as the court deems to be in the best interests of the child.

Query: What ever happened to the constitutional right to confront witnesses?

§ -24 Motions to vacate or modify prior orders. Probably what they think they are talking about here are motions for reconsideration under the provisions of Rule 59. At the present time the court is not required to provide a hearing. However, the language that they have used does not say that. This says that any motion to modify or vacate a prior order does not entitle the person making the motion to a new hearing or an evidentiary trial, but gives the court the authority to deny them out of hand.

Example: A court enters an order that a parent cannot see a child until the parent has progressed sufficiently in therapy that the DHS and the GAL in consultation think that it is appropriate for him/her to see the child. After four months the parent thinks that he has made sufficient progress but the DHS and the GAL will not permit visits. The parent believes that the DHS social worker is prejudiced against him and/or alleges that nobody is returning calls or paying any attention to his/her progress. Parent files a motion asking the court to order that visits commence. Under the proposed statute, the court does not have to provide the parent with a hearing where he/she can present evidence regarding the degree of progress and thus deny the parent a record for appeal.

Query: Why is this a good idea?

§ -26 Temporary foster custody hearing. Under the present law whenever the court is to enter orders relating to temporary foster custody it also is supposed to enter those orders "as are deemed by the court to be in the best interests of the child." That requirement has completely disappeared from the proposed law. There is a section (d)(9) that says that the court may enter "any other orders that the court deems necessary." The existing law makes it clear that the basis that the court is to use in deciding what orders to enter is what is best for the child. Under the

new law there is no reference to the child or the child's best interests. It is important that wherever possible this statute make it clear that the decisions other than the decision to terminate parental rights are to be driven by what is best for the child. Judges are not always clear on the standard and the DHS constantly tries to argue that it is what they want not what is best for the child. This is a step back and a lessening of the protections for children subject to the act.

Also, note that this section contains language that relates to the return hearing (below) and says that the court can order the parties to undergo psychiatric examinations, provide family information, order that everyone shall view a video of the child, and undergo a criminal history record check, presumably before jurisdiction has been established. How or why should the judge be able to order parties to do things before it has determined that it has jurisdiction over the parties?

§ -27 Service plan. The existing law speaks of providing "the steps that will be necessary to facilitate the return of a child to a safe family home." The new law speaks of providing the specific steps required "to ameliorate the safe family home factors that caused the child harm or to be threatened with harm." Ameliorate means to improve or make better. I am not sure where this leaves the standard, because if all we have to do is make the factors "better" what is the standard? A child should not be returned home until the home is safe. Here we are saying that we will return a child home if some of the factors that made the home unsafe are ameliorated.

The business about time frames is generally a joke. HRS 587-73(a) says that parental rights will be terminated if the parents have not been able to provide a safe family home within a reasonable time which shall not exceed two years from the date when the child was first placed under foster custody by the court. The proposed statute also has this language. Everyone in the family court chooses to ignore this language in the statute even though the appellate courts have held that two years clearly means two years. The new statute proposes to tell parents that if the child has been out of the home for 15 of the most recent 22 months the DHS is required to file a motion to terminate parental rights, but it does not inform parents that the reasonable time that they are given by statute to provide a safe family home is two years from the date when the child first went into foster custody. The appellate courts have said that you cannot terminate parental rights just because two years have passed, but if two years have passed and the home is not safe because the parents have not completed services or because they have not eliminated the factors that made the home unsafe, then that is it. The statute has a clear statement that parents have two years to get their kid back into their home (note that you could have a case that lasted more than two years if the child was already back in the home at the end of two years under family supervision) and if they cannot do that within two years, they lose.

The provision that provides a hearing if parents and the DHS cannot agree on the terms of a service plan is probably a good thing..

§ -28 Return hearing. The new statute combines the return date (HRS 587-62) adjudication hearing (HRS 587-63), and disposition hearing (HRS 587-71) into one hearing called a return hearing. Under the present law a parent contesting jurisdiction is entitled to a adjudication hearing where the DHS has to produce evidence to convince the court by a preponderance of the evidence that the elements of jurisdiction exist. If they cannot prove their elements then the case

is dismissed. The evidentiary rules (HRS 587-41) make it clear that the findings must be based upon a preponderance of the evidence. Combining the hearings into one "return" creates questions about how you proceed. When does an adjudication trial take place? Are there any time limits on when it has to be decided? Do you stop the rest of the return hearing until the decision regarding jurisdiction is made? Can the court decide what services should be provided to the child's parents if it has not yet established jurisdiction? If someone objects to the services do you have a hearing on that before you have established jurisdiction? Also, it is difficult to understand why the section on jurisdiction says that the court has jurisdiction if a child is subject to harm, imminent harm or threatened harm and the section regarding the jurisdictional hearing says that a court can take jurisdiction if it finds by a preponderance of the evidence that the child has been harmed or threatened harm. The section on jurisdiction in the new statute says that jurisdiction exists if the child has been harmed, etc., by the child's family, but the section on adjudication says that the court shall decide whether the child has been harmed, etc., by the child's parents.

With regard to aggravated circumstances the statute provides no guidance as to how you "determine" whether aggravated circumstances are present. Also, it says that if you determine aggravated circumstances are present then the court must conduct a permanency hearing within 30 days and order the DHS to file a motion to terminate parental rights within 60 days. There is no way that it should take the DHS 60 days to file a motion to terminate parental rights if aggravated circumstances are present. They should have to file the motion by the time of the permanency hearing.

The current statute provides that the court shall enter "such further orders as it deems to be in the best interests of the child." That has completely disappeared from the proposed statute. Once again, often the only protection that a child has under this statute is the Court's "further orders" power. The Court can order the department to exercise its discretion to license a foster home if it decides that it is in the child's best interests to do so. Everything relating to the child should be subject to the best interests standard.

§ -30 Periodic review hearing.

The current statute gives the court the authority to make further orders that are in the child's best interests. The proposed statute says that the court may "issue any other appropriate orders." As noted above the further orders power is often the only thing that is available to protect the child from arbitrary actions on the part of the DHS or the GAL. The authority to issue "appropriate" orders is not the same and deletes any reference to the basis and the focus of the further orders power. Deleting this power represents a significant threat to the safety and welfare of children within this system.

Under existing law the court was to determine at each review hearing whether aggravated circumstances were present. There is no reason why the court should look at aggravated circumstances at the time of the return hearing and then drop it forever.

The proposed statute says that the DHS has to file a motion to terminate parental rights once the child has been out of the home for 15 of the most recent 22 months unless certain factors are

present. The present statute says that the "compelling reason" why it would not be in the child's best interests has to be documented in the safe family home guidelines. In the proposed statute the compelling reason has to be documented in the safe family home factors "or other written report submitted to the court." This is dangerous for a child. The existing standard requires the DHS to demonstrate based upon reports in the safe family home reports that this is what is best for the child. Under the proposed statute all that they have to do is submit a "report" the day before the hearing in which they say that they have compelling reasons to keep the case open. It basically would be whatever they could think of at the last minute and there might be no way to rebut because they are no longer required to make the reason appear in the existing reports before the court. It should also be noted that this section is usually used by the DHS when it knows that it cannot get things done within the two year limit and it does not want to file a motion to terminate for whatever reason. The courts have been willing to let them do this even there is nothing in the statute that says that this section in any way modifies or changes the language in HRS 587-73(a).

§ -31 Permanency hearing. This section says that a permanency hearing shall be conducted within 12 months of a finding of aggravated circumstances. The return hearing section says that you have the hearing within 30 days of a determination of aggravated circumstances. Which is it?

This apparently is the section that has to be in the statute in order for the DHS to get their money. If you look at the section it could be added to the statute without all the other changes that have been suggested in the proposed statute.

The proposed statute says that at each permanency hearing the court shall order reunification, continued placement in foster care or a permanent plan. It is difficult to understand how these three are mutually exclusive. Also, what happened to reunification under family supervision? This section says that the court shall order continued placement in foster care where "reunification is expected to occur within a time frame that is consistent with the developmental needs of the child." What does that mean? The statute says that the outside limit for reunification of a child in foster care is two years. Does this means something else and how does it relate to the two year requirement? Also this section apparently creates another deadline that the court will ignore. It says that if a child has been in foster care for more then 12 consecutive months you must order a permanent plan with a date for the DHS to file the motion to terminate parental rights. Now if they really mean that if a child is in care for more than 12 months you have to file a permanent plan, that is a good thing. However, it is unlikely that this is what they mean and it is likely that the court will ignore this language just as it ignores the language about two years.

Once again instead of having language that says that the court will enter such orders as are in the best interests of the child to see that the plan is implemented and accomplished, the proposed statute speaks of "appropriate" orders.

§ -32 Permanent plan. There is nothing in this section that speaks about a child's best interests. It says that if adoption is not the goal the DHS must state a compelling reason why legal guardianship or permanent custody "is the most appropriate permanency goal for the child." As

with other sections, decisions regarding the child's future should be based upon what is best for the child, not what is appropriate.

§ -33 Termination of parental rights hearing. The proposed statute says that if the court finds the required elements by clear and convincing evidence it shall "terminate the existing service plan." However under the permanency hearing section, if the court does not order reunification or continued foster care, it is supposed to order a permanent plan. So you presumably will have a permanent plan in place prior to the hearing on termination of parental rights.

The proposed statute says that if the DHS fails to prove its case it shall order the "preparation of a plan to achieve permanency for the child." What does that mean? Does that mean a permanent plan or a service plan? The existing statute says that the court shall order changes to the existing service plan. Since we are discussing termination of parental rights what else would you do except order some continuing version of a service plan?

Subsection (d) in the proposed law is redundant with other sections.

§ -34 Reinstatement of parental rights. This section provides that a motion can be filed by "a child", the child's attorney, the GAL, or the DHS to reinstate terminated parental rights. How can a child who is over 14 but under 18 file his or her own motion? Also, why are we not giving parents the right to file a motion to reinstate rights?

What is the rationale that the preliminary hearing is to be 90 days in the future?

Why do we have language that says that the motion will be denied if you cannot find the parent whose rights are to be reinstated? Who would file a motion to reinstate rights without knowing the situation of the terminated parent? This seems to be a statute that is designed to dump children who are approaching the years when they will age out of the system back on their parents so that the DHS does not have to provide them with continuing services and transition services.

They say that you can put a child back in the home if there has been a "material change of circumstances." What has happened to whether the parent is able to provide a safe family home? Likewise, if a parent's home can only be made safe with the assistance of services after the passage of all that time, why would you consider a temporary placement?

The section requires the moving party to prove that the permanent plan goals for the child have not been achieved and are not likely to be achieved. If that is the case, in order for anyone to get a placement wouldn't it be necessary for the court to make a finding at that hearing that the goals of the plan have not been achieved and are not likely to be achieved?

§ -40 Court records. The proposed statute says that the DHS can disclose information in the court record without court order. It would be more appropriate to say that records can only be disclosed with court order. Otherwise the DHS can go around disclosing things about cases that are damaging to the child and it puts the burden on someone to go into court to ask for an order

preventing them from doing this. By the time you get such an order it may be too late and the cat out of the bag.