



THE JUDICIARY, STATE OF HAWAII

Testimony to the House Committee on Human Services

The Honorable John M. Mizuno, Chair

The Honorable Jo Jordan, Vice Chair

Monday, January 31, 2011, 9:00 a.m.

State Capitol, Conference Room 329

by

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Family Court of the First Circuit

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 909, Relating to Family Court

Purpose: Amends existing divorce laws relating to property division.

Judiciary's Position:

The Judiciary takes no position on this bill but respectfully submits the following points for consideration.

We are concerned that this bill may have an opposite effect from the stated purpose of "simplifying and codifying existing law." There are many crucial phrases in this bill that may cause an increase in litigation and contested hearings.

For example, the determination of the "date of the dissolution of the marital partnership" is critical because the values of the properties, to be divided between the parties, are set as of this date (p.4, subsection (a), lines 11-13). The definition of "date of the dissolution of the marital partnership," at page 2, Section 2, is described as the earliest of five possible dates. Except for number (2) "[t]he date of the filing of the complaint for divorce," the other four dates are subjective. Unless the parties agree, much time will be spent in court arguing these critical points. Furthermore, number (3) "the date one or both of the parties took a substantial step toward a final separation that subsequently occurred;" number (4) "the date one or both of the



parties contemplated or took a substantial step toward the filing of the complaint for divorce that was subsequently filed;" or number (5) "the date one or both of the parties demonstrated their express will to withdraw from the marital partnership;" may generate irresolvable factual disputes. A seemingly innocent act or intent during a marriage may later be argued as "a substantial step toward a final separation" or as evidence that a party "contemplated or took a substantial step toward filing of the complaint" or as a demonstration of an "express will to withdraw from the marital partnership."

At page 3, from line 7, the term, "marital separate property," has already been appropriately defined by appellate court decisions. Including a set list of factors in the statutes may exclude those properties which may otherwise legitimately be deemed as "marital separate properties."

There will be increased litigation because the "date of the dissolution of the marital partnership," discussed above, marks the "commencement of the marital partnership winding up period," at page 4, line 13. If a spouse takes a "substantial step toward a final separation that subsequently occurred," but the other spouse did not interpret the act as such a "step," there will be much confusion and litigation. Also, these provisions do not take into account (a) that it is common for couples to wait a very long time from "wanting" a divorce to "filing" for divorce, and (b) couples/spouses change their minds and may change their minds a number of times. Would the very first act that is deemed as a "substantial step" be the dispositive act even though the couple mutually changed their minds before finally proceeding with and completing a divorce?

This "marital partnership winding up period" does not end until all aspects of a divorce have been completed. This might have the effect of allowing property issues to unduly delay the final disposition of the issues regarding children. In the vast majority of divorces, all aspects are decided at the same time. However, from time to time, usually because of the complexity of the marital estate and sometimes because of terminal illness of one of the spouses, some aspects are decided earlier (such as child-related matters or allowing the dissolution of the marriage) before the property division is decided.

The proposed language in subsection (e) at page 6 (lines 8-18) may also create fiercely contested cases without adding incentives for parties to conclude their divorce cases quickly and simply. The family court already has authority to grant an unequal share of the marital estate if one spouse has been found to waste marital assets. This section will force specific valuations upon the court's equitable powers. Further, the type of proof required (e.g., detailed bookkeeping) may also add to the litigation expenses of the parties. The new provisions at pages 9 (lines 6-8), 12 (line 22), and 13 (lines 1-3) may cause similar untoward effects.



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The characterization of spouses as "debtors and creditors" in subsection (f) on page 6, line 20 appears to unduly apply purely commercial standards to personal human relationships. Indeed, the title of Chapter 651C is the "Uniform Fraudulent Transfer Act." The wholesale importation of commercial partnership principles to property division in divorce cases may have unintended consequences and could be inconsistent with the equitable powers the court applies in dividing property in divorce cases.

The proposed amendments to add a new subsection (a)(1) to HRS Section 580-10(Section 3, lines 9-12) may be helpful. The amendment would allow the family court to more easily issue pre-decree orders to promote full exchange of financial information and to prohibit wasting of assets. However, changing the existing "may" to "shall" will mandate the already existing provisions in this subsection, which are available, under existing law, only upon the filing of an application by the party.

Deleting the existing statutory language in subsection (d) of HRS Section 580-56 (p.15, lines 4-11) will cause more litigation, less certainty in court orders, and unintentionally expand the family court's reach to many unrelated individuals, including bona fide purchasers (who, presumably, would have a right to a jury trial). Particularly in these dire economic times, certainty and finality of orders affecting property must be protected.

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