



THE JUDICIARY, STATE OF HAWAII

Testimony to the House Committee on Health

Representative Ryan I. Yamane, Chair
Representative Dee Morikawa, Vice Chair

Friday, April 1, 2011, 9:00 a.m.
State Capitol, Conference Room 329

by

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WRITTEN TESTIMONY ONLY

Measure No. and Title: House Concurrent Resolution No. 218, Requesting an audit of child custody proceedings involving the commission of family violence by a parent, to assess the application and enforcement of section 571-46, Hawaii Revised Statutes.

Judiciary's Position:

The Judiciary takes no position on this concurrent resolution but offers the following comments and suggestions.

- (1) We suggest a rephrasing of the following "whereas" clause:

"WHEREAS, the Legislature is concerned that Family Court judges may not be correctly applying or enforcing section 571-46(a) (9) - (14), Hawaii Revised Statutes, to the detriment of domestic violence survivors and their children and ultimately punishing survivors and their children for successfully escaping abusive homes;"

Presumably, this concurrent resolution was designed to find out *whether or not* Family Court judges are applying the law correctly in child custody matters in divorce and paternity cases. The audit could determine that factors outside the control of the Family Court judges are affecting the manner that the provisions in Section 571-46(a) (9) - (14) of the Hawaii Revised Statutes are being applied. For example, they could find that the very dynamics that this statutory section is seeking to address are the very dynamics that allow the abusing partner to prevail. They could also find that years of abuse engender coping mechanisms in some of the



victimized parents to the degree that these parents are unable at the time of separation to safely care for the children. Indeed, they might find that many cases are a complex mix of these and various other factors.

It would be more accurate to rephrase this "whereas" clause as follows:

"WHEREAS, the Legislature is concerned that [~~Family Court judges may not be correctly applying or enforcing section~~] Section 571-46(a) (9) - (14), Hawaii Revised Statutes, may not be effective or effectively applied and enforced, to the detriment of domestic violence survivors and their children and ultimately punishing survivors and their children for successfully escaping abusive homes;"

(2) The Legislature may have to consider taking a different kind of action if it wants State enforcement of private court actions. The Courts have no independent enforcement function in civil cases. The Court's function is different in civil cases than it is in criminal cases. It is not the Court's function to make court orders in private civil cases and then aggressively monitor and punish transgressors. Moreover, we do not have the resources to do this. In this country's jurisprudence, in private civil cases, enforcement proceedings must be initiated by the State or by one of the parties to the action. If the Legislature believes that the State should aggressively monitor and enforce court orders in these private civil cases, then the Legislature may have to consider setting up such an agency in the Executive Branch or the various prosecutors' offices, delineate its powers and responsibilities, and then fund it.

(3) The redaction of names in case files reviewed by the Auditor's office should be discretionary. The volume of cases and the number of pleadings in files of contested cases are high. A requirement as envisioned in the following clause would require Judiciary staff to copy each document in each court file, mark all names, redact this information, and then re-copy the document so that the confidential information is not legible. This requirement will frustrate the Auditor's ability to carry out its work according to this concurrent resolution.

Therefore, rather than this requirement:

"BE IT FURTHER RESOLVED that the Judiciary is requested to redact the names of all parties, witnesses, attorneys, judges, and other interested persons from all selected custody proceedings to maintain privacy and confidentiality;"

We suggest:

"BE IT FURTHER RESOLVED that the Judiciary [~~is requested~~] has the discretion to redact the names of all parties, witnesses, attorneys, judges, and other interested persons from [~~all~~] selected custody proceedings to maintain privacy and confidentiality;"



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An audit involving review of a great many Family Court files was conducted by the Auditor's office in 2002. Many discussions between the Senior Judge and the auditors-in-charge of that project were held so that both offices could gain a clear picture of the concerns and requirements of the other office. As a result, a specific procedure for requesting, obtaining, and reviewing files, including confidential files, was agreed upon. Confidential files were clearly identified and the auditors were extremely careful in their handling of the information from these and from all the files. No redactions of confidential files were requested by either office and none were made. The Auditor's office honored the concerns of Family Court regarding possible harm to children and parties should such information be made public. We reiterate our request that, if this concurrent resolution is adopted, redaction of files should be discretionary to the family court.

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