

# SB 2301

Measure Title: RELATING TO CHILD VISITATION.  
Report Title: Child Custody; Grandparent Visitation  
Description: Permits family court to award reasonable visitation to grandparents if the denial of visitation would cause significant harm to the child. Establishes a rebuttable presumption that visitation decisions made by a parent are in the best interests of the child. Presumption may be rebutted by certain evidence. Identifies factors the court shall consider in awarding visitation. Effective July 1, 2012.  
Companion:  
Package: Kupuna  
Current Referral: HMS, JDL  
Introducer(s): CHUN OAKLAND, FUKUNAGA, GREEN, IGE, SHIMABUKURO, Nishihara



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**TESTIMONY OF THE FAMILY LAW SECTION, HAWAII  
STATE BAR ASSOCIATION, IN FAVOR OF SENATE  
BILL NO. 2301, RELATING TO CHILD VISITATION**

Committee on Human Services  
Senator Suzanne Chun Oakland, Chair  
Senator Les Ihara, Jr., Vice Chair  
Conference Room 016, State Capitol  
January 31, 2012, 1:15 p.m.

**Good morning Senators:**

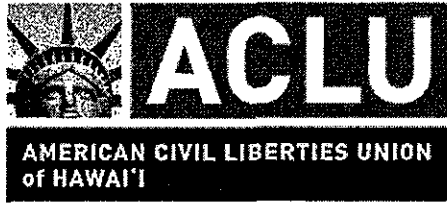
**My name is Steven L. Hartley and I am the current Chair of the Family Law Section of the Hawaii State Bar Association. I submit this written testimony on behalf of the Family Law Section.**

**The Family Law Section is comprised of over one hundred attorneys who practice law in the Family Court. The majority of us handle all types of family law matters, including divorce, paternity, domestic violence and guardianship cases. As a Section, our testimony represents the views of our members.**

**Last year we supported SB 56, HD2, because it addressed the unresolved issue of grandparent visitation rights in Hawaii. That Bill also addressed and resolved the Hawaii Appellate Court's prior holdings concerning the constitutionality of Section 571-46.3, Hawaii Revised Statutes.**

**For these same reasons, we support SB 2301.**

**Thank you for allowing us to submit our testimony.**



Committee: Committee on Human Services  
Hearing Date/Time: Tuesday, January 31, 2012, 1:15 p.m.  
Place: Room 016  
Re: Testimony of the ACLU of Hawaii to Offer Comments on S.B. 2301,  
Relating to Child Visitation

Dear Chair Chun Oakland and Members of the Committee on Human Services:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes to offer comments to S.B. 2301, relating to child visitation.

In 2007, the Hawaii Supreme Court struck down H.R.S. § 571-46.3, establishing grandparents visitation rights, and noted that legislative action was necessary to correct the statute's unconstitutional provisions. *Doe v. Doe*, 116 Hawaii 323, 336 (2007). S.B. 2301 appears to be the Legislature's attempt to address the issues raised by the court in that case. The ACLU of Hawaii acted as co-counsel in that case and, given our expertise with this issue, we hope this Committee will act upon our comments through amendment to S.B. 2301.

S.B. 2301 and its predecessor in law, H.R.S. § 571-46.3, were undoubtedly prompted by laudable goals. Indeed, innumerable children enjoy loving and beneficial relationships with grandparents (as well as other family members) who certainly contribute to the reservoir of nurturing and beneficial experiences, and unconditional love, that establish a sense of familial intimacy. The ACLU of Hawaii does not wish to detract from those relationships. But the question presented by this statute is whether, and under what standards, the state can override a parent's determination regarding visitation by a grandparent. The lack of standards contained in S.B. 2301 may subject the bill to constitutional scrutiny for failure to include the necessary deference to a fit parent's decision that is required to comport with that parent's constitutional rights. See *Doe*, 334-336; *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

We would suggest that S.B. 2301 be amended to articulate the following standards:

- 1) Clear and convincing evidence that denial of reasonable visitation rights would cause significant harm to the child;<sup>1</sup>

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<sup>1</sup> To be clear, the ACLU of Hawaii does not contend that all child-rearing decisions by fit parents are immune from all judicial inquiry. But for the State to establish a compelling interest sufficient to override parental discretion, the ACLU of Hawaii believes that, with respect to a request for visitation by a grandparent, a showing of significant

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- 2) What age the child must be in order for a grandparent to petition for visitation (age 1, e.g.);
- 3) Enumeration of factors:
  - the preference of the child, if the court finds the child is to be of sufficient maturity to make this decision
  - the mental and physical health of the child
  - the mental and physical health of the grandparent, great-grandparent or sibling
  - the length of the prior relationship between the child and the grandparent, great-grandparent, or sibling
  - the good faith of the party in filing the petition
  - the good faith of the person denying the visitation
  - the quantity of the visitation time requested and the potential for adverse impact the visitation would have on the child's customary activities
  - whether the child resided with the petitioner for at least six consecutive months with or without the current custodian present
  - whether the petitioner had frequent or regular contact or visitation with the child for at least twelve consecutive months
  - any other fact that establishes that the loss of relationship between the person bringing the action and the child is likely to harm the child's mental, physical, or emotional health, and
  - whether the grandparent, great-grandparent, or sibling was a primary caretaker of the child for a period no less than six consecutive months.<sup>2</sup>

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-

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"harm" to the child must be made. Although the plurality in *Troxel* found it unnecessary to determine whether a finding of "harm" was required before a fit parent's decision regarding visitations can be overridden. 530 U.S. at 73. Requiring a finding of harm, however, would be completely consistent with the notion of special deference to the fit parent's decision. Furthermore, a finding that harm exists should be proved by the enhanced "clear and convincing evidence" standard that applies when individual constitutional interests are at stake. See e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring clear and convincing evidence of neglect to terminate parental rights); *V.C. v. M.J.B.*, 163 N.J. 200 (2000) (requiring clear and convincing evidence of harm to deny psychological parent visitation).

<sup>2</sup> The foregoing factors are taken from the Illinois statute on grandparent visitation and are included for guidance only. 750 ILCS 5/607.

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Sen. Chun Oakland, Chair, HMS Committee  
and Members Thereof  
January 31, 2012  
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profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple  
Staff Attorney  
ACLU of Hawaii

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# Raelene Tenno

January 27, 2012

The Honorable Suzanne Chun Oakland  
Committee on Human Services  
Conference Room 016  
State Capitol  
415 South Beretania Street  
Honolulu, Hawaii 96813

RE: Support of SB 2301 relating to Child Visitation

I am in support of Senate Bill 2301 in granting Grandparents visitation rights as a family advocate and on a personal experience.

As many know, often times it's the grandparents that offer the child a comforting, safe, and secure haven to the family structure and should be able to visit with the child/ren as often as necessary for the child/ren. No grandparent should ever have to hire an attorney or petition the court for visitations.

I currently have grandparents that have not seen their grandchild during the holidays (since 12/14) or the visits are limited to 1 hour per month. Both cases are non DV, Drug or Sex abuse related and the birth parents rights have been terminated by Child Welfare.

If this bill passes and becomes law I encourage our legislature to require DHS to implement policy and procedures within 90 days to increase grandparents (as appropriate in relationship to DV, Drug or Sex Abuse) visits. Otherwise this law will become mute and will be another battle with CWS for visitation rights.

Thank you for this opportunity to testify on Senate Bill 2301.

Sincerely,



Raelene Tenno  
Family Advocate

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