



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013**

ON THE FOLLOWING MEASURE:

H.B. NO. 172, RELATING TO CHILD VISITATION.

BEFORE THE:

HOUSE COMMITTEE ON HUMAN SERVICES

DATE: Thursday, February 14, 2013 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 329

TESTIFIER(S): David M. Louie, Attorney General, or
Jay K. Goss, Deputy Attorney General

Chair Carroll and Members of the Committee:

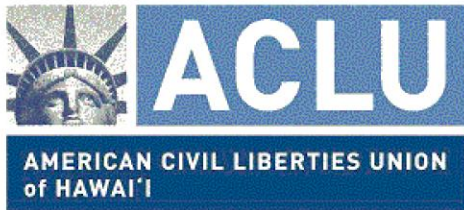
The Department of the Attorney General (the "Department") appreciates the intent of this bill, but provides the following comments and suggested amendments.

This bill would amend section 571-46.3, Hawaii Revised Statutes, (HRS), which was held to be unconstitutional by the Supreme Court of the State of Hawaii in Doe v. Doe, 116 Haw. 323, 172 P.3d 1067 (2007). The Supreme Court in Doe ruled that section 571-46.3, HRS, was unconstitutional because it did not require a grandparent, who was petitioning for visitation, to show that the denial of visitation would cause significant harm to the child.

This bill attempts to address the concerns raised by the Hawaii Supreme Court by (1) adding a requirement that if a grandparent challenges the visitation decisions made by a parent, the grandparent must show that the denial of visitation would cause "demonstrable" harm to the child, and (2) making clear that parents have a fundamental privacy right in making child rearing decisions, and that there is a presumption that their decisions regarding visitation are in their child's best interests.

As amended in section 2 of this bill, section 571-46.3(a)(2) sets forth as criteria to be met "Reasonable visitation rights are in the best interest of the child or that the denial of reasonable visitation rights would cause demonstrable harm to the child." (emphasis added). However, the Hawaii Supreme Court has ruled that "proper recognition of parental autonomy in child-rearing decisions requires that the party petitioning for visitation demonstrate that the child will suffer significant harm in the absence of visitation before the family court may consider what degree of visitation is in the child's best interests." Doe at 335-336. To conform with the holding in Doe,

case we suggest that section 571-46.3 (a)(2) on page 1, lines 10-13, be amended to delete the "best interest of the child" existing wording and to read "Denial of reasonable visitation rights would cause significant harm to the child."



Committee: Committee on Human Services
Hearing Date/Time: Thursday, February 14, 2013, 9:30 a.m.
Place: Room 329
Re: Testimony of the ACLU of Hawaii to Offer Comments on H.B. 172,
Relating to Child Visitation

Dear Chair Carroll and Members of the Committee on Human Services:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes to offer comments to H.B. 172, 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). H.B. 172 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 H.B. 172.

H.B. 172 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 H.B. 172 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 suggest that H.B. 172 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;¹

¹ 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 finding that 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
- 4) Factors implicating **Significant Harm to the Child:**
 - 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.²

These amendments would ensure that all parties' rights are maintained. While the fundamental rights of parents are the ACLU of Hawaii's immediate concern, we would also suggest that the Legislature consider extending familial rights to all Hawaii's families, particularly those lesbian and gay parents and hanai families who are unable to exercise the same rights and responsibilities as those given to their "married" counterparts.

Thank you for this opportunity to testify.

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).

² 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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Chair Carroll, HUS Committee Members
February 14, 2013
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Sincerely,

Laurie A. Temple
Staff Attorney and Legislative Program Director
ACLU of Hawaii

The ACLU has been the nation's guardian of liberty since 1925 and the ACLU of Hawaii since 1965. The ACLU works daily in the courts, legislatures and communities to defend and preserve the individual rights and liberties equally guaranteed to all by the Constitutions and laws of the United States and Hawaii. The ACLU works to ensure that the government does not violate our constitutional rights, including, but not limited to, freedom of speech, association and assembly, freedom of the press, freedom of religion, fair and equal treatment, and privacy. The ACLU network of volunteers and staff works throughout the islands to defend these rights, often advocating on behalf of minority groups that are the target of government discrimination. If the rights of society's most vulnerable members are denied, everyone's rights are imperiled.

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kobayashi1-Joni

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 11, 2013 6:08 PM
To: HUS testimony
Cc: pamelapcm@gmail.com
Subject: *Submitted testimony for HB172 on Feb 14, 2013 09:30AM*

Categories: Blue Category

HB172

Submitted on: 2/11/2013

Testimony for HUS on Feb 14, 2013 09:30AM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Pamela Williams	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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