



*The Judiciary, State of Hawaii*

**Testimony to the House Committee on Human Services**

The Hon. Mele Carroll, Chair

The Hon. Bertrand Kobayashi, Vice Chair

Tuesday, February 4, 2014

9:30 a.m.

State Capitol, Conference Room 329

WRITTEN TESTIMONY ONLY

By

R. Mark Browning

Deputy Chief Judge, Senior Family Judge

Family Court of the First Circuit

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**Bill No. and Title:** House Bill No. 2488, Relating to Children

**Purpose:** Changes the standard of proof in child abuse and neglect proceedings.

**Judiciary's Position:**

The Judiciary respectfully offers the following comments regarding this bill.

1. Requiring the clear and convincing standard of proof to all proceedings in HRS Chapter 587A cases may be counterproductive. It is certainly against the grain of how civil cases are treated in this country. For example, the laws on procedures in civil cases in children's and adults' cases in the family courts cites the preponderance of evidence standards. (HRS Sections 571-41(c) and (d); 571-42(d). It may add greater complexity and cost at each level and for every type of hearing in these proceedings.

2. This change may not be in the children's best interest if the delays and additional costs result. Speed is of the essence in these cases. Children need safety and security at all times but they particularly need it after suffering trauma and/or harmful neglect. For the children in foster care, every day may feel like an eternity. It is essential that all parties immediately and

effectively focus on promoting healing in the family and restorative and rehabilitative work by the parents.

3. This change may not be good for parents, either. It may be that the bill seeks to ensure that parents will temporarily lose their children to foster care only if the standard of proof were increased and met in every case. However, this heightened standard will also apply to them as they seek relief. Moreover, the state has better access to legal representation and litigation resources. Under this bill, the state would have already proven harm to the child and specific allegations of abuse and/or neglect against one or both parents by clear and convincing evidence. This creates a significant hurdle for parents to surmount. Although parents are assured of legal representation, they are still at a disadvantage in their access to legal representation because of the number of cases that court appointed attorneys must handle without adequate supportive resources and maximum “caps” on their work.

For these reasons, it may be more prudent to refrain from making the changes in this bill.

Thank you for the opportunity to testify on this bill.



STATE OF HAWAII  
DEPARTMENT OF HUMAN SERVICES  
P. O. Box 339  
Honolulu, Hawaii 96809-0339

February 4, 2014

**TO:** The Honorable Mele Carroll, Chair  
House Committee on Human Services

**FROM:** Patricia McManaman, Director

**SUBJECT: H.B. 2488 - RELATING TO CHILDREN**

Hearing: Thursday, February 4, 2014, 9:30 a.m.  
Conference Room 329, State Capitol

**PURPOSE:** The purpose of this bill is to change the standard of evidence to clear and convincing for certain family court hearings pertaining to child welfare and child protection.

**DEPARTMENT'S POSITION:** The Department of Human Services (DHS) strongly opposes the proposed change to the definitions in section 587A-4, Hawaii Revised Statutes (HRS) for: "adjudication" that raises the level of evidence from "preponderance of the evidence" to "clear and convincing"; and for establishing "clear and convincing evidence" as the standard of proof for all proceedings under chapter 587A, HRS, the Child Protective Act.

During the initial phases of investigation / intervention, an immediate response from the DHS to assess the safety issues for the child may be required. In some severe child abuse cases, there may not be clear and convincing evidence in the beginning regarding the identification of the specific perpetrator of the abuse. The DHS must take immediate actions to protect the child, and files a petition

seeking judicial intervention and oversight based on a safety assessment with only the information available at that time. Bringing a child abuse / neglect situation to the attention of the Family Court and establishing jurisdiction is done to ensure the safety of a child, and the also ensures the protection and preservation of the parents' rights in cases where a child has been harmed or threatened with harm. Requiring clear and convincing evidence at the time of adjudication will clearly delay the ability of the DHS and the Court to ensure immediate safety of the child and will delay the provision of necessary support for the child's family.

The safety and protection of a child is paramount intervention by Child Welfare Services (CWS) and Family Court's intervention is often essential in ensuring the safety of a child.

Thank you for the opportunity to testify.



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-SEVENTH LEGISLATURE, 2014**

**LATE**

**ON THE FOLLOWING MEASURE:**  
H.B. NO. 2488, RELATING TO CHILDREN.

**BEFORE THE:**  
HOUSE COMMITTEE ON HUMAN SERVICES

**DATE:** Tuesday, February 4, 2014 **TIME:** 9:30 a.m.

**LOCATION:** State Capitol, Room 329

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

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Chair Carroll and Members of the Committee:

The Department of the Attorney General (Department) opposes this bill.

The purpose of this bill is to raise the standard of proof to protect children under chapter 587A, Hawaii Revised Statutes (Child Protective Act), from the "preponderance of the evidence" standard of proof to the higher "clear and convincing evidence" standard of proof.

The stated purpose of the Child Protective Act as indicated in section 587A-2, Hawaii Revised Statutes (HRS), is to create "within the jurisdiction of the family court a child protective act to make paramount the safety and health of children who have been harmed or are in life circumstances that threaten harm." Under the current statutory scheme of the Child Protective Act, the standard of proof required for the court to take jurisdiction and to protect children from harm or threatened harm is the "preponderance of the evidence" standard and the standard of proof to terminate parental rights is the higher "clear and convincing evidence" standard. These standards are consistent with the constitutional requirements set forth in the holdings by the United States Supreme Court in Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388 (1982), and the Hawaii Supreme Court in Woodruff v. Keale, 64 Haw. 85, 637 P.2d 760 (1981). The current statutory scheme meets all constitutional requirements and strikes a balance between the rights of parents to raise their children and the state's interest in protecting children who have been harmed or are subject to threatened harm.

Because this bill raises the standard of proof above the standard that is required by either the United States Constitution or the Hawaii State Constitution, and makes it more difficult to

protect children who have been harmed or are subject to threatened harm, the Department opposes this bill.

Marilyn Yamamoto

Family advocate

Testimony for HB 2488 on Feb. 4, 9:30 am, Rm 329

Child abuse and neglect is a criminal act, yet few parents whose children are placed in state care are referred to criminal court where the standard of evidence is high. Instead, many child removals are based upon “predicted” neglect where a social worker report has only hearsay and opinion. Proponents of the lower standard of preponderance of evidence would argue that it’s better to “err on the side of child safety”. How is it good for a child to be ripped away not only from his parents, but aunts, uncles, grandparents, neighbors and school? Unless there is true imminent danger, the trauma of removal is far more damaging than the perceived future abuse or neglect from family. Child removal should be used as a last resort only because foster care effectively punishes the child, not the parent. Family preservation is the standard promoted by federal law and child welfare guidelines and should be priority unless there is clear and convincing evidence to prove otherwise.

As a parent advocate, I see that there is always some kind of circumstance that triggers a child welfare investigation, but in the absence of outright false allegations, services to address family issues should be priority. It is my belief that when preponderance of evidence (51%) is the standard to remove a child there is a presumption that parents are guilty until proven innocent.

A sentence in criminal court in Hawaii in 2010 for assault that resulted in permanent disability of a child was 6 months of incarceration and probation, while a child welfare case in civil court often results in the incarceration of a child in foster care for up to a year due in part simply to court scheduling. Offenders should be in state care, not children.

A well-known therapist who worked with foster children for 24 years stated for the record that every single child, even those who were actually physically abused, wanted nothing more than to “go home”. All court players need to keep this in mind when decisions to remove and keep these children away from family are made. The impact upon the entire family has life-long consequences.

The following paper further explains the reason for my support of the change in Hawaii statute.

**From NCCPR.org paper SOLUTIONS: Due Process**

RECOMMENDATION 14: The standard of proof in all court proceedings should be raised from the current standard in most states, “preponderance of the evidence,” to “clear and convincing.”

The standard also should apply when a worker decides to “substantiate” alleged maltreatment. There are few punishments one can inflict on a child that are more severe than needlessly tearing away his family. And yet, when it’s time for courts to decide to place a child in foster care, they do not apply the standard used to convict someone accused of murdering a child, “beyond a reasonable doubt,” or even the middle standard, “clear and convincing” evidence. Instead, courts in most states apply the lowest

standard of proof, “preponderance of the evidence.” As we noted at the start of this report, this is the same standard used to decide which insurance company pays for a fender bender. Only at the very end, when the issue is termination of parental rights, does the standard rise to “clear and convincing” – and it took a U.S Supreme Court case to make that the law of the land in all 50 states.

The “clear and convincing” standard should be the standard for every decision, from the moment a caseworker decides whether to “substantiate” a case, through initial removal, through continuing foster care. Opponents say, in effect, that if caseworkers ever actually had to provide real evidence that a parent did something wrong before they took away the children, then children might be left in unsafe homes. But if the standard is not raised, even more children will be subject to the unconscionable trauma of needless foster care – and some of them will be abused in foster care itself. Furthermore, the system will continue to be overwhelmed and that will lead to more children in real danger being missed. In fact, even if the standard is raised, the impact may be limited. Some states already use a clear and convincing standard – yet the rate of child removal in those states appears to be no lower than others. In other words, no matter what the law says, judges tend to apply a standard that boils down to almost no standard.

The impact of raising the standard is likely to be symbolic – if it is raised with enough media attention it might cause at least a temporary reduction in needless removals of children. In addition, it may increase the chances of bad decisions being overturned on appeal.



**kobayashi1-Joni**

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, February 03, 2014 3:37 PM  
**To:** HUS testimony  
**Cc:** breaking-the-silence@hotmail.com  
**Subject:** Submitted testimony for HB2488 on Feb 4, 2014 09:30AM

**HB2488**

Submitted on: 2/3/2014

Testimony for HUS on Feb 4, 2014 09:30AM in Conference Room 329

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Dara Carlin, M.A.	Individual	Comments Only	No

Comments: Good Morning Representatives ~ Abuse is a crime, not a personal problem - HB 2488 illustrates why abuse cases need to be heard in criminal court NOT family court. Thank you for the opportunity to provide comments on this proposal.

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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