

JAN 16 2014

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# A BILL FOR AN ACT

RELATING TO CHILD VISITATION.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The legislature finds that section 571-46.3,  
2 Hawaii Revised Statutes, was enacted to permit grandparents to  
3 seek visitation with their grandchildren where it is "in the  
4 best interests of the child." The legislature left no doubt  
5 that it intended to permit a court to order visitation by a  
6 minor child's grandparents, even over a parent's objection, if  
7 found by a court to be in the best interests of the child. The  
8 senate committee on judiciary found that "grandparents play a  
9 significant role in the lives of minor children and should be  
10 allowed reasonable visitation rights so long as it is in the  
11 best interests of the child." Senate Stand. Comm. Rep. No.  
12 1053, 1993 Senate Journal, at 1154. The house committee on  
13 judiciary found that "In today's society grandparents play an  
14 integral part in the lives of children. In the United States,  
15 millions of grandparents care for their grandchildren when  
16 parents are away. Your Committee believes that there are times  
17 when visitation by grandparents is in the best interest of the



1 child and thus should be encouraged." House Stand. Comm. Rep.  
2 No. 611-98, 1998 House Journal, at 1276.

3 The legislature also finds that in *Troxel v. Granville*, 530  
4 U.S. 57 (2000), the United States Supreme Court considered a  
5 challenge to a similar Washington state statute that permitted  
6 anyone to seek visitation when it serves the "best interest of  
7 the child." The Washington supreme court had concluded that the  
8 statute unconstitutionally infringes on the fundamental rights  
9 of parents to rear their children because it did not require a  
10 showing that harm would result from lack of visitation. The  
11 United States Supreme Court upheld the Washington supreme  
12 court's decision, observing that the problem was not that the  
13 trial court intervened but that, when it did so, it failed to  
14 give "special weight" to the determination of a fit parent as to  
15 what was in her child's best interests.

16 Following *Troxel*, in *Doe v. Doe*, 116 Hawaii 323 (2007), the  
17 Hawaii supreme court considered whether a court may order  
18 grandparent visitation under section 571-46.3, Hawaii Revised  
19 Statutes, absent a showing of harm or potential harm to the  
20 child. The Hawaii supreme court tried to determine whether the  
21 statute could be saved by requiring the family court to give  
22 special weight--to effectively apply a rebuttable presumption of



1 validity--to the visitation decisions of a custodial parent  
2 whose fitness has not been challenged.

3       The Hawaii supreme court held that the statute must require  
4 a showing that denial of visitation to the nonparent would  
5 result in significant harm to the child, before a court  
6 considers what degree of visitation is in the child's best  
7 interests. However, the court found that it could not go so far  
8 as to read a "harm to the child" standard into the statute  
9 because it uses the term "best interests of the child" and that  
10 to do so would constitute "judicial legislation" prohibited by  
11 the doctrine of separation of powers. Accordingly, the Hawaii  
12 supreme court concluded that, absent a substantive amendment by  
13 the legislature adding the "harm to the child" standard, the  
14 statute is unconstitutional on its face.

15       To address the *Doe* decision, the legislature in 2011 passed  
16 House Bill No. 56, which explicitly gave "special weight" to the  
17 parent's decision regarding grandparent visitation by applying a  
18 rebuttable presumption that it is in the "best interests of the  
19 child." The measure also required a showing that denial of  
20 visitation to the grandparent would result in "significant harm  
21 to the child" to overcome that presumption. As introduced, the  
22 bill established "preponderance of the evidence" as the burden



1 of proof necessary to rebut the presumption that parental  
2 visitation decisions are in the child's best interests.  
3 However, at the request of the American Civil Liberties Union of  
4 Hawaii, the bill was amended to increase the burden of proof to  
5 "clear and convincing evidence" and it was passed with that  
6 requirement.

7       Ultimately, the governor vetoed House Bill No. 56, in part  
8 because of his belief that "it will be too difficult for  
9 grandparents to show by clear and convincing evidence that the  
10 denial of visitation will cause significant demonstrable harm to  
11 the child." The governor went on to say that while he  
12 recognized the parents' constitutional right to raise their  
13 child as they see fit, he also recognized that grandparents  
14 often have a significant role in children's lives and should be  
15 able to visit their grandchildren.

16       The legislature also finds that section 571-46.3, Hawaii  
17 Revised Statutes, having been found unconstitutional as  
18 presently written, must either be fixed or repealed. It cannot  
19 remain in its current form because it provokes unwarranted  
20 concern in the minds of custodial parents and offers no relief  
21 to grandparents concerned about the effect of their  
22 grandchildren being denied visitation with their grandparents.



1 Because the legislature believes that denying children  
2 visitation with their grandparents, in certain circumstances,  
3 may cause harm to the children, the statute must be amended,  
4 rather than repealed, in a way that makes it both constitutional  
5 and practical to apply.

6 The legislature also finds that neither the *Troxel* nor the  
7 *Doe* decision specified the burden of proof necessary to overcome  
8 the rebuttable presumption that the parent's visitation decision  
9 is in the best interests of the child. In child protective  
10 proceedings pursuant to chapter 587A, Hawaii Revised Statutes,  
11 adjudications involving determinations that a child has been  
12 harmed or is subjected to threatened harm must be supported by a  
13 preponderance of the evidence. Section 587A-4, Hawaii Revised  
14 Statutes. By contrast, permanent plans, including complete  
15 termination of parental rights, may be ordered only on the basis  
16 of clear and convincing evidence. Section 587A-33, Hawaii  
17 Revised Statutes.

18 The legislature further finds that visitation orders are  
19 only temporary because the court retains jurisdiction over  
20 custody matters until the child reaches the age of majority,  
21 section 571-46(a), Hawaii Revised Statutes, and that authorizing  
22 grandparent visitation in appropriate cases does not require the



1 level of proof necessary for termination of parental rights.  
2 Accordingly, this Act specifies that the presumption that a  
3 parent's denial of grandparent visitation is in the best  
4 interests of the child may be rebutted by a preponderance of the  
5 evidence that denial of visitation will cause significant harm  
6 to the child.

7 The purpose of this Act is to promote the best interests of  
8 children by permitting a court to order visitation with their  
9 grandparents when the preponderance of the evidence proves that  
10 denial of visitation will cause significant harm to a child.

11 SECTION 2. Section 571-46.3, Hawaii Revised Statutes, is  
12 amended to read as follows:

13 "**§571-46.3 Grandparents' visitation rights; petition;**  
14 **notice; order.** (a) A grandparent or the grandparents of a  
15 minor child may file a petition with the court for an order of  
16 reasonable visitation rights. The court may award reasonable  
17 visitation rights; provided that the following criteria are met:

18 (1) This State is the home state of the child at the time  
19 of the commencement of the proceeding; and

20 (2) [~~Reasonable~~] Denial of reasonable visitation rights  
21 [~~are in the best interests of~~] would cause significant  
22 harm to the child.



1        (b) In any proceeding on a petition filed under this  
2 section, there shall be a rebuttable presumption that the  
3 parent's decision regarding visitation is in the best interests  
4 of the child. The presumption may be rebutted by a  
5 preponderance of the evidence that denial of reasonable  
6 visitation rights would cause significant harm to the child. In  
7 ruling on the petition, the court may consider factors including  
8 the following:

9        (1) The nature and extent of any pre-existing relationship  
10 between the child and the grandparent;

11        (2) Whether the grandparent has previously been granted  
12 visitation by the child's parent or custodian and, if  
13 so, the nature and extent of the visitation;

14        (3) Whether the grandparent has previously been awarded  
15 visitation rights or custody of the child by a court;

16        (4) Whether the child has resided with the grandparent,  
17 either alone or with a parent and, if so, how recently  
18 and for how long;

19        (5) Whether the grandparent was a primary caregiver for  
20 the child and, if so, for how long;



- 1        (6) Whether the grandparent has provided financial support  
2        to the child, including for food, clothing, education,  
3        and medical, dental, or mental health care;
- 4        (7) The amount of visitation time requested and the  
5        potential for adverse impact on the child's customary  
6        activities;
- 7        (8) The physical and mental health of the child and the  
8        grandparent;
- 9        (9) The good faith of the grandparent and the parent or  
10       custodian denying visitation;
- 11       (10) If the parent or custodian has denied the grandparent  
12       visitation or substantially restricted visitation  
13       previously granted, whether the reason given, if any,  
14       bears on the grandparent's ability to safely care for  
15       the child during visitation or relates to an issue  
16       between the grandparent and parent not directly  
17       related to safe care of the child during visitation;
- 18       (11) The child's preference; provided that the court finds  
19       the child is of sufficient maturity to state a  
20       preference;
- 21       (12) Any relevant factor in the safe family home factors  
22       under section 587A-7; and





1        (13) Any other factor that establishes that the loss of  
 2                    relationship between the grandparent and the child is  
 3                    likely to harm the child's mental, physical, or  
 4                    emotional health.

5        (c) No hearing for an order of reasonable visitation  
 6 rights under this section shall be had unless each of the living  
 7 parents and the child's custodians shall have had due notice,  
 8 actual or constructive, of the allegations of the petition and  
 9 of the time and place of the hearing thereof.

10        (d) An order made pursuant to this section shall be  
 11 enforceable by the court, and the court may issue other orders  
 12 to carry out these enforcement powers if in the best interests  
 13 of the child."

14        SECTION 3. This Act does not affect rights and duties that  
 15 matured, penalties that were incurred, and proceedings that were  
 16 begun before its effective date.

17        SECTION 4. Statutory material to be repealed is bracketed  
 18 and stricken. New statutory material is underscored.

19        SECTION 5. This Act shall take effect upon its approval.

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INTRODUCED BY: *Shiranne Chum Cleland*



S.B. NO. 2217

Anna Tuel

R  
Muller

Ronald & Bel



# S.B. NO. 2217

**Report Title:**

Child Custody; Grandparent Visitation

**Description:**

Permits family court to award reasonable visitation to grandparents of a child if denial of visitation would cause significant harm to the child. Establishes presumption that visitation decisions by parent are in the best interests of the child. Presumption may be rebutted by a preponderance of the evidence. Identifies factors court may consider in awarding visitation.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

