



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

ON THE FOLLOWING MEASURE:

H.B. NO. 2461, RELATING TO CHILD VISITATION.

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

Chair Carroll and Members of the Committee:

The Department of the Attorney General (Department) provides the following comments.

The purpose of this bill is to allow the family court to award reasonable visitation to a grandparent if the denial of visitation would cause significant demonstrable harm to the child. The bill establishes a rebuttable presumption that visitation decisions made by a parent are in the best interest of the child.

The current version of section 571-46.3, Hawaii Revised Statutes (HRS), was held 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) 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, and (2) requiring that if a grandparent challenges the visitation decisions made by a parent, the grandparent must show that the denial of visitation would cause significant demonstrable harm to the child. However, this bill does not specify the standard of proof required by a grandparent in seeking to show that the denial of visitation would cause significant demonstrable harm to the child.

In 2011, the Legislature passed House Bill No. 56 which provided that parents have a fundamental privacy right in making child rearing decisions including decisions concerning

visitation with their children and required that if a grandparent wanted to challenge those visitation decisions, the grandparent had to show by clear and convincing evidence that the denial of visitation would cause significant demonstrable harm to the child. However, the bill was vetoed by the Governor because while he recognized that parents have a constitutional right to raise their children as they see fit, he also recognized that grandparents often have a significant role in children's lives and should be able to visit their grandchildren and that it would be too difficult for grandparents to show by clear and convincing evidence that the denial of visitation will cause significant demonstrable harm to the child.

The Department recommends that the language on page 1, line 16 of the bill be amended as set forth in House Bill No. 172, page 7, line 17 as follows: "The presumption may be rebutted by a preponderance of the evidence that denial of reasonable visitation rights would cause significant harm to the child." House Bill No. 172 specifies that while parents have fundamental privacy right in making child rearing decisions including decisions concerning visitation with their children, a person can challenge those visitation decisions, if they can show by a preponderance of the evidence that the denial of visitation would cause significant demonstrable harm to the child.

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TO: Representative Mele Carroll, Chair
Representative Bertrand Kobayashi, Vice-Chair
House Committee on Human Services

FROM: Dyan M. Medeiros
E-Mail: d.medeiros@hifamlaw.com
Phone: 524-5183

HEARING DATE: February 4, 2014 at 9:30 a.m.

RE: Testimony in Opposition to HB 2461 Relating to Child Visitation
(Grandparents' Visitation)

Good afternoon Representative Carroll, Representative Kobayashi, and members of the Committee. My name is Dyan Medeiros. I am a partner at Kleintop, Luria & Medeiros, LLP and have concentrated my practice in Family Law for fifteen (15) years. I am also a past Chair of the Family Law Section of the Hawaii State Bar Association. I am here today to testify against HB2461.

I oppose HB2461 related to grandparents' visitation rights.

I would like to state that on a personal level, I recognize the important contribution that grandparents can make in the raising of their grandchildren. After my mother passed away (when I was barely 2 years old), I was raised by a single father. His parents took my sister and I to school, picked us up from school, and helped with other child care. I was very close to my paternal grandparents and value the influence they had on my life.

However, my father also felt it was important that I spend significant time with my maternal relatives. As a result, I visited them regularly until my early teens when I refused to visit with them due to their criticism and badmouthing of my father, something he never really knew about because as a child I couldn't explain it.

My point is that not all grandparents are the same and "someone" other than a Court should have the final say about who children ultimately spend time with. That "someone" should be a child's parent.

Both as a Family Law attorney and as an adult who has personally experienced the good and the bad of grandparent visitation, I simply cannot support this bill. It is an open invitation for increased litigation, something which is not

usually in a child's best interest. It also has the potential to overburden the Family Court as potentially each of four (4) grandparents will now have the ability to initiate family court litigation for visitation.

Custody cases between parents are always highly emotional and often contentious. This bill would allow grandparents to personally become involved in an already contentious matter and simply put, make things worse. From a public policy perspective, this legislation seems to be encouraging or promoting the destruction of families rather than strengthening families.

A parent's right to the care, custody and control of his or her child has been found to be a fundamental right under the Fourteenth Amendment. This bill acknowledges that there is a "rebuttable presumption that the parent's decision regarding visitation is in the best interests of the child". However, it is unclear what would have to be shown to rebut that presumption. If the Family Court awarded visitation to a grandparent over a parent's objection, it would be essentially overruling a parent's fundamental right to raise his or her children. Given the right at stake, a "clear and convincing evidence" burden of proof is appropriate.

"Significant demonstrable harm to the child" is not defined in this bill. Instead, nine (9) factors are listed that the Court may consider. Although some of the factors appear to be similar to factors the Court considers in determining what is in a child's best interest, some are not. In fact, some factors seem to ignore what is in a child's best interest.

For example, Factor #5 is a financial factor that shouldn't matter when awarding visitation. If a grandparent has paid for child care but otherwise has had little contact with a child, should that grandparent be awarded visitation over a parent's objection?

In addition, Factor #6 ignores the reality that a parent and grandparent can have an issue with each other that won't affect a grandparent's ability to "safely" care for a child but does impact the child. For example, grandparents badmouthing the other parent in front of children.

Further, this bill doesn't limit the ability to file a petition for visitation to grandparents who have no contact with their grandchildren. In other words, under this bill, a parent or parents could actually allow contact with grandparents but if the grandparents want more time with their grandchildren, they could file a petition for more visitation. This is actually what happened in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000), a United States Supreme Court case that found Washington's grandparent visitation statute unconstitutional.

When determining visitation for parents, the Family Court applies the best interest of the child standard. There is no mention of that standard in this bill and it appears therefore that a different standard would apply to grandparents.

Lastly and most importantly, this bill is unnecessary as the Court can already allow third parties (including grandparents) to visit with children under Hawaii Revised Statutes Section 571-46(7):

“Reasonable visitation rights shall be awarded to parents, grandparents, siblings, and any person interested in the welfare of the child in the discretion of the court, unless it is shown that rights of visitation are detrimental to the best interests of the child”

Thank you.

TO: Representative Mele Carroll, Chair
Representative Bertrand Kobayashi, Vice-Chair
House Committee on Human Services

FROM: William C. Darrah
E-Mail: bill@wcdlawhawaii.com
Phone: 533-2930

HEARING DATE: February 4, 2014 at 9:30 a.m.

RE: Testimony in Opposition to HB 2461 Relating to Child Visitation
(Grandparents' Visitation)

Good afternoon Representative Carroll, Representative Kobayashi, and members of the Committee. My name is William Darrah. I am a sole practitioner and have concentrated my practice in Family Law for more than thirty (30) years. I am also a past Chair of the Family Law Section of the Hawaii State Bar Association. I am here today to testify against HB2461.

As a Family Law attorney, I simply cannot support this bill. It is an open invitation for increased litigation, something which is not usually in a child's best interest. It also has the potential to overburden the Family Court as potentially each of four (4) grandparents will now have the ability to initiate family court litigation for visitation.

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Thank you.