



The Judiciary, State of Hawaii

Testimony to the Senate Committee on Judiciary and Labor

Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

Friday, February 26, 2016, 10:00 a.m.
State Capitol, Conference Room 016

by
R. Mark Browning
Senior Judge, Deputy Chief Judge
Family Court of the First Circuit

Bill No. and Title: Senate Bill No. 2883, Relating to Amending Identity of Registrant's Parent on a Birth Certificate

Purpose: Clarifies that amendments to birth records that change parenthood shall not be conducted through the Uniform Information Practices Act procedures to correct personal records, but must be pursuant to a court order of appropriate jurisdiction or other legal establishment of parenthood.

Judiciary's Position:

The Judiciary takes no position on this bill.

However, we wish to clarify certain statements made in the bill's Justification Sheet. It suggests that "some" courts have changed "the original information on their birth records to establish parenthood by someone other than their listed parents." The Justification Sheet also suggests that "some" courts subscribe to a statutory interpretation that would enable a "nightmarish" scenario.

We wish to report that there were only 3 circuit court cases involving 5 petitioners whose ages ranged from 35 to 65. In one case, 3 petitioners wanted their original birth certificates unsealed and corrected. Those petitioners were not seeking to alter any relationships created by adoption. In the second case, the petitioner wanted to add the biological father's name to the birth certificate (this case settled and DOH corrected the birth certificate voluntarily). In the last



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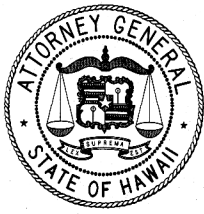
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case, the court determined that competing presumptions were involved (biological father vs. presumed father) and issued an order deciding the matter.

We respectfully submit this clarification, in response to the Justification Sheet, to ensure the Legislature and the public that the courts respect all parties, both individuals and governmental entities, and work to fairly decide cases according to the law and the particular facts of each case.

Thank you for the opportunity to submit this testimony.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016**

ON THE FOLLOWING MEASURE:

S.B. NO. 2883, RELATING TO AMENDING IDENTITY OF REGISTRANT'S PARENT ON A BIRTH CERTIFICATE.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Friday, February 26, 2016

TIME: 10:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): WRITTEN COMMENTS ONLY. For more information, call Jill T. Nagamine, Deputy Attorney General at 587-3050.

Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General supports this bill as it is currently written.

Section 338-15, Hawaii Revised Statutes (HRS), authorizes a person born in this State to file or amend a vital records certificate after the time prescribed¹ upon submitting proof as required by rules adopted by the Department of Health (DOH). This bill proposes an amendment to section 338-15, HRS, which would clarify and confirm that amendments to birth certificates that would change or establish the identity of a parent may only be made by the DOH pursuant to a court order or pursuant to a legal establishment of parenthood under chapter 584, HRS, and cannot be made as a correction to a personal record under chapter 92F, HRS.

This amendment is necessary because:

(1) Without it, parental rights can be established and terminated without affording parents their constitutional due process rights;

(2) Without it, the DOH, which has already been sued in state circuit court numerous times to change the identity of parents on birth certificates, may continue to be assessed costs and attorneys' fees in some cases, even though it is following the law and its rules; and

(3) Without it, the standards for accuracy of data on Hawai'i birth certificates will be compromised in favor of allowing persons to change their parents at will without notice to those parents and without any judicial safeguards to protect parental rights.

¹ State of Hawai'i, Department of Health, Public Health Regulations, chapter 8, section 2 provides: "Time allowed for birth report. A certificate of every live birth shall be filed within 7 days from date of occurrence."

Birth certificates and parentage

Registration of births is compulsory in Hawai‘i. Birthing facilities, physicians, midwives, or other legally authorized persons in attendance at a birth, including the parents if no one else is in attendance, are required to register a birth within seven days of its occurrence pursuant to Public Health Regulations, chapter 8, section 2. There are legal presumptions concerning parenthood of a child that are established by law. Section 584-4, HRS. Certificates filed within thirty days are prima facie evidence of the facts stated therein. Section 338-12, HRS. Birth certificates are used as prima facie evidence to prove identity, citizenship, parenthood, age, sex, and race. The Uniform Parentage Act, chapter 584, HRS, defines a parent and child relationship and provides the means to determine or establish that relationship. Chapter 584 requires notice be given to alleged and presumed parents when an action is brought to determine a parent and child relationship.

Constitutional rights of parents

As stated many times by the Hawai‘i Supreme Court, the rights of parents are protected by both the State and Federal Constitutions:

Important constitutional interests provide additional reason for providing parents a full and fair opportunity to present their case in custody decisions. Indeed, a parent's right to the "care, custody and control" of his or her child is a fundamental liberty interest protected by the United States Constitution. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) ("[T]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court."). This court has also recognized that independent of the United States Constitution "parents have a substantive liberty interest in the care, custody, and control of their children protected by the due process clause of article 1, section 5 of the Hawai‘i Constitution. Parental rights guaranteed under the Hawai‘i Constitution would mean little if parents were deprived of the custody of their children without a fair hearing." *In re Doe*, 99 Hawai‘i 522, 533, 57 P.3d 447, 458 (2002).

AC v. AC, 134 Hawai‘i 221, 339 P.3d 719, 731 (2014).

Allowing or requiring the DOH to amend the identity of parents on birth certificates without the protections of a judicial determination or the requirements of chapter 584, HRS, would amount to a denial of the due process rights of parents who are not notified but whose names are removed from birth certificates. One foreseeable consequence of allowing this interpretation could occur in cases of married couples who conceive their child with donated

genetic material. Although under chapter 584 they are presumed parents of a child born to them during their marriage, one or both of them could lose their rights without a hearing, and even without notice, if the child demanded a correction to the birth certificate based on test results that matched the child's DNA to the DNA of the donor of the genetic material. Another scenario would allow a child to add a father to the birth certificate where one was never listed before, or to switch fathers, without giving the man whose name was to be added an opportunity to contest the paternity. Neither the Attorney General, the Office of Information Practices², nor the DOH subscribes to this interpretation of section 338-15, HRS, but some courts do, and thus, section 338-15, HRS, needs the amendment proposed by this bill.

The DOH can correct its records but cannot establish or terminate a parental relationship

The DOH is allowed to administratively correct spelling errors or simple mistakes on birth certificates, and this bill would not change that. This bill would ensure that the DOH could not effectively terminate parental rights by changing the identity of a parent on a birth certificate after that birth certificate has already been evidence of another parental relationship all of the birth registrant's life. Changes like that cannot be taken lightly and cannot be treated as a mere clerical mistake that needs correction.

The DOH's own rules already mandate a court order or a legal establishment of parenthood pursuant to chapter 584, HRS, before it changes the identity of a parent on a birth certificate, but DOH's interpretation of its own rules has been challenged in circuit court, with varying results. There have been cases of birth registrants seeking to change the identity of their parents on their birth certificates by characterizing their requested change as a "correction" of their record based on section 92F-24, HRS, which gives a person a right to request an agency to correct a factual error in that person's personal record. Section 92F-24 allows an agency twenty days to make the requested amendment or refuse to make it and provide the reason for the refusal. Upon a refusal, the person who requested the change has a right to bring a civil action pursuant to section 92F-27, HRS, and ultimately, if the court makes a judicial determination of

² In its testimony to the House Committee on Judiciary on House Bill 939, which is identical to this bill, the Office of Information Practices stated it: ". . . believes that UIPA's correction of personal record provisions are not the appropriate venue for an individual seeking to change the parentage reflected on a birth certificate, and therefore **supports** the clarification proposed by this bill."

parenthood, even if that determination is pursuant to chapter 584 (which is what the DOH believes is required), then the DOH is responsible for the requestor's costs and attorney's fees, because the original request was made and the lawsuit was brought pursuant to section 92F-27. There are already two cases in which the DOH was assessed attorney's fees and costs to change a father on a birth certificate. One resulted in a judgment against the DOH in the amount of \$5,527.73 and the other resulted in a judgment of \$41,953.62.³

Accuracy of Hawaii's vital records

Hawai'i prides itself on the accuracy of its vital records. That accuracy is achieved by laws that mandate birth registration and that carefully designate which persons are presumed to be parents. Allowing a change to the identity of a parent by substituting one person for another and changing a whole legal parental relationship, as if doing so was a mere correction to a typographical error or a mistake in recording, will endanger the accuracy of the vital records system.

Conclusion

Passage of this bill would assure that the due process rights of parents could not be taken away by a mere clerical action, would support DOH's longstanding interpretation of its own law and rules, would maintain the accuracy of vital records in Hawai'i, and would protect the State from significant unnecessary costs and attorney's fees.

We respectfully request that this bill be passed.

³ The Attorney General has appealed that case to the Intermediate Court of Appeals.