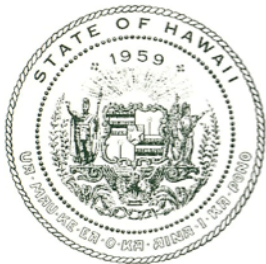


HAWAII
STATE
COMMISSION
ON THE
STATUS
OF
WOMEN



Chair
LESLIE WILKINS

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February 1, 2017

To: Representative Scott Nishimoto, Chair
Representative Joy San Buenaventura, Vice Chair
Members of the House Committee on Judiciary and Labor

From: Cathy Betts
Executive Director, Hawaii State Commission on the Status of Women

Re: Testimony in Opposition, HB 78, Relating to Attorney's Fees and
Costs in Hawaii Family Court

Thank you for this opportunity to testify in opposition to HB 78, which would provide for attorney's fees and costs in limited situations.

It is the Commission's position that HB 78 could have unintended consequences on victims of intimate partner violence, harassment, stalking, and domestic violence. HB 78 could also have unintended negative consequences in situations where one party does not have strong counsel, or where there is a power differential between the parties.

It is not uncommon for a victim of abuse to appear pro se in Family Court, with little access to legal resources or information on the ways in which the Family Court functions. Additionally, it is not uncommon for victims of abuse to feel powerless in a court case against his or her abusive partner. HB 78 could pressure litigants to settle in situations where they really should not settle.

HB 78 could represent a unique opportunity for abusive partners to take advantage of a party with less resources and potentially less power. For example, if a victim of domestic violence requested full custody, child support, and educational expenses for her children, the former abusive partner could easily use this procedure to gain the upperhand in negotiating a settlement, pressuring a victim to settle for shared custody or for a decrease in educational support for her children. Knowing that she would be potentially saddled with attorney's fees and costs, it seems unlikely that a victim of violence would turn down a settlement offer, regardless of how unfair or unsafe it may appear.

The Commission understands the need to ensure family court cases are dealt with fairly and expeditiously. HB 78 could potentially assist with a crowded court calendar and pressure contentious individuals to be less contentious. Given the possibility for HB 78 being used as a tool of abuse, the Commission respectfully urges this Committee to hold HB 78.

Thank you for this opportunity to testify in opposition to HB 78.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2017**

LATE

ON THE FOLLOWING MEASURE:

H.B. NO. 78, RELATING TO ATTORNEY'S FEES AND COSTS IN HAWAII FAMILY COURT.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Wednesday, February 1, 2017 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Erin K.S. Torres, Deputy Attorney General

Chair Nishimoto and Members of the Committee:

The Department of the Attorney General appreciates the intent of this bill but has some suggested modifications.

The purpose of this bill is to create a presumption in certain family court cases that the settlement offeror is entitled to an award of costs and reasonable attorney's fees if (1) the offer is not accepted and (2) the judgment is not patently more favorable to the offeree than the settlement offer. This presumption can be overcome if the court specifically finds that the award of costs and attorney's fees would be inequitable.

If the intent is for this bill to apply to annulment, divorce, and separation matters only, the sentence beginning paragraph (2) of section 580-47(f), Hawaii Revised Statutes, on page 3, lines 4-10, in section 2 of the bill should be revised to read as follows:

"At least twenty days before any contested hearing is scheduled to begin pursuant to this chapter, any party may serve upon the adverse party an offer to allow a judgment to be entered to the effect specified in the offer."

If the intent is for this bill to apply to other family court cases as well as annulment, divorce, and separation matters, then there are certain types of cases that should be excluded in addition to law violations, criminal matters, and child protection matters. When determining which cases should be excluded from this bill, public policy

concerns should be taken into consideration. For example, child protection matters are properly excluded because if the State were to become liable for costs and attorney's fees of alleged perpetrators of harm, there would be a potential chilling effect on the filing and pursuit of court cases to protect children who are in need of protection by the State. This public policy of ensuring the safety of the most vulnerable individuals in our community should include protecting children at risk of harm, as well as vulnerable adults and mentally defective or mentally ill individuals. Therefore, if the intent of this bill is to include family court cases other than annulment, divorce, and separation matters, the sentence beginning section 580-47(f)(2) on page 3, lines 4-10, in section 2 of the bill should be modified to read as follows:

“At least twenty days before any contested hearing is scheduled to begin pursuant to section 571-11, 571-12, 571-13, or 571-14, excluding law violations, criminal matters, child protection matters, truancy matters, guardianship and adoption matters, termination of parental rights matters, Interstate Compact on Juvenile matters, vulnerable adult protection matters, and treatment or commitment of mentally defective or mentally ill person matters, any party may serve upon the adverse party an offer to allow a judgment to be entered to the effect specified in the offer.”

The long list of types of family court cases that should be excluded make this suggested wording lengthy and cumbersome. For that reason, we recommend that the bill be revised to apply to annulment, divorce, and separation matters only, as discussed above.

It appears that this bill essentially takes the wording of the Hawai'i Family Court Rules (HFCR) Rule 68 and adds it to the existing section 580-47(f). In Cox v. Cox, 138 Hawai'i 476, 382 P.3d 288 (2016), the Supreme Court of Hawai'i opined that the application of HFCR Rule 68 would be inconsistent with the principles of equity and justice inherent in cases governed by section 580-47 and consequently held that HFCR Rule 68 is not applicable to family court cases under section 580-47. This concern of incompatibility could be addressed by adding wording to the end of paragraph (2) to clarify that a determination of equity should be made in consideration of the totality of

the circumstances of the case, as set forth in the already existing wording of section 580-47(f).

The sentence beginning on page 3, line 21, to page 4, line 6, at the end of section 580-47(f)(2) in section 2 of the bill should be revised to read as follows:

“If the judgment, in its entirety, finally obtained by the offeree is patently not more favorable than the offer, the offeree shall pay the costs, including reasonable attorney’s fees incurred after making the offer, unless the court shall specifically determine in accordance with paragraph(1) that the award would be inequitable.”

We respectfully recommend that the Committee make the suggested modifications if it intends to pass this measure.



25 Years

TO: Chair Nishimoto
Vice Chair San Buenaventura
Members of the Committee on Judiciary

FR: Nanci Kreidman, M.A.
Chief Executive Officer

RE: HB 78

Aloha! Thank you for the opportunity to provide our testimony in opposition to HB 78.

As we see it, the Cox decision is good for the constituency the Domestic Violence Action Center is dedicated to serving. It helps prevent coercion of economically disadvantaged people. Rule 68 is incredibly intimidating. We understand it is used as leverage to force litigants to settle, because if you get a Rule 68 offer, and don't beat the Rule 68 number, then you have to pay the other side's costs and attorney fees.

Family Court deals with special issues, like emotional, physical and economic abuse. Abuse thrives where one partner has substantially more power and control than another partner. Oftentimes, the person with less power in a relationship, and in a divorce, is the woman (but in any case, the disadvantaged person is made to suffer further). It's well-documented that when couples split up, it frequently is the woman who plunges into poverty. She may not be able to afford a lawyer. She may have to proceed pro se (like the respondent in the Cox case!). The power imbalance is only made worse by Rule 68. Her husband's lawyer has her in a bind with Rule 68, i.e. take whatever I choose to offer you or face the consequences of possibly losing everything (by having to pay my costs and lawyer out of whatever you get). Rule 68 is designed to be coercive; the problem is that abusers will use Rule 68 as yet another tool with which to abuse their partners (economically).

HRS Section 580-47, as it currently stands, is a better, more just standard to use in divorce actions, as it permits the Court, who is best suited to see situations involving the abuse of power, to award costs and fees only where it is "just and equitable." A coercive leveraging tool, such as Rule 68, doesn't have a place in a Court that regularly determines property settlements between parties who often do not have equal economic power.

Please hold HB 78. Thank you.

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25 Years

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**FAMILY LAW SECTION
OF THE
HAWAII STATE BAR ASSOCIATION**

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www.hawaiifamilylawsection.org

January 31, 2017

TO: Representative Scott Y. Nishimimoto, Chair
Representative Joy A. San Buenaventura, Vice Chair
House Committee on Judiciary

FROM: LYNNAE LEE, Chair
TOM TANIMOTO, Vice-Chair
Family Law Section of the Hawaii State Bar Association

CHAIR
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VICE-CHAIR / CHAIR-ELECT
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SECRETARY
ANTHONY PERRAULT
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TREASURER
NAOKO MIYAMOTO
N.Miyamoto@hifamlaw.com

HEARING DATE: February 1, 2017 at 2 p.m.

RE: Testimony in Support of HB78 Relating to Attorney's Fees
and Costs in Hawaii Family Court

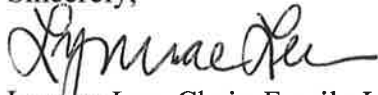
Dear Chair Nishimoto, Vice Chair San Buenaventura, and fellow committee members:

The Family Law Section of the Hawaii State Bar Association supports HB78, which in essence, restores Hawaii Family Court Rule 68. Not enough can be said about the need to settle cases, especially in the Family Court where the case load is heavy and the parties highly litigious and acrimonious. Every avenue of settlement is an essential tool for Family Law practitioners, including mediation, settlement conferences with the Court, 4-way meetings with the parties and their respective counsel, if any, as well as arbitration, which has been proposed in this legislative session by the Senate as SB335. The *de facto* restoration of Rule 68 is another one of those critical tools as it has without a doubt been critical in facilitating the settlement of many cases in the past, and will likely do so in the future.

For the reasons stated above, the Family Law Section supports HB78.

Thank you for the opportunity to provide testimony on this bill.

Sincerely,



Lynnae Lee, Chair, Family Law Section
Tom Tanimoto, Vice-Chair, Family Law Section

NOTE: *The comments and recommendations submitted reflect the position/viewpoint of the Family Law Section of the HSBA. The position/viewpoint has not been reviewed or approved by the HSBA Board of Directors, and is not being endorsed by the Hawaii State Bar Association.*

TESTIMONY OF THOMAS D. FARRELL

Regarding House Bill 78 Relating to Attorney's Fees and Costs in Hawaii Family Court
House Committee on Judiciary
Representative Scott Y. Nishimoto, Chair

Wednesday, February 1, 2016 2:00 p.m.
Conference Room 325, State Capitol

Good afternoon Representative Nishimoto and Members of the Committee:

The short version of my testimony is that this is a great bill and you should adopt it without delay.

As you know, the provisions of this bill were existing law contained in Rule 68, HAW. FAM. CT. RULES. In last year's Cox decision, the Hawaii Supreme Court invalidated the rule, essentially on policy grounds. For those who may be interested, I commend to your reading the Chief Justice's dissenting opinion.

While I am second to none in my defense of judicial independence, the determination of what is good policy in divorce cases is not the exclusive province of the judicial branch. Unlike some areas, this is one in which you should legislate.

I will concede that there are cases in which Rule 68 can be difficult to apply, because it can be difficult to determine if the final result in a case was materially better or worse than the offer. I will also admit that there can be equitable considerations that would make it inappropriate to impose attorney's fees on a losing litigant in a particular case. However, trial judges are uniquely qualified to make those case by case determinations, and to grant or deny post-trial motions for the award of fees and costs. Nothing was automatic under the old Rule 68, and nothing would be automatic under HB 78.

While I have not often obtained a Rule 68 award, I think many cases have settled that would not otherwise have, and that is the great value of the rule. So at a time when court congestion is at an all-time high, and you are being asked to fund more judges to cope with it, here is one small thing that you can do that will not cost the taxpayers any money and will provide a little relief to crowded family court dockets.

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