



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

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 422, RELATING TO CHILD VISITATION.

**BEFORE THE:**

SENATE COMMITTEE ON JUDICIARY AND LABOR

**DATE:** Wednesday, February 1, 2017      **TIME:** 9:00 a.m.

**LOCATION:** State Capitol, Room 016

**TESTIFIER(S):** Douglas S. Chin, Attorney General, or  
Jay K. Goss, Deputy Attorney General

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Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General 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 actual or potential harm to the child. The bill also 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 the person 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, he or she must show that the denial of visitation would cause actual or potential harm to the child. However, the Supreme Court in Doe ruled that the standard to be used is not a showing of "actual or

potential" harm to the child, but rather that the denial of the visitation would cause "significant" harm to the child.

To increase the likelihood that this bill will pass challenges based on the holding Doe, the Department recommends that any changes track the wording used by the Supreme Court. The Department suggests that page 13, lines 15-16, be amended to read "Denial of reasonable visitation rights would cause significant harm to the child." In addition, we suggest that the wording on page 14, lines 3-8, be amended to read "In any proceeding on a petition filed under this section, there shall be a rebuttable presumption that a parent's decision regarding visitation is in the best interest of the child. The presumption may be rebutted by a preponderance of the evidence that denial of reasonable grandparent visitation rights would cause significant harm to the child."

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

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January 30, 2017

TO: Senator Gilbert S.C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair  
Senate Committee on Judiciary and Labor

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

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HEARING DATE: February 1, 2017 at 9 a.m.

RE: Testimony in Opposition to SB422 Relating to Child Visitation

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Dear Chair Keith-Agaran, Vice Chair Rhoads, and fellow committee members:

We are writing in opposition to SB422 on behalf of the Family Law Section of the Hawaii State Bar Association which is comprised of approximately 140 members statewide all practicing and/or expressing an interest in Family Law.

FLS would note that it is beyond axiomatic that grandparents love their grandchildren and vice-versa. The landscape concerning the standing of grandparents to seek custody and/or visitation in family court over grandchildren must however, be respectful of the rights of parents.

It is well known that although the U.S. Supreme Court's decision in Troxel v. Granville, 530 U.S. 57 (2000) rendered Haw. Rev. Stat. 571-46.3 infirm, it provides the now familiar guidelines that permit grandparents standing to seek visitation in a family court, namely when the welfare of grandchildren is concerned. Instead of just ministerially eliminating HRS 571-46.3, SB422 seeks to replace it with a whole bunch of provisions which attempt to respect and not run afoul of the Troxel mandate. While well-meaning, SB422 may yet again exceed the limitations set forth in Troxel, thereby triggering further and lengthy litigation of constitutional proportions. SB422 calls for a rebuttable presumption accorded to parent's decisions concerning visitation, and we submit that it is an untested proposition whether such a provision will withstand constitutional scrutiny. SB422 may in fact head right back towards the U.S. Supreme Court the first instance it is invoked in the Hawaii Family Court. Clearly, the rights of parents to raise their children are paramount and any attempt to limit (in any way) those rights, must be done so with the utmost sensitivity and adherence to the Troxel ruling.

The Family Court already has sufficient guidance in Haw. Rev. Stat. 571-46 with respect to determining what custody and visitation awards are in the best interests of children. HRS 571-46(a)(2) is clear that not only parents can be awarded custody. Moreover, HRS 571-46(a)(7) states that visitation awards can be made to non-parents, including grandparents.

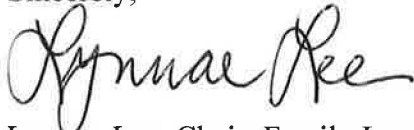
When the matter of a child's welfare is at stake, DHS has the power to step in with far more alacrity than any grandparent petition. In such instances, a DHS petition has at the forefront the goal of reunification of children and parents, and can provide services, while there is no guarantee of the same goal and services under a grandparent petition. Should SB422 become law, grandparents could disrupt nuclear families without those families receiving much needed support and services.

In summary, an all-new revised statutory provision as proposed by SB422 can result in a flood of grandparents seeking custody and visitation due to the appearance that they now have a brand new panoply of "rights." It goes without saying that the Family Court is overloaded as is, without an explosion in grandparent custody and visitation litigation.

For the reasons stated above, the Family Law Section opposes SB422.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Lynnae Lee". The signature is fluid and cursive, with the first name being more prominent.

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.***