HAWAII
STATE
COMMISSION
ON THE
STATUS
OF
WOMEN

Chair
LESLIE WILKINS

COMMISSIONERS:

SHERRY CAMPAGNA
CYD HOFFELD
JUDY KERN
MARILYN LEE
AMY MONK
LISA ELLEN SMITH

Executive Director
Catherine Betts, JD

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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: Comments Regarding HB 79, Relating to Family Law

Thank you for this opportunity to provide comments regarding HB 79, which would effectively create several different types of injunctions upon the filing and serving of a complaint for divorce. The Commission appreciates the intent of this measure.

HB 79 addresses several areas which are already addressed by the courts. First, financial disclosures are already required by the court when filing a complaint for divorce. Additionally, while mediation may be ordered by the court at any point during a divorce proceeding, there are times when mediation should be counseled against. For example, in cases where there is domestic violence or family violence, mediation should not occur. However, in many cases, an attorney representing a client may not even know that there is domestic violence involved. Or, oftentimes, the Court does not make a finding that family violence occurred. At other times, a Court may not believe a victim and thus, not treat the case as one dealing with domestic violence. Mandating mediation may work in other situations, but in this context, it can be very damaging.

HB 79 also addresses the removal of children. When people divorce, the parties often move. Sometimes this means children change schools and move with the custodial parent. Or, in situations of violence, moving the children may be the only safe action to undertake. If HB 79 is passed, an abusive partner could file the complaint, serve the complaint upon the abused partner, and the abused partner would automatically become enjoined from moving his or her children from the home or the school. This creates a serious safety issue and could easily be used as a tactic of abuse and intimidation.

Finally, if a victim were found to be in violation of these provisions, thereby triggering automatic jail time, it could have devastating impacts on the victim and the children. Criminal sanctions in a divorce proceeding could additionally be used as an abusive tactic by the abusive partner in order to obtain custody of children.

Thank you for the opportunity to provide comments on this measure.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERA
TWENTY-NINTH LEGISLATURE, 2017

LATE

ON THE FOLLOWING MEASURE:
H.B. NO. 79, RELATING TO FAMILY LAW.

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
Lynette J. Lau, Administrator, Child Support Enforcement Agency

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Chair Nishimoto and Members of the Committee:

The Department of the Attorney General provides the following comments.

The purpose of this bill is to specify what actions the parties are required to take - and to temporarily refrain from taking - when a divorce proceeding is initiated.

In Section 3, relating to section 580-47.5, Hawaii Revised Statutes, the reference to section 580- (d)(2) on page 8, lines 10-11, should be changed to 580- (c)(2). In addition, page 8, line 12, should be amended to add the Child Support Enforcement Agency as an office that will provide notice to the parties of the opportunity to enter into an alternative arrangement for the direct payment of child support. Line 12 should be amended to read, "or 576E, either the court, the child support enforcement agency, or the office of child support…".

The Department of the Attorney General respectfully requests that the proposed amendments be considered if this bill is passed.

LATE

The Judiciary, State of Hawai'i

Testimony to the House Committee on Judiciary
Representative Scott Y. Nishimoto, Chair
Representative Joy A. San Buenaventura, Vice Chair

Wednesday, February 1, 2017 2:00 PM
State Capitol, Conference Room 325

by
Judge R. Mark Browning
Senior Family Judge and Deputy Chief Judge
First Circuit

Bill No. and Title: House Bill No. 79, Relating to Family Law.

Purpose: Temporarily requires parties in a divorce proceeding to refrain from moving a child from a county of residence, removing the child from school, interfering with custodial arrangements, or discontinuing payments on financial obligations. Expedites mediation and property disclosure.

Judiciary's Position:

The Judiciary respectfully opposes this bill. The Family Court has grave concerns about the negative effects of this bill on the welfare and safety of the children. Unlike a similar bill introduced in this Legislature designed to preserve the status quo of marital property for the benefit of the parties, this bill may disrupt the parties and their children and may lead to increased litigation. Unfortunately, the children will be vulnerable to increased harm above the trauma that is already inherent when their parents part.

This bill will encourage a parent (usually the one with greater resources and advantages) to arrange a favorable "status quo" prior to the filing of a complaint. The vast majority of parents going through a divorce will proceed in a humane manner and will recognize the need to make decisions in their children's best interest despite the tension and bitterness between the parents. Unfortunately, in the family court's collective experience, a significant percentage of parents are often so filled with bitterness and their own hurt that they lose sight of how best to parent during this traumatic chapter in their lives. Often, because of greater resources and/or the

dynamics of family violence, one parent is significantly more powerful than the other. This bill will encourage manipulation of a new "status quo" before the complaint is filed.

On the other end of the spectrum, the requirements in subsection (a), page 3 beginning at line 20, even the most amicable parties will find themselves in an intolerable position. These requirements have the effect of binding parents in the same living situation that led to their decision to seek a divorce. This kind of pressure cooker situation will harm children.

This bill introduces direct application of the criminal law into the breakup of families, at a critical time when parents are most likely to act badly. Once again, the parent with the greater resources will have the upper hand. The parent who is using violence and intimidation will have the upper hand. As the Judiciary has experienced with previous sentencing laws, reliance on criminal sanctions and mandatory sentences lead to inevitable delays. Because civil cases are often stayed until the related criminal cases have concluded (including the time period for appellate review, the parties and their children will be subject to an extended period of time before their lives can move on with any certainty. This bill that is designed with the honorable intention of protecting children may potentially cause them greater harm.

The Judiciary also has concerns about practical matters. References to "existing custodial rights" or an "existing custodial schedule" are vague and will be difficult to address. The decision by one or both parents to divorce is already cataclysmic for their children. Many resulting disruptions, including housing and schooling, are inevitable. Even in cases where the parents are working hard to remain amicable and cooperative, painful decisions must be made and implemented. In cases of unequal power between the parents and/or cases with family violence, the problems for the children are magnified.

Another practical matter is the common inability of a couple, faced with paying for two households, to "[c]ontinue to pay for existing financial obligations" (page 4, line 14). In our state with its very high cost of living, it is inevitable that the couple will not be able to meet this requirement at the initial phases of the divorce (and, often, longer). This common occurrence will expose many struggling parents to possible incarceration. Unless the couple is rich and treat each other fairly, most divorcing couples simply struggle along, especially during the initial stages of a divorce, without resorting to court action.

Subsection (b), from page four at line 19, is vague and does not appear to comport with the court's current rules and practices—for example, section 580-2 does not reference a scheduled "initial appearance." We are unable to give more specific feedback because of the nature of the vagueness.

The "written informational statement" referred to in subsection (c), page 5, line 4, may be problematic. First, the information as stated in the bill is confusing and may not be accurate. Second, it appears to require a new hearing within 20 days of the filing of the complaint. Third, the references and requirements regarding mediation are simply not possible unless the Judiciary receives adequate funding from the Legislature to operate its own mediation services.

Subsection (e), beginning at page six, is troubling. This section creates a criminal misdemeanor based on behaviors exhibited by parents with shocking regularity when they are reeling from the reality of a divorce proceeding and their lives are in turmoil. The mandatory minimums may lead to the creation of additional circuit-level (jury) criminal courtrooms, as reflected in our experience with the mandatory minimums in criminal family violence cases. As noted above, the related civil matter will be delayed pending the disposition of the criminal case. Our concern is that, despite the intentions of this bill, the children will suffer.

We respectfully ask that this bill be held in committee.

DOMESTIC VIOLENCE ACTION CENTER

COMMUNITY SAFETY & SUPPORT ~ SINCE 1990

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 79

Aloha! Thank you for the opportunity to provide our testimony in opposition to HB 79. There may be serious threats to health and safety that should not be interfered with even if a divorce proceeding is under way.

For survivors of domestic violence, for example, it may be essential to undertake an escape from further danger. Court calendars are sometimes delayed in scheduling timely hearings and it would be unfortunate for a victim and her (his) children to remain at risk because dockets are full or attorneys are unavailable due to other commitments.

For military families, the military will relocate the family. Military shelters and housing access is limited, thereby requiring relocation. This may need further exploration.

It is also worth noting that children may have to be removed from school to protect their safety and that of their parent survivor. When families go to a shelter, for example, they may receive tutoring or are registered in another school.

The automatic issuance of a restraining order robs individuals (survivors) of their agency and facility to make decisions about their personal and family lives. Needless to say, criminal charges for transgressions is distressing.

Thank you.

P. O. Box 3198 Honolulu, HI 96801-3198
O'ahu Helpline: 808 531-3771 | Toll-free: 800 690-6200 | Administration: 808 534-0040 | Fax 808 531-7228
dvac@stoptheviolence.org | www.domesticviolenceactioncenter |
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FAMILY LAW SECTION
OF THE
HAWAII STATE BAR ASSOCIATION

c/o 841 Bishop Street, Ste. 480, Honolulu, Hawaii 96813
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

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

RE: Testimony in Opposition to HB79 Relating to Family Law

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

We are writing in opposition to HB79 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 agree with HB79's preamble regarding the notion that children are very often stuck in the middle of domestic disputes and litigation as unfortunate pawns in a fight for power.

However, our reading of HB79 leads us to conclude that the bill is well-designed but assumes that in every case, children are used as pawns to gain leverage. That is not always the case. There are certainly cases where a parent and/or child who has suffered abuse at the hands of a spouse and/or parent who must flee the jurisdiction for safety reasons. HB79 does not provide a mechanism to define, exempt and protect those very individuals whose flight to safety may very well be thwarted by a spouse who preempts their departure by filing for divorce.

Another matter is the reference to the appearance scheduled pursuant to HRS 580-2. At this juncture we submit that it is unclear what that means, except to say that it appears that the court will be authorized to order the parties to attend mandatory mediation on a given date, subject to criminal penalties for non-attendance.

The statistics are rather clear in terms of the increasing number of pro se litigants in Family Court, certainly in divorce cases. Mediation is already required prior to setting a matter for trial

pursuant to Hawaii Family Court Rule 94. The First Circuit also has their Volunteer Settlement Master program to further settlement discussions with the assistance of a volunteer attorney serving as a settlement master. Immediate mediation may be premature, can be expensive and not beneficial in that the parties may not be aware of their finances or even be ready to discuss options concerning property division, support, custody, etc. Having a criminal penalty assigned to the mediation may result in a glut of proceedings in family criminal court. While we agree that mediation is a good tool for litigants to resolve legal disputes, forcing unwilling litigants into mediation often times is a waste of time and resources.

HB79 also seeks to maintain the children in their county residence and schools, which is already taken up by HB80, and if that passes, would be redundant to also have in HB79.

For the reasons stated above, the Family Law Section opposes HB79.

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.***

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, January 31, 2017 8:50 AM
To: JUDtestimony
Cc: katc31999@gmail.com
Subject: *Submitted testimony for HB79 on Feb 1, 2017 14:00PM*

HB79
Submitted on: 1/31/2017
Testimony for JUD on Feb 1, 2017 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Kat Culina	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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From: mailinglist@capitol.hawaii.gov
Sent: Monday, January 30, 2017 8:04 PM
To: JUDtestimony
Cc: sturgio17@gmail.com
Subject: Submitted testimony for HB79 on Feb 1, 2017 14:00PM

HB79
Submitted on: 1/30/2017
Testimony for JUD on Feb 1, 2017 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Anne E Sturgis	Individual	Support	No

Comments: Aloha, Please support HB 79 because it is the right thing to do to support a level playing field when one party has more resources than the other. Mahalo, Anne Sturgis

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Sent: Monday, January 30, 2017 3:58 PM
To: JUDtestimony
Cc: panther_dave@yahoo.com
Subject: *Submitted testimony for HB79 on Feb 1, 2017 14:00PM*

HB79
Submitted on: 1/30/2017
Testimony for JUD on Feb 1, 2017 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Dave Kisor	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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TESTIMONY OF THOMAS D. FARRELL
Regarding House Bill 79 Relating to Family Law

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:

While I generally support the imposition of automatic restraining orders in divorce cases, and criminal penalties for people who violate Family Court orders, I believe House Bill 79 is problematic, and that House Bill 80, which addresses the same subject, is a superior vehicle.

I do not believe the requirement for the court to provide an informational statement is the best approach. Rather, the court should simply issue an order in terms that are clear enough for the parties to understand and obey. I attach as an example, albeit not a perfect example, the *Initial Pre Trial Order* currently in use in the Fifth Circuit.

I also note that the bill puts the order in place until an "initial appearance" is made. However, there is no "initial appearance" mandated by §580-2, as the bill's drafters appeared to believe. Rather, the defendant must answer or otherwise plead within twenty days after the service of a summons. So the initial appearance language doesn't make much sense.

I am also concerned about the mandatory mediation provisions, and language referring to the "setting of an appointment." The court does not provide a mediation service, and does not make appointments for divorce litigants. Mediation by a qualified mediator (and, frankly, there are only a handful in Honolulu that I believe are competent) is expensive. Generally, the retainer is $5,000. That's a barrier for many litigants. And if mediation does not succeed, that money is wasted. People who want to mediate will do so, and those who are not aware of that option should be made aware of it. I do so in every case. However, forcing people to go to mediation is a bad idea, and a waste of everyone's time.

Whether there should be a requirement for "full financial disclosure" within a specified period after filing is debatable. In some cases, it isn't really necessary, and in others it is hellishly difficult. I have had cases where it literally took months of work with accountants and the client to produce a set of Family Court financial statements that the client could sign without committing perjury. (And they are signed, in case you didn't know, under penalty of perjury).

I also have some concerns about provisions regarding disruption to existing custodial arrangements or removing a child from home. Where a parent, a child, or both have been subjected to or threatened with domestic violence, it is entirely appropriate to leave. It is not appropriate, however, to disappear with no way for the other parent to serve process of the parent who left or to obtain a judicial order for the return of the child. Section 707-726, HAW. REV. STAT., *Custodial interference in the first degree*, provides language at subsection (2) that deals with this situation. So, I would limit the automatic no-removal/interference order by adding the language "unless otherwise authorized by law or by an order of this court..." And that limitation should only apply to removal from school or home. There is no reason that an individual in this situation cannot find safety somewhere in the county of their residence.

Finally, while I usually applaud anything that puts some teeth into Family Court orders, I see some potential problems with this bill's attempt to do so. First off, what court will have jurisdiction to criminally prosecute violations? Generally speaking, outside of summary contempt, which is an offense committed in the immediate view and presence of the court, violations of court orders require a complaint to the police and the normal prosecutorial process. Moreover, I worry that some of these orders may not be clear enough to place a potential criminal defendant on notice of what conduct is prohibited. For example, how would the prosecutor establish a case that the defendant failed to observe "continuing financial obligations" or that he disrupted "existing custodial rights," in the absence of any custody or visitation order?

So I respectfully submit that HB 80 has fewer of these problems, and should be the basis of your legislation on this subject. To the extent that you may be thinking of incorporating some of HB 79's provisions into HB 80, I would counsel your caution.

STATE OF HAWAI'I FAMILY COURT FIFTH CIRCUIT	**INITIAL PRE-TRIAL ORDER**	CASE NUMBER FC-D NO.

_____ PLAINTIFF, (Full Name) vs. _____ DEFENDANT. (Full Name)	This document is prepared by: ❑ Plaintiff ❑ Attorney for Plaintiff Name Address City, State, Zip Code Phone

A complaint for Divorce was filed on _____ , and appears to the Court that it would be in the best interest of all parties that the following conditions be established during the pendency of this matter.

THEREFORE, IT IS HEREBY ORDERED that:

1. Both parties are prohibited from interfering with the established routine and activities of the child(ren), if any, of this marriage. Neither party shall remove child(ren) from Kaua'i or deny the other party normal custody involvement with the child(ren). However, any existing restraining orders, including those granted pursuant to HRS Section 580-10 and Chapter 586 or any other lawful court order must be followed;

2. If child(ren) are involved, both parties are prohibited from discussing the pending divorce action and any related subjects and from making direct or indirect disparaging statements to the child(ren) (including through third parties) about the other party;

3. Both parties are prohibited from transferring, encumbering, wasting or otherwise disposing of any property in their control, unless it is necessary to pay for ordinary business expenses and the usual living expenses after all of their current sources of income have been depleted. This prohibition means you are not to withdraw funds for any bank, credit union, retirement and/or stock accounts, charge beneficiaries or give away and/or sell anything of value to a third party, or to hide, throw away, or damage anything of value without prior court approval;

4. Both parties are prohibited from canceling or reducing any benefit or insurance that protects the other party or the child(ren), including all life, health, automotive, liability, disability, or homeowners' insurance;

5. Within thirty (30) days after the Complaint of Divorce is served on the Defendant, ***both*** parties must file with the Court an accurate, and complete "Asset and Debt Statement" and an "Income and Expense Statement". And, ***both*** parties ***must*** each sign their respective Statements;

6. Within ninety (90) days after the date that the Complaint for Divorce was filed, the Plaintiff must complete and sign a "Case of Status Report" and file it with the Court. A ***filed*** copy must be sent to the Defendant; ***and***,

7. Within seven (7) days after the Defendant has received a filed copy of the Plaintiff's "Case of Status Report", the Defendant may also complete and file a "Case of Status Report" with the court.

This Order Shall remain in effect until further order of the Court or upon the filing of a motion by either party to modify any of the foregoing orders.

DATED: Līhu'e, Hawai'i, _____

_____
Judge of the above-entitled Court

hscadv
HAWAII STATE COALITION AGAINST DOMESTIC VIOLENCE
1164 Bishop Street, Suite 1609, Honolulu, HI 96813

LATE

January 31, 2017

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

From: Janelle Oishi, Managing Director
Hawaii State Coalition Against Domestic Violence

RE: Testimony in Opposition, HB 79, Relating to Family Law

The Hawaii State Coalition Against Domestic Violence (HSCADV) is a statewide partnership of 25 domestic violence programs and shelter providers across our Hawaiian Islands. Our mission is to engage communities and organizations to end domestic violence through education, advocacy, and action for social justice.

HSCADV is submitting testimony in opposition of HB 79, as it would disproportionately negatively impact victims of domestic violence and their children. As domestic violence cases comprise a significant proportion of all family court cases, including divorce, the automation of temporary restraining orders would have a punitive effect on victims trying to access safety for themselves and their children.

HB 79 would like to restrict individuals from moving a minor child out of the current residence and school, and restrict any disruptions of custodial rights. Many victims of domestic violence take steps such as leaving the residence to stay at a different location or shelter, and keeping themselves and their children away from the batterer to stay safe. If HB 79 were enacted, this would criminalize the actions victims take to ensure safety for themselves and their children.

HB 79 would also like to require mediation appointments. Requiring mediation in domestic violence cases has been long opposed by domestic violence professionals. Mediation assumes that both parties have equal power and share a common vision of resolution. This is clearly not the case with domestic violence, and most abusers use mediation as a tool to further manipulate the system against the victim. A frequent consequence of this manipulation is the increase in danger of continuing and/or increasing violence by the abuser.

There is an existing ex-parte process for applying for a temporary restraining order to provide access to safety. This process allows for judicial review to determine if the situation warrants a temporary restraining order and/or protective order. By replacing part of the process with automation, many victims would be adversely affected, particularly by abusers who engage in litigation to manipulate and coerce the victim. It is commonplace for batterers to utilize a vast array of tactics to manipulate victims in the legal arena. Family court filings like divorce, paternity and temporary restraining orders are opportunities batterers take to engage in retaliatory litigation.

Given the detrimental outcomes for domestic violence victims and their children, HSCADV respectfully requests that the Committee hold HB 79. Thank you for this opportunity to testify.

Janelle Oishi, MSW
Hawaii State Coalition Against Domestic Violence