



The Judiciary, State of Hawai'i

Testimony to the House Committee on Judiciary

Representative Chris Lee, Chair

Representative Joy A. San Buenaventura, Vice Chair

Thursday, February 7, 2019, 2:05 p.m.
State Capitol, Conference Room 325

by

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Administrative Director of the Courts

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 353, Relating to the Family Court.

Purpose: Makes decisions of the family court appealable to the Supreme Court instead of the Intermediate Court of Appeals.

Judiciary's Position:

The Judiciary respectfully opposes this bill, but offers suggestions:

The reason stated for this bill is the length of time families, including children, must wait for decisions related to children and families. The Judiciary recognizes that appeals involving the custody of children must be decided in a timely fashion. To that end, the Supreme Court has adopted an expedited process for handling family court termination of parental rights cases. In addition, both the Supreme Court and the Intermediate Court of Appeals (ICA) give priority to termination of parental rights cases, and family court matters involving the custody of children.

For fiscal year 2017-2018, there were thirty-four family court appeals terminated by the ICA. There were only six family court applications for a writ of certiorari from ICA decisions filed in the Supreme Court. Thus, the majority of family court appeals are resolved by the ICA and do not move on to the Supreme Court.

Of the four cases cited in this proposed legislation as evidence of the delay in child custody matters, two appeals did not involve the custody of children. Cox v. Cox, 138 Hawai'i



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476, 382 P.3d 288 (2016), involved the award of attorneys' fees. Brutsch v. Brutsch, 139 Hawai'i 373, 390 P.3d. 1260 (2017), involved the division of the husband's inheritance. The opinion in Brutsch v. Brutsch, stated specifically that the issue of child custody was resolved and was not the subject of the appeal.

Tumaneng v. Tumaneng 138 Hawai'i 468, 382 P.3d 280 (2016) did involve the custody of a child. Review of record shows, however, that a portion of the time the case was pending in the appellate courts was the result of requests for extensions filed by both parties to the appeal. Once briefing was complete, the ICA issued its decision quickly. The Supreme Court issued its published opinion within seven months after the application for a writ of certiorari was accepted. Further, if one of the parties believed the case was of importance and needed to bypass the ICA, either party could have filed an application for transfer to the Supreme Court pursuant to HRS section 602-58 and Rule 40.2 of the Hawai'i Rules of Appellate Procedure.

The final case cited is W.N. v. S.M., which involved a dispute over joint custody and visitation. This was not a case that involved the transfer of custody from one party to another. As noted in House Bill No. 353, there were two separate appeals. After briefing in the appeal was completed, one of the parties filed an application for transfer pursuant to HRS section 602-58. The Supreme Court accepted the application for transfer, bypassing consideration by the ICA. The first appeal was resolved with a published opinion and a remand for further proceedings in 2016. A.A. v. B.B., 139 Hawai'i 102, 384 P.3d 878 (2016). The family court disposition on remand resulted in a second appeal. The Supreme Court granted another application for transfer, which resulted in a second published opinion within four months thereafter. W.N. v. S.M., 143 Hawai'i 128, 424 P.3d 483 (2018). Both published opinions explained why remands were necessary. Multiple remands for a single case are extremely rare, and this case involved very unusual circumstances and issues of first impression. Given the specific facts presented by these appeals, not remanding the matter for further proceedings in each appeal could have been interpreted as denying due process to the party seeking review.

The Supreme Court already has procedures in place to ensure appeals, particularly appeals involving the custody of children, are resolved in a timely fashion; therefore, the Judiciary believes the changes proposed by House Bill No. 353 are unnecessary. The Judiciary is open, however, to considering changes that may further expedite final decisions in child custody matters. One possibility is specifically adding child custody matters to the grounds for discretionary transfer of cases from the ICA to the Supreme Court under HRS § 602-58(b). Another possibility is that the Supreme Court could consider rule changes or a pilot program to allow expedited consideration of child custody matters.

Thank you for the opportunity to testify on this matter.

TESTIMONY OF THOMAS D. FARRELL
Regarding HB 353, Relating to the Family Court
Committee on Judiciary
Representative Chris Lee, Chair/Representative Joy San Buenaventura, Vice Chair
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I support HB 353, which would channel all family court appeals to the Supreme Court, would require disposition of child custody cases within 180 days, and would discourage the use of remands.

That said, there will be problems. Most family law appeals are handled by the ICA and end there. So, this bill would redistribute the workload in the appellate system, and mean that fewer other civil and criminal cases get to the State's highest court. I'm not sure that 180 days is workable, as it takes at least forty days to get the record on appeal to the court, and cases in which there have been long trials will require extensive transcripts. I also have some concerns about limiting the use of remand, because the Supreme Court is not intended to be a trial court. I believe that there will be a significant increase in Summary Disposition Orders, in which the parties may have their issue resolved, but there is not much discussion of the law or guidance for future cases.

I have been telling my own clients in custody litigation that appeals are generally not an effective remedy, largely due to the delay in getting them resolved. They are frequently better off to wait a year or two, and then file a new motion for change of custodial arrangements based on a change in circumstances since the last order. So, HB 353 might be worth a try, unless the Judiciary would like to try its own pilot program for expedited appeals in child custody cases, as it did for Child Welfare Services cases.

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