



*The Judiciary, State of Hawai‘i*

**Testimony to the Senate Committee on Judiciary**

Senator Karl Rhoads, Chair  
Senator Glenn Wakai, Vice Chair

Friday, February 1, 2019, 9:00 a.m.  
State Capitol, Conference Room 016

**WRITTEN TESTIMONY ONLY**

by  
R. Mark Browning  
Chief Judge, First Circuit

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**Bill No. and Title:** Senate Bill No. 3, Relating to Guardianship.

**Purpose:** Requires the court to appoint an attorney to represent the respondent in a guardianship petition. Requires the court appointed attorney to meet with the respondent at least once prior to the guardianship petition hearing.

**Judiciary's Position:**

The Judiciary respectfully **opposes** this bill, which would mandate the appointment of a lawyer for the respondent with every petition filed for the establishment of a guardianship of an incapacitated person. This one-size-fits-all approach would not account for each respondent’s unique circumstances. Existing law and court rules provide for a more nuanced, individualized determination of whether a given respondent may need legal representation.

For example, the court may currently appoint a kokua kanawai pursuant to Hawai‘i Revised Statutes (“HRS”) § 560:5-305(a). Generally, among other duties as the court may direct, the kokua kanawai serves as an extension of the court to conduct an independent review of the situation; interview the respondent and the person seeking to be appointed guardian; explain to them the nature and purpose of the proceeding; determine the respondent’s views; and report findings and recommendations to the court. Although the appointment of a kokua kanawai is discretionary, traditionally the court will appoint one as a matter of course and common practice. Moreover, all kokua kanawai must be individuals “having the training or experience that the court deems appropriate,” and in practice are almost invariably attorneys themselves.



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Among the kokua kanawai's existing duties are to inform the respondent of the right to request a court-appointed attorney, and, further, to include in his or her report a recommendation as to whether an attorney **should** be appointed to represent the respondent, given the respondent's particular needs, wishes, and circumstances. (See HRS § 560:5-305(e).)

Additionally, when necessary, and completely independent of the kokua kanawai's recommendations, the court has the authority to appoint a guardian ad litem for the respondent under Rule 28(b) of the Hawai'i Probate Rules. Said rule in relevant part provides that "[t]he guardian ad litem shall represent the interests of the person . . . for whom the guardian ad litem is appointed."

Given the effectiveness and flexibility of existing safeguards, the Judiciary is concerned that this bill's one-size-fits-all approach would generate unnecessary costs—for example, in situations where a kokua kanawai recommends that the respondent does not require legal representation, or where the respondent him or herself does not desire legal representation—while current law already provides for an expedient, personalized, and just process.

With respect to potential costs, the Judiciary also notes that this bill deletes the existing provision that all costs and expenses related to the proceeding are to be paid by the respondent, without specifying an alternative funding source for court-appointed legal representation in guardianship proceedings. That this lack of direction may compel the Judiciary's circuits to bear the costs of court-appointed counsel individually, especially without the allocation of additional monies sufficient to fund that representation, is of concern. The Judiciary also understands that the available pool of attorneys who would be willing to accept the role of court-appointed representation would be very limited in some circuits.

In conclusion, the Judiciary is confident that existing law, which gives due consideration to each respondent's unique circumstances and allows for the appointment of a kokua kanawai and/or a guardian ad litem whenever necessary, sufficiently safeguards the rights and needs of a respondent in a proceeding to establish guardianship of an incapacitated person.

Thank you for the opportunity to testify on this measure.

**SB-3**

Submitted on: 1/31/2019 5:25:17 AM

Testimony for JDC on 2/1/2019 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Melodie Aduja	Testifying for O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Support	No

Comments:

WRITTEN TESTIMONY RE: SB 3  
SENATE COMMITTEE ON JUDICIARY

FEBRUARY 1, 2019; 9:00 a.m.

My name is Frank T. Kanemitsu, Esq. an attorney licensed to practice in the State of Hawaii. An area of my practice is conservatorships and guardianships. I am also a member of the Standing Committee on the Uniform Probate Code and Probate Court Practices of the Judiciary of the State of Hawaii (the "Probate Committee"). The Probate Committee was organized pursuant to Resolution No. 91-25, adopted by the sixth annual Hawaii State Judicial Conference. The Probate Committee is comprised of three circuit court judges, each representing a Circuit Court of the Judiciary of the State of Hawaii and nine attorneys that practice estate planning and probate law, all of whom have been appointed by the Chief Justice of the Supreme Court of the State of Hawaii. These comments represent my views only.

I OPPOSE SB 3.

While the intended purpose of the proposed legislation is unclear, HRS § 560:5-305 already empowers the Court with the discretion to appoint an attorney to represent the respondent, if necessary. Who better than the presiding judge to determine if the respondent requires independent representation? The automatic requirement of a "court-appointed lawyer" will only increase the cost of guardianship proceedings with little benefit or protection to the respondent. For example, a respondent with severe dementia is unlikely to benefit from a "court-appointed lawyer", yet the proposed legislation would require such an appointment. Moreover, the proposed legislation fails to address how the "court-appointed lawyer" is to be compensated once appointed when it eliminates the provision that all costs and expenses of the proceeding will be paid from the respondent's estate.

Finally, this proposed legislation also fails to address a similar statutory requirement under HRS § 560:5-406.

Respectfully submitted this 30th day of January, 2019.

By

  
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Frank T. Kanemitsu, Esq.

WRITTEN TESTIMONY RE: SB 3  
SENATE COMMITTEE ON JUDICIARY

FEBRUARY 1, 2019; 9:00 a.m.

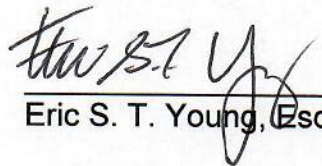
My name is Eric S. T. Young, Esq. and am an attorney licensed to practice in the State of Hawaii. A significant part of my legal practice includes estate planning and conservatorship, probate and trust administration. I am member of the Standing Committee on the Uniform Probate Code and Probate Court Practices of the Judiciary of the State of Hawaii (the "Probate Committee"). I am also a Fellow of the American College of Trust and Estate Counsel, and an instructor of a clinical class on estate planning at the William S. Richardson School of Law. These comments represent my personal views only.

I OPPOSE SB 3.

HRS § 560:5-305 currently empowers the Probate Court with the discretion to appoint an attorney to represent the respondent. A presiding judge is the appropriate person to determine whether a respondent requires independent representation in a guardianship proceeding. Many guardianship proceedings are uncontroversial, such as cases involving advanced dementia or Alzheimer's Disease. In these cases, the automatic requirement of a "court-appointed lawyer" under SB 3 will unnecessarily increase the cost of guardianship proceedings with little benefit or protection to the respondent, especially in light of the fact that current guardianship procedures already provide for the appointment of a kokua kanawai, who is tasked with making recommendations to the Court in the respondent's best interest (including whether an attorney should be appointed to represent the respondent). The bill is silent with regard to whether the court-appointed lawyer will, like any kokua kanawai, be compensated out of the respondent's guardianship estate.

The proposed legislation also fails to address a similar statutory framework governing the appointment of conservators under HRS § 560:5-406.

Respectfully submitted this 30th day of January, 2019.

  
Eric S. T. Young, Esq.