



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020**

ON THE FOLLOWING MEASURE:

S.B. NO. 2110, RELATING TO THE CHILD PROTECTIVE ACT.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Thursday, February 20, 2020 **TIME:** 9:15 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Clare E. Connors, Attorney General, or
Erin L.S. Yamashiro, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General (Department) offers the following comments.

The purpose of this bill is to require the family court to appoint counsel for an indigent parent in chapter 587A, Hawaii Revised Statutes (HRS), child protective services cases. The bill amends section 587A-17, HRS, to require the appointment of counsel three days prior to any chapter 587A, HRS, hearing, including the first one, and to ensure that an indigent parent has legal representation at every hearing, unless he or she knowingly, and voluntarily waives the right to appointed counsel.

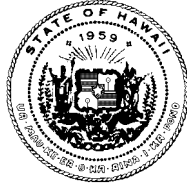
The bill is unclear because it broadly requires the family court to appoint counsel for cases involving foster custody or family supervision, but there is also additional, unnecessary, and specific wording in the bill that gives family court the discretion to appoint counsel for family supervision cases. If the intent is to require family court to appoint counsel for both foster custody and family supervision cases, we suggest removing "in family supervision cases" from section 2, page 3, lines 17-18. If the Legislature intends to require court-appointed counsel for only foster custody cases,

then section 2, page 2, lines 19-20, should be amended as follows:

“~~§587A-17~~ Court-appointed attorneys. (a) ~~The~~ For cases involving foster custody of a child, the court ~~may~~ shall appoint an attorney to represent a legal parent who”

and leave the remainder of the sentence intact.

Thank you for the opportunity to provide comments.



STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES
P. O. Box 339
Honolulu, Hawaii 96809-0339

February 18, 2020

TO: The Honorable Karl Rhoads, Chair
Senate Committee on Judiciary

FROM: Pankaj Bhanot, Director

SUBJECT: **SB 2110 – RELATING TO CHILD PROTECTIVE ACT**

Hearing: February 20, 2020, 9:15 a.m.
Conference Room 016, State Capitol

DEPARTMENT’S POSITION: The Department of Human Services (DHS) appreciates the intent of the proposed bill and offers comments. DHS defers to the Judiciary regarding funding and implementation.

PURPOSE: This bill requires the court to appoint counsel to indigent parents and make every effort to do so at the first hearing attended by the parent.

DHS agrees that all parents should have legal representation at court proceedings related to Chapter 587A, Hawaii Revised Statutes (HRS), to ensure that reasonable efforts are made to prevent removal of a child from a family home, that parents and youth are represented, that parents and youth understand their rights, that parents understands the services they are being asked to attend, such as substance abuse treatment, mental health services, parenting education, establishing paternity, visitations, etc., to expedite reunification with their child in foster care, and to advocate for parents in a complicated judicial process.

Legal proceedings in child welfare cases are complex, can be intimidating, and most crucially, the stakes are extremely high as one consequence could be the termination of parental rights. Given the potentially life-changing ramifications of Chapter 587A, HRS, court case, legal counsel for parents is essential.

The department notes the following concerns:

- 1) Knowingly and voluntarily waiving the right to counsel requires an entity to inform the parent of their rights and the effect of waiving the right to counsel; this requires clarification as to who will provide this information as DHS should not be the agency to inform the parent of their right to counsel and/or their rights if they waive counsel;
- 2) Allowing for new circumstances for continuances (page 3, lines 14-16) will delay action in the case and cause trauma to children in out of home care;
- 3) The bill implies (page 2, lines 3-11) that the current “court-established guidelines” for determining eligibility for a court-appointed attorney are insufficient, stating that the system is making decisions, not based on formal guidelines, but on a “case-by-case” basis. At the same time, language regarding the “court-established guidelines” remains in the statute, without clarification or modification;
- 4) There is inconsistency regarding the type of cases that mandate appointment of legal counsel. At the beginning of the proposed statutory changes (page 2, lines 19-20 and page 3, lines 1-3), the required court-appointment of counsel appears to apply to all Chapter 587A, HRS, cases, regardless of legal status. Later (page 3, lines 16-20), the bill states that the court appointment of legal representation is optional for family supervision cases. It is also not clear as to whether indigent parents in all types of Chapter 587A, HRS, cases (e.g. legal guardianship cases) will be provided with no-cost attorneys;
- 5) The proposed wording (page 3, lines 14-16) states that a continuance may be requested, if counsel has not been appointed. Without an attorney, a parent would not know to request a continuance. Also, this wording states that the continuance may be granted to “counsel,” but there is no counsel at this point in the case. DHS is concerned with additional delay that continuances cause in terms of decision making on behalf of the child; and
- 6) Implementation of this bill requires additional funding to the Judiciary, and DHS defers to the Judiciary as to the necessary funds required to provide counsel at initial hearings.

Thank you for the opportunity to testify on this matter.



The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Judiciary

Senator Karl Rhoads , Chair
Senator Jarrett Keohokalole, Vice Chair

Thursday, February 20, 2020, 9:15 a.m.
State Capitol, Conference Room 016

by
Christine E. Kuriyama
Senior Judge, Deputy Chief Judge
Family Court of the First Circuit

Bill No. and Title: Senate Bill No. 2110, Relating to the Child Protective Act.

Purpose: Requires the court to appoint counsel to indigent parents and make every effort to do so at the first hearing attended by the parent

Judiciary's Position:

The Judiciary does not take a position on this bill, but offers the following comments and observations:

1. It should be noted that Senate Bill No. 214 (2019) clarified that mandatory appointment of counsel would be required in foster care cases: “(a) the court [~~may~~] shall appoint an attorney, in foster care cases...” However, the instant bill does not include this language. For purposes of clarity, it may be helpful to include this language in this bill.
2. As a result, the Judiciary requests that the bill be amended as follows: “(a) the court [~~may~~] shall appoint an attorney, in foster care cases, ...”
3. Should the Legislature incorporate this clarification, the bill would be consistent with the Judiciary’s practice in Child Protective Act cases involving foster custody.
4. The Judiciary shares the view that it would be ideal to provide court-appointed attorneys for parties in all Child Protective Act cases, including family supervision cases. Unfortunately,



Senate Bill No. 2110, Relating to the Child Protective Act
Senate Committee on Judiciary
Thursday, February 20, 2020
Page 2

such a change would require a major appropriation in all circuits in order to fund mandatory appointments in all family supervision cases.

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



Hon. Joseph E. Cardoza,
Judge, Third Judicial Circuit
State of Hawai'i (Ret.)
Chair

Derek R. Kobayashi
Vice Chair

HAWAII ACCESS TO JUSTICE COMMISSION

Commissioners:

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February 18, 2020

The Honorable Karl Rhoads, Chair
The Honorable Jarrett Keohokalole, Vice Chair
Senate Committee on Judiciary
Hawaii State Capitol
415 South Beretania Street
Honolulu, HI 96813

Re: SB 2110
Hearing: February 20, 2020 at 9:15 a.m.
Testimony IN SUPPORT (written testimony only)

Dear Chair Rhoads, Vice Chair Keohokalole and members of the Senate Committee on Judiciary:

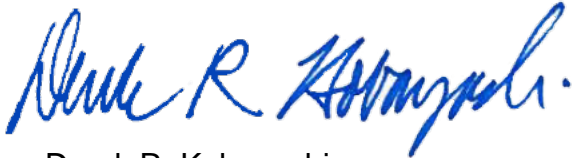
I am writing on behalf of the Hawai'i Access to Justice Commission (the "ATJ Commission") to express the ATJ Commission's **support** for SB 2110. As you may know, the ATJ Commission was established on May 1, 2008 by the enactment of Rule 21 of the Rules of the Supreme Court of the State of Hawai'i. Rule 21(b) expressly provides, "The purpose of the Commission shall be to substantially increase access to justice in civil legal matters for low- and moderate-income (together "low-income") residents of Hawai'i."

Towards fulfilling this stated purpose, the ATJ Commission hereby expresses its support of SB 2110, the intent of which is to ensure that our laws comport with the Hawai'i Supreme Court decision *In the Interest of T.M.*, 131 Haw. 419 (2014), wherein the Court held that under the due process clause of the Hawai'i State Constitution, indigent parents are guaranteed the right to court-appointed counsel in termination of parental rights proceedings. Enactment of SB 2110 would serve the ATJ Commission's purpose of increasing access to justice in civil legal matters for low- and moderate-income residents of Hawaii by ensuring the right to counsel to indigent legal parents in cases where their parental rights are in jeopardy.

The Honorable Karl Rhoads, Chair
The Honorable Jarrett Keohokalole, Vice Chair
Senate Committee on Judiciary
February 18, 2020

Accordingly, the ATJ Commission submits this testimony in support of SB 2110 and respectfully requests that your Committee give this measure its favorable consideration.

Sincerely,



Derek R. Kobayashi
Vice Chair
Hawai'i Access to Justice Commission

Cc: Hon. Joseph E. Cardoza, Judge, Third Judicial Circuit, State of Hawai'i (Ret.)
Chair
Hawai'i Access to Justice Commission

LATE



Hawai'i


Committees: Senate Committee on Judiciary
Hearing Date/Time: Thursday, February 20, 2020, 9:15 a.m.
Place: Conference Room 016
Re: Testimony of the ACLU of Hawai'i in Support of S.B. 2110, Relating to the Child Protective Act

Dear Chair Rhoads, Vice Chair Keohokalole, and Committee members:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") writes **in support of S.B. 2110**, which codifies the Hawai'i State Supreme Court's ruling in *In re T.M.*, holding that indigent parents are guaranteed the right to counsel in termination proceedings.

This measure simply conforms statute to existing caselaw. In its opinion in *T.M.*, the Court recognized that Article I Section 5 of the Hawai'i State Constitution protects parents' substantive liberty interest in the care, custody, and control of their children. Inherent in this interest is "the right to counsel to prevent erroneous deprivation of their parental interests." *T.M.* at 353. Hawai'i Revised Statutes Section 587A-17 provides courts discretion in appointing counsel, a determination that was made, prior to *T.M.*, on a case-by-case basis. The case-by-case approach, as the Court recognized and as the ACLU of Hawai'i, Legal Aid Society of Hawai'i, and Hawai'i Appleseed Center for Law and Economic Justice argued in a joint amicus brief, places an enormous burden on the trial courts to determine *in advance* whether court-appointed counsel would make a substantial difference in the outcome of a case. For families, this discretion could lead to different courts ruling differently in substantially similar cases, meaning that the difference in the judge that hears your case could mean the difference between losing your child and maintaining your parental rights. In light of the important liberty interests at stake, this led to an unacceptable risk of error.

To prevent further unconstitutional deprivation of parental interests, the Court rightly ruled that counsel *must* be appointed to indigent parents in proceedings that could result in the termination of parental rights. Because Hawaii's courts have been required to appoint counsel in these cases since the 2014 ruling, this measure will not increase the burden on the courts. For these reasons, the ACLU of Hawai'i requests that the Committee support this bill. Thank you for the opportunity to testify.

Sincerely,

Mandy Fernandes
Policy Director
ACLU of Hawai'i

Chair Rhoads and Committee Members
February 20, 2020
Page 2 of 2

The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai'i has been serving Hawai'i for over 50 years.

American Civil Liberties Union of Hawai'i
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SB-2110

Submitted on: 2/18/2020 11:10:49 AM

Testimony for JDC on 2/20/2020 9:15:00 AM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|--------------|--|--------------------|--------------------|
| John Pollock | Testifying for National Coalition for a Civil Right to Counsel | Support | No |

Comments:

Senate Judiciary Committee Hearing on

Senate Bill 2110, Room 016

9:30 AM, February 20, 2020

February 18, 2010

On behalf of the National Coalition for a Civil Right to Counsel (NCCRC), I am pleased to submit this testimony in support of SB 2110. This bill is necessary to ensure that the constitutional rights of parents are fully protected.

The statute governing appointment of counsel for parents in child welfare proceedings, Haw. Rev. Stat. § 587A-17(a), currently states, “The court may appoint an attorney to represent a legal parent who is indigent based on court-established guidelines.” However, in *In re T.M.*, 319 P.3d 338 (Haw. 2014), the Supreme Court of Hawai'i held that the Hawaii Constitution's due process clause requires the appointment of counsel for all parents in abuse/neglect and termination of parental rights proceedings. The *T.M.* decision put Hawai'i in line with the vast majority of other states as to the right to counsel, and ensures that the fundamental, constitutional rights of parents receive the due process protection that they deserve.

The statute now needs to be amended for a number of reasons:

- First, § 587A-17(a) has not been rewritten since *T.M.*, so it still states a court has discretion as to whether or not to appoint counsel for an indigent parent, rather than it being mandatory. This could lead trial judges unaware of *T.M.* to mistakenly believe they have the discretion to deny the appointment of counsel.

- Second, *T.M.* was unclear as to the timing of appointment of counsel. It said that counsel must be appointed “once DHS files a petition to assert foster custody over a child” while also saying that counsel must be appointed “upon the granting of a petition to DHS for temporary foster custody of their children.” It is therefore necessary to clarify exactly when counsel must be appointed for indigent parents, and such timing is not currently spelled out in § 587A-17(a).
- Third, trial courts may not be asking whether parents want counsel or may be improperly including that parents have waived such their right to counsel. In *In re T.S.*, 353 P.3d 409 (Haw. App. 2015), after a father’s retained counsel withdrew, the trial court “questioned whether Father wanted to proceed without an attorney” and said to him, “[I]f you’re not comfortable and would like to have an attorney present, then you can let me know.” The father then said that he would proceed. From this, the Court of Appeals concluded that “Father was aware of his right to counsel but chose to proceed without counsel.” Thus, the Court of Appeals either required the father to request appointed counsel or determined he had waived his right to appointed counsel. Yet *T.M.* does not require a parent to affirmatively request counsel in order for the right to counsel to attach; rather, it states that trial courts “must appoint counsel.” And in order to fully protect the vital parental rights at stake, any waiver of appointed counsel must be knowing, voluntary, and on the record. The current version of § 587A-17(a) does not address these things.

SB 2110 eliminates the discretionary language in § 587A-17(a), requires the court to inquire whether the parent desires counsel, specifies that counsel must be appointed quickly absent certain extenuating circumstances, and requires a waiver of appointed counsel to be knowing, voluntary, and on the record. Moreover, it addresses the situation where a parent no longer has retained counsel but may qualify for appointed counsel (a fairly common occurrence where a low-income parent is able to secure counsel for a short period but then runs out of resources). These statutory changes are necessary to ensure that the constitutional requirements laid out in *T.M.* are met and that parents are not deprived of their children without due process.

We thank you for your consideration and hope the bill gains your support.

Sincerely,
John Pollock

Coordinator, National Coalition for a Civil Right to Counsel

February 16, 2020

PUBLIC HEARING JDC
SB2110, February 20, 2019

Senator Rhoads,

I strongly support SB2110.

A comment is that, as an advocate for parents, I am concerned that there is adequate time for appointed lawyer and client to discuss the case prior to the initial removal hearing, even though the continuance is a part of the language of this bill. My second comment is that I hear from parents about issues with their court appointed lawyers (that are the majority of all parents in the system). The most common responses are that parents are not informed of their right to a trial/adjudication prior to the initial hearing, that communication between hearings is rare and that meetings occur only minutes prior to each hearing where the parent is given a copy of the caseworker report.

I have a guideline for engaging with parent lawyers that encourages email communication to make the lawyer's job of answering questions less time-consuming, but the practice of keeping the caseworker's court report until the day of the hearing violates a parent right to respond in writing to errors in that report.

My suggestion is that court appointeds should be required to have a copy of the ABA STANDARDS OF PRACTICE FOR LAWYERS OF PARENTS IN CHILD ABUSE CASES.

Thank you for time to express my views and concerns on defense of parents in the system.

Marilyn Yamamoto

Hawaii Parent Advocacy Team



HAWAII APPLESEED
CENTER FOR LAW & ECONOMIC JUSTICE

Testimony of Hawai‘i Appleseed Center for Law and Economic Justice
In Support of SB 2110 – Relating to the Child Protective Act
Senate Committee on Judiciary
Thursday, February 20, 2020, 9:15 AM, in conference room 016

Dear Chair Rhoads, Vice Chair Keohokalole, and members of the Committee:

Thank you for the opportunity to testify in **strong support** of SB 2110, which codifies the Hawaii Supreme Court’s decision requiring the appointment of legal counsel to parents involved in Child Protective Services cases. The Court ruled in the case *In Re T.M.*, 319 P3rd 338 (Haw.2014) that “[i]nherent in the substantive liberty interest that parents have in the care, custody, and control of their children under the Hawaii Constitution is the right to counsel to prevent erroneous deprivation of their parental rights.” The Court further found that the procedure set forth in Haw. Rev. Stat. § 587-A17 (a), in which the court had discretion to decide whether to appoint counsel, violated the state Constitution. The Court concluded: “Thus, in light of the constitutionally protected liberty interest at stake in a termination of parental rights proceeding, we hold that indigent parents are guaranteed the right to court-appointed counsel in termination proceedings under the due process clause in article I, section 5 of the Hawai‘i Constitution.”

SB 2110 simply codifies this ruling. It eliminates the outdated discretionary language currently on the books. It eliminates any confusion or uncertainty in the courts. It ensures that parents faced with challenges to the fundamental right to keep their family intact are able to protect that right. It is also advances the interests of the court in ensuring that proceedings are fair and efficient.

We appreciate your consideration of this testimony. We urge you to pass SB 2110.

SB-2110

Submitted on: 2/15/2020 4:53:06 PM

Testimony for JDC on 2/20/2020 9:15:00 AM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Dara Carlin, M.A. | Individual | Support | No |

Comments: