



DAVID Y. IGE
GOVERNOR

JOSH GREEN
LT. GOVERNOR

**STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**

335 MERCHANT STREET, ROOM 310
P.O. BOX 541
HONOLULU, HAWAII 96809
Phone Number: 586-2850
Fax Number: 586-2856
cca.hawaii.gov

CATHERINE P. AWAKUNI COLÓN
DIRECTOR

JO ANN M. UCHIDA TAKEUCHI
DEPUTY DIRECTOR

Testimony of the Department of Commerce and Consumer Affairs

**Before the
Senate Committee on Judiciary
Thursday, February 21, 2019
10:00 a.m.
State Capitol, Conference Room 016**

**On the following measure:
S.B. 866, RELATING TO FORECLOSURE**

Chair Rhoads and Members of the Committee:

My name is Stephen Levins, and I am the Executive Director of the Department of Commerce and Consumer Affairs' (Department) Office of Consumer Protection. The Department has serious concerns about this bill.

The purpose of this bill is to provide that a minute order entered on a decree of foreclosure incorporating an order of sale or entered on an order confirming the sale of a foreclosed property shall operate as a final appealable order.

The Department has the following concerns with S.B. 866. First, the bill would create a bright-line rule with the effect of removing the judge's discretion from consideration. The judge, as the trier of fact in foreclosure cases, sits in equity, and makes decision based on fairness after becoming familiar with the facts and circumstances of a case. Each case is unique. The judge should have the liberty to fashion the most appropriate remedy under the circumstances of each case. This bill seems to intrude into an area where wider discretion is preferable. The court can

always order that certain relief is effective immediately. The effect of this bill will be to force the homeowner into appealing a decision based on an incomplete record.

Second, enabling all minute orders to be treated as final for purposes of appeal does not appear to be the law anywhere in the country. In other words, no other state has identified a problem that can only be satisfactorily addressed in the proposed fashion. There is no evidence that this proposal would solve more problems than it creates, and such a law would very likely have unforeseen and unintended consequences.

Third, the bill seems to conflict with pending court rules, notably Rule 62 of the Hawaii Rules of Civil Procedure, pertaining to a stay of enforcement. Rule 62 specifically authorizes a judge to exercise discretion as the court sees fit. The effect of this bill would do away with this discretion and thereby effectively rewrite Rule 62. Rule 62(b) addresses relief from a judgment, and while a minute order does not constitute a judgment, the bill seemingly attempts to dispense with the differentiation between the two.

Fourth, S.B. 866 seemingly fails to appreciate the fundamental difference between a minute order and an appealable judgment. The minute order is intended to succinctly state the outcome of a motion and oftentimes reflects the grant or denial of a motion, without mentioning the reasons for the ruling. If a homeowner is forced to appeal from the minute order, the homeowner would have a difficult time articulating the reasons for the appeal, other than providing a general statement that the court erred in its ruling. Since a minute order is so abbreviated that it sheds little light on how the court reached its ruling, the record for appeal will be incomplete.

Thank you for the opportunity to testify on this bill.



The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Judiciary

Senator Karl Rhoads
Senator Glenn Wakai, Chair

Thursday, February 21, 2019, 10:00 a.m.
State Capitol, Conference Room 016

by

WRITTEN TESTIMONY ONLY

Elizabeth Zack
Supreme Court Staff Attorney

Bill No. and Title: Senate Bill No. 866, Relating to Foreclosure.

Purpose: Provides that a minute order entered on a decree of foreclosure incorporating an order of sale or entered on an order confirming the sale of a foreclosed property shall operate as a final, appealable order.

Judiciary's Position:

The Judiciary respectfully, but strongly opposes Senate Bill No. 866 which seeks to amend section 667-51 of the Hawai'i Revised Statutes by providing that a minute order entered on a decree of foreclosure incorporating an order of sale or entered on an order confirming the sale of a foreclosed property shall operate as a final, appealable order.

The rationale for this proposed legislation is not stated in Senate Bill No. 866 and we are not aware of any committee report that addresses why this bill is necessary. We see no valid reason for the proposed amendment. To the contrary, the bill appears to run afoul of longstanding requirements laid out by the legislature and the courts concerning appeals from judgments.

Minute orders in civil cases in the Circuit Courts are, by their nature, general and short orders. Minute orders are not intended to be final and in foreclosure matters, do not contain detailed findings and orders that are necessary when a court grants a request to enter a decree of



Senate Bill No. 866, Relating to Foreclosure
Senate Committee on Judiciary
Thursday, February 21, 2019
Page 2

foreclosure and order of sale or when a court confirms a sale of a foreclosed property. If passed, Senate Bill No. 866 would allow for a poor record for appellate review and could pose an undue and unnecessary hardship on the courts and court staff.

HRS § 667-51 currently authorizes a party in a foreclosure action to assert an appeal from a judgment entered on a decree of foreclosure incorporating an order of sale or from a judgment entered on an order confirming sale of a foreclosed property, and that such judgments shall be deemed final and appealable. The statute is clear that a party can only appeal from judgments. The statute is also consistent with HRS § 641-1,¹ Rule 58 of the Hawai‘i Rules of Civil Procedure,² and the Hawai‘i Supreme Court’s ruling in Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai‘i 115, 869 P.2d 1334, (1994).³

Thus, the proposed amendment appears to run afoul of the longstanding requirements laid out by the legislature and the courts concerning appeals from judgments.

Minute orders, by their nature, are general and short orders and are not intended to be final orders in civil cases in the Circuit Courts, let alone in foreclosure cases. Minute orders are not defined in the Hawai‘i Revised Statutes or the Rules of Court. They are not signed by the judge and they are not file stamped, although they are part of the court record. Minute orders are also not docketed in the court file unlike documents that are file stamped and docketed, such as motions, orders, and judgments.

Typically in any civil case, including foreclosures, minute orders are prepared by the court clerk following a court hearing that sets forth the court’s oral ruling in open court. Such minute orders are, in most instances, a general, short and plain statement of the court’s oral ruling on a particular matter or request (e.g., “the court granted the motion and directed [counsel for the prevailing party] to prepare an order”).⁴

¹ Appeals as of right or interlocutory, civil matters. (a) Appeals shall be allowed in civil matters from all final judgments, orders, or decrees of circuit and district courts and the land court to the intermediate appellate court, subject to chapter 602....(c) An appeal shall be taken in the manner and within the time provided by the rules of court.

² Rule 58 provides that “Every judgment shall be set forth on a separate document.”

³ The Supreme Court of Hawai‘i held in Jenkins that “[a]n appeal may be taken from circuit court orders resolving claims against parties only after the orders have been reduced to a judgment and the judgment has been entered in favor of and against the appropriate parties pursuant to HRCF [Rule] 58[.]” Jenkins, 76 Hawai‘i at 119, 869 P.2d at 1338.

⁴ Court rules require the prevailing party to prepare a judgment, decree, or order in accordance with a judge’s decision. See, Rule 23 of the Rules of the Circuit Courts, State of Hawai‘i. Given the volume of foreclosure filings, it would be an extreme hardship on the courts and staff to prepare orders, judgments and decrees in every instance when a request for court decision is made.



Senate Bill No. 866, Relating to Foreclosure
Senate Committee on Judiciary
Thursday, February 21, 2019
Page 3

On occasion, a judge may take a matter or request under advisement during a hearing and the court clerk later enters the judge's decision which may be a short and general statement of the decision, or it may set forth the basis for the judge's ruling in more detail. In either instance, the court directs the prevailing party to prepare the written order for the judge's signature as required by the rules of court.⁵

Written orders that enter decrees of foreclosure and confirmations of sale that are signed by the judge are necessary because the written orders contain specific findings of fact, conclusions of law, and orders. If appeals are permitted from minute orders, which again by their nature are general and short, the appellate courts will not have the requisite findings needed for proper review, and may have to remand the proceedings back to circuit court for the record on appeal to be supplemented, further delaying proceedings for both litigants and court staff.

Written orders entering a decree of foreclosure or confirmation of sale consist of multiple pages and detailed facts and legal conclusions that must be entered whenever a decree of foreclosure is granted and when the court confirms a foreclosure sale. For example, the written orders specify the amounts owed by mortgagor(s) and detail the chain of title. The orders identify and appoint a commissioner to sell the foreclosed property, set forth the scope of the commissioner's authority to sell the property, instruct the commissioner on the terms of the sale, proper notice to the public and auction of the foreclosed property. These written orders also specify the approved sale price, the amounts to be distributed to the parties upon the sale of the property, and direct the commissioner to convey the property by deed to the purchaser.

Such detailed factual findings, conclusions of law, and orders are not contained in any minute order entered by the court clerk in foreclosure cases.

If passed, it may then become necessary for the court clerk to enter specific and detailed minute orders for a proper record on appeal. This would pose an undue hardship on the court clerk to enter pages and pages of detailed findings, conclusions and orders in minute orders. In the First Circuit alone, the presiding judge handling foreclosure matters entered nearly 750 written orders entering decrees of foreclosure and confirmations of sale in 2018.

For all of these reasons, the Judiciary strongly opposes Senate Bill No. 866.

⁵ Specifically, Rule 23 of the Rules of the Circuit Courts, State of Hawai'i.

SB-866

Submitted on: 2/19/2019 11:34:53 PM

Testimony for JDC on 2/21/2019 10:00:00 AM

LATE

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

Comments:

SB-866

Submitted on: 2/19/2019 1:14:23 AM

Testimony for JDC on 2/21/2019 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Robert Quartero	Individual	Support	No

Comments:

Aloha Kakou,

I support SB866.

Regards,

Robert Quartero