



The Judiciary, State of Hawai‘i

**Testimony to the Thirty-First Legislature
2022 Regular Session**

Senate Committee on Ways and Means
Senator Donovan M. Dela Cruz, Chair
Senator Gilbert S.C. Keith-Agaran, Vice Chair

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair

Thursday, March 3, 2022 at 10:30 a.m.
State Capitol, Conference Room 211 & Videoconference

By

Matthew J. Viola
Senior Judge, Deputy Chief Judge
Family Court of the First Circuit

WRITTEN TESTIMONY ONLY

Bill No. and Title: Senate Bill No 2422, S.D.1, Relating to Family Court.

Purpose: Requires certain persons to immediately submit a written report to the court if the person has reason to believe that a child in foster custody has suffered an injury that may arise to a tort claim. Establishes procedures for Family Court upon receipt of the written report, including required contents of an order appointing a master. Appropriates funds. (SD1)

Judiciary's Position:

The Judiciary respectfully opposed Senate Bill No. 2422 before the House Committee on Human Services. While family court was in support of the bill's intent, we were concerned that



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the process required by the original bill would work against the best interests of the children on the H.R.S. Chapter 587A calendar.

The Judiciary now supports Senate Bill No. 2422, S.D. 1 (with suggestions for fine tuning the language) because the Committee on Human Services (*see*, SSCR #2568) responded to family court's concerns by amending the original bill as follows:

- “(1) Deleting the provisions that require the court-appointed master to investigate and determine the merits of the potential tort claim;
- (2) Deleting the provisions relating to the court's issuance of an order authorizing the filing of a tort claim on behalf of the injured child, including provisions relating to appointment of outside counsel to represent the injured child;
- (3) Appropriating an unspecified amount of funds for the Judiciary to compensate a court-appointed master pursuant to this measure; and
- (4) Changing the effective date to conform with the added appropriation provision.”

With S.D. 1, all the judicial circuits retain the flexibility to establish practices that will work best in each circuit. The appropriation provided by S.D. 1 for compensating court-appointed masters is appreciated.

The family court respectfully offers these suggestions to fine tune S.D. 1 to make the process more efficient and to comport with the rules of court.

Change page 2, lines 18 and 19, to read:

“. . . these persons shall immediately report the matter to the court in writing a declaration attached to a motion for immediate hearing.”

Requiring a declaration rather than a non-specified “writing” along with a motion will avoid delays and will ensure consistency throughout the state.



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Change page 2, line 21, to read:

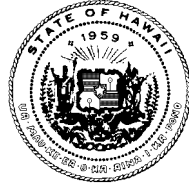
“. . . the court shall immediately set a hearing and provide a copy of the written communication to all parties upon receipt of the motion, the court shall set a hearing as soon as practicable.”

Requiring a motion rather than a writing will ensure more timely notice to all the parties under the rules of court. Setting a hearing as soon as practicable recognizes the importance of all of the cases the court must hear pursuant to H.R.S. Chapter 587A as well as the reality of the volume of cases already set on those dockets.

The Judiciary supports Senate Bill No. 2422, S.D. 1 and the foster child’s ability to sue for damages when it is viable. We will continue to work on encouraging all of our systems to channel appropriate cases to reputable law firms for evaluation and appropriate follow up.

Thank you for the opportunity to testify in this matter.

DAVID Y. IGE
GOVERNOR



CATHY BETTS
DIRECTOR

JOSEPH CAMPOS II
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES

P. O. Box 339
Honolulu, Hawaii 96809-0339

March 1, 2022

TO: The Honorable Donovan M. Dela Cruz, Chair
Senate Committee on Ways and Means

The Honorable Karl Rhoads, Chair
Senate Committee on the Judiciary

FROM: Cathy Betts, Director

SUBJECT: **SB 2422 SD1 – RELATING TO FAMILY COURT.**

HEARING: March 3, 2022, 10:30 a.m.
Via Videoconference

DEPARTMENT'S POSITION: The Department of Human Services (DHS) appreciates the intent, provides comments, requests clarification, and defers to the Judiciary.

PURPOSE: The purpose of this measure is to require certain persons to immediately submit a written report to the court if the person has reason to believe that a child in foster custody has suffered an injury that may arise to a tort claim. Establishes procedures for Family Court upon receipt of the written report, including required contents of an order appointing a master. Appropriates funds. (SD1) The SD1 amended the measure by:

- (1) Deleting the provisions that require the court-appointed master to investigate and determine the merits of the potential tort claim;
- (2) Deleting the provisions relating to the court's issuance of an order authorizing the filing of a tort claim on behalf of the injured child, including provisions relating to appointment of outside counsel to represent the injured child;
- (3) Appropriating an unspecified amount of funds for the Judiciary to compensate a court-appointed master pursuant to this measure; and
- (4) Changing the effective date to conform with the added appropriation provision.

The DHS appreciates the SD1 amendments and the measure's intent to preserve and investigate potential tort claims of minors while in foster care and to authorize the filing of a claim. However, DHS remains concerned regarding placing this additional reporting requirement within chapter 587A, Hawaii Revised Statutes (HRS), and requests clarification. Mandated reporters are required to report allegations of abuse or neglect to the CWS or law enforcement as provided by Chapter 350, HRS. The duty does not stop if the child is in foster care. Similarly, individuals may also make reports to CWS or law enforcement regarding suspected cases of child abuse or neglect.

Additionally, when a child is in foster care, CWS investigates all serious injuries that require medical attention or injuries that appear inconsistent with how the injuries were reported to have occurred. The investigating social worker can also refer the case to the Multi-disciplinary Team (MDT) to examine further whether the injury was accidental or non-accidental. The resulting report of the MDT is part of the child's record and is made available to the Court and parties. If the injuries are determined to be non-accidental or abusive, the child will be removed from the foster home and placed in another foster home if the child's family is not yet able to provide a safe home for the child.

The Department is concerned and requires clarification on how the report and investigation of the potential tort and CWS investigation regarding serious injuries will be handled and reconciled. For example, a child has a broken arm reportedly due to a fall from park equipment or another kind of "accident." CWS investigates and confirms that the injuries were most likely accidental and does not confirm abuse or neglect. However, as drafted, the new requirement to immediately report a potential tort in writing to the Court will require a hearing to determine whether the master is needed to investigate the injury and determine whether the child has a claim. While there may be certain situations where the additional tort analysis may be necessary, this additional time will take valuable time and resources away from the focus of the Chapter 587A case. Also, potentially the child will be interviewed multiple times about their injury which may cause unnecessary stress. Perhaps the Court should have the discretion whether to schedule a hearing or whether to add the issue to currently scheduled hearing. However, DHS remains concerned that this new requirement not be placed

within Chapter 587A. We provide additional discussion below regarding the purpose and focus of Chapter 587A.

Hawaii's existing tort law is well-established and codified in Chapter 663, HRS, with statutes of limitation addressed in Chapter 657, HRS. Notably, section 657-1.8, HRS, provides additional time for an individual to bring a claim for injuries due to sexual abuse while a minor. The Legislature may want to consider a similar provision for recovery of damages due to injuries suffered while in foster custody. Also, Rule 53 of the Hawaii Family Court Rules currently allows the Family Court to appoint "a master, referee, auditor, examiner, assessor, special master, volunteer settlement master, commissioner, or receiver ("a master") to perform specific acts and/or obtain specific evidence to assist the court." The Hawaii Supreme Court may want to consider amending its rule to clarify the process further when a child in foster custody suffers additional injuries and requires representation to recover damages.

The Department requires additional clarification on how the measure, if passed, will be reconciled with section 346-17(m), HRS. Notably, via Act 133, Session Laws of Hawaii 2016 (Act 133), the Legislature amended Hawaii law to comply with "the Preventing Sex Trafficking and Strengthening Families Act of 2014, Public Law No. 113-18, to expand opportunities for children in foster care to participate in age or developmentally appropriate extracurricular, enrichment, cultural and social activities equal to their classmates and peers in accordance with the "reasonable and prudent parent standard."¹ Amongst other things, Act 133 amended section 346-17, HRS, and added immunity from civil liability as follows:

"(m) Any resource caregiver or child caring institution issued a certificate of approval pursuant to this section shall be immune from liability in a civil action to recover damages for injury, death, or loss to a person or property that results by authorizing a child in the caregiver's or institution's foster care to participate in an extracurricular, enrichment, cultural, or social activity; provided that the authorization is in accordance with the reasonable and prudent parent standard as defined in title 42 United States Code section 675(10)(A)."

The preamble of Act 133 describes the reason for immunity from civil liability as follow,

¹See Act , https://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=2350&year=2016

"The Preventing Sex Trafficking and Strengthening Families Act, title 42 United States Code section 675(10)(A), defines the "reasonable and prudent parent standard" as "the standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child, that a caregiver shall use when determining whether to allow a child in foster care under the responsibility of the State to participate in extracurricular, enrichment, and social activities."

As mentioned above, DHS has significant concerns about placing the proposed process in chapter 587A, Hawaii Revised Statutes (HRS). The purpose of the Child Protective Act (CPA), codified as chapter 587A, is to "provide children with prompt and ample protection from the harms detailed herein, with an opportunity for timely reconciliation with their families if the families can provide safe family homes." Under the CPA and federal law, parents with children in foster care have a limited time to complete court-ordered services and demonstrate their ability to provide a safe family home. However, per section 587A-29, HRS, the court at any stage may set a show cause hearing where the child's parents have the burden to present evidence as to why the case should not be set for termination of parental rights or legal guardianship hearing. Time is of the essence.

During the 587A case, the primary focus of all parties involved should be on the child's needs and parents' successful engagement in completing their service plan. The Department is required to provide "[e]very reasonable opportunity should be provided to help the child's legal custodian to succeed in remedying the problems that put the child at substantial risk of being harmed in the family home." The CPA policy and purpose acknowledges the protection of children by "providing assistance to families to address the causes of abuse and neglect" and "ensuring that families are meaningfully engaged and children are consulted in an age-appropriate manner in case planning." Section 587A-2, HRS. In addition, DHS Child Welfare Services (CWS) must make "reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child's safety is assured" to remain eligible to receive federal foster care maintenance payments under Title IV-E of the Social Security Act.

Although DHS appreciates the intent to explore other possible legal opportunities for children in foster care, the Department is concerned that the additional responsibilities

associated with investigating potential tort claims during the chapter 587A case may frustrate the Court, CWS, and parents' efforts to provide a safe family home for the children in foster care. DHS is also concerned that if additional tort investigations are initiated during the 587A case, resource caregivers may not want to continue serving as resource caregivers for the child, resulting in the child being further traumatized by an additional move or resources caregivers will be reluctant to make prudent parenting decisions that would allow a child in care to participate in the normal age- and developmentally appropriate prosocial activities.

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

DAVID Y. IGE
GOVERNOR



CRAIG K. HIRAI
DIRECTOR

GLORIA CHANG
DEPUTY DIRECTOR

EMPLOYEES' RETIREMENT SYSTEM
HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
OFFICE OF THE PUBLIC DEFENDER

STATE OF HAWAII
DEPARTMENT OF BUDGET AND FINANCE
P.O. BOX 150
HONOLULU, HAWAII 96810-0150

ADMINISTRATIVE AND RESEARCH OFFICE
BUDGET, PROGRAM PLANNING AND
MANAGEMENT DIVISION
FINANCIAL ADMINISTRATION DIVISION
OFFICE OF FEDERAL AWARDS MANAGEMENT (OFAM)

WRITTEN ONLY
TESTIMONY BY CRAIG K. HIRAI
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
TO THE SENATE COMMITTEES ON WAYS AND MEANS AND JUDICIARY
ON
SENATE BILL NO. 2422, S.D. 1

March 3, 2022
10:30 a.m.
Room 211 and Videoconference

RELATING TO FAMILY COURT

The Department of Budget and Finance (B&F) offers comments on this bill.

Senate Bill No. 2422, S.D. 1, requires certain persons to immediately submit a written report to the court if the person has reason to believe that a child in foster care custody has suffered an injury that may arise to a tort claim; establishes procedures for Family Court upon receiving such reports, including appointing a master if necessary; and makes an unspecified general fund appropriation in FY 23 for the Judiciary to compensate court-appointed masters pursuant to this measure.

B&F notes that, with respect to the general fund appropriation in this bill, the federal Coronavirus Response and Relief Supplemental Appropriations Act requires that states receiving Elementary and Secondary School Emergency Relief (ESSER) II funds and Governor's Emergency Education Relief II funds must maintain state support for:

- Elementary and secondary education in FY 22 at least at the proportional level of the state's support for elementary and secondary education relative to the state's overall spending, averaged over FYs 17, 18 and 19; and

- Higher education in FY 22 at least at the proportional level of the state's support for higher education relative to the state's overall spending, averaged over FYs 17, 18 and 19.

Further, the federal American Rescue Plan (ARP) Act requires that states receiving ARP ESSER funds must maintain state support for:

- Elementary and secondary education in FY 22 and FY 23 at least at the proportional level of the state's support for elementary and secondary education relative to the state's overall spending, averaged over FYs 17, 18 and 19; and
- Higher education in FY 22 and FY 23 at least at the proportional level of the state's support for higher education relative to the state's overall spending, averaged over FYs 17, 18 and 19.

The U.S. Department of Education has issued rules governing how these maintenance of effort (MOE) requirements are to be administered. B&F will be working with the money committees of the Legislature to ensure that the State of Hawai'i complies with these ESSER MOE requirements.

Thank you for your consideration of our comments.

SB-2422-SD-1

Submitted on: 2/28/2022 7:33:27 PM

Testimony for JDC on 3/3/2022 10:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Marilyn Yamamoto	Testifying for Hawaii Family Advocacy Team	Support	No

Comments:

Chairs of JDC and WAM,

I fully support this bill and the credible testimonies of Attorneys Case, Potts and Special Master Lane.

FOSTER CHILDREN IN HAWAII AND THEIR RIGHT TO COUNSEL

Thank you for allowing me to offer testimony on behalf of Senate Bill 2422. My interest in this subject is prompted by my 25 years plus as licensed foster parent, my 3 years as a VGAL with the Family Court and my service as a Special Master with Family Court where I have represented the interests of abandoned and abused children, including helping them secure access to counsel when they suffer harm. As some of you may know, I recently served *pro bono* as the Special Master in the Peter Boy Kema case.

What I have found most striking in my experience is that in the land of milk and honey where there are probably more licensed attorneys per square foot than almost any country in the world, our most vulnerable population, the children who are wards of the State and or in foster care have virtually no access to counsel if they suffer harm as a result of third party tort liability.

According to Toni Schwartz, the Public Information Officer of the Department of Human Services, 2745 children went through the foster care system in Hawaii in 2010. In earlier years the numbers approached 5,000. Of the children in foster care, a significant number of them are also wards of the State of Hawaii. That is, they have no responsible adult or parent to serve as their legal guardian. The State of Hawaii is their legal guardian and that duty is largely discharged by the DHS social worker assigned to the child and the attendant family court case.

If your child, who is not in foster care, suffers an injury or harm at the hands of another, such as an automobile accident, schoolyard fall etc., you as the parent may choose to consult a lawyer on your child's behalf to see if the child has a claim for damages. In the event a lawyer decides there is a claim, he will appoint you to serve as your child's *prochien ami*, or next friend, so that the claim can be filed in court. In Hawaii a minor under 18 years of age cannot hire a lawyer on their own and can only be represented if the court approves a responsible adult or parent to act on his or her behalf.

If a child in foster care who is also a ward of the State of Hawaii is involved in an accident or otherwise suffers harm, the paradigm changes dramatically. First of all, if there are physical injuries involved requiring medical care, the State of Hawaii steps in and pay the medical bills through the Department of Human Services MedQuest program. However, there is no one present in the child's life at this point that has the legal authority to act on the child's behalf and in their best interest to investigate if there is a claim for damages.

If there is a Volunteer Guardian Ad Litem involved with the child, the local office has taken the position that it is outside the authority of the VGAL to act in this area or to even investigate a possible claim for the child. The Department of Social Services has taken the position in at least several cases that it isn't their responsibility to even report such an injury let alone seek an independent voice to represent the best interests of the child and investigate a possible claim. Most troublesome of all, if the State of Hawaii

discovers there is insurance, they will seek to “represent” the child in a claim for damages but only to the extent that they are able to recover back the “out of pocket” expenses they incurred by extending the MedQuest benefits to the injured child.

The State of Hawaii is certainly entitled to try and assert their lien rights in such a case by attempting to secure reimbursement for their medical costs. However, they ethically cannot do that while standing in the child’s shoes, pretending to be the child’s lawyer on one hand, and their own lawyer on the other. The old adage that you cannot serve two masters applies here. The child should be entitled to their own independent voice and counsel who would seek full recovery for any claims of damage they might have against a third party who caused the injury, not simply limited to recovering their medical expenses for the purpose of reimbursing the State of Hawaii. That is the Attorney General’s job, but not as the lawyer for the child.

Under the present system an entire class of children has been fundamentally disenfranchised of their right to counsel in the event they suffer injury at the hands of another because they had the misfortune of becoming wards of the State through no fault of their own.

While there is a provision in the Family Court Rules for the family court judge to appoint what is described as a Special Master under Rule 66 to act in the child’s best interest in investigating such claims and securing a *prochien ami* and or counsel to represent the child, there are other systems in place that appear to offer the same remedy, more efficiently and comprehensively. In some California jurisdictions for example, their Juvenile Courts automatically appoint litigation or civil counsel in the event that a ward of the jurisdiction suffers harm.

The Dependency Court Tort Policy in the Juvenile Division of the Los Angeles County Superior Court has proven to be both effective and efficient, As proposed by HB 2301 there are no administrative costs attendant to the program and between March of 1992 and February of 2008 more than \$18,000,000 was recovered including millions of dollars reimbursed to the county and State for the costs of medical and related services that would have otherwise been lost.

The provisions afforded in Senate Bill 2422 and House Bill 2301 are a sensible and cost efficient way to address this long standing inequity. At no additional cost to the State, it provides counsel to otherwise disenfranchised minor children who suffer harm and in many cases results in a significant recovery of otherwise lost costs incurred by the State in paid medical and related expenses.

Steve Lane

February 5, 2022

To: The Honorable Senator Donovan Dela Cruz, Chair
The Honorable Senator Gilbert S.C. Keith-Agaran, Vice Chair
Members of the Senate Committee on Ways and Means

The Honorable Senator Karl Rhoads, Chair
The Honorable Senator Jarrett Keohokalole, Vice Chair
Members of the Committee on Judiciary

Re: Strong Support of SB2422, SD1 Relating To Family Court

Hrg: Thursday, March 3, 2022 at 10:30am, Conference Room 211 & Videoconference

Position: Support

Good afternoon, Chair Dela Cruz, Vice-Chair Keith-Agaran, and members of the Senate Committee on Ways and Human Means and Chair Rhoads, Vice-Chair Keohokalole, and Members of the Senate Committee on Judiciary. My name is Ann Yabusaki from Kaneohe, Hawaii. Thank you so much for the opportunity to submit testimony on SB2422. I strongly support the intent of this law to protect children in foster care.

Children continue to be harmed by physical and emotional abuse, and neglect in the foster care system. My concern arises from children with fetal alcohol spectrum disorders (FASD), a widespread condition that is underdiagnosed in foster care and other systems of care. Research shows that about 85% of children in the foster care system are missed or misdiagnosed for an FASD.¹ The fetal brain is damaged when a pregnant woman drinks alcohol, often drinking without knowing that she is pregnant. FASD is described as brain damage with behavioral symptoms that are often misdiagnosed as other disorders. Hence the children do not receive proper care nor are their caretakers provided with support and education for FASD. The lack of proper diagnosis, caretaker expectations beyond the child's ability, can increase the possibility of harm to children with FASD.

As a psychologist, I am constantly seeking services for children and families, and I strongly urge the passage of this bill as another means to protect the children.

Mahalo for the opportunity to submit testimony.

Respectfully,

Ann S. Yabusaki, Ph.D., LMFT

¹ Chasnoff, I., Wells, A.M., & King L. (2015). Misdiagnosis and missed diagnoses in foster and adopted children with prenatal alcohol exposure. *Pediatrics*, **135**(2), DOI: 10.1542/peds.2014-2171.
<http://pediatrics.appublications.org/content/early/2015/01/07/peds.2014-2171>

SB-2422-SD-1

Submitted on: 3/1/2022 3:53:23 PM

Testimony for JDC on 3/3/2022 10:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Kenichi Yabusaki	Individual	Support	No

Comments:

Aloha Chair Dela Cruz, Vice-Chair Keith-Agaran, and Members of the Ways and Means Judiciary Committee:

Who is responsible for the "rights" of foster children that are wards of the State? It seems children do not have any rights and this is absurd. Aside from asking why children are in foster care, the State has a responsibility to protect them and ensure the caregivers (foster parents, etc.) are carefully vetted so no harm comes to the child. If and when a foster child is harmed or suspected of being harmed, the proper authorities must be notified immediately so the child is removed from potentially more harm. Also, those who are entrusted with the care and/or placement of the child into foster care should be held accountable to pay for the costs of any injury (ies) to the foster child. Hawaii cannot deny the recent case of Ariel (Isabella) Kalua was a tragic death that could have been prevented had those in authority visited Ariel's home. The State cannot deny there are other instances most notably that of "Peter Boy". We cannot stick heads into the sand when children are being harmed. I strongly support the passage of SB2422 as a step towards the prevention of more tragedies for our children and families in the foster care system.

Respectfully,

Kenichi K. Yabusaki, Ph.D.

Kaneohe

TESTIMONY IN SUPPORT OF SB2422, SD1 (RELATING TO FAMILY COURT)
BEFORE THE SENATE COMMITTEES ON JUDICIARY AND WAYS AND MEANS,
MARCH 3, 2022, AT 10:30AM VIA VIDEOCONFERENCE

Chairs Rhoads and Dela Cruz, Vice Chairs Kehokalole and Keith-Agaran, and Members of the Committee:

My name is David Case. I am a retired lawyer living on the Kona side of Hawai'i Island. I sometimes represented families and minor children caught up in the child welfare service ("CWS") system of another state. Most CWS systems have similar procedures for removing minors from their parental homes and placing them in foster care with the goal of returning them to their own homes as quickly as possible. While the minors are in foster care, they are wards of the state, which is responsible for overseeing their welfare.

If the minors are injured while they are state wards, the state would normally be expected to take steps to recover compensation for their injuries, since the minors are legally and otherwise incapable of representing themselves. But this is where most CWS systems falter. They are after all only supposed to have the children in state custody for a short period of time, but often these periods are extended and repeated until the children age out of the system. Under Hawaii's system the guardians ad litem and the state social workers handling these cases are either prohibited, ill-equipped and in some cases conflicted in taking the necessary steps to obtain counsel to represent children in tort claims.

That is why is so important to have procedures in place, such as those SB2422, SD1, to recover compensation for children who are injured while in state custody and care. As amended the Bill removes the specific requirement of SB2422 that a court appoint an attorney to represent the child. It now also provides an appropriation to compensate a master appointed to investigate the need for filing a tort claim on behalf of injured children. These amendments seem intended to allow flexibility for the judiciary to act as well as paying a master to perform their essential duties.

SB2422 would rely on private counsel to represent children injured while in state hands. These independent attorneys are ethically obligated to "zealously represent" their clients and would typically be paid under a contingency fee arrangement at no cost to the state. It is the way most personal injury claims are handled in the United States, and the State of Hawaii's minor wards should be entitled to nothing less.

I urge you to approve SB2422, S1 and refer it to the Senate for a vote.

With Aloha,
David S. Case
78-6980 Kaluna St, Apt 102
Kailua-Kona, HI 96740-2822