



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-SECOND LEGISLATURE, 2023**

ON THE FOLLOWING MEASURE:
S.B. NO. 406, RELATING TO CHILD VISITATION.

BEFORE THE:
SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES

DATE: Monday, January 30, 2023 **TIME:** 1:00 p.m.

LOCATION: State Capitol, Room 225

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Ian T. Tsuda, Deputy Attorney General

Chair San Buenaventura and Members of the Committee:

The Department of the Attorney General provides the following comments.

The purpose of this bill is to amend section 571-46.3, Hawaii Revised Statutes (HRS), to allow the family court to award reasonable visitation to a grandparent if the parent of a child is unable to exercise parental visitation due to incarceration or death. The bill also establishes a rebuttable presumption that visitation decisions made by a parent or custodian are in the best interest of the child, which may be rebutted by a preponderance of the evidence that denying a grandparent reasonable visitation rights would cause significant harm to the child.

We recommend an amendment to the bill to satisfy a decision of the Supreme Court of the State of Hawaii. In *Doe v. Doe*, 116 Hawai'i 323, 172 P.3d 1067 (2007), the Hawaii Supreme Court ruled that the current version of section 571-46.3, HRS, was unconstitutional because it did not require the petitioner to show that denial of visitation by a grandparent would cause significant harm to the child. The court stated that "proper recognition of parental autonomy in child-rearing decisions requires that the party petitioning for visitation demonstrate that the child will suffer significant harm in the absence of visitation before the family court may consider what degree of visitation is in the child's best interests." *Doe v. Doe*, 116 Hawai'i 323, 335, 172 P.3d 1067, 1079 (2007). While this bill explains that evidence of significant harm is necessary to overcome the presumption in favor of a parent or custodian's decision regarding

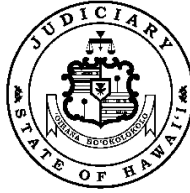
visitation, it does not require this as a finding for the family court to award reasonable visitation rights to a grandparent.

To ensure this bill satisfies the requirements of *Doe*, the Department recommends that in the amendments to section 571-6.3, HRS, in section 1, a new paragraph (3) be inserted in subsection (a), starting from page 1, line 16, to read as follows:

(3) Denial of reasonable grandparent visitation rights would cause significant harm to the child.

The Department respectfully requests that the Committee consider these recommendations.

Thank you for the opportunity to testify.



The Judiciary, State of Hawai‘i

Testimony to the Thirty-Second Legislature, 2023 Regular Session

Senate Committee on Health and Human Services

Senator Joy A. San Buenaventura, Chair

Senator Henry J.C. Aquino, Vice Chair

Monday, January 30, 2023 at 1:00 p.m.
State Capitol, Conference Room 225 & 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. 406, Relating to Child Visitation.

Purpose: Allows grandparents of a minor child to petition the court for an order granting reasonable visitation rights when the child's parent is unable to exercise parental visitation due to death or incarceration. Sets forth procedures, considerations, and standards for the court to grant grandparent visitation rights. Specifies that any person who violates the terms and conditions of a court order granting reasonable grandparent visitation rights may be held in contempt of court.

Judiciary's Position:

The Judiciary takes no position regarding the purpose of this bill, but we respectfully suggest that the “preponderance of the evidence” burden of proof in section (c) be replaced with the “clear and convincing evidence” standard because the United States Supreme Court has recognized that “the interest of parents in the care, custody, and control of their children...is perhaps the oldest of the fundamental liberty interests.” *Troxel v. Granville*, 530 U.S. 57 (2000). The Hawai‘i Supreme Court has also recognized that parental rights “are of constitutional dimension.” *In Re Doe*, 99 Hawaii 522, 57 P.3d 447 (2002).



Senate Bill No. 406, Relating to Child Visitation
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Family Court actions that touch upon parents' constitutionally-protected rights must be determined using a "clear and convincing" standard of proof in order to satisfy existing federal and Hawai'i case precedent. The Judiciary respectfully suggests amending the proposed bill at page 2, beginning at line 5, as follows:

(c) In any proceeding on a petition filed pursuant to this section, there shall be a rebuttable presumption that a parent's or custodian's decision regarding visitation is in the best interest of the child. The presumption may be rebutted by [~~a preponderance of the~~] **clear and convincing** evidence that denial of reasonable grandparent visitation rights would cause significant harm to the child.

Thank you for the opportunity to submit testimony on this bill.