

ACT 253

S.B. NO. 529

A Bill for an Act Relating to Parental Rights.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that state law does not prevent a natural parent from claiming parental rights and obtaining custody or visitation of a child conceived as a result of sexual assault or rape. The perpetrator-parent is afforded the same rights as any other parent despite the sexual assault against the victim-parent, because Hawaii does not have a law restricting or terminating those rights. Consequently, a perpetrator-parent may assert parental rights, including custody and visitation, forcing a victim-parent to confront the perpetrator-parent on a recurring basis while raising a child conceived from a sexual assault.

The legislature finds that approximately twenty-five thousand women become pregnant as a result of rape each year in the United States. According to a 2003 report by the National Violence Against Women Prevention Research Center, one out of every seven adult women in Hawaii, or about fifteen per cent, has been a victim of sexual assault. This number is higher than the national average. A 2004 report by the department of the attorney general crime prevention and justice assistance division and the Sex Abuse Treatment Center in Honolulu detailed that Hawaiian or part-Hawaiian women make up the largest category of sexual assault victims. The legislature further finds that, generally, eight out of ten rapes are committed by a person that the victim knows, so the consequences can be extreme for a victim-parent raising a child from rape with no legal protections.

The purpose of this Act is to prohibit the family courts from granting custody and visitation of a minor child who was conceived as a result of rape or sexual assault to a natural parent who has been convicted of that offense and to authorize the family court to terminate the parental rights to a minor child who was conceived as a result of rape or sexual assault of a natural parent who has been convicted of that offense.

SECTION 2. Section 571-46, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) In actions for divorce, separation, annulment, separate maintenance, or any other proceeding where there is at issue a dispute as to the custody of a minor child, the court, during the pendency of the action, at the final hearing, or any time during the minority of the child, may make an order for the custody of the minor child as may seem necessary or proper. In awarding the custody, the court shall be guided by the following standards, considerations, and procedures:

- (1) Custody should be awarded to either parent or to both parents according to the best interests of the child, and the court also may consider frequent, continuing, and meaningful contact of each par-

- ent with the child unless the court finds that a parent is unable to act in the best interest of the child;
- (2) Custody may be awarded to persons other than the father or mother whenever the award serves the best interest of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall be entitled prima facie to an award of custody;
 - (3) If a child is of sufficient age and capacity to reason, so as to form an intelligent preference, the child's wishes as to custody shall be considered and be given due weight by the court;
 - (4) Whenever good cause appears therefor, the court may require an investigation and report concerning the care, welfare, and custody of any minor child of the parties. When so directed by the court, investigators or professional personnel attached to or assisting the court, hereinafter referred to as child custody evaluators, shall make investigations and reports that shall be made available to all interested parties and counsel before hearing, and the reports may be received in evidence if no objection is made and, if objection is made, may be received in evidence; provided the person or persons responsible for the report are available for cross-examination as to any matter that has been investigated; and provided further that the court shall define the requirements to be a court-appointed child custody evaluator, the standards of practice, ethics, policies, and procedures required of court-appointed child custody evaluators in the performance of their duties for all courts, and the powers of the courts over child custody evaluators to effectuate the best interests of a child in a contested custody dispute pursuant to this section. Where there is no child custody evaluator available that meets the requirements and standards, or any child custody evaluator to serve indigent parties, the court may appoint a person otherwise willing and available;
 - (5) The court may hear the testimony of any person or expert, produced by any party or upon the court's own motion, whose skill, insight, knowledge, or experience is such that the person's or expert's testimony is relevant to a just and reasonable determination of what is for the best physical, mental, moral, and spiritual well-being of the child whose custody is at issue;
 - (6) Any custody award shall be subject to modification or change whenever the best interests of the child require or justify the modification or change and, wherever practicable, the same person who made the original order shall hear the motion or petition for modification of the prior award;
 - (7) Reasonable visitation rights shall be awarded to parents, grandparents, siblings, and any person interested in the welfare of the child in the discretion of the court, unless it is shown that rights of visitation are detrimental to the best interests of the child;
 - (8) The court may appoint a guardian ad litem to represent the interests of the child and may assess the reasonable fees and expenses of the guardian ad litem as costs of the action, payable in whole or in part by either or both parties as the circumstances may justify;
 - (9) In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that family violence has been committed by a parent raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the

child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence. In addition to other factors that a court shall consider in a proceeding in which the custody of a child or visitation by a parent is at issue, and in which the court has made a finding of family violence by a parent:

- (A) The court shall consider as the primary factor the safety and well-being of the child and of the parent who is the victim of family violence;
 - (B) The court shall consider the perpetrator's history of causing physical harm, bodily injury, or assault or causing reasonable fear of physical harm, bodily injury, or assault to another person; and
 - (C) If a parent is absent or relocates because of an act of family violence by the other parent, the absence or relocation shall not be a factor that weighs against the parent in determining custody or visitation;
- (10) A court may award visitation to a parent who has committed family violence only if the court finds that adequate provision can be made for the physical safety and psychological well-being of the child and for the safety of the parent who is a victim of family violence;
- (11) In a visitation order, a court may:
- (A) Order an exchange of a child to occur in a protected setting;
 - (B) Order visitation supervised by another person or agency;
 - (C) Order the perpetrator of family violence to attend and complete, to the satisfaction of the court, a program of intervention for perpetrators or other designated counseling as a condition of the visitation;
 - (D) Order the perpetrator of family violence to abstain from possession or consumption of alcohol or controlled substances during the visitation and for twenty-four hours preceding the visitation;
 - (E) Order the perpetrator of family violence to pay a fee to defray the costs of supervised visitation;
 - (F) Prohibit overnight visitation;
 - (G) Require a bond from the perpetrator of family violence for the return and safety of the child. In determining the amount of the bond, the court shall consider the financial circumstances of the perpetrator of family violence;
 - (H) Impose any other condition that is deemed necessary to provide for the safety of the child, the victim of family violence, or other family or household member; and
 - (I) Order the address of the child and the victim to be kept confidential;
- (12) The court may refer but shall not order an adult who is a victim of family violence to attend, either individually or with the perpetrator of the family violence, counseling relating to the victim's status or behavior as a victim as a condition of receiving custody of a child or as a condition of visitation;
- (13) If a court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation;
- (14) A supervised visitation center shall provide a secure setting and specialized procedures for supervised visitation and the transfer of chil-

- dren for visitation and supervision by a person trained in security and the avoidance of family violence; ~~and~~
- (15) The court may include in visitation awarded pursuant to this section visitation by electronic communication provided that the court shall additionally consider:
- (A) The potential for abuse or misuse of the electronic communication, including the equipment used for the communication, by the person seeking visitation or by persons who may be present during the visitation or have access to the communication or equipment;
 - (B) Whether the person seeking visitation has previously violated a temporary restraining order or protective order; and
 - (C) Whether adequate provision can be made for the physical safety and psychological well-being of the child and for the safety of the custodial parent[-];
- (16) The court may set conditions for visitation by electronic communication~~[-]~~ under paragraph (15), including visitation supervised by another person or occurring in a protected setting. Visitation by electronic communication shall not be used to:
- (A) Replace or substitute an award of custody or physical visitation except where:
 - (i) Circumstances exist that make a parent seeking visitation unable to participate in physical visitation, including military deployment; or
 - (ii) Physical visitation may subject the child to physical or extreme psychological harm; or
 - (B) Justify or support the relocation of a custodial parent[-]; ~~and~~
- (17) Notwithstanding any provision to the contrary, no natural parent shall be granted custody of or visitation with a child if the natural parent has been convicted in a court of competent jurisdiction in any state of rape or sexual assault and the child was conceived as a result of that offense; provided that:
- (A) A denial of custody or visitation under this paragraph shall not affect the obligation of the convicted natural parent to support the child;
 - (B) The court may order the convicted natural parent to pay child support;
 - (C) This paragraph shall not apply if subsequent to the date of conviction, the convicted natural parent and custodial natural parent cohabit and establish a mutual custodial environment for the child; and
 - (D) A custodial natural parent may petition the court to grant the convicted natural parent custody and visitation denied pursuant to this paragraph, and upon such petition the court may grant custody and visitation to the convicted natural parent where it is in the best interest of the child.”

SECTION 3. Section 571-61, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) Involuntary termination.

- (1) The family courts may terminate the parental rights in respect to any child as to any legal parent:
 - (A) Who has deserted the child without affording means of identification for a period of at least ninety days;

- (B) Who has voluntarily surrendered the care and custody of the child to another for a period of at least two years;
 - (C) Who, when the child is in the custody of another, has failed to communicate with the child when able to do so for a period of at least one year;
 - (D) Who, when the child is in the custody of another, has failed to provide for care and support of the child when able to do so for a period of at least one year;
 - (E) Whose child has been removed from the parent's physical custody pursuant to legally authorized judicial action under section 571-11(9), and who is found to be unable to provide now and in the foreseeable future the care necessary for the well-being of the child;
 - (F) Who is found by the court to be mentally ill or intellectually disabled and incapacitated from giving consent to the adoption of or from providing now and in the foreseeable future the care necessary for the well-being of the child; or
 - (G) Who is found not to be the child's natural or adoptive father.
- (2) The family courts may terminate the parental rights in respect to any minor of any natural but not legal father who is an adjudicated, presumed or concerned father under chapter 578, or who is named as the father on the child's birth certificate:
- (A) Who falls within subparagraph (A), (B), (C), (D), (E), or (F) of paragraph (1);
 - (B) Whose child is sought to be adopted by the child's stepfather and the stepfather has lived with the child and the child's legal mother for a period of at least one year;
 - (C) Who is only a concerned father who has failed to file a petition for the adoption of the child or whose petition for the adoption of the child has been denied; or
 - (D) Who is found to be an unfit or improper parent or to be financially or otherwise unable to give the child a proper home and education.
- (3) In respect to any proceedings under paragraphs (1) and (2), the authority to terminate parental rights may be exercised by the court only when a verified petition, substantially in the form above prescribed, has been filed by some responsible adult person on behalf of the child in the family court of the circuit in which the parent resides or the child resides or was born and the court has conducted a hearing of the petition. A copy of the petition, together with notice of the time and place of the hearing thereof, shall be personally served at least twenty days prior to the hearing upon the parent whose rights are sought to be terminated. If personal service cannot be effected within the State, service of the notice may be made as provided in section 634-23 or 634-24.
- (4) The family courts may terminate the parental rights in respect to any child as to any natural father who is not the child's legal, adjudicated, presumed or concerned father under chapter 578.
- (5) The family courts may terminate the parental rights in respect to any child of any natural parent upon a finding that the natural parent has been convicted in a court of competent jurisdiction in any state of rape or sexual assault and the child was conceived as a result of the rape or sexual assault perpetrated by the parent whose rights are sought to be terminated; provided that:

- (A) The termination of parental rights shall not affect the obligation of the convicted natural parent to support the child;
- (B) The court may order the convicted natural parent to pay child support;
- (C) This paragraph shall not apply if subsequent to the date of conviction, the convicted natural parent and custodial natural parent cohabitate and establish a mutual custodial environment for the child; and
- (D) The custodial natural parent may petition the court to reinstate the convicted natural parent's parental rights terminated pursuant to this paragraph.

Such authority may be exercised under this chapter only when a verified petition, substantially in the form above prescribed, has been filed by some responsible adult person on behalf of the child in the family court of the circuit in which the parent resides or the child resides or was born, and the court has conducted a hearing of the petition.

If the mother of the child files with the petition an affidavit representing that the identity or whereabouts of the child's father is unknown to her or not ascertainable by her or that other good cause exists why notice cannot or should not be given to the father, the court shall conduct a hearing to determine whether notice is required.

If the court finds that good cause exists why notice cannot or should not be given to the child's father, and that the father is neither the legal nor adjudicated nor presumed father of the child, nor has he demonstrated a reasonable degree of interest, concern, or responsibility as to the existence or welfare of the child, the court may enter an order authorizing the termination of the father's parental rights and the subsequent adoption of the child without notice to the father."

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect upon its approval.

(Approved July 1, 2013.)