

HB2061

HD1 SD1

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Hawaii Chapter, MOAA
P.O. Box 1185
Kailua, Hawaii 96734-1185

The Honorable Brian T. Taniguchi, Chair
Committee on Judiciary and Government Operations
Room 219, Hawaii State Capitol

Re: HB 2061 HD1 SD1 Relating to Children

Dear Senator Taniguchi and Committee Members

Our chapter of 500 retired and currently serving officers of the Uniformed Services supports the purpose and intent of HB 2061, HD1, SD1, as amended, which takes a military parent's deployment status into account in child custody cases. However, we have serious concerns with the current version of the bill.

Increases in the length and frequency of unit deployments to operations in Iraq, Afghanistan and other places around the world, have created a corresponding increase in challenges to the child custody responsibilities of parents with court-ordered child custody who are ordered to deploy.

About 7.8% of all military members are single parents and there are about 36,000 families where both parents are in the armed forces. These parents must prepare a Family Care Plan designating a person, living in their area and often, but not always, a relative, to take care of the child while they are deployed. However, even when a Family Care Plan has been prepared and accepted by the military command, non-custodial individuals are more frequently filing for custody, just on the basis of the custodial parent's absence.

Many states and municipalities have recognized this problem and do take deployment status into account. Similar federal legislation has been proposed but child custody is, after all, a state matter. Hawaii should take action now and we believe that this bill, if properly amended, can ensure that these important issues are addressed.

We do not feel that SD1 is adequate in several respects. It appears to not comply with current international law regarding service of process. We also believe that the court should decide in each case the custody circumstance that

is in the child's best interest. Further, it appears unnecessary to mandate that there be a post-deployment hearing, again depending on the facts in each case. Finally, a rapid return to the pre-deployment custody status upon return of the deployed custodian is essential to ensure the best interests of the child.

We believe that the proposed SD2 does not limit the authority of Family Court judges to act in child custody disputes; it just sets forth guidelines for those actions and strongly supports the concept of acting in the child's best interest.

For these reasons and other more technical language issues in SD1, we cannot support that version, and urge the committee to adopt the SD2 proposed by the Adjutant General.

Thank you for the opportunity to provide this testimony.

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TESTIMONY OF THOMAS D. FARRELL
FAMILY LAW SECTION, HAWAII STATE BAR ASSOCIATION
RE HOUSE BILL 2061, HD1, SD1 RELATING TO CHILDREN

Senate Committee on Judiciary and Government Operations
March 23, 2010

Dear Senator Taniguchi and Members of the Committee:

I am the Vice Chair of the Family Law Section of the Hawaii State Bar Association, and I have extensive experience litigating child custody matters in our Family Court. Many of my clients have been military personnel or their spouses. I am also a retired Army intelligence officer, with almost thirty years service, including a deployment to Iraq. I regret that I may not be able to attend your Committee, as I have a court hearing at 8:30 this morning. My absence should in no way be considered a reflection on the importance of this matter. I testify on behalf of the Section and over a hundred attorneys who practice in the Family Court.

I was very surprised to receive the testimony of various persons, late yesterday afternoon. The reason for my surprise is that the Hearing Notice clearly stated that this hearing was a "Decision making meeting only, no public testimony will be accepted." If there was some other kind of testimony that *would* be accepted, I certainly wasn't aware of it. And I believe this bill should have a full public hearing.

I was also quite disappointed to read the testimony of Maj. Gen. Robert G. F. Lee, Adjutant General of the State of Hawaii. It appeared to me that it was probably written in a five-sided building just off Shirley Highway in Arlington, Virginia. What General Lee submitted was essentially the "Pentagon-approved" version of HB 2061. General Lee and I soldiered together for many years (he pinned on my Eagles almost a decade ago) and I have considerable respect and aloha for our Adjutant General. However, I believe the positions he espouses are based more on his reliance on officials in the US Dept. of Defense (including the ubiquitous Dr. Laurie Crehan), than on his own personal understanding of the issues. His reliance on these officials has not been well placed.

I can and will address the various amendments proposed by the Defense Department, but the fundamental difference between SD1 and the Pentagon proposal is one of philosophy: the Pentagon proposal serves the paramount interest of protecting military personnel from losing child custody due to

deployment; SD1 serves the paramount interest of protecting the children who are the innocent victims of their parents' custody disputes.

Please keep in mind that my colleagues and I have no financial or personal interest in what you may or may not pass. It will help some of our clients, and it will hurt others. Whatever you enact, I will win some cases and lose others because of it. But those of us who practice in the Family Court feel an obligation to speak up on behalf of the integrity and fairness of the system; on behalf of the Constitution which we, too, are sworn to uphold and defend; and on behalf of children. Children don't vote, and they don't contribute. If we don't speak for them, who will?

Frankly, the position of the Family Law Section is that we have always opposed HB 2061, and could only support it in the form of SD1. SD1 is essentially a procedural statute to create an expedited process for resolving these disputes and that recognizes the unique aspects of military service in the longest war in our nation's history. To be perfectly honest, SD1 is pretty much what Family Court is doing anyway. You don't need to legislate to accomplish this result. **So, if SD1 isn't enough to satisfy the various "stakeholders," then our position is that your committee would do a great service to the children of Hawaii by voting to hold this bill in committee.**

The most serious dispute between military advocates and child advocates concerns the extent to which a court may consider a servicemember's deployment as a factor in awarding child custody. The original version of HB2061 provided that the court can't consider it at all. We find that appalling. Now, the Pentagon says that it will be satisfied if you say that the court can't make it the "sole factor." Those of us who actually try child custody cases think that there are cases where one parent's deployment or deployability may well be the sole and determinative factor in deciding the child's best interest, and to tie the judge's hands is both morally and constitutionally offensive. Consider Kaneohe's Third Marine Regiment, whose infantrymen serve 6-7 months in a combat zone, return for an equal period, and then go back again. What responsible judge would order that a school-age child spend six months on and six months off with each parent, especially if the parents are geographically separated?

Then we have the question of how long a temporary order giving custody to the non-deploying parent should last, and whether there should be an automatic review hearing upon the servicemember's return from deployment. SD1 says that the order should terminate thirty days after return from deployment, and that the court should hold a review hearing prior to termination. The Pentagon version says fourteen days and that there should be no review hearing---just termination and automatic return to status quo ante. You should also note that the Pentagon objects to the extended service of process provisions in SD1.

We don't really care how fast a review hearing is held upon return from deployment, but fourteen days seems a little fast, particularly when these dates can get a little slippery. I actually came home from Iraq about two weeks sooner than I had thought would be the case when I left Hawaii.

We believe that a review hearing is essential. This is where it helps to understand how Family Court actually works. If the warring parents come to an agreement before the hearing, they can always submit a stipulated order and the court will approve it and take the hearing off calendar. If the parents can't agree, then they need to see a judge and get the dispute resolved. By setting a review hearing at the same time as the court issues its initial temporary order, that process is already put into place. What the Pentagon wants is to force the other parent to file a brand new motion, and in the meantime, for the temporary order to automatically expire. In this scenario, the child may have spent a year to a year and a half away from the deployed parent. The child may have adjusted to a new school, a new home, made new friends, etc.---but none of this matters. The Pentagon wants this child to automatically go back to the status quo ante until the other parent can file a motion and get a hearing.

You might say that this other parent can file a new motion and get a hearing as soon as the deploying parent leaves. The problem, however, is that unless you adopt SD1, the deployed parent can't be served with any motions at all. This will encourage servicemembers to hide the fact of their deployment from the other parent and then claim that they are immune from civil process as soon as they reach their foreign destination. Don't think this hasn't happened, by the way.

You will note that I mentioned earlier that the Pentagon objects to the extended service provisions of SD1, which would allow service by mail to an APO or FPO address, or by fax, or by email. The Pentagon's position is that the only effective way to serve process on a servicemember out of the country is via the Hague Convention, officially known as the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. Here's what the Pentagon didn't tell you: neither Iraq nor Afghanistan have acceded to the Hague Convention (and even if they had, their judicial systems are so dysfunctional that neither country could ever actually effect service as prescribed in the convention).

So here we are as the Family Law Section of the Bar telling you that we're just fine with servicemembers appearing by phone, or accepting faxed or scanned documents in lieu of originals, and otherwise making it user-friendly for soldiers to deal with Family Court; while the Pentagon is telling you that someone trying to serve a Hawaii domiciliary on a US military installation in Afghanistan should first translate their documents into Pashto or Dari and send them through the Afghan Foreign Ministry (assuming that Afghanistan

someday signs up to the treaty). That sort of disingenuousness just defies polite characterization.

Those of you who are students of history know that America has often adopted laws fueled by patriotism and in time of war that we later realized were damned foolhardy and downright repressive. From the Alien & Sedition Acts of 1798, to the internment of Japanese-Americans in 1942, to the USA Patriot Act in 2001: we've made some pretty bad mistakes.

On behalf of the Family Law Bar, I appeal to what President Lincoln would have referred to as your "better angels." I would rather you pass an act to give five votes in every state election to every combat veteran than you pass out HB2061. If you must, report out SD1 without changes. **Given that the military organizations that it was designed to mollify have refused to accept it as a compromise, then we urge you to kill the bill entirely.**

For further background, I attach my testimony to your committees on Human Services and Public Safety/Military Affairs.

Respectfully,

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THOMAS D. FARRELL
Vice Chair (Chair Elect)
Family Law Section
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