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**TESTIMONY OF THE FAMILY LAW SECTION
HAWAII STATE BAR ASSOCIATION
IN OPPOSITION TO HOUSE BILL 1110, RELATING TO FAMILY COURT
AND HOUSE BILL 1111, RELATING TO MILITARY BENEFITS**

House Committee on Human Services
Monday, February 7, 2011, 9:35 a.m.
Conference Room 329, State Capitol

Good afternoon, Rep. Mizuno and Rep. Jordan and members of the Committee:

My name is Tom Farrell. I am an attorney and the chair of the Family Law Section of the Hawaii State Bar Association, on whose behalf I testify this morning. I should also point out that I am the author of Chapter 9 of the Hawaii Divorce Manual, titled "Divorce and the Military;" I am a veteran myself of over 29 years of military service; and probably half of my clientele as a divorce attorney are currently serving in the military, retired, or their spouses.

The Family Law Section is comprised of over a hundred attorneys who practice primarily in family court. We handle divorce, paternity, domestic violence, child protection and guardianship cases. As a Section, our testimony represents the views of our members only; we do not speak on behalf of the entire Hawaii State Bar Association.

The Family Law Section opposes these two measures because they are either unnecessary or will be completely ineffective.

HB 1110 would prohibit the family court from considering a person's federal veterans disability benefits in determining whether to award support and maintenance allowances or the amount of any such allowance to the person's spouse or former spouse. HB 1111 would prohibit the family court, in making a disposition of property pursuant to a divorce decree, from considering federal disability benefits awarded to a military veteran.

It's always a good idea to know what the law is before one starts trying to change it.

The provisions for Permanent Disability Retirement are found at 10 U.S.C. Chapter 61. Permanent Disability Retirement is non-taxable. To qualify, the servicemember must be found medically unfit for duty, the condition must be permanent, he must be at least 30% disabled, and must have at least twenty years of military service. Unlike regular military retirement, Permanent Disability Retirement is non-divisible in divorce.

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Most servicemembers do not qualify for Permanent Disability Retirement, but many qualify for VA Disability Compensation. The enabling legislation is at 38 U.S.C. Chapter 11. When a servicemember retires and subsequently is rated with a disability by the Department of Veterans Affairs, it had been the rule in all cases that the retiree was required to waive his retired pay “dollar-for-dollar” to receive VA Disability Compensation. VA Disability Compensation is not divisible in divorce. *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). This created an incentive for military retirees to seek the maximum disability rating in order to shelter regular military retirement (which *is* divisible in divorce) from their soon-to-be former spouses.

The Hawaii appellate courts have had two cases since the *Mansell* decision addressing the interplay of Permanent Disability Retirement, VA Disability Compensation, and regular military retirement. In *Jones v. Jones*, 7 Haw. App. 496 (1989), the Intermediate Court of Appeals addressed the nondivisibility of VA Disability Compensation in a case involving a Navy couple. The court held that the \$335,584 cash value of husband’s time-of-divorce entitlement to disability compensation post-divorce could not be used as the basis for an award to wife of other marital assets of an equal cash value. Therefore, HB 1111 is unnecessary. What it attempts to do is already the law in Hawaii.

In 2005, the Hawaii Intermediate Court of Appeals ruled in *Perez v. Perez*, 107 Hawaii 85, 110 P.3d 409 (2005), that a stipulated family court divorce decree in which a former servicemember agreed to compensate his former spouse if he converted his divisible military retirement into nondivisible disability retirement is enforceable and does not violate Federal law, where at the time the family court entered the decree it did not divide disability retirement and the former servicemember could comply with the terms of the decree by utilizing funds and other assets other than his disability retirement pay. In other words, the family court can’t order it, but if the former servicemember voluntarily agrees to compensate his former spouse if he converts his divisible military retirement into nondivisible disability retirement, and he does so as part of a negotiated divorce settlement, the family court can enforce that agreement.

In 2004, Congress enacted legislation to lessen the financial impact of disability on former servicemembers. By restoring 100% of the servicemembers’ retired pay, it had the collateral effect of restoring dollars available for division with the former spouse. There are two new programs.

The first is *Concurrent Retirement Disability Pay (CRDP)*. Under this program, the retiree who meets certain conditions (degree of disability, etc.), will receive both VA disability compensation and this new form of compensation (which is not related to combat injuries). See 10 U.S.C. §1414. The net effect is that the servicemember then has three sources of payment for his service: (1) part of his regular military retired pay; (2) VA Disability Compensation; and (3) Concurrent Retirement Disability Pay. This program applies only to retirees with 50% or more disability rating and it will be phased in over ten years from 2005 to 2015. Retirees who were

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rated 100% disabled on January 1, 2005 are receiving the full CRDP. Because CRDP restores regular retired pay that would otherwise be offset by a waiver in favor of VA Disability Compensation, it is divisible under the Uniformed Services Former Spouses Protection Act as “disposable” military retired pay.

The second program is *Combat Related Special Compensation (CRSC)* authorized by 10 U.S.C. Section §1413a. However, Section 1413(g) states: Payments under this section are not retired pay” and therefore, they cannot be added to the fund to be divided under the Uniformed Services Former Spouses Protection Act.

Although there is no reported caselaw in Hawaii on how veterans’ disability payments interact with alimony, a family court order that explicitly awarded alimony to compensate for the fact that a spouse can’t get a share of disability pay would be very unlikely to pass appellate muster, in view of *Jones v. Jones*. However, as a practical matter, in most divorce decrees that contain an alimony proviso, there is no explanation of how it was arrived at, therefore there would be no way to know if the family court judge ignored your proposed legislation.

Permit me to explain a bit further.

A divorce decree is not an explanation. It is merely an order that says who gets what. If there is an alimony proviso (and most decrees don’t have alimony) it will read that Spouse 1 will pay alimony to Spouse 2 of X amount for Y duration. Somewhere in the neighborhood of 90% of divorce decrees are the product of an agreement of the parties. Only in those small numbers that actually go to trial and where alimony is at issue is there any opportunity for the family court judge to make a ruling on alimony. As you know, there are thirteen statutory criteria that guide the family court judge, but most of them are rather subjective. So even if you passed a bill forbidding the family court judge from considering veteran’s disability payments in making an alimony award, you’d never know whether the judge did so or not. And even if a judge were later required to state the reasons for a particular alimony award, if a judge is determined to award a particular amount, there are plenty of other subjective reasons that would support that award.

Perhaps the proponents of this measure are confusing alimony with child support. Unlike alimony, which is completely subjective, child support is very formulaic. There are mandatory child support guidelines in which there is a formula and a worksheet for computing the precise amount that the law requires. That worksheet is filed in the court file, so it is always very clear how the judge arrived at a particular child support amount. Other than the number of children, parents’ incomes are the principal determinant of what that child support will be. Veteran’s benefits are included in the definition of “income” for child support purposes, but then so are disability insurance and workers’ compensation.

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Although the proposal isn't before you today, I suppose you could legislate that veteran's benefits be excluded as income for child support purposes. That probably wouldn't be such a good idea, either. In most cases, if the only income a parent has are these disability benefits, then child support will be rather minimal---\$70 per month per child. Suppose, however, that you have a retired Colonel pulling \$90,000 a year in retirement pay. By excluding his additional veteran's benefits you would give him a break that he really doesn't need, and you would do so at the expense of his child. I like veterans as much as the next guy, but it seems to me that taking care of children ought to take priority.

Thank you for the opportunity to testify this morning.

THE OAHU VETERANS COUNCIL

OAHU VETERANS COUNCIL

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January 27, 2011

TESTIMONY IN FAVOR OF HOUSE BILL 1111 RELATING TO MILITARY BENEFITS

HOUSE COMMITTEE ON HUMAN SERVICES

HEARING ON MONDAY, FEBRUARY 7TH, 2011 AT 9:35AM, IN
CONFERENCE ROOM 329

Aloha Chair Mizuno: The Oahu Veterans Council's member organization's identified in the left margin represent the interests of over 80,000 veterans and their families. On January 27th, the Council's Legislative Committee voted unanimously to support House Bill 1110, 1111 AND 1218.

Only the relative seriousness of the injury or illness sustained by a military service member, while performing creditable service, by the review board that determines their federal veteran's disability benefit. Prohibiting our courts from considering any part of this benefit, in making a disposition of property pursuant to a divorce decree, satisfies this original intent.

The Oahu Veterans Council urges your committee to consider passing House Bill 1111 as written. Mahalo for allowing us to testify, regarding this extremely important issue.

Fred Ballard

Fred Ballard; President



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**HAWAII STATE HOUSE OF REPRESENTATIVES
COMMITTEE ON HUMAN SERVICES
HEARING: MONDAY, FEBRUARY 7, 2011 AT 9:35 a.m.**

TESTIMONY IN STRONG SUPPORT OF HB1111

Good morning, Chair Mizuno, Vice Chair Jordan and Members of the Committee on Human Services:

I applaud you standing up for Hawaii's disabled veterans. Too often, when our wounded sons & daughters come home, they are the ones with the least resources and legal awareness of their rights, and they are devoured in America's family courtrooms. As you formulate your own legislation for the citizens of the Aloha state, please know that I am here to help & assist you in any way I can.

My name is Major Mark Beres, and I am intimately familiar with this problem, and, along with State Senator Frank Antenori (Tucson) came up with a legislative solution that was signed into law on April 16th, 2010. A disabled veteran in Arizona is no different than a disabled veteran in Hawaii or anywhere for that matter. The issues & solution are identical and not complex whatsoever.

Let me first quickly describe the problem. Federal law prohibits courts from diverting VA disability compensation from a wounded soldier to third parties. See 38 USC 5301 (a) and *Mansell v. Mansell*, at 49 USC 581 (1989). Based on research in the Library of Congress, this prohibition dates all the back to 1828, when the 12th Congress was seeking to provide for the wounded veterans from the American Revolution. The wording at 38 USCS 5301 (a) quite literally is virtually-unchanged over the centuries. The underlying philosophy is simple - a veteran gives of him or herself in service to the nation. If that service results in injuries, then the people of this nation have both a moral and financial obligation to care for that wounded veteran. Congress therefore dispenses disability compensation with a specific purpose - to care for the injured. Congress explicitly prohibits diversion of these benefits by courts, because to divert disability funds from a wounded soldier by-definition means that the care afforded to the injured veteran is likewise diminished. Congress does not dispense disability compensation to care for the families of injured veterans - which provision falls on the states through other programs.

Over the past 30 years, and largely due to the passage of the Uniformed Services Former Spouse's Protection Act (10 USC 1408), attorneys have developed legal methods to circumvent the federal prohibitions against the diversion of disability compensation - they have exploited

loopholes. The legislation that we passed in Arizona closed these loopholes. Let me explain them.

Indemnification: Lawyers have gone to great lengths to ensure that the former spouse of a military serviceperson is protected from a veteran post-decree exercising their federal right to receive disability compensation if they are wounded in combat. To do this, a family court will insert an indemnification clause into a divorcing able-bodied military serviceperson's divorce decree. The clause of indemnity is a statement whereby the veteran "stipulates" to re-imburse their former spouse for any loss the former spouse incurs to their "property" ("retirement pay") should the veteran ever become injured. You see, federal law at 38 USC 5305 requires (there is no option) that for a veteran to receive disability compensation, they must waive dollar-for-dollar retirement pay. In doing so, the wounded veteran reduces the amount of disposable retirement pay there is to divide with his or her former spouse. In some cases, such as where a veteran becomes severely wounded, the former spouse will lose all of his or her retainer pay entirely.

This loss is seen as "unfair" by advocates for the plundering of wounded soldiers. However, don't be fooled - remember, all of our society bears a burden to care for the wounded, and an indemnity clause quite literally exempts the injured veteran's spouse from bearing any burden at all. This also is based on a false premise - for in many cases, an injured soldier's wounds may get worse over time. Thus, the extent of the injuries can and likely may grow, and society's obligation to provide care to that veteran will grow as well. We put a stop to the immoral practice of indemnification by enacting HB1110, 1111, and 1218.

Indemnification ONLY affects injured veterans who are also eligible for retainer pay. What about the injured vets who are NOT eligible for retainer pay?

Lawyers are able to plunder these injured veterans by getting courts to award alimony or increased child support by considering the veteran's receipt of disability compensation as "income", and then awarding alimony - in some cases for LIFE, to the former spouse. In doing so, the court very-cleverly avoids "direct" apportionment of the disability and instead divides it "indirectly". However, the result is the same - the amount of care/provision to the veteran decreases.

Chair Mizuno, my recommendation to you is to copy Arizona's HB 2348 language exactly, as the wording of your law there must be very specific to achieve the result (attached). The goal is to make sure that a veteran's disability compensation stays with the veteran, that it is not diminished or diverted, regardless of how noble the state's desire may be to do otherwise.

America is and will continue to endure a generation of wounds upon our sons & daughters.

Divorce rates are extremely high (above 60% in Maricopa county, Arizona), and the extent of the problem is profound. A close friend of mine - Doug Joyner, put a .45-caliber bullet through his brain in April of last year. He did so because a court was committing him to a life of poverty, as nearly all of his disability compensation was being taken from him and given to his former spouse. Imagine, if you will, the humiliation a veteran feels to see a former spouse "cash in" on account of one's wounds & continued physical & emotional suffering. I strongly encourage you and the Hawaii State Legislature to pass HB1110, 1111, and 1218 to ensure that Hawaii takes care of its brave servicemen and women in return for the service they have given to our country.

Thank you for the opportunity to submit testimony.

Mark Beres, Major, USAF (ret.)

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State of Arizona
House of Representatives
Forty-ninth Legislature
Second Regular Session
2010

HOUSE BILL 2348

AN ACT

AMENDING TITLE 12, CHAPTER 9, ARTICLE 2, ARIZONA REVISED STATUTES, BY ADDING SECTION 12-1539; AMENDING TITLE 25, CHAPTER 3, ARTICLE 2, ARIZONA REVISED STATUTES, BY ADDING SECTION 25-318.01; AMENDING TITLE 25, CHAPTER 5, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTION 25-530; RELATING TO MILITARY DISABILITY BENEFITS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:
2 Section 1. Title 12, chapter 9, article 2, Arizona Revised Statutes,
3 is amended by adding section 12-1539, to read:
4 12-1539. Veterans disability benefits; exemption from seizure
5 A. NOTWITHSTANDING SECTION 12-1521, FEDERAL DISABILITY BENEFITS
6 AWARDED TO VETERANS FOR SERVICE-CONNECTED DISABILITIES PURSUANT TO 38 UNITED
7 STATES CODE CHAPTER 11:
8 1. ARE EXEMPT FROM THE CLAIM OF CREDITORS.
9 2. ARE NOT SUBJECT TO ATTACHMENT, LEVY OR SEIZURE UNDER ANY LEGAL OR
10 EQUITABLE PROCESS, AS PROVIDED BY FEDERAL LAW.
11 3. MAY NOT BE AWARDED TO ANY OTHER PERSON.
12 B. THIS SECTION DOES NOT APPLY TO THAT PORTION OF SERVICE-CONNECTED
13 DISABILITY BENEFITS THAT IS SUBJECT TO CHILD AND SPOUSAL SUPPORT ENFORCEMENT
14 UNDER 42 UNITED STATES CODE SECTION 659(h)(1)(A)(ii)(V).
15 Sec. 2. Title 25, chapter 3, article 2, Arizona Revised Statutes, is
16 amended by adding section 25-318.01, to read:
17 25-318.01. Military retirement benefits; disability related
18 waiver
19 IN MAKING A DISPOSITION OF PROPERTY PURSUANT TO SECTION 25-318 OR
20 25-327, A COURT SHALL NOT DO ANY OF THE FOLLOWING:
21 1. CONSIDER ANY FEDERAL DISABILITY BENEFITS AWARDED TO A VETERAN FOR
22 SERVICE-CONNECTED DISABILITIES PURSUANT TO 38 UNITED STATES CODE CHAPTER 11.
23 2. INDEMNIFY THE VETERAN'S SPOUSE OR FORMER SPOUSE FOR ANY PREJUDGMENT
24 OR POSTJUDGMENT WAIVER OR REDUCTION IN MILITARY RETIREMENT OR RETAINER PAY
25 RELATED TO RECEIPT OF THE DISABILITY BENEFITS.
26 3. AWARD ANY OTHER INCOME OR PROPERTY OF THE VETERAN TO THE VETERAN'S
27 SPOUSE OR FORMER SPOUSE FOR ANY PREJUDGMENT OR POSTJUDGMENT WAIVER OR
28 REDUCTION IN MILITARY RETIREMENT OR RETAINER PAY RELATED TO RECEIPT OF THE
29 DISABILITY BENEFITS.
30 Sec. 3. Title 25, chapter 5, article 1, Arizona Revised Statutes, is
31 amended by adding section 25-530, to read:
32 25-530. Spousal maintenance; veterans disability benefits
33 IN DETERMINING WHETHER TO AWARD SPOUSAL MAINTENANCE OR THE AMOUNT OF
34 ANY AWARD OF SPOUSAL MAINTENANCE, THE COURT SHALL NOT CONSIDER ANY FEDERAL
35 DISABILITY BENEFITS AWARDED TO THE OTHER SPOUSE FOR SERVICE-CONNECTED
36 DISABILITIES PURSUANT TO 38 UNITED STATES CODE CHAPTER 11.