HB2163
HD2

FAMILY LAW SECTION
OF THE
HAWAII STATE BAR ASSOCIATION

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February 24, 2014

To: Senate Committee on Judiciary and Labor
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice-Chair

From: Dyan K. Mitsuyama, Treasurer and current
Legislative Committee Chair for the
Family Law Section, Hawaii State Bar Association

Re: Testimony in Support of HB2163 HD2
Hearing: Tuesday, April 1, 2014 at 10:30 a.m.

Good Morning Chair and Vice Chair and the members of the Judiciary and Labor Committee, I am Dyan K. Mitsuyama, a partner in Mitsuyama & Rebman, LLLC, which is a law firm concentrating in all family law matters. I have been a licensed attorney here in the State of Hawaii for about 15 years now. I am the current Treasurer and current Chair of the Legislative Committee of the Family Law Section of the Hawaii State Bar Association, which is comprised of approximately 136 licensed attorneys all practicing or expressing an interest in practicing family law.

The Family Law Section did not originally support HB2163 as originally written for various reasons. However, the Family Law Section is now in support of HB2163 HD2 with the amended changes.

Thank you for your time.

NOTE: ***The comments and recommendations submitted reflect the position/viewpoint of the Family Law Section of the HSBA. The position/viewpoint has not been reviewed or approved by the HSBA Board of Directors, and is not being endorsed by the Hawaii State Bar Association.***

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TESTIMONY OF THOMAS D. FARRELL
Regarding House Bill 2163 HD2, Relating to Parental Parity

Committee on Judiciary and Labor
Senator Clayton Hee, Chair
Tuesday, April 1, 2014 10:30 a.m.
Conference Room 016, State Capitol

Dear Senator Hee and Members of the Committee:

I will not repeat what my colleagues in the Family Law Bar have said, but would respectfully make a few additional points.

As a general rule, legislators should refrain from legislating unless the proposed bill (1) will actually effect a change, (2) that change would be for the better, and (3) it will not have unintended consequences. I know this is a hard sell: you come here to pass bills. More often than not, you should refrain. This is one of those times.

"Joint Custody" (and we think the Legislature meant "Joint *Physical* Custody") is defined in §571-46.1, Hawaii Revised Statutes, as any arrangement of parenting time in which both parents have "frequent, continuing and meaningful contact" with the child. "Joint physical custody" does not mean <u>equal</u> parenting time. Therefore, creation of a presumption for joint physical custody is not harmful, *per se*, because it would create a presumption for neutral terminology, but not for a particular substantive outcome. Creation of a presumption for equal time sharing is another matter.

There is no reason why an arrangement in which a child resides primarily with one parent cannot be referred to as "joint physical custody." In fact, when parents are not battling each other, I often write divorce decrees and paternity judgments that do just that. The main objection to the term "joint physical custody" comes from parents who mistakenly believe that the phrase "sole physical custody" imbues them with some additional power or control over the child. It doesn't. Sometimes that parent is so emotionally attached to the phrase "sole physical custody" that you can't get her to back off, even if there is no dispute about the actual residential schedule. Conversely, the parent who has less time with the child may not necessarily object to the schedule, but objects to terminology reducing him to the status of mere "visitor." Wouldn't you?

No matter what terminology is used, a divorce decree or paternity judgment is supposed to spell out when the child is to be at dad's house and when the child is supposed to be at mom's house. Once that is done, you can call it "Chinese Custody" or "Purple Custody" or "Type One

Custody" or whatever you want. All that really matters is where junior is supposed to be on any particular day.

In most cases, where there are school-age children and two competent parents residing on the same island, the judge will give each of them at least 110 overnights a year with the child. So while many custody fights are often couched in terms of who is the better parent (wrongly so, in my opinion), the practical issue that the judge faces is how the 140 days in the middle are going to be allocated. I strongly believe that the allocation of time should be based on what is in the "best interests" of the child, and not on fairness to parents. The child didn't create the problem; the parents did, and fairness to mom and dad should be an entirely secondary concern. That is what current law provides. No change is needed.

If fairness to parents is the overriding concern, then we should just saw the child in half. The original HB 2163 did that by creating a presumption of equal continuing physical contact. Family Court judges should not be handcuffed by legislated presumptions. If you want them to do what is best for the child, you have to allow them to decide each case on its own facts. And you should beware the law of unintended consequences. The last time the Legislature decided to create presumptions about custody, it ventured into the minefield of domestic violence. The result was an explosion of false or exaggerated *Petitions for Protection* filed in order to gain a leg up in the custody battle. It's rare that a contested custody case doesn't begin these days with one parent or both filing an FC-DA action.

Judge Browning has well explained why a presumption for equal physical contact is a rotten idea. HB 2163 should have died. Instead, we have HD 2, which gets rid of the presumption, offers new language, but doesn't really change existing law. The proponents of mandatory equal timesharing may be proponents of a bad policy, but they aren't stupid. They can read and they can tell that HD 2 does nothing. So why bother?

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TO: Senator Clayton Hee, Chair
Senator Maile L. S. Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor

FROM: Dyan M. Medeiros
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Phone: 524-5183

HEARING DATE: April 1, 2014 at 10:30 a.m.

RE: Testimony in Support of HB 2163, HD2 Relating to Parental Parity

Good morning Senator Hee, Senator Shimabukuro, and members of the Committee. My name is Dyan Medeiros. I am a partner at Kleintop, Luria & Medeiros, LLP and have concentrated my practice solely in the area of Family Law for more than fifteen (15) years. I am also a past Chair of the Family Law Section of the Hawaii State Bar Association. I am submitting this testimony in support of HB2163, HD 2.

I support the current language of HB2163, HD2. It requires the Court to consider frequent and continuing contact with both parents and requires the Court to explain why something other than frequent and continuing contact would be in the best interest of the child. Although I believe this is something that the Court already does, HB2163, HD2 reinforces that practice and is much more preferable to HB2163 as it was originally drafted.

Thank you.

TO: Senator Clayton Hee, Chair
Sentor Malie S.L. Shimabukuro, Vice-Chair
Senate Committee on Judiciary and Labor

FROM: Jessi L.K. Hall
E-Mail: jhall@coatesandfrey.com
Phone: 524-4854

HEARING DATE: April 1, 2014 at 10:30 a.m.

RE: Testimony in Strong Support of HB2163, HD2

Good day Senator Hee, Senator Shimabukuro, and members of the Committee. My name is Jessi Hall. I am an attorney who practices Family Law. I am also a past Chair of the Family Law Section of the Hawaii State Bar Association. I am here today to testify in strong support of HB2163, HD2.

I strongly support the language in the amended Bill, especially with the deletion of the original preamble. It requires the Court to consider frequent and continuing contact with both parents, which is important. It further requires the Court to explain why anything other than frequent and continuing contact would not be in the best interest of the child. This amended language also removes the word "equal" which so many litigants tend to lock on to, often to the detriment to the child. I would suggest that the use of the word "also" be removed from the provision as I believe that it would provide more strength to the provision.

For reference I include herein below my reasoning for not supporting the original draft of this Bill.

First of all, I had extreme doubts as to the validity of the information provided for in the preamble to the Bill. The preamble makes a broad assumption that a "large majority" of children reside with their mothers and have limited or inconsistent contact with their Fathers. The parties submitting the same should be required to provide details as to where they obtained these statements. I am personally aware of a large number of custody cases in the First Circuit in which both parents have significant contact with their children. Based on the cases that I am privy too, I would say that significant contact with both parents is the norm and situations as set out in the preamble are the minority.

Second, there are many factors in which the Court needs to consider in making a custody orders. Currently Hawaii Revised Statutes § 571-46(a)(1) as written encourages the Court to include in their consideration that there should be frequent and consistent contact between the child and

both parents. This provision could strengthened by just modifying some of the current language. I would support HRS 571-46(a)(1) being modified as follows:

> Custody should be awarded to both or either parent according to the best interests of the child, and the Court ~~may~~ shall consider maintaining frequent, continuing and meaningful contact between the child and both parents ~~of each child with the parent~~ unless the Court finds that a parent is unable to act in the best interest of the child.

Finally, the biggest issue with the proposed language of the original draft of HB2163 was the use of the term "equal". If parties removed labels and focused on the schedule that works best for the child and both parents based on their schedules, location of residence, and location of school then the best possible outcome would be reached for the child. Use of the word "equal" creates certain expectations. Parties will think that they won/loss (depending on the side that they are on) if the schedule is not equal down to the day (in some cases down to the hour). Most of the time a truly "equal" schedule is difficult for all involved, even intact families are incapable of doing everything on an "equal" basis. When parties get fixated on the term they are unable to see that something different may work better for all.

It is for the above reasons that I wrote in opposition of the prior draft of HB2163, but today I support the language of HB2163, HD2. Thank you for this opportunity to testify.

Dara Carlin, M.A.
Domestic Violence Survivor Advocate
881 Akiu Place
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April 1, 2014

Good Morning Senators and thank you for this opportunity to provide testimony **IN STRONG OPPOSITION** to HB2163, Relating To Parental Parity.

Please understand that the passing of this measure ***will*** result in the loss of life. While parental parity looks like a good idea on the surface, I cannot impress upon you the potential lethality of it's effect upon children who are already in dangerous situations.

100% of the cases I have concern legitimate abuse cases that have been "misdiagnosed" and failed by the professionals assigned to assist them. This problem remains unaddressed even with the laws that we currently have in place. In the world of abuse, there is no such thing as parity (or co-parenting, cooperation, compromise, fairness, equity, respect, etc.) – **for those whose lives have been impacted by abuse and remain entwined with an abuser, their lives remain under the abuser's control even after they've "successfully escaped" and left/ended the relationship**. For the children born into an abusive relationship, there is no escape – there are only the laws and professionals to protect them and as we've seen countless times, those laws and professionals are failing them – HB 2163 will only make matters worse.

From: **Domestic Violence Perpetrators Kill Their Children, Often During Visitation Murders Usually Linked to Custody Battles and Divorce or Separation**
www.alliance4children.weebly.com/batterers-who-killed-their-children-often-during-unsupervised-visitation.html

"While not all batterers kill, it's important to realize that many batterers often do kill their children. Judges often make the deadly mistake of assuming that batterers will become less angry after a divorce and "things settle down." The reality is that abusers are extremely dangerous after divorce/separation, especially during a custody battle over the children.

Batterers have a strong sense of ownership of their partners and children. During a divorce/separation, abusers become enraged that their partner has left them, and they will kill the children to get revenge and punish their ex-partners for leaving, and to re-assert their control over the ex-partner and the kids. Separation and divorce are powerful triggers for murder - these abusers often murder their own children during a custody battle or divorce, when judges grant them unsupervised visitation."

The tragic case of **Talia Williams**, now being prosecuted in Honolulu's District Court is such a case where multiple professionals trained in abuse failed to recognize it. From several news sources reporting on the case:

(Step-mother) “Delilah Williams' federal defender has said **she was also abused by her husband and had repeatedly sought assistance from the Army, friends and family to put a stop to the beatings and to leave her husband**.

“…complaints were filed **by neighbors, the day care Talia attended and a relative of Delilah Williams**, and that the record shows the failure of the state and military to properly investigate instances of abuse against the girl.”

“According to the court records, five months earlier, in February, **Criminal Investigative Command agent Michael Parker** was notified by **MPs** that **employees at the Schofield Barracks Child Development Center** said that marks on Talia’s body made them suspect she was a victim of child abuse. When the development center employee asked Talia about the marks, she said they were “bug bites, her mother hit her, her father hit her and spider bites as well,” according to court documents.” (In just this paragraph alone, HOW MANY professionals were informed about the abuse?)

“**CID agents** asked the development center employees to take Talia to the acute care center at Schofield Barracks to be examined by **a doctor**. The doctor, identified in court records as **Dr. Mark Schmalz, examined Talia and concluded it was not child abuse**. ‘*I can’t say with 100 percent certainty, but about 99, 98 to 99 percent certainty that it was not abuse*,’ he is quoted as telling the CID agent in charge.”

“While Schmalz was examining Talia, **CID says it did a background check on Williams and his wife and found nothing suspicious**. Based upon the doctor’s opinion, and the lack of suspicious information in the background checks, CID did not inform Hawaii Child Protective Services — as called for in an agreement between the Army and the state of Hawaii. After the doctor’s conclusion and the results of the background check on Naeem and Delilah Williams, CID handed Talia back to her parents.”

“But according to court records, **the Williams household had been the subject of several domestic violence reports** in January and February 2005.”

I know you all already know this but PLEASE bear this in mind as you cast your vote: **the laws you pass impact the lives of ALL** – those whose cases have been misunderstood, those whose cases where life hangs in the balance and those who may never need to know them. Mistakes CAN be undone and repaired; death cannot.

Respectfully,

Dara Carlin, M.A.
Domestic Violence Survivor Advocate

I oppose HB 2163 for the following reasons:

1. It appears that a small group of naysayers who have been involved in the family court system want to increase the odds of equal parenting by changing a few words in the law to put pressure on the court to think twice before ruling on custody and visitation that is not 50/50.

2. I agree with testimony that parents who can agree to equally share time with their children in the case of separation never need to see the inside of the courtroom. It's the parents who cannot agree who require a judicial decision. The issue is the reason for disagreement, not how a judge makes a decision according to statute. My perspective is that there must be an element of abuse or alienation (which is a form of child abuse).

3. I have experienced domestic abuse in a marriage and my children have never recovered from the devastating effects of that, partly because family court judges do NOT have a proper handle on how to assess abuse much less rule reasonably to protect the children or the non-offending parent.

4. Until the judiciary sees fit to order professional assessment for all cases (GALs not included) where domestic abuse or alienation/estrangement of children is alleged, it would be useless to change statutes that already exist to define custody and visitation. It is my opinion that only a Licensed Marriage and Family Therapist (LMFT) has the training to assess family dynamics.

5. I am an advocate for parents involved in the child welfare system and see the same lack of professional assessment for decisions regarding placement and parenting times for families. Several children have died in Hawaii in the past few years due to "mistakes" in placement of children because professional opinions were not considered or asked for.

6. Thank you for the opportunity to testify that, until the court officials are mandated to obtain accurate information on the dynamics of the households involved, I oppose any change to the language of the law that could shift the rulings for custody and parenting time.