

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016**

ON THE FOLLOWING MEASURE:

H.B. 2281, RELATING TO SERVICE BY PUBLICATION IN PATERNITY CASES.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Wednesday, March 23, 2016 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Lynette J. Lau, Administrator, Child Support Enforcement Agency

Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General supports this bill.

The provisions of this bill amend section 584-8, Hawaii Revised Statutes (HRS), to clarify that service by publication is allowed in those situations where defendants in paternity cases cannot be located or personally served.

Currently, section 584-8(c), HRS, only specifies service by registered or certified mail when the defendant is not found within the circuit although it does indicate that other methods of service provided by statute or court rule apply. The family court has long authorized the Department of the Attorney General, Child Support Enforcement Agency, to serve defendants in paternity cases by publication if they cannot be located or personally served. Furthermore, all other types of family court proceedings including divorce, adoption, guardianship, and child protective services, have explicit provisions in the relevant statutes authorizing service by publication of a person who cannot be located or personally served. There is no similar wording in section 584-8, HRS. This measure will codify the family court's practice of allowing service by publication in paternity cases and make service in these cases consistent with service in other family court proceedings. This measure also benefits the public by explicitly providing for an additional method of service in the establishment of paternity and by helping to make the child support process more efficient.

The Department of the Attorney General respectfully asks the Committee to pass this bill.

PETER L. FRITZ

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THE SENATE
THE TWENTY-EIGHTH LEGISLATURE
REGULAR SESSION OF 2016

COMMITTEE on JUDICIARY and LABOR

Testimony on H.B. 2281

Hearing: March 23, 2016

Relating to Service by Publication in Paternity Cases

Chair Keith-Agaran, Vice Chair Shimabukuro and members of the Committee. My name is Peter Fritz. I am an attorney licensed to practice law in Hawaii. I am also licensed to practice law in other states that permit and/or require filing and/or service of documents electronically. I am testifying **in support** of this bill and suggesting amendments to give the court authority to permit service of process in any manner calculated to give actual notice.

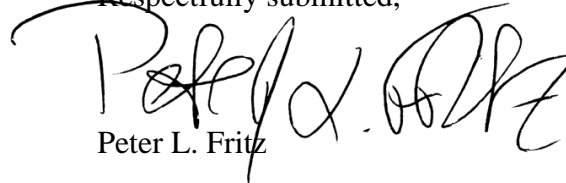
“History teaches that, as technology advances and modes of communication progress, courts must be open to considering requests to authorize service via technological means of then-recent vintage, rather than dismissing them out of hand as novel.”¹ Communication is changing. Newspapers are shifting to online editions and people are shifting from written letters to email or social media. Many people no longer have landlines or listings in telephone directories. These changes necessitate that Hawaii courts have the flexibility to authorize service using methods that are reasonably calculated to give a party actual notice of the proceedings and an opportunity to be heard.

A person’s presence on social media may be easier to trace than locating his or her physical whereabouts. After exhausting all reasonable efforts to serve legal process personally, courts should have the flexibility to authorize plaintiffs to serve and notify evasive parties of legal proceedings using alternate methods. Such authority should only be granted after a plaintiff presents affidavits that personal service is not possible and presents credible evidence authenticating that the social media site belongs to the party to be served (e.g., matching an e-mail address and identifying information on the social platform with other independent corroborating evidence) or that the alternate service is reasonably calculated to give actual notice of the proceedings and an opportunity to be heard.

To provide courts with the flexibility to authorize alternate service of process, I have attached a revised paragraph (c) and a revised paragraph (e) for the Committee’s consideration.

Thank you for the opportunity to testify.

Respectfully submitted,



Peter L. Fritz

¹ Federal Trade Comm. v. PCCare 247, Inc., No. 12 Civ. 7189 (PAE), 2013 U.S. Dist. LEXIS 31969 (S.D.N.Y. Mar. 7, 2013) at 16-17

New Paragraph (c)

(c) In addition to any other method of service provided by statute or court rule, if the defendant is not found within the circuit, service may be effectuated by registered or certified mail, with request for a return receipt and direction to deliver to addressee only. The return receipt signed by the defendant shall be prima facie evidence that the defendant accepted delivery of the complaint and summons on the date set forth on the receipt. Actual receipt by the defendant of the complaint and summons sent by registered or certified mail shall be the equivalent to personal service on the defendant by an authorized process server as of the date of the receipt. If it appears that the defendant has refused to accept service by registered or certified mail, is concealing oneself or evading service, or the plaintiff does not know the address or residence of the defendant and has not been able to ascertain the same after reasonable and due inquiry and search, the court may authorize notice of the paternity action and the time and date of hearing by any other manner that is reasonably calculated to give the party actual notice of the proceedings and an opportunity to be heard. The method of service could include publication of the notice in a print or online newspaper or other publication of general circulation in the circuit at least once a week for four consecutive weeks; service of the notice to the absent party's e-mail account; posting of the notice to the defendant's social networking account; physically posting a copy of the notice on a public bulletin board; or any method the court determines to be reasonable and appropriate and shall have the same force and effect as such person having been personally served with the summons; provided that the last date of the notice shall not be less than twenty-one days prior to the return date stated in the summons.

New Paragraph (e)

(e) Proof of Service. [~~For service effectuated by registered or certified mail, an electronic copy or facsimile of the signature of the served individual on certified mailers provided by the United States Postal Service shall constitute valid proof of service on the individual.~~]

- (1) Service by Registered or Certified Mail. If service is made by registered or certified mail, an electronic copy or facsimile of the signature of the served individual on certified mailers provided by the United States Postal Service shall constitute valid proof of service on the individual.
- (2) Service by Publication in a Printed Newspaper. If service is made by publication in a printed newspaper, proof of publication shall be made by the affidavit of the newspaper's publisher, printer, manager, foreman, or principal clerk, or by the certificate of the attorney for the party at whose instance the service was made. A printed copy of the published notice with the name of the newspaper and dates of publication marked therein shall be attached to the affidavit or certificate.
- (3) Service by Posting to an Online Publication Website. If service is made by posting to an online publication website, proof of posting shall be made by

affidavit of the online publication's publisher, printer, manager, foreman, or principal clerk, or by the certificate of the attorney for the party at whose instance the service was made. A printed copy of the posted notice with the name of the online publication and dates of posting marked therein shall be attached to the affidavit or certificate.

- (4) Service by E-mail or Posting to a Social Networking Account. If service is made by e-mail or posting to a social networking account, proof of e-mail transmission or electronic posting shall be made by affidavit. If service is made by e-mail, a copy of the sent e-mail transmission shall be attached to the affidavit. If service is made by posting a notice on the defendant's social networking account, a screen print of the posting shall be attached to the affidavit.
- (5) Service by Posting to a Public Bulletin Board. If service is made by posting to a public bulletin board proof of posting shall be made by affidavit of posting of the notice and the complaint or other pleadings.
- (6) Other Service by Court Order. If the court has allowed service to be made upon a defendant in any other manner calculated to give actual notice, proof of service shall be made as directed by the court.

TESTIMONY OF THOMAS D. FARRELL

Regarding House Bill 2281 Relating to Service by Publication in Paternity Cases

Senate Committee on Judiciary and Labor
Senator Gilbert S. C. Keith-Agaran, Chair

Wednesday, March 23, 2016 9:00 a.m.
Conference Room 016, State Capitol

Good morning Senator Keith-Agaran and Members of the Committee:

Like its companion, SB 2810, HB 2281 is a terrible idea and should go no farther than this Committee. Unfortunately, both House and Senate versions crossed over, although I note that your committee “defect dated” SB 2810 to “encourage further discussion.”

I understand that this bill is part of the Governor’s package, that it is backed by the AG’s office, and that therefore there is probably nothing I can say that will convince you to kill this thing. I’m going to try anyway.

Current law requires that before you can be legally established as the father of a child, you have to actually know that the court is trying to do that. You have to be served with the Petition for Paternity, either personally or by mail, with a return receipt. That’s the law, and if it wasn’t, the AG’s office wouldn’t be asking that the statute be amended. However, as the AG’s testimony notes, they’ve apparently been doing this anyway for quite some time now. Their prior testimony on SB2810 said, “The family court has long authorized the Department of the Attorney General, Child Support Enforcement Agency, to serve defendants in paternity cases by publication if they cannot be located or personally served.” In other words, the AG’s office has been violating the law for years, and now they’d like you to authorize what they’ve been doing.

I caught them once. I got a call from a guy on the Mainland, who tried to get a passport or a driver’s license or something, and found out he was on some deadbeat dad list and owed tens of thousands of dollars for a kid he never knew that he had. How did this happen? The AG’s office served him by publication and then took a default judgment against him, thereby making him the legal father of the child. As soon as I filed a *Motion to Set Aside Default Judgment*, the AG’s office conceded---they knew they were wrong and they didn’t even try to fight it.

If this amendment to Hawaii’s Uniform Parentage Act is adopted, you will be legalizing paternity judgments entered by default against men who had no idea that they were fathers or that they were being hauled into court. Imagine that you visit Hawaii, have a little fling here,

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*Certified by the National Board of Trial Advocacy. The Supreme Court of Hawaii grants Hawaii certification only to lawyers in good standing who have successfully completed a specialty program accredited by the American Bar Association.

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and go home. Unknown to you, a child is born a few months later. Maybe you are the father, maybe not.

If this bill becomes law, a judgment could be entered against you making you legally and financially responsible for this child without you ever getting actual notice or an opportunity to defend yourself. Any mother could hire my law firm for a paternity case, name you as the daddy, and tell me that she has no idea where you are. No problem. I'll just publish the summons in *Hawaii Hochi*.

Perhaps years later, when thousands of dollars of child support arrears have accrued and someone finally finds you and assets in your name, there's a lien on your house, your bank account is frozen, you can't get a passport, and your credit rating tanks. And when you try to set aside the judgment, or get a paternity test ordered, the court will say, "Sorry, you were properly served and defaulted because in 2016 the Hawaii Legislature amended the statute to allow service by publication."

I understand that it is desirable to establish paternity and I agree, in principle, with the proposition that no child should be without a legally established father. However, creating the legal obligation of parent based on a notice published where the respondent will never see it is fundamentally unfair.

Do you still think this is such a great idea?